

The Eighteenth Amendment to the Constitution: Substance and Process

Edited by Rohan Edrisinha and Aruni Jayakody

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Abbreviations

APRC	All Party Representative Committee
CP	Communist Party of Sri Lanka
CWC	Ceylon Workers' Congress
EPDP	Eelam People's Democratic Party
IGP	Inspector General of Police
JHU	Jathika Hela Urumaya
JVP	Janatha Vimukthi Peramuna
LSSP	Lanka Sama Samaja Party
LTTE	Liberation Tigers of Tamil Eelam
NFF	National Freedom Front
NPC	National Police Commission
PSC	Public Service Commission
TNA	Tamil National Alliance
UMNO	United Malays National Organisation
UNP	United National Party
UPFA	United People's Freedom Alliance

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Introduction

The 18th Amendment to the Constitution marks an important event in Sri Lanka's constitutional evolution. It achieves what one might have thought was previously unthinkable, it makes Sri Lanka's over-mighty executive even more powerful. The 18th Amendment removed the two term limit on holding the office of the President and removed important checks on the exercise of executive power. Yet, such important changes that have a devastating effect on the democratic process were hatched in secrecy and enacted in to law, with no public consultation and little debate. Key actors that ought to have played a greater role in a process of constitutional amendment, such as the Supreme Court, took little notice of both the substance and process of the amendment. This volume of essays examines the process, substance and political implications of the 18th Amendment.

Chapter I by Dr Paikiasothy Saravanamuttu analyses the implications for Sri Lankan politics and political culture under the 18th Amendment. Defenders of the 18th Amendment argued that since economic development is the overarching priority, a stronger executive as facilitated by the 18th Amendment is required to ensure the political stability that is necessary for economic development. Yet, if one were to look at Sri Lanka's past, a strong executive under President J R Jayawardene did not translate in to strong economic development. Rather, a stronger executive in part contributed to tendencies towards authoritarianism and insurgencies in both the north and south, which drained the country of many opportunities and resources. The 18th Amendment also represents both a consolidation of power in the hands of the

Rajapaksa family and a transformation of Sri Lanka's political culture from a vibrant and unruly South Asian democracy to a more homogenous and disciplined East Asian system.

Chapter II by Aruni Jayakody examines the substance of the 18th Amendment. In terms of substance it is important to understand the 18th Amendment as a mechanism that achieved more than just the removal of the two term limit. In addition to removing the two term limit, it also repealed important checks on executive power introduced by the 17th Amendment. The President now has unfettered power to make all key public service appointments. For example, the President has been given significantly greater control over the entire legal system, as it is solely at his discretion that the Attorney General, Judges of the Supreme Court and Judges of the Court of Appeal are appointed. Further the 18th Amendment also reduces the powers of key bodies such as the Public Service Commission, Election Commission and National Police Commission. In particular, the Election Commission no longer has the power to prevent the abuse of state resources including state media. More worryingly the Election Commission has been given power to issue guidelines to not only the state media but also the private media during election times. Thus, not only is the President allowed to run for an innumerable number of terms but the mechanisms that regulate the integrity and independence of elections have also been removed.

Chapter III by Rohan Edrisinha & Aruni Jayakody examines the process used to enact the 18th Amendment. The Amendment was tabled before Cabinet, reviewed for constitutionality before the Supreme Court, debated in Parliament and enacted in to law within a mere ten days. Such a process violates the first principles of constitutionalism

and demonstrates a shocking disregard for basic, internationally accepted norms of constitution making. The bill was deemed urgent in the national interest in order to expedite its progress through the legislature. Yet, there were no compelling reasons why the 18th Amendment was urgent or in the national interest. The Supreme Court as a superior court with special responsibilities as the custodian of the Constitution took little note of the shortcomings in neither the process nor substance of the 18th Amendment.

Chapter IV by Niran Anketell critiques the Supreme Court determination on the 18th Amendment. The determination is sadly noteworthy, for what it fails to state. For example in response to the Intervient petitioners' arguments that the removal of the two term limit undermines the sovereignty of the People, the Court was content to note that this was not the case as the voters would be given a wider choice including the choice of a candidate who had already been twice elected to the office. Similarly despite numerous arguments as to the inappropriateness of using the urgent bill process to effect constitutional change, the Court refused to address this issue altogether in its determination. The Court seemed impervious to the argument that the removal of institutions that promoted independence and depoliticisation affected the sovereignty of the People.

Chapter V by Asanga Welikala examines the removal of the two term limit in light of the gradual erosion of the fixed term and offers a comparative perspective on the use of term limits. With respect to the erosion of the fixed term, the President can now not only run for innumerable number of terms but can also call for elections at the most politically opportune moment after the first four years into a term. Further a comparative perspective on term limits illustrates

that the trend is towards their enactment, reflecting a broader trend in favour of liberal principles and a limited executive.

We have also included a set of documents which are important to a discussion on the 18th Amendment. These are the texts of the 17th and 18th Amendments; a table that highlights in summary form the substance of the changes brought under the 18th Amendment and the special determinations by the Supreme Court on the 17th and 18th Amendment bills. We have included the documents relating to both the 17th and 18th Amendments, in order to draw attention to the significance of what has been repealed under the 18th Amendment.

We hope that this collection of essays proves to be a useful tool in facilitating greater understanding of the changes brought under the 18th Amendment.

Rohan Edrisinha & Aruni Jayakody
Editors
Centre for Policy Alternatives
March 2011

Chapter I

The 18th Amendment: Political Culture and Consequences

Dr Paikiasothy Saravanamuttu

In political and constitutional terms the 18th Amendment must be seen as yet another decisive step in the centralisation of power in the executive – the recurring theme of our country's constitutional evolution. This must be set against the backdrop of the intentional violation of two other constitutional amendments that sought to reverse the centralisation of power – the Thirteenth dealing with devolution which has never been implemented in full anywhere in the country and the Seventeenth explicitly dealing with checks and balances on the exercise of executive power. Moreover, the 18th Amendment was passed when a political settlement of the ethnic conflict necessitating power sharing is required to move the country from a post-war to a post-conflict phase and when the rhetoric of the executive is about equal citizenship and a return to peace time democratic governance.

A number of observations about the 18th Amendment are therefore illustrative of the current state of governance and politics.

The timing of the Amendment and the process through which it was brought to the legislature for passage by a two-thirds majority of the House are instructive. The Amendment was proposed after two national elections – presidential and general and before the second term of the incumbent was to commence. Elections are the fundamental mechanism for choice and change in a functioning democracy and accordingly, the process through which the electorate makes informed choices on the basis of information provided and manifestoes outlining policies and proposed legislation, presented. This was not the case in respect of the 18th Amendment. No mention was made of it in either the presidential or parliamentary election – were it to have been mentioned it is not at all unreasonable to argue that it would have been an issue of considerable interest and debate and one, which, could well have swayed votes. That it was not reinforces the democratic deficit that plagues our politics and governance and underpins its authoritarian character.

This is attested to as well in the manner in which it was done. The Amendment was referred to the Supreme Court as urgent in the national interest even though the incumbent President's second term of six years had yet to commence. As pointed out by Tamil National Alliance (TNA) MP Sumanthiran in the debate on the Amendment in Parliament, it was not referred to the provincial councils as required, even though it impacts on the powers devolved to them. Whilst the latter attests to the government's regard for the second tier of government – or indeed the lack of it – the former goes to the heart of the

regime's intention for government into the future and its need for constitutional validation to underpin it.

It was also the case that the Amendment given to those who intervened in the matter when it was referred to the Supreme Court and the Amendment debated and passed in Parliament were not exactly the same. There were reportedly differences regarding the parliamentary consultative body, which can make observations on presidential nominees to commissions. Given the government's argument that the Amendment was "urgent in the national interest", the apparent sloppiness in process and procedure is a cause for concern. It indicates levels of competence and regard for constitution-making that fall short of the minimum requirements of governance.

The Debate

A number of arguments have been trotted out in defence of the 18th Amendment, some inducing a sense of déjà vu and true to form obscuring real intention.

Echoing J.R. Jayawardene, we are told that since economic development is now the overarching priority of the country economic development demands a strong executive, upon which, in turn, political stability will be founded. A basic knowledge of contemporary history will reveal that the Jayawardene over-mighty executive did not accomplish the economic development it should have in full measure and that it had to deal with an insurgency in the south and in the north, which drained the potential and resources of this country in more ways than one and which in no small measure were also attributable to its authoritarianism. We must do more than hope that history will not repeat itself.

More relevant is the consolidation of power and dynastic rule. Power in Sri Lanka is concentrated in the hands of the Rajapaksa family and in the hands of the President and his brothers in particular – Basil as economic czar, Gotabaya as head of the security apparatus and Chamal as speaker and in effect the first line of defence against an impeachment motion, if ever there was to be one. Son Namal, first time MP, is increasingly frequently referred to as the Crown Prince in the vocabulary of dynastic succession and the trajectory of that succession - vertically to son or horizontally to a brother - has also been speculated upon with references to intra-familial rivalry. The removal of the term ban on an incumbent contesting the presidency also puts paid to a succession struggle and the prospect of the incumbent becoming a lame duck President into the last two years of his second and last term.

The lame duck argument has also been used. No doubt it can be used for a third term when in a second and a fourth in a third and so on and so forth. That most countries with presidencies restrict incumbents to two terms seems to be an irrelevant consideration here. The removal of the term bar, according to its proponents, does not run counter to democratic norms because the incumbent will always have to stand for election and the People therefore will decide. This is where the disturbing significance of the jettisoning of the 17th Amendment by the 18th is underlined.

The Election Commission envisaged under the 17th Amendment was never set up because President Kumaratunga had problems with one of the Constitutional Council's nominees. The issue of what should happen if the President refused to appoint a Council nominee was never resolved. However, the 17th Amendment vested the

incumbent Election Commissioner alone with all the powers envisaged for the Election Commission provided for under the 17th Amendment. That he has not made the fullest use of this and that he publicly expressed his frustration to the extent of stating that his authority was being flouted as well as the delay in the announcement of the presidential election results, lends credence to the argument that the integrity of the electoral process has been undermined and with it public trust and confidence in the integrity of the electoral process. The national elections of 2010 are not exclusively responsible for this. They however serve as the most egregious examples of this in recent memory. Consequently, exclusive reliance upon the electoral process as a defence against authoritarianism is an insufficient guarantee of democratic rights and freedoms.

Proponents of the 18th Amendment have also cited recent political events in the Maldives in support of the argument that the 17th Amendment had to be jettisoned to avoid a deadlock in government. Two points are worth considering in this context. There was a parliamentary committee set up to look at amendments to the 17th Amendment. Furthermore, it is illustrative of the mindset of the government that instead of looking seriously at amendment of the 17th Amendment and at checks and balances on the exercise of executive power integral to democratic governance, they opted for gutting the 17th Amendment and effectively vesting the executive with the powers the 17th Amendment had given to the Constitutional Council and independent commissions.

As instructive as the stance of the government, in terms of contemporary attitudes and intention in respect of governance, was the stance of the opposition.

Caught up in its leadership battle, the main opposition party the United National Party (UNP) decided to boycott the debate in parliament on the 18th Amendment vowing instead to demonstrate its opposition to it outside. The decision of the UNP to demonstrate its opposition to the Amendment outside parliament and that too not particularly successfully, denied the parliamentary debate of the fullest expression of views on the Amendment and constituted a diminution of the significance and central role of legislative debate in a functioning democracy by the main opposition party. The UNP may well have concluded that the vote was a foregone conclusion and that the fight had to be carried out in the country at large. This nevertheless did not dispel the notion that the main opposition party had abdicated its legislative responsibilities in respect of a key issue of governance and that in doing so contributed to the diminishing importance of parliament it had championed through the introduction of the Second Republican Constitution in 1978.

Consequently, the main opposition to the 18th Amendment in parliament was voiced by the Janatha Vimukthi Peramuna (JVP) and TNA. The Sri Lanka Muslim Congress (SLMC) supported the government enabling it to muster the necessary two-thirds majority. Some members of the SLMC, unhappy with the party's decision to support the 18th Amendment and to join the government, averred that support was extended on the basis of the removal of the term bar and not for the jettisoning of the 17th Amendment, which, they claimed to be unaware of. More relevant to the SLMC position is the enduring risk of the party splitting whilst in opposition and without access to state resources and patronage for its constituency.

Much too was made of earlier statements by the “old left” parties the Lanka Sama Samaja Party (LSSP) and Communist Party of Sri Lanka (CP) as well as Mr Vasudeva Nanayakkara’s grouping expressing their opposition to the Amendment. There was speculation that they would if not vote against, abstain. Tragically this was not to be the case. The allure of office, of ministerial portfolios overrode allegiance to constitutionalism. As with the First Republican Constitution of 1972, the “old left”, its protestations notwithstanding, will not be able to escape responsibility for contributing towards the embedding of authoritarianism and majoritarianism as central themes of constitutional evolution in Sri Lanka.

UNP and JVP organised demonstrations against the Amendment, civil society intervention in the Supreme Court and a series of articles in the media including editorials critical of the Amendment, did not however arouse sufficient interest in the issue at a mass level and public opposition to its passage. Whilst this reflects the level of opposition and civil society capacity to galvanise a critical mass of popular opinion behind an issue of overarching constitutional importance, it also draws attention to the cross roads Sri Lanka’s democracy is at in the aftermath of the military victory against the LTTE.

Overarching considerations

The declared objective of the government is the prioritisation of economic development. As with the defeat of the LTTE in the face of calls for a humanitarian cease fire and allegations of war crimes thereafter, the government claims it is determined to pursue and deliver economic development with the single-mindedness of purpose it employed in the defeat of the LTTE. In this perspective rights, political and

civil especially, are considered irrelevant at best and subversive at worst. Any focus on rights is seen as a disingenuous camouflage for regime change. Economics it is hoped will trump politics and blunt the demand for the satisfaction of political aspirations and the addressing of political grievances.

What is being effected is a transformation of the political culture on the heels of military victory from the more boisterous and unruly South Asian model with an implicit faith in democratic norms and processes epitomised by India to a more disciplined and homogenous one along East and Southeast Asian lines. The United People's Freedom Alliance (UPFA) as an umbrella coalition encompassing the "old left", the Jathika Hela Urumaya (JHU), National Freedom Front (NFF), Ceylon Workers' Congress (CWC), Eelam People's Democratic Party (EPDP) and now the SLMC, corresponds to the Malaysian United Malays National Organisation (UMNO) model formation. Similarities can be drawn between the fate of opposition leaders Anwar Ibrahim and Sarath Fonseka as well. The transformation is founded on the popularity of the incumbent following the defeat of the LTTE and is underpinned by a majoritarian and triumphalist ideology in the service of dynastic rule.

The key challenge is as to whether a polity that has enjoyed adult universal suffrage for seven decades and one, which is proud of its democratic traditions however flawed, will succumb to authoritarianism as the acceptable price for accelerated economic growth. The cumulative impact of the 18th Amendment after all is to make the incumbent President effectively President for life – the removal of the term bar, the jettisoning of the 17th Amendment and the existing clause of

the 1978 constitution granting the holder of the office of the President legal immunity.

The Jayawardene referendum in 1981 on the extension of the life of the 1977 parliament and the postponement of elections ushered in a period of insurgency and bloodshed. This put paid to any plans President Jayawardene had of contesting the presidency for a third term. The Rajapaksa 18th Amendment has come to pass in different circumstances. Yet, it has in common with the infamous referendum, its authoritarian nature and ostensible democratic rubber stamp - in the form of a highly controversial and violent referendum in the first instance and a two thirds majority in the second with the main opposition dangerously self-absorbed in its internal problems and considerably weakened by a series of electoral defeats.

Finally, the passage of the 18th Amendment is instructive in one especially important respect. The protection and strengthening of democratic rights and freedoms will crucially depend on the interest and demonstrable commitment of citizens. The campaign to ensure implementation of the 17th Amendment though tirelessly pursued by civil society activists through the courts and in the country at large, failed to galvanise a critical mass. That the everyday concerns of the citizen are inextricably linked to the independence and integrity of state institutions and agencies and that without the latter there will be no Rule of Law or law and order fundamental to a functioning democracy, the delivery of services and the peaceful, non-discriminatory conduct of public business and economic development, is a message that needs the widest and active subscription in the polity.

Or else, we risk going back to the future.

Chapter II

The 18th Amendment and the Consolidation of Executive Power

Aruni Jayakody

Introduction

The 18th Amendment to the Constitution repeals the two term limit and important checks on the exercise of executive power introduced by the 17th Amendment. The President now has unfettered power to make all key public service appointments. Thus, for example, the President now wields significantly greater control over the entire legal system, as it is solely at his discretion that the Attorney General, Judges of the Supreme Court and Court of Appeal are appointed. Further the Amendment repeals important powers of key public bodies including the Public Service Commission, National Police Commission and the Election Commission. Its defenders sought to explain it as an effort to resolve the constitutional crisis created by the 17th Amendment and strengthen the office of the President, so that the public service could be streamlined and made more efficient. However, in reality it represents a consolidation of power in the office of the President. It undermines the rule of law in Sri Lanka and takes away key mechanisms that seek to ensure the integrity of the democratic process.

This chapter first looks at the history of the 17th Amendment, the reasons for its failure and argues that there were several alternative options to resolve the 17th Amendment crisis. Secondly, the chapter examines the Parliamentary Council that replaces the 17th Amendment and how the powers of key public bodies have been reduced. Thirdly, the chapter looks at other mechanisms introduced by the 18th Amendment that enhance the power of the executive, such as the removal of the two term limit and the requirement that the President mandatorily attend Parliament. Finally, the chapter looks at the impact the 18th Amendment has on the provincial councils.

Part 1: The History of 17th Amendment

Sri Lanka's independence Constitution, the Soulbury Constitution, established an independent Public Service Commission that was responsible for the transfer, dismissal and disciplinary control of public servants. It operated free of political pressure, and public servants were largely free to offer frank advice. However, both the 1972 and 1978 Republican Constitutions firmly rejected the idea of an independent public service. The 1972 Constitution made clear that the Cabinet of Ministers shall be directly responsible for matters relating to the maintenance of the public service.¹ The 1978 Constitution retained the Cabinet's control over the public service and institutionalised unfettered power in the office of the President. In particular it gave the President power to dissolve the legislature at virtually any time without having to consult any one. The President was also given sweeping immunity from legal proceedings, such that he can't be made party to any legal proceedings, not

¹ *Constitution of the Socialist Democratic Republic of Sri Lanka (1972)* (Sri Lanka), Article 106(1).

even in his private capacity. Though an impeachment mechanism was provided for, it was virtually impossible to implement. It required two third majority votes in the legislature on three separate occasions and a finding of guilt by the Supreme Court. In times of emergencies, the President was given even greater power, where he could promulgate regulations that could override the laws of Parliament.

In this context, it is important to note that the two term limit on holding the office of the President was one of the few checks on executive power. These unfettered powers given to the executive proved fatal during Sri Lanka's subsequent experiences with communal violence and civil war. The state regularly declared states of emergency, such that for the past thirty years, Sri Lanka has been in an almost uninterrupted state of emergency. During these periods of conflict and especially during emergencies, increased powers were given to the police and armed forces; which contributed to increased incidences of abductions, enforced disappearances and extra judicial killings. State institutions like the police force, Attorney General's department and the judiciary were weakened and were accused of committing human rights abuses with impunity.²

The 17th Amendment was devised in part, as a response to this erosion of the rule of law. The logic being that if one could devise a mechanism to make law enforcement agencies and more broadly the public service independent and accountable then perhaps rule of law would improve. Thus, a constitutional amendment was designed to check the executive's unfettered power to make key public service appointments. The argument being that when a purely

² Elaine Chan, 'Sri Lanka's Constitutional Council', (2008) 18 *Law and Society Trust Review* 1,1.

political entity makes these key appointments, the resulting appointments are political and not merit based and the actions of such appointees would also lack objectivity and transparency.³

In substance the 17th Amendment created a Constitutional Council that was appointed with consensus and in consultation among the political parties represented in Parliament. The Constitutional Council consisted of the Prime Minister, the Speaker, the Leader of the Opposition, one person nominated by the President, five persons nominated by the Prime Minister and Leader of the Opposition (done in consultation with the leaders of parties in Parliament, and three of the appointees were to represent minority interests) and one person nominated upon agreement by the majority of MPs who do not belong to the parties of either the Prime Minister or the Leader of the Opposition. Persons nominated from the last three categories were to be persons of eminence and integrity, who have distinguished themselves in public life and who are not members of any political party.

The 17th Amendment was passed with wide support in September 2001 and the first Constitutional Council was constituted in March 2002. In fact, recommendations made by the Constitutional Council were appointed to the Human Rights Commission, the Public Service Commission and the National Police Commission. The Constitutional Council also nominated candidates to the Election Commission; however, President Kumaratunga rejected the nominee for Chairman to the Commission, thus the Election Commission was never formed. A legal question remains whether the President had

³ Cyrene Siriwardhana, 'Public Institutions and de-politicisation rise and the fall of the 17th Amendment' in Elizabeth Nissan (ed), *Sri Lanka: State of Human Rights 2007* (2007), 237, 237.

the power to reject a nominee of the Constitutional Council. President Kumaratunga's refusal to appoint the Election Commission marked the beginning of what ultimately became known as the 'crisis' or 'failure' of the 17th Amendment. This crisis was deepened in March 2005, when the first term of office of the first Constitutional Council expired and no new appointments were made to the Council. The reasons for this failure have been examined at length elsewhere⁴, broadly they can be summarised as lack of political will⁵, structural flaw in the 17th Amendment which insisted on such a complex appointment mechanism and failure of the Courts to issue clear legal precedent to resolve the political impasse.⁶

As the deadlock prolonged, the President proceeded to make appointments without the recommendations from the

⁴ See for example Siriwardhana above n 3 and National Peace Council, *The 17th Constitutional Amendment A collection of Analytical Articles* (2009).

⁵ For example there was criticism of the minor parties, who stalled the nomination process by failing to agree on a candidate to represent them in the Constitutional Council. Further, there was much criticism of the President, Speaker and Leader of the Opposition in failing to exert more pressure both politically and through the parliamentary process on the minor parties to select a candidate.

⁶ See for example *Public Interest Law Foundation v The Attorney General and Others*, CA Application No 1396/2000. When President Kumaratunga refused to appoint a chairman to the Elections Commission, the Court upheld the President's refusal by holding that it fell within the blanket immunity under Article 35 of the Constitution. See criticism of this approach, Kishali Pinto Jayawardena, *Offering Constitutional Solutions for the Conflict Amidst Constitutional Anarchy*, 2 July 2006, Sunday Times. Other cases that challenged directly the validity of the unilateral appointments by President went unanswered by the State in Court: CA (Writ) No 890/2006. At the time of the 18th Amendment's passing two other cases were still pending in the Supreme Court concerning the 17th Amendment: SC(FR) 297/2008 and SC (FR) 578/2008.

Constitutional Council. In particular, appointments were made to the Human Rights Commission, the National Police Commission, the Public Service Commission, Judges of the Court of Appeal and the Supreme Court, Attorney General and the Auditor General. The President's direct appointments were severely criticised as being in contravention of the Constitution. It was pointed out that the 17th Amendment judgment implied that there was no residual power in the President to make appointments outside of the 17th Amendment process. Article 41(B)(1) and 41(C)(1) provided that no person shall be appointed by the President to any of the Commissions or Offices except on a recommendation by the Constitutional Council. Thus, a straight forward reading of the 17th Amendment provided that the President had a ceremonial rather than a substantive role in the appointment process.⁷

Critics of the President's handling of the 17th Amendment crisis, point out that there were still other options the President could have pursued to solve the crisis. These solutions fall in to three broad categories: mechanisms that seek to break the dead lock among the minor parties; re-interpreting the minimum requirements of the Constitutional Council; and reforming the 17th Amendment mechanism to make it more workable. The point to be noted is that there were alternative means of resolving the crisis, rather than simply repealing it in its entirety and replacing it with a far weaker mechanism. For example, in order to resolve the dead lock among the minor parties, it was argued that in order to meet the requirements under the 17th Amendment it would have been sufficient if one person was nominated by majority

⁷ Siriwardhana, above n 3, 251; Asanga Welikala, 'The Right to Vote', in Elizabeth Nissan (ed), *The State of Human Rights 2005* (2005) 181, 188.

of the MPs belonging to smaller parties.⁸ Alternatively it was suggested that this tenth member be appointed on a rotational basis so that different smaller parties have their preferred nominee, albeit for a shorter period of time on the Constitutional Council.⁹ Further the solutions that seek to reinterpret the minimum requirements of the Constitutional Council argued that there is nothing to prevent the Constitutional Council from functioning since nine out of the ten members were decided upon and the quorum for the Council was six.¹⁰ An alternative interpretation such as this, as opposed to direct appointments by the President would have been in line with the spirit of the Constitution and the objectives of the 17th Amendment.

Part II: 18th Amendment and the Parliamentary Council

The 18th Amendment repealed the Constitutional Council under the 17th Amendment and replaced it with a weaker mechanism known as the Parliamentary Council. The Parliamentary Council is composed of the Prime Minister, the Speaker, the Leader of the Opposition, one Member of Parliament nominated by the Prime Minister and one Member of Parliament nominated by the Leader of the Opposition.¹¹ In making their nominations, the Prime Minister and Leader of the Opposition, should nominate candidates from a community

⁸ Siriwardhana, above n 3, 245-6.

⁹ Siriwardhana, above n 3, 246.

¹⁰ Siriwardhana, above n 3, 247.

¹¹ *Constitution of the Socialist Democratic Republic of Sri Lanka (1978)* (Sri Lanka) (**Constitution of Sri Lanka**), Article 41A(1), as amended by the *Eighteenth Amendment to the Constitution* (**Eighteenth Amendment**).

other than their own.¹² Once the 18th Amendment is enacted, within one week the Speaker is to require the Prime Minister and the Leader of the Opposition to nominate their members. If the Leader of the Opposition and the Prime Minister fail to nominate candidates, then the Speaker at his sole discretion can nominate two Members of Parliament for the Parliamentary Council.¹³

In terms of composition, unlike the Constitutional Council, the Parliamentary Council is smaller in number and all the members of the Parliamentary Council must be Members of Parliament.¹⁴ There is no longer a requirement that members be persons of eminence and integrity that have distinguished themselves in public life.¹⁵ In particular the Constitutional Council had four nominees designed to represent minority political interests whereas the Parliamentary Council only has two nominees to represent minority interests. Thus, the range of opinion represented in the Parliamentary Council will be far less than it was the case in the Constitutional Council. Similar to the Constitutional Council, the Parliamentary Council does not aim to ensure diversity in gender among its members. Further, the process for obtaining observations of the Parliamentary Council is to be determined by the Speaker.¹⁶

¹² Ibid.

¹³ *Constitution of Sri Lanka*, Article 41A(3), as amended by the *Eighteenth Amendment*.

¹⁴ *Constitution of Sri Lanka*, Article 41A, as amended by the *Eighteenth Amendment*.

¹⁵ *Constitution of Sri Lanka*, Article 41A, as amended by the *Seventeenth Amendment to the Constitution* (**Seventeenth Amendment**).

¹⁶ *Constitution of Sri Lanka*, Article 41A, as amended by the *Eighteenth Amendment*.

These procedures are not required to be publicised which means they cannot be subject to any public scrutiny. Thus, there is a question over the rigour of the nomination process and the level of consensus within the Parliamentary Council.

Similar to the Constitutional Council, the Parliamentary Council is to nominate persons for key public service appointments. There is a provision where by a leader of a recognised political party can forward nomination to a key public service appointment to the Speaker.¹⁷ However, the Speaker is not required to consider such a nomination or forward it to the Parliamentary Council. The Parliamentary Council is to nominate all members and chairmen of the Election Commission, Public Service Commission, National Police Commission, Human Rights Commission, Commission to Investigate Allegations of Bribery or Corruption, the Finance Commission, the Judicial Service Commission and Delimitation Commission.¹⁸ Further the Parliamentary Council is also to nominate persons to the following key posts: Chief Justice and Judges of the Supreme Court, President and Judges of the Court of Appeal, the Attorney General, the Auditor General, and the Parliamentary Commission for Administration and the Secretary General of Parliament.¹⁹ The IGP has been expressly removed from the purview of the Parliamentary Council. However, as noted below, through the changes enacted to the Public Service Commission, the Cabinet is given the power to appoint heads of departments,

¹⁷ *Constitution of Sri Lanka*, Article 41A (9), as amended by the *Eighteenth Amendment*.

¹⁸ *Constitution of Sri Lanka*, Article 41A, Schedule I, as amended by the *Eighteenth Amendment*.

¹⁹ *Constitution of Sri Lanka*, Article 41A, Schedule II, as amended by the *Eighteenth Amendment*.

thus the Cabinet and indirectly the President will be given control over the appointment of the IGP.

However, unlike under the 17th Amendment mechanism where the President was to make appointments on the recommendation of the Constitutional Council, under the 18th Amendment, the President only has to seek the observations of the Parliamentary Council. On a technical analysis the words 'seeking observations' is far less obligatory than seeking recommendations. Under the 18th Amendment, there is not even an obligation to consider the opinion; the President is only under a requirement to request that the Parliamentary Council proposes a nomination. Thus, once the President has received the observation, the President is free to entirely disregard it. Further, once the President notifies the Council that he is seeking observations, the Council has one week to communicate its nominations; where it fails to do so within one week, the President can proceed to make appointments at his sole discretion.²⁰ Thus, the Parliamentary Council has very little, if any power at all to influence the appointment process.

Further the Parliamentary Council has no role to play in the removal process and an unclear role in appointing an acting person to a designated commission or office. The 18th Amendment provides that the President is to seek observations for nominations to the specified Commissions and Offices. However, the 17th Amendment expressly provided that on both matters of removal and appointing acting persons, the President was to act on the recommendations

²⁰ *Constitution of Sri Lanka*, Article 41(A)(8), as amended by the *Eighteenth Amendment*.

of the Constitutional Council.²¹ Thus, under the 18th Amendment it is unclear whether the President has to seek the observations of the Parliamentary Council in the event of making a temporary appointment. In any event, it is likely to make little difference given that the President is under no duty to consider or act on the observations of the Parliamentary Council.

It is important to remember that the 17th Amendment was passed without opposition in an effort to restore public confidence in the rule of law. The argument being that public institutions were not performing the role they were designed to do as they were headed by incompetent and or politically partial individuals. Given that the 18th Amendment now returns to a system where appointments are effectively made at the sole discretion of the President, there is little hope for a transparent, accountable or independent public service. This situation is worsened, given that minority communities are further marginalised as they are given no meaningful capacity to influence the appointment process.

To date, the Parliamentary Council has only been functioning for approximately one month. The Council consists of the Prime Minister, Speaker, Leader of the Opposition and the two nominees agreed upon by the Prime Minister and the Leader of the Opposition: A. H. M Azwar and D. M.

²¹ See for example removals and temporary appointments to the Public Service Commission: Articles 54(4) & (7) as amended by the *Seventeenth Amendment*; temporary appointments to the Election Commission: Article 103 (7) as amended by the *Seventeenth Amendment*; temporary appointments to the Judicial Service Commission: Article 111E (5) as amended by the *Seventeenth Amendment*; removals from the National Police Commission: 155A(4) as amended by the *Seventeenth Amendment*.

Swaminathan.²² Several comments can be made about its early performance. Despite promises to form the first Parliamentary Council within one week after passing of the 18th Amendment, the first Parliamentary Council was formed after five months delay, in February 2011. To date the first Parliamentary Council has only communicated its observations concerning who should be appointed to the Human Rights Commission. First, given that Sri Lanka is getting ready to have local government elections across the country, it is rather surprising that nominations weren't sought by the President for constituting the much needed and long awaited Election Commission.²³ This is particularly so given that the current Elections Commissioner, (who exercises the powers of the Election Commission) has been seeking and denied retirement despite over thirty years in office and numerous serious health conditions.²⁴ Secondly, there is a question mark over the persons nominated to the Human Rights Commission. In particular, the nomination of a former IGP Mr Anandarajah to a human rights protection role is highly questionable given that during his tenure as IGP, the police force was identified as the most corrupt public

²² Sandun A Jayasekera, 'Except Elections Commission other Commissions soon', *Daily Mirror*, 15 January 2011 <<http://print.dailymirror.lk/news/news/33001.html>> accessed 26 January 2011.

²³ See above n 16, Sadun Jayasekera.

²⁴ See *Dayananda Dissanayake v Attorney General* S.C. Application No 271/2003; BBC, 'I won't vote says elections chief', *BBC*, 24 September 2004 <http://news.bbc.co.uk/2/hi/south_asia/4278216.stm> accessed 4 March 2011; Malinda Seneviratna, 'The Legal requirement of being immortal', *Daily Mirror*, 29 September 2009 <<http://print.dailymirror.lk/opinion1/398-the-legal-requirement-of-being-immortal-.html>> accessed 4 March 2011.

institution in the country.²⁵ Additionally during his tenure as head of the police force there were numerous reports of tortures in custody, deaths in custody and arbitrary arrests.²⁶ As noted above, there has been no questioning of the internal nomination process within the Parliamentary Council, or the level of consensus within the Parliamentary Council over these nominations.

The 18th Amendment further amends the powers of several key public service bodies established under the 17th Amendment to further institutionalise power in the hands of the executive. Each of the bodies and the changes made to them are considered below.

Public Service Commission

The 18th Amendment provides that the President shall appoint and remove all nine members of the Public Service Commission (PSC).²⁷ Further the President also has the power to appoint a Chairman to the PSC.²⁸ In matters of appointment the President is to seek the observations of the Parliamentary Council. However the President is not required to seek the observations of the Parliamentary Council in

²⁵ Jayantha Sri Nissanka, 'IGP expresses doubt over survey', *Daily News*, 19 December 2002 <<http://www.dailynews.lk/2002/12/19/new23.html>> accessed 4 March 2011. See also Jayantha Dhanapala, 'Friday Forum Statement on Recent Appointments to the Human Rights Commission of Sri Lanka', *The Island*, 26 March 2011 <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=21657> accessed 29 March 2011.

²⁶ See U.S. Department of State, *Country Reports on Human Rights Practices* 2002 & 2003.

²⁷ *Constitution of Sri Lanka*, Article 54(1), as amended by the *Eighteenth Amendment*.

²⁸ *Ibid.*

matters of removals or acting appointments.²⁹ Under the 17th Amendment, the PSC was given the power to deal with appointment, promotion, transfer, disciplinary control and dismissal of the public officers.³⁰ Further the Cabinet was given power over the appointment, promotion, transfer, disciplinary control and dismissal of all heads of departments. However, whenever acting over these matters, the Cabinet was to act only after ascertaining the views of the Constitutional Council. This feature was criticised even under the 17th Amendment, since the question was raised as to what use is there of having a PSC if it cannot exercise control over heads of departments?³¹ In fact, it was predicted that without stronger phrasing such as the ‘Cabinet must act with the concurrence of the PSC’, heads of departments would continue to be pawns of politicians.³²

The 18th Amendment significantly reduces the power given to the PSC. Now, it is the Cabinet of Ministers that determines policy matters relating to appointment, promotion, transfer, disciplinary control and dismissal of the public service.³³ Further, powers over heads of departments also vests with

²⁹ Under the 17th Amendment, in matters of both removals and acting appointments the President had to act on the recommendations of the Constitutional Council: *Constitution of Sri Lanka*, Article 54(4),(7), as amended by the *Seventeenth Amendment*.

³⁰ *Constitution of Sri Lanka*, Article 55(1), as amended by the *Seventeenth Amendment*.

³¹ M. C. M. Iqbal, ‘The Public Service in Sri Lanka’ in Sumudu Atapattu (ed) *Sri Lanka State of Human Rights 2002* (2002), 170, 190.

³² Iqbal, above n 32, 190-1.

³³ *Constitution of Sri Lanka*, Article 55(1), as amended by the *Eighteenth Amendment*.

the Cabinet, and unlike under the 17th Amendment, the Cabinet does not have to ascertain the views of the Parliamentary Council prior to dealing with heads of departments. Subject to these two conditions, the PSC retains the power to appoint, dismiss, transfer and discipline public officers.³⁴ In this regard it is important to note that under the Sri Lankan Constitution the Cabinet is essentially controlled by the President. It is the President at his sole discretion that appoints Cabinet members.³⁵ The President determines the size of the Cabinet and which members should be assigned with what functions. Further at any time, the President can change the assignment of subjects or the composition of the Cabinet. In fact, at any time the President can assign to himself any subject or function.³⁶ Thus, the powers of the PSC not only lie with the Cabinet, but also indirectly with the President.

To be sure, the independence of the public service has been severely hampered under successive constitutions and amendments. However, the changes implemented under the 18th Amendment, are by far the most devastating in terms of impact on the independence of the public service. Changes under the 18th Amendment raise significant challenges in ensuring the independence of the public service. All public servants, including heads of departments are now beholden to the Cabinet and ultimately the President for appointment, dismissal and promotions, thus further institutionalising a culture of patronage and acquiescence. Any limited capacity

³⁴ *Constitution of Sri Lanka*, Article 55(3), as amended by the *Eighteenth Amendment*.

³⁵ *Constitution of Sri Lanka*, Article 44.

³⁶ *Constitution of Sri Lanka*, Article 44(2).

they had to offer ‘free and frank’ advice has been significantly limited. For all practical purposes, the public service will be serving at the pleasure of the President.

Numerous reports, inquiries and reform committees have all repeatedly concluded that the main problems of the public service are a lack of accountability, inadequacy of knowledge with respect to their assigned functions; absence of effective supervision; lack of adequate motivation and above all political interference.³⁷ Obviously to cure all these problems a number of broader reform programs need to take place for example, adequate remuneration and proper training. However, removing political interference in appointments is at the heart of ensuring accountability, independence and transparency.

National Police Commission

Prior to the creation of the National Police Commission (NPC), numerous reports revealed that there were serious defects in regulating the police force.³⁸ Several legislative efforts were made to address these shortcomings; however, they were never effectively implemented.³⁹ In fact at the time

³⁷ Iqbal, above n 32, 18.

³⁸ Justice Soertz Commission (1946); Basnayake Commission (1970); Jayalath Committee (1995); The Commissions of Inquiry into the Involuntary Removal and Disappearance of (Certain Persons) (2001).

³⁹ For example the 13th Amendment to the Constitution provided that both national and provincial police commissions be established: See 13th Amendment to the Constitution, Ninth Schedule, Appendix 1, items 3-4. Further to give effect to these provisions, the *Police Commission Act. No. 1* of 1990 was enacted. However, these police commissions were never established. It has been recommended that to reduce the potential for conflict that the *National Police Commission Act* be repealed: See J. C. Weliamuna, ‘The National Police Commission’ in Elizabeth Nissan (ed), *Sri Lanka State of Human Rights 2004*, (2004) 159, 165-6.

of NPC's inception, the police department was viewed as one of the most corrupt public institutions in Sri Lanka.⁴⁰ The 17th Amendment established the NPC and gave it the specific powers to appoint, dismiss, transfer and take disciplinary action over police officers.⁴¹ Further it was given an additional range of powers over the internal affairs of the police force; including power to formulate recruitment and training schemes, develop policies to improve efficiency and independence of the police force, decide on matters relating to provision of arms and other equipment for the use in both national and provincial police forces.⁴² Additionally, the NPC also had the power to receive complaints and grievances regarding the police from the public and investigate such complaints.⁴³

It has to be noted that like many of the other institutions enacted under the 17th Amendment, the NPC had a mixed record. During its first term the NPC often delegated its disciplinary control of police officers to the IGP which led to very little action being taken against alleged misconduct of

⁴⁰ *Transparency International Regional Survey Report*, December 2002.

⁴¹ *Constitution of Sri Lanka*, Articles 155G and 155H, as amended by the *Seventeenth Amendment*.

⁴² *Constitution of Sri Lanka*, Article 155(G), (3), (4), as amended by the *Seventeenth Amendment*.

⁴³ *Constitution of Sri Lanka*, Article 155G (2), as amended by the *Seventeenth Amendment*.

police officers.⁴⁴ It was only in 2004 that the NPC decided to assume substantive disciplinary control of police officers. The NPC's independence and control was critical in investigation of officers that have violated fundamental rights and preventing politically motivated transfers of police officers prior to elections.⁴⁵ Further the NPC also had a mixed record with respect to its equally important second function, that of receiving complaints from the public against police officers and where possible providing redress. In this regard, after much delay the NPC established a complaints procedure, however there were many criticisms over the NPC's failure to take action over many of the complaints.⁴⁶

The 18th Amendment amends the composition of the NPC by providing that the President shall appoint no more than seven

⁴⁴ At first delegating disciplinary control was justified on the grounds that IGPs are better suited to administer their own departments. However, it soon transpired that IGPs would delegate disciplinary matters to subordinate officers or special investigative units. This resulted in a situation where police officers were investigating other police officers which led to very little disciplinary action being taken against police officers. Further, the IGP, as the head of the department was recommended by the Cabinet (after ascertaining the views of the PSC) and appointed by the President. Thus, there was no guarantee that the IGP was an independent, politically impartial player.

⁴⁵ Kishali Pinto Jayawardena, 'The National Police Commission in Sri Lanka: Squandering a Golden Opportunity' (2007) 18(238), *Law and Society Trust*, 9, 16; J. C. Weliamuna, 'The National Police Commission', Elizabeth Nissam(ed) *Sri Lanka State of Human Rights 2004* (2004), 159, 178.

⁴⁶ For example, it was reported that despite receiving thousands of complaints against police personnel, only 73 indictments had been filed, and mostly over minor offences. Though the Attorney General's department is partly to blame for failure to file indictments, the NPC was also subject to criticism over its failure to have a more open, accountable and transparent investigative mechanism, See Jayawardena, above n 45, 18.

members.⁴⁷ This leaves open the possibility that the NPC can be constituted with less than seven members. The quorum for meetings of the NPC remains four members, thus at minimum four members must be appointed by the President. Under the 18th Amendment all seven members of the NPC and its Chairman are to be appointed solely by the President.⁴⁸ They can also be dismissed solely at the discretion of the President.⁴⁹ Powers of the NPC are also significantly reduced. Now, the NPC's powers have been limited to investigating complaints from the public against a police officer and providing redress.⁵⁰ The Public Service Commission has been given power over matters relating to appointment, promotion, transfer, disciplinary control and dismissal of police officers.⁵¹ In particular, in order to effect this change, the 18th Amendment removed the police force from the exception to the definition of public officers for the purpose of Chapter IX; thus, effectively making them public officers and bringing them under the purview of the PSC.⁵²

However, it is important to recall that the NPC also had other powers relating to recruitment, training, provision of nature

⁴⁷ *Constitution of Sri Lanka*, Article 155 A, as amended by the *Eighteenth Amendment*.

⁴⁸ *Ibid.*

⁴⁹ *Constitution of Sri Lanka*, Article 155A(4), as amended by the *Eighteenth Amendment*.

⁵⁰ *Constitution of Sri Lanka*, Article 155FF, as amended by the *Eighteenth Amendment*.

⁵¹ *Eighteenth Amendment* s 36(5).

⁵² *Constitution of Sri Lanka*, Article 61F, as amended by the *Eighteenth Amendment*.

and types of arms, ammunition and other equipment necessary for the police force. The 18th Amendment removes these powers from the NPC, however does not repose them in any other body. The *Police Ordinance No 3 of 1974* (as amended), provides that the administration of the police shall be vested in the officers of the police⁵³ and that the IGP, subject to the Minister in charge, may make rules for the police force.⁵⁴ Currently the Department of Police comes under the Ministry of Defence, which has been assumed by the President, thus all future internal affairs of the police are to be controlled by the President and secretary to the Ministry of Defence.

Numerous criticisms can be made about the changes to the NPC. A practical question can be raised over the bringing of the NPC within the purview of the PSC; given that the PSC already has command over such a large number of public servants, does it really have the capacity to manage an additional 7,500 police men and women?⁵⁵ Despite the numerous criticisms levelled at the NPC over its failure to exercise its powers, it was viewed as making some limited progress in improving the regulation of the police. Thus, repealing the powers of the NPC and returning to a situation where political actors are regulating the police force is hardly likely to improve administration of the police. Further though the NPC retains one of its key functions of handling public complaints against the police, its ability to carry out its functions in this regard is severely hampered. This is owing

⁵³ *Police Ordinance No 3 of 1974* (Sri Lanka) (as amended), s 20.

⁵⁴ *Police Ordinance No 3 of 1974* (Sri Lanka) (as amended), s 55.

⁵⁵ Transparency International Sri Lanka, *Adverse Impact of the 18th Amendment on Governance Position Paper* (2010), 9.

to the fact that given the new appointment mechanism, there will be less chance of an individual with a record of taking on sensitive issues will be appointed to the NPC.

Under the 18th Amendment, as noted above, the appointment of the IGP no longer falls within the purview of the Parliamentary Council. Further, the President's power to appoint the IGP has been expressly repealed.⁵⁶ However, with the amendment of the powers of the PSC, the power to appoint heads of departments vests with the Cabinet.⁵⁷ Thus, the appointment of the IGP, as head of the police force will be made by the Cabinet. In any event, given the significant control the President exercises over Cabinet, the President effectively has control over the appointment of the IGP. This is further reinforced by the fact that the police force has been brought within the Department of Defence, which has been assumed by the President.

Election Commission

The Election Commission was an important body established under the 17th Amendment to ensure the integrity of elections. The Election Commission had the power to prevent the use of state property to promote or prevent the campaign of any candidate or political party.⁵⁸ The Chairman of the Election Commission had the power to issue guidelines during an election to television and radio broadcasters in

⁵⁶ *Constitution of Sri Lanka*, Article 61E, as amended by the *Eighteenth Amendment*.

⁵⁷ *Constitution of Sri Lanka*, Article 55(2), as amended by the *Eighteenth Amendment*.

⁵⁸ *Constitution of Sri Lanka*, Article 104B (4), as amended by the *Seventeenth Amendment*.

order to ensure a free and fair election.⁵⁹ Further, where the state owned radio or television broadcasters contravened guidelines issued by the Election Commission, the Chairman of the Election Commission had the power to appoint a competent authority to take over the management of state media in respect of political broadcasts until the conclusion of the election.⁶⁰ However, to date the Election Commission has not yet been formed. As noted previously, though the first Constitutional Council recommended candidates for the Election Commission, President Kumaratunga refused to act on those recommendations.⁶¹ However, the 17th Amendment provided that the powers of the Election Commission shall vest in the Commissioner of Elections until an Elections Commission is formed.⁶² The Election Commissioner has at best a mixed record in exercising powers of the yet to be formed Election Commission.⁶³ In crucial moments the Election Commissioner has used some powers to prevent the abuse of state resources by political parties. For example in June 2009, the Government was prevented from making new appointments to the public service pending the outcome of the presidential elections. Further, the Elections Commissioner has twice exercised his powers to appoint a competent authority over the state owned television broadcaster,

⁵⁹ *Constitution of Sri Lanka*, Article 104B (5), as amended by the *Seventeenth Amendment*.

⁶⁰ *Ibid.*

⁶¹ See above n 6.

⁶² *Seventeenth Amendment*, s 27(2). See also *Ashraff Hussain Ghany v Dayananda Dissanayake SC Appeal No 37/2003*.

⁶³ See for example Centre for Monitoring Election Violence, *Final Report on Election Related Violence Parliamentary Election April 2010* (October 2010), 12-14.

Rupavahini Corporation, the first in March 2004 during the General elections and in 2010 during the presidential election.⁶⁴

The 18th Amendment significantly reduces the powers of the Election Commission. Firstly, the Election Commission is reduced from five to three members.⁶⁵ However, the quorum for the Commission remains three members.⁶⁶ This change makes it potentially more difficult for the Election Commission to operate in the event that a member is temporarily unavailable, or where there is a delay in appointing a new member after the removal of another member before the expiration of their full term. The power to issue guidelines has been limited to matters “which are directly connected with the holding of the respective election (or referendum).”⁶⁷ Specifically, the guidelines may not relate directly to any matter relating to the public service or any matter within the ambit of administration of the Public Service Commission or the Judicial Service Commission.⁶⁸ The precise ambit of this narrowed list of matters is unclear. However, it is clear that the intention is to remove any constitutional limitations on

⁶⁴ Lankaenews, ‘Elections Commissioner appoints competent authority at long last’, *Lankaenews.com*, 29 December 2009 < <http://www.lankaenews.com/English/news.php?id=8867> > accessed 1 February 2011. See also Welikala above n 7, 190.

⁶⁵ *Constitution of Sri Lanka*, Article 103 as amended by the *Eighteenth Amendment*.

⁶⁶ *Constitution of Sri Lanka*, Article 104 as amended by the *Seventeenth Amendment*.

⁶⁷ *Constitution of Sri Lanka*, Article 104B(1)(4)(a) as amended by the *Eighteenth Amendment*.

⁶⁸ *Constitution of Sri Lanka*, Article 104B(1)(4)(b), as amended by the *Eighteenth Amendment*.

abusing state resources. The Election Commission shall no longer have the power to intervene in matters of transfer, promotion, dismissal of a public servant or a police officer as this power now falls within the ambit of the Public Service Commission.

Further, the 18th Amendment requires both state and private media (print and broadcast) to take all necessary steps to ensure compliance with guidelines issued by the Election Commission. Previously, only the state owned media had a duty to comply with guidelines. Insisting that private media also adhere to guidelines issued by the Election Commission, undermines their freedom of expression and ultimately undermines the free flow of information during election time. Private media and state media cannot be put in the same category, as state media is funded by public funds whereas private media is not, and it can represent content of any manner of political persuasion (both pro and anti government). Only by allowing private media to function freely can there be free flow of information to the electorate during election time. By allowing the state to dictate guidelines to private media during election times, it will allow the ruling party to manipulate all media during election time. Thus, by ensuring that members of the Election Commission will be loyalists of the President and by removing many of its important powers, the Election Commission has been rendered powerless to regulate elections and referendums.

Broader implications of repeal of the 17th Amendment

It is clear from the manner in which the 17th Amendment was repealed and the new Parliamentary Council that replaces it, that the fundamental objective behind the 18th Amendment was to give absolute power to the President over all key public servants. The President now has complete control,

not just de-facto control over the public service. These changes have a drastic impact on public perception and public confidence in these institutions. Given that power is concentrated in one institution, only those who are loyal to those in power can have access to positions of power. In this regard the President's unfettered power to appoint the Attorney General and the judiciary is especially destabilising, as it gives the executive vast control over the entire legal system, and ultimately undermines the capacity of citizens to assert their rights and seek redress through legal mechanisms. Thus, the changes undermine notions of equality of citizenship which requires that all citizens be regarded equal, despite differences particular to individuals, whether those differences relate to ethnicity, wealth or political allegiance. In a larger context, these changes also hamper efforts at national reconciliation. Issues relating to the protection of human rights are only worsened, as mechanisms that could have been utilised to ensure independent investigations and provide redress have now been politicised and rendered meaningless.

The repeal of the 17th Amendment has been justified on a wide range of grounds. It was argued that where there is a presidential system, the President should have the prerogative to appoint whomever he wants and that it is improper to limit his powers of appointment arbitrarily. However, this logic simply does not hold up: an independent public service is considered an important part of good governance even in presidential systems. Allowing the President unfettered power to make key appointments is hardly a method of ensuring accountability, transparency or depoliticisation of the appointment process. Further, even in countries with strong democratic presidential systems, such

as the United States, the President's appointments have to be approved by the Senate.

Further, it was justified on the grounds of being necessary for development. In particular, it was argued that it will create a more efficient public service and therefore will accelerate economic development in the country. A full analysis of this argument is beyond the scope of this chapter. However, it is difficult to imagine that a politicised public service can necessarily improve efficiency and ultimately result in a successful development strategy. On the one hand, having a politicised public service will encourage patronage and further institutionalise a culture of 'yes sir'. However, it is unlikely to improve the rigour of the decision making process or the quality of its decisions. It is certainly unlikely to ensure that competent people, with relevant qualifications and experience will be appointed to the public service.

More broadly, these changes do little to advance the cause of post-war democratisation in Sri Lanka. It is more important than ever that Sri Lanka develops a political system where citizens are rewarded for participating in its political system. In particular, given Sri Lanka's history of conflict, it is important that those who formerly felt excluded from the system, or powerless to bring change within the existing system be included. However, the 18th Amendment, as noted above, represents a marked concentration in the hands of the executive; it creates no incentives within the system to resist majoritarian impulses. In fact, it does the opposite: it removes the last few remaining counter-majoritarian checks on our political system.

Part III: More power to the Executive

The 18th Amendment makes two other changes that further enhance the power of the executive. In particular, the President is now required to attend Parliament once every three months and the number of times a person can hold the office of the President has been removed. The impacts of each of these changes are considered below.

Mandatory Attendance at Parliament

The 18th Amendment creates a new requirement that the President shall attend Parliament once every three months.⁶⁹ The President continues to enjoy all the privileges, powers and immunities other than the right to vote, of a Member of Parliament.⁷⁰ Further, the President is given the express right to address Parliament and send messages to Parliament.⁷¹ The motive behind this provision is unclear. Proponents argued that this provision will increase accountability of the office of the President, as he or she can be subject to questioning by Members of Parliament. However, the Amendment only requires the President to merely attend Parliament, he is not under any obligation to answer questions or be held accountable in any way through the parliamentary process. Certainly, given the dominance of the current ruling party in Parliament, and the crisis of the opposition, it is unlikely that the President will be subject to any questioning or pressure through the parliamentary process. However, it remains to be seen how this provision would function if a party other than the President's party were

⁶⁹ *Constitution of Sri Lanka*, Article 32, as amended by the *Eighteenth Amendment*.

⁷⁰ Ibid.

⁷¹ Ibid.

to gain majority in Parliament. In any event, under this change, the President is given additional power as he enjoys further immunities and privileges in addition to those afforded to him by virtue of the office of the President. Requiring the President to attend Parliament and giving him an express right to address and send messages to Parliament increases his influence in Parliament and affords the President greater opportunity to manipulate or interfere with the parliamentary process. Thus, by increasing the President's influence over the Parliament the separation of powers is undermined.

Repeal of two term limit

The original 1978 executive system made the Sri Lankan Presidency one of the most powerful in the world. However, one of the few limitations that were placed upon it was the two term limit on holding office of the President. The 18th Amendment removes the two term limit, thus, going a step further than the 1978 Constitution, and marks an even greater concentration of power in the office of the President. The legal effect of the removal of the two term limit is just that, any President who has been President for two terms can again stand for President. However, the broader implications for Sri Lanka's democracy are more complex. Term limits provide an important check on the concentration of power and avoids promoting a personality based vision of democracy. During elections, the incumbent has an enormous advantage over rival challengers, as they have unrivalled access to state resources and funds. Even in consolidated multi party democracies that has extensive mechanisms to regulate elections, there are often instances of abuse of state resources and campaign funds. Thus, allowing a candidate to stand for office for an innumerable number of terms makes it less likely that he or she will be defeated. By removing the possibility of electoral rewards, it

removes the President's incentive to perform in a manner that best serves the interests of the electorate.

Proponents of removal of the two term limit argued that its removal will avoid the 'lame duck' second term in office, where the President has little incentive or authority to administer new policy. Moreover, that in the event that the electorate desired to have the President re-elected, removing the two term limit will in fact enhance the franchise. However, if the term limit was removed then there should be at minimum other mechanisms that limit the incumbent's electoral advantage, such as checks on abuse of state property, regulation of campaign finances, a process for public funding of campaigns and a free media. However, in Sri Lanka despite the removal of the two term limit there have been no moves to introduce any of these other measures of regulation or to improve media freedom. Moreover, the repeal of the two term limit needs to be seen in context with the other changes made under the 18th Amendment. The power given to the President to make all key public service appointments, and the reduction of the powers of the Public Service Commission and the Election Commission, serve to take away key safeguards that ensure the legitimacy of the democratic process. In particular, the Election Commission has little power to prevent the abuse of state property; intervene and control inappropriate use of state media; or prevent the strategic transfer of police officers during election times. At the next presidential election, a loyalist to the President will be able to go a step further and issue guidelines to all media to function in a manner that serves the interests of the incumbent. Given that the judiciary will also now be handpicked by the President, little reliance can be placed on judicial protection of fundamental rights or due process to ensure free and fair elections.

Thus, without such safeguards, over the long term, unlimited term limits can concentrate power in the executive and weaken the other two branches of government namely, the judiciary and legislature. Further in the absence of term limits, others aspiring for power may become impatient and employ extra constitutional means of achieving the Presidency. In fact, around the world, most countries with a democratic presidential system have a term limit on the office of the President.⁷² Alternatively, where they don't have term limits, countries like Peru, Chile and Uruguay provide that Presidents can serve for unlimited number of terms; however, the terms can't be consecutive.⁷³ Thus, in practice this additional qualification prevents the same person holding office for an interrupted number of terms.

Part IV: Impact on the Provincial Councils

The 18th Amendment also has several provisions that impact on provincial councils and the devolution of power. In particular, the 18th Amendment amends provisions affecting the finances of provincial councils and their powers relating to law and order.

Finances of Provinces

Firstly, the 18th Amendment affects the composition of the Finance Commission, which recommends the allocation of

⁷² Jayampathy Wickremaratne PC advanced these arguments during the Supreme Court proceedings on the 18th Amendment. In particular he noted that the following countries do not have term limits, and they are either one party states or dictatorships: Azerbaijan, Singapore, Syria, Turkmenistan, Vietnam, Venezuela, Yemen, Belarus, Cuba, Niger, Algeria, Burkina Faso, Libya, Uganda. Singapore though often portrayed as a model of development, is a one party state. In its 94 member parliament, 82 are from the ruling party, 9 are appointed members and only 3 are from the opposition.

⁷³ Ibid.

funds for the provincial council.⁷⁴ The Finance Commission consists of the Governor of the Central Bank of Sri Lanka, the Secretary to the Treasury and three other members that represent the three major communities, appointed by the President.⁷⁵ Under the 18th Amendment, the Parliamentary Council can make observations with respect to the latter three members; however, as noted above, the discretion to make the final appointment lies solely with the President.⁷⁶ The arrangement of having the Financial Commission recommending funds of the provinces, which comes out of the national budget, with very little revenue raising powers given to the provinces has been criticised mainly because it undermines devolution by giving financial control over the provinces to the centre.⁷⁷ Moreover this structure has been further undermined in practice, as the centre's final allocation of funds to the provinces is far below what is recommended by the Finance Commission and what is required to meet the expenditures of the provinces. However, the Finance Commission has an important role to play in ensuring effective fiscal devolution as it has broad powers to recommend both the amount of funds to be transferred to the provinces and to recommend principles on which funds may be granted to the provinces and decide any other matter

⁷⁴ *Constitution of Sri Lanka*, Article 154R (3), as amended by the *Eighteenth Amendment*.

⁷⁵ *Constitution of Sri Lanka*, Article 154R, as amended by the *Eighteenth Amendment*.

⁷⁶ *Constitution of Sri Lanka*, Article 41A and 154R, as amended by the *Eighteenth Amendment*.

⁷⁷ Asanga Welikala, *Fiscal and Financial Arrangements in a Federal Sri Lanka: Some issues for discussion* (2004), 22-23; The Centre for Policy Alternatives, *Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008 -2010* (2010), 68-69.

relating to provincial finances, as referred to it by the President.⁷⁸ Thus, getting appointments to the Finance Commission right is an important part of ensuring effective devolution of power to the provinces.

Further the 18th Amendment provides that the Auditor-General is now to audit the accounts of the Provincial Public Service Commissions.⁷⁹ Currently, there are Provincial Public Service Commissions operating in all the provinces. As part of the auditing process the Auditor-General is entitled to have access to all books, records, returns and require explanations and any information as may be necessary for the completion of the audit.⁸⁰ Currently the centre has significant powers of audit over the province's finances.⁸¹ Whether it's necessary to have the centre audit the provinces, or whether the provinces themselves should have independent, transparent financial auditing processes is part of a larger question about effective fiscal devolution. Currently, as noted above, the provinces are entirely dependent on the centre for their finances; therefore, a measure of auditing by the centre is necessary to ascertain the accurate financial needs of the provinces.

⁷⁸ *Constitution of Sri Lanka*, Article 154(4), as amended by the *Thirteenth Amendment to the Constitution* (**Thirteenth Amendment**).

⁷⁹ *Constitution of Sri Lanka*, Article 154(1), as amended by the *Eighteenth Amendment*.

⁸⁰ *Constitution of Sri Lanka*, Article 154(5).

⁸¹ See for example *Provincial Councils No.42 of 1987*, s 23, which provides that the accounts of the Provincial Fund are to be audited by the Auditor-General at the Centre. The auditing process can have significant political implications, for example in May 2010, the Eastern Provincial Council rejected allegations made by the Auditor-General that there were financial irregularities in the Eastern Provincial Chief Minister's Secretariat. See Jamila Najmuddin, 'EPC rejects fraud claims', *Daily Mirror*, 9 May 2010 <<http://www.dailymirror.lk/news/3635.html?task=view>> accessed 14 February 2011.

Nonetheless, requiring the Provincial PSC's to be audited by the centre amounts to a significant intrusion in to the autonomy of provincial councils.

Police Powers

As noted above much of the powers of the NPC have either been repealed or vested with the PSC. It is important to note that some of these powers that have been taken away from the NPC affect powers of the provinces. The 13th Amendment, via Appendix 1, List 1, of the Ninth Schedule gave certain police powers to the provinces. The 13th Amendment created both a National Police Commission and a Provincial Police Commission, and both were given specific powers over the provincial police forces.⁸² Further, the 13th Amendment also gave the President specific powers over the provincial police forces.⁸³ However, as noted above, neither of these police commissions were ever established. The 17th Amendment created a new NPC, which subsequently did come in to operation. The 17th Amendment specifically amended the Ninth Schedule and replaced the NPC created under the 13th Amendment.⁸⁴ Further, the NPC established under the 17th Amendment was given specific power to exercise the powers vested in it under Appendix 1, List 1 of the Ninth Schedule.⁸⁵ Thus, after the enactment of the 17th

⁸² See for example, *Constitution of Sri Lanka*, Ninth Schedule, List 1, Appendix 1, items 2 & 3, as amended by the *Thirteenth Amendment*.

⁸³ See for example, *Constitution of Sri Lanka*, Ninth Schedule, List 1, Appendix 1, items 6, 7 & 9:2, as amended by the *Thirteenth Amendment*.

⁸⁴ *Constitution of Sri Lanka*, Ninth Schedule, List 1, Appendix 1, item 3, as amended by the *Seventeenth Amendment*.

⁸⁵ *Constitution of Sri Lanka*, Article 155G(4), as amended by the *Seventeenth Amendment*.

Amendment, there was only one NPC, and it was vested with the specific powers relating to the provincial police divisions. Additionally, the 17th Amendment further amended the Ninth Schedule by providing that the NPC was to exercise the powers vested in the President relating to the provincial police division.⁸⁶

Similar to its powers relating to the national police division, the NPC's powers relating to the provincial police divisions were also related to internal policy matters. For example, the NPC had power to set policies concerning the recruitment of police officers to the national division and the promotion of police officers in the provincial division to the national division.⁸⁷ Further the NPC in consultation with provincial police divisions was responsible for determining nature and types of arms, ammunition and other equipment necessary for use by the national division and the provincial divisions.⁸⁸ Further the NPC had powers to set policy relating to training of the provincial police divisions⁸⁹ and determine the cadres and ranks of provincial police forces⁹⁰. Additionally where the IGP and the Chief Minister disagreed over the appointment of

⁸⁶ *Constitution of Sri Lanka*, Ninth Schedule, List 1, Appendix 1, items 6, 7 & 9:2, as amended by the *Seventeenth Amendment*.

⁸⁷ 13th Amendment to the Constitution, Ninth Schedule, List 1, Appendix 1, item 3.

⁸⁸ *Constitution of Sri Lanka*, Article 155G(3), as amended by the *Seventeenth Amendment*; Ninth Schedule, Appendix 1, item 8, as amended by the *Thirteenth Amendment*.

⁸⁹ *Constitution of Sri Lanka*, Ninth Schedule, Appendix 1, item 9:2, as amended by the *Seventeenth Amendment*.

⁹⁰ *Constitution of Sri Lanka*, Ninth Schedule, List 1, Appendix 1, item 7, as amended by the *Seventeenth Amendment*.

DIG to a province, the NPC had the power to appoint a DIG in consultation with the Chief Minister.⁹¹

The 18th Amendment partially repeals these powers given to the NPC that affect the provincial police divisions. As noted above, the NPC no longer has any powers to set policies over recruitment, equipment, or any other internal affairs of the national police division. More specifically under the 18th Amendment, the power given to the NPC over provincial police divisions is repealed.⁹² However, the 18th Amendment doesn't correspondingly amend the powers in the Ninth Schedule.⁹³ Thus, though the NPC no longer has the power to exercise powers vested in it relating to the provincial police division, the 13th Amendment (as amended by the 17th Amendment) continues to give it power relating to the provincial police forces. This lacuna creates a measure of legal uncertainty whether the NPC can still exercise these powers conferred to it under the 13th Amendment. However, given the broader intent evident in the 18th Amendment to centralise power in the executive, and more specifically to limit the mandate of the NPC, the proper view is presumably that the NPC no longer has any powers over the provincial police divisions.

⁹¹ *Constitution of Sri Lanka*, Ninth Schedule, List 1, Appendix 1, item 6, as amended by the *Seventeenth Amendment*.

⁹² *Constitution of Sri Lanka*, Article 155G(4), as amended by the *Eighteenth Amendment*.

⁹³ Article 155G(4) has been repealed by the 18th Amendment. However, the 17th Amendment's amendment of the 13th Amendment has not been repealed. See above notes 87 and 89-91, these sections haven't been repealed by the 18th Amendment.

However, there is a further question, whether, even if the NPC does legally have the power to set policy relating to provincial police divisions, whether it will be equipped to do so in practice, given that now the NPC's mandate is limited to handling external problems of the police force rather than its internal affairs. As noted above the *Police Ordinance* provides that powers over administration and setting rules for the police force vests with the IGP and the relevant Minister in charge of the police force. Thus, as noted above these internal policy questions of the national police division, and potentially the provincial police divisions will be exercised by the Ministry under which the police department falls, that being the Ministry of Defence, headed by its secretary, Gotabaya Rajapaksa and its head, President Rajapaksa. To date the police powers given to the provinces have never been implemented; therefore, it is difficult to assess how these powers will be exercised in practice. However, in the event that a provincial council were to establish a provincial police force, the exercise of the police powers could potentially be controlled by the centre, and in particular the executive.

These changes to undermine the powers of the provincial councils are concerning more broadly because of the larger context of consolidation of presidential power. Power is not just being taken back to the centre, but also being centralised in the office of the President. Given the wide powers already afforded to the President over provincial councils, this affirms the broader pattern in Sri Lanka's devolution history, of retaining the centre's tight control over the provinces. These changes further legitimise long held complaints over the centre's failure to implement devolution in letter, spirit and practice. As noted above these changes also have negative implications for broader issues of reconciliation and post-war

democratisation. Little hope can be had for implementing an effective political solution that would improve on the current devolutionary scheme.

Conclusion

The 18th Amendment represents a marked concentration of power in the office of the President, even worse than was the case under the 1978 Constitution. It is important to understand the Amendment as not something that merely took away the two term limit on holding the office of the President. In addition, it gives unfettered power to the President over all key public service appointments, and also drastically reduces the powers of key bodies such as the Public Service Commission, Election Commission and National Police Commission. In particular, the Amendment repeals many of the powers of the Election Commission which were key to ensuring the integrity of the democratic process. Thus, not only is the President allowed to run for Office for innumerable number of terms, the capacity to regulate elections have been removed, thus increasing his advantage over potential rivals. Additionally, it also has negative consequences for devolution, as several of its provisions negatively impact on the finances of the provinces and any future exercise of police powers. More broadly the Amendment has negative consequences for counter-majoritarianism, post-war democratisation and reconciliation. By undermining the independence of the public service and appointing loyalists to the President to all key public service posts, little hope can be had for resisting majoritarian impulses that have in the past ignited and sustained conflict in Sri Lanka. Further, the changes create little space for addressing past wrongs, or building stronger human rights protection mechanisms for the future.

Chapter III

Constitutionalism the 18th Amendment and the Abdication of Responsibility

Rohan Edrisinha & Aruni Jayakody

The 18th Amendment was placed before the Cabinet of Ministers, reviewed for constitutionality by the Supreme Court, debated in Parliament and passed into law within ten days. Prior to the bill being placed before the Cabinet, there were no public announcements concerning the constitutional change. During the Supreme Court hearing on the 18th Amendment the intervening petitioners were given accurate copies of the proposed changes only partway through the hearing. The changes were hatched in secrecy and rushed through as a bill 'urgent' in the national interest. The whole process adopted for the introduction of the 18th Amendment and the substance of the 18th Amendment violate first principles of constitutionalism and demonstrate a shocking disregard for basic, internationally accepted norms of constitution making. This chapter examines the process used to pass the 18th Amendment, and its implications for

constitutionalism. In particular it looks at the failure of political actors, civil society and the judiciary in making the process of constitutional change more inclusive.

Process used to enact the Eighteenth Amendment

In 2010, Sri Lanka went through two national level elections: the presidential and general elections. At neither of these elections, did the President or the ruling party offer any hints as to the changes that were to be made under the 18th Amendment. Prior to the 18th Amendment bill being approved by the Cabinet, there were unconfirmed news reports of impending constitutional change. The proposed changes speculated in the media ranged from removing the two term Presidential term limit, introducing a second house and dismantling the Presidential system and replacing it with the so-called “Executive Prime Ministerial” system. However, none of these changes was discussed at any great detail in the public domain. In particular, there was much confusion over what exactly an Executive Premiership would entail.⁹⁴ The President placed the 18th Amendment before the Cabinet on Monday 30 August. Since the Cabinet declared it as urgent in the national interest the Amendment bill was automatically referred to the Supreme Court, the following day on Tuesday 31 August. Those who were fortunate enough to have had access to a copy of the Amendment,

⁹⁴ If one were to look at the literature, there is generally a demarcation between Presidential and Parliamentary executive systems. What was being proposed was a combination of the two systems. The idea has been previously proposed in Israel and Japan. In Japan the consensus among academic circles was that the idea was without merit. In Israel the concept was briefly implemented, but was ultimately quickly abandoned, as it proved unworkable in practice. A key feature of the proposal was that the Prime Minister should be elected by the whole country. However, such a feature would still encourage populist politics and the system would be centred on a single charismatic individual, similar to the current Presidential system.

intervened before the Supreme Court. At the Supreme Court hearing, it became apparent during the Attorney General's submissions that the version of the bill in possession of the intervening petitioners was different to the version relied on by the Attorney General. When the intervenient petitioners objected in court, the Attorney General turned to them and stated "This is what happens when you have documents you are not supposed to have." He subsequently relented however, and gave a copy of the Amendment to one of the intervenient petitioners who then asked his junior to rush out into the streets of Hulftsdorp to make photocopies of the Amendment for the others who were challenging the bill. Thus, the intervening petitioners were only given accurate copies of the proposed changes after the Attorney General had commenced his submissions.

Within a day of the hearing the Supreme Court issued its opinion in a judgment consisting merely of few pages, holding that the Amendment did not affect the entrenched provisions of the Constitution, and thus, did not require a referendum. Though a parliamentary debate took place, it did so without the participation of the main opposition party, which with its now characteristic irresponsibility boycotted the debate, and with little contribution from the smaller opposition parties. The Government was able to secure a two- third majority and passed the bill in to law few days after the Supreme Court hearing.

Failure of Constitutionalism

Constitutionalism is premised on the assumption that a Constitution is meant to protect and empower the People. This includes protecting and empowering the People from and in relation to those who wield political power. The *raison d'être* of a Constitution which has been described by Eugene

Rostow, the former Dean of the Harvard Law School as a “counter majoritarian document,” is to protect the People from the tyranny of the majority and the tyranny of those who are in government. If the Constitution can be changed by the wielders of power without the participation of and the concurrence of those whom a constitution is designed to protect, the basic rationale of constitutionalism is undermined. At the heart of this idea is that, when the Constitution is being reformed or amended, the People should be part of the process, at the very least they should be informed of the process, be able to observe it and if possible participate in the process.

Sri Lanka unfortunately has a history of constitutional reform without the participation of the People. In particular, unlike in other countries, there are few linkages between academics, civil society actors, lawyers and the political actors who seek to reform and draft constitutional change in Sri Lanka. If one were to examine efforts at constitutional reform from recent history, the process of debate about constitutional reform and actual drafting of constitutional amendments took place in a sphere far removed from the public. For example the recent All Party Representative Committee (APRC) that considered various constitutional reform proposals was largely confined to a few individuals in a room. Similarly under President Kumaratunga, constitutional reform initiatives were largely limited to a Parliamentary Select Committee. The 18th Amendment proved no exception to this pattern. It is difficult to assess who had input in to the drafting of the 18th Amendment other than those closest to the President. Currently the main locus of political power is centred in the Presidential Secretariat, the President’s close confidants and advisors and not the usual institutions in a democracy such as the Cabinet and the Parliament. This is one of the

fundamental flaws of the Second Republican Constitution introduced by J. R. Jayewardene.

The failure to have a wide, consultative process to amend the Constitution is part of wider problems that underlie our political culture. At a certain level, civil society actors, lawyers and academics must take responsibility for their collective failure to give the People a better understanding of ideas of constitutionalism. It is important to note that the Bar Association despite passing a resolution that constitutional change should be done with greater public participation, failed to appear in Court to oppose the Amendment. More broadly, political leaders from all sides must take responsibility for not opening up the process, and not affording the public the chance to be informed, observe and participate in the process of constitutional change. The failures of the opposition parties were glaring. The main opposition party boycotted the Parliamentary debate, and its leader actually thought it opportune to travel abroad, during the week within which the Amendment was enacted. The most vocal opposition activity came from the Janatha Vimukthi Peramuna (JVP) who not only intervened in the Supreme Court hearing but also led the more widely attended political demonstrations expressing opposition to the Amendment.

The other smaller minority parties also failed both individually and collectively to galvanise any support to more vehemently resist this Amendment. At the time of its enactment, more than one year had lapsed since the end of the war, yet the minority parties had failed to adjust to the post war political realities. In particular, the capitulation of the Sri Lanka Muslim Congress (SLMC), which joined the government and ultimately granted them the two third majority to make the

Amendment possible, presents a clear example of the failure of minority of parties to engage in any meaningful, principled opposition politics. At the time, the SLMC's rationale for crossing over was explained as an exercise in pragmatism: without being in power, they were unable to respond to the demands of their constituents.

The response of the Tamil National Alliance (TNA) was better. Though the party was engaged in a process of reflection and debate on its role in the post-LTTE political context and was inclined to withdraw from the debate on an issue that it was argued by some was a matter that did not affect them directly, it did oppose the Amendment. The speech delivered by Mr Sumanthiran M.P. contained probably the most powerful critique of the Amendment. However, the TNA's failure to intervene in the Supreme Court hearing on the 18th Amendment was noteworthy.

The most pathetic capitulation of principle was of course by the Old Left that had long fought against the Executive Presidency. However, this must be viewed in a historical perspective. It must be remembered that the LSSP and Communist Parties were responsible for the dismantling of constitutionalism and many of the underlying assumptions of the Seventeenth Amendment such as the need for independent institutions such as the judiciary and the public service. The introduction of the First Republican Constitution in 1972, which on paper is worse than the Second Republican Constitution and which fortunately lasted for just six years, began the trend of constitutional design for executive convenience. (It was probably not surprising that thirty eight years later the Attorney General, when critiquing the 17th Amendment and justifying the introduction of the 18th had the temerity to declare that it would be easier and

more convenient for the government if the 17th Amendment were repealed!). The LSSP and the Communist Parties were however powerful critics of the Second Republican Constitution and the Executive Presidency in particular. They championed its repeal for thirty two years, made it a key issue at several national elections, possibly even exaggerated its role by claiming it was responsible for all the ills gripping the country, and then supported an amendment which in effect makes the executive President more powerful than when it was first introduced.

The Mandate Theory and the Eighteenth Amendment

When discussing the responsibility of political actors to open up the process of constitutional reform, one cannot escape the discussion of the role of the ruling party. In addition to seeking to change the Constitution in complete secrecy, the proposed amendments were in violation of what was promised by the President at both the 2004 and 2010 presidential elections. Thus, the proposed 18th Amendment violated the mandate given by the People at two successive presidential elections. In 2005, Mahinda Chinthanaya 1 promised to abolish the Executive Presidency before the end of the first presidential term. Mahinda Chinthanaya 2 promised to a) reduce the powers of the Executive Presidency, b) make it more accountable Parliament and c) “established equality before the law and (ensure that the Presidency) is accountable to the judiciary”, in short, repeal Article 35 of the Constitution, the sweeping immunity clause that violates the Rule of Law. However, the cumulative effect of the 18th Amendment is to concentrate more power in an already ‘over-mighty’ executive, and to make it less accountable as the Constitutional Council is replaced by a powerless Parliamentary Council. Thus, these changes are in violation of the promise in Mahinda Chinthanaya 2010.

Use of the ‘urgent bill’ process

The Government used the “urgent bill” mechanism to enact the 18th Amendment. This amounts to a gross misuse of constitutional process to amend the Constitution. The Constitution lays down specific processes for amending the Constitution. One method is that it can be amended by passing a bill with a two-third majority of Parliament. Where a constitutional change affects certain entrenched articles of the Constitution, there must be two third majority approval in Parliament and the approval by the People at a referendum. For example a change that affects Article 3 (which establishes the sovereignty of the People) would require a referendum. A referendum is only successful if the total number of ‘Yes’ votes amount to an absolute majority of the total valid votes cast at the referendum.

The Constitution also provides for the introduction of urgent bills. A bill can be deemed ‘urgent in the national interest’ by the Cabinet. The declaration is made entirely in the subjective opinion of the Cabinet; and, there is no requirement that any reason or explanation be given why a bill is ‘urgent’. A Cabinet declaration that legislation is urgent in the national interest precludes the constitutionally mandated requirement that a draft bill be made public and the possibility of pre-enactment constitutional review initiated by a member of the public. Instead in the case of urgent bills, the Constitution provides that the President must forward urgent bills to the Supreme Court for constitutional review. Once the urgent bill is referred to the Court, the Court is required to state whether in its opinion, a) the bill actually changes the Constitution and if it does, b) whether a referendum or whether a simple two third majority is sufficient to make the proposed changes.

It has been vigorously argued on many occasions before that bills to amend the Constitution should not be introduced via the provisions that permit urgent bills. Indeed it could be argued that neither the text of the Constitution nor the intention of the framers of the Constitution envisaged that a bill to amend the Constitution, as opposed to an ordinary bill, could be declared a bill urgent in the national interest. A Supreme Court with a commitment to constitutionalism and the will of the People, rather than deference to the political branches and executive convenience would probably have declared that the use of urgent bills is an abuse of constitutional process very early in the life of the Second Republican Constitution. It robs the public the chance to be informed, observe or participate in the process of changing the Basic Law that is supposed to protect them from those who wield power. Using such a provision to introduce constitutional amendments is inconsistent not only with first principles of constitutionalism, but also the sovereignty of the People. In this regard it is important to note that the Bar Association of Sri Lanka has passed a resolution criticising the use of urgent bills as a mechanism of constitutional change. Yet, once again similar to several instances in the recent past, the 18th Amendment bill was deemed 'urgent' and rushed through to the Supreme Court. However, there was no obvious urgency with respect to the 18th Amendment. One would have expected the Supreme Court as the custodian of constitutionalism to have taken greater note of the fact that the public and the intervenient petitioners were able to obtain copies of the amendment only on the day that the matter was to be considered by the Supreme Court and the fact that an amendment that would have such a profound impact on the independence and integrity of democratic institutions and therefore the governance of the country was hatched in secrecy with no public consultation.

It was argued in Court, given that the 17th Amendment was passed as an urgent bill, the 18th Amendment can also be passed as an urgent bill and without a referendum. The 17th Amendment should not have been passed as an urgent bill. Two wrongs do not make a right. However, it is important to note that the 18th Amendment takes away checks on the Executive and institutions that facilitate the fundamental rights of the People. The 17th Amendment established an independent, bipartisan Constitutional Council which was primarily responsible for appointing members to a host of important institutions whose legitimacy and credibility depended on their independence and perceived independence. Institutions such as the judiciary, the Human Rights Commission, the Election Commission, the Public Service Commission and the National Police Commission have a vital role to play in upholding and protecting the fundamental rights of the People and the franchise of the People. Such institutions facilitate the realisation of fundamental rights and freedoms which in terms of Article 3 and 4 of the Constitution, international human rights norms and constitutional theory are part and parcel of the sovereignty of the People. Therefore the 17th Amendment enhanced the sovereignty of the People while the 18th Amendment undermined it. The Supreme Court should have considered the fundamental difference between the two amendments.

Therefore the argument that what was introduced by a two-thirds majority does not have to be repealed by more than a two-thirds majority is flawed. The Second Republican Constitution of 1978 was not introduced with a two-thirds majority plus a referendum, but several clauses in it are entrenched and require approval at a referendum for change and indeed a referendum will be needed for its complete

repeal and replacement. In this regard, it is important to note that the Indian Constitution was not introduced after a referendum; however, it states that its provisions can be amended by a two-thirds majority but the Indian Supreme Court has held that some of its provisions are completely unalterable.

Responsibility of Constitutional Courts

It is important to note that as a superior court, the Supreme Court has special responsibilities when it comes to constitutional interpretation. The Basic Structure Doctrine developed by the Indian Supreme Court over the years, commencing with the landmark case of *Kesavananda Bharathi*, demonstrates that its underlying rationale was that the People needed to be protected from even their representatives. The basic features as articulated by the Indian Supreme Court were features/values that could not be amended by Parliament even with a two thirds majority as these values were at the heart of India's Constitution and the Court recognised that sometimes those who wielded power would want to introduce amendments not to benefit the People but rather to benefit themselves and that the Court had a special responsibility to protect the People.

Similarly in the United States where there has always been vigorous debate about the legitimacy of judicial review and the relationship between the judiciary and the “political branches” of government, the legislature and the executive, there is recognition that the courts have a special responsibility to protect the constitutional provisions that govern the democratic process. *In Democracy and Distrust: A Theory of Judicial Review*, John Hart Ely, the former dean of Stanford Law School urged judicial restraint in constitutional interpretation in many areas but argued that the Court should

be activist and interventionist when it came to cases which involved the democratic process and the protection of minorities. He argued that if one believed that one had to be deferential to the political branches to decide political matters, one then had to accept that the judiciary had a vital responsibility to ensure the integrity of the democratic processes and the protection of minority opinions because the politicians had a tendency to want to stay in or in short that incumbents tended to manipulate the system to give themselves advantages and that the Court had to ensure that this would not happen.

The 18th Amendment read as a whole makes it clear that key mechanisms which uphold the integrity of the democratic process is being undermined. In particular, the powers and independence of the Elections Commission has been seriously undermined. The Attorney General's argument that removing the two term limit is not inconsistent with the sovereignty of the People as it allows the People to decide lacks credibility if the integrity of the electoral process is seriously undermined by the very amendment that removes the limit. One cannot have one's cake and eat it. If one wants to remove the two term limit then one cannot seriously undermine the safeguards for a free and fair election.

Provisions of the Seventeenth Amendment were directory

The Attorney General in Court argued that the 17th Amendment to the Constitution was directly and not mandatory. However, this argument was not only unfounded but also dangerous. Firstly it was inconsistent with the text of the Constitution. Secondly it was inconsistent with the intentions of its framers. Thirdly it was inconsistent with the rationale or purpose of the 17th Amendment. Fourthly it was inconsistent with the Supreme Court rulings as per the

determinations on the 17th, 18th and 19th Amendments to the Constitution.

The text of the 17th Amendment was unequivocal. The Hansard proceedings on the debate on the 17th Amendment especially the speeches of its promoter, Prime Minister, Ratnasiri Wickremanayake and Mr. Wimal Weerawansa, make it absolutely clear that the intention of the framers, the intention of the legislature was that the provisions of the 17th Amendment with respect to the Constitutional Council in particular, were to be mandatory. Further the public discussions that preceded the adoption of the Amendment, the civil society campaign that led to its adoption, provided that the basic rationale of the 17th Amendment was to depoliticise and promote the independence of key democratic institutions.

Further, the determination of the Supreme Court on the 17th Amendment was based on the assumption that its provisions were mandatory. When the Court considered the question as to whether the executive power of the President would be eroded it gave several reasons as to why it was curtailed but not eroded. The fact that the recommendations of the Constitutional Council were directory was significantly NOT one of the reasons. The determination of the Supreme Court in the 17th Amendment to the Constitution was based on the assumption that the Constitutional Council was indeed part of the executive and that its provisions were mandatory. The determination of the Supreme Court in the 19th Amendment to the constitution did not state anywhere that the provisions regarding the Constitutional Council were directory and has to be viewed in the context of the tensions of co-habitation that arose in the Kumaratunga/Wickremesinghe co-habitation period. Indeed the determination highlighted the need for a

balance between the various organs of government, the importance of checks and balances and again presumed that the constitutional council and other institutions referred to in the 17th Amendment were required to act independently.

The Executive Presidency and Process of Constitutional Change

In Sri Lanka's sixty two years of independence, it has had a parliamentary executive model for thirty years and the presidential executive model for thirty two years. Sri Lanka's Executive Presidency is a key factor that undermines our ability to have a more participatory political culture, and in particular a participatory process of constitutional change.

The basic rationale for Presidentialism put forward by Prof. A J Wilson, one of its champions, at the time the Presidency was introduced, was twofold. He argued that such a system was required for stability and strong government and second that it would empower the minorities. The latter argument was premised on the following logic that the President would have to be elected by the whole country rather than from a small constituency. Thus, a presidential candidate would have to attract votes from both the north and the south of the island and from all ethnic and religious groups, thus it would encourage moderation in the policies of candidates. However, it soon became apparent that once elected the President was so powerful, that s/he became a virtual elected dictator. It became extremely difficult, not only for minorities, but for anyone else, to exert influence or pressure or for public opinion to influence the President. The events relating to the 18th Amendment illustrate vividly that this continues to be an enormous challenge for Sri Lanka.

Conclusion

The 18th Amendment concentrates more power in the executive President undermining vital checks and balances that existed in the Constitution; it undermines important democratic institutions that are vital in protecting the fundamental rights of the People. The major weakness in the Amendment was the repeal of the main features introduced by the 17th Amendment and not the removal of the two term limit on election to the Presidency. The latter is bad but the former is worse. The Amendment was introduced in a manner that violates first principles of constitutionalism and in an anti-People manner that adversely affects the fundamental rights and the franchise of the People. The whole process also reflects glaring failures of key actors that would ordinarily be expected to play a vital role in upholding the Constitution. Political actors, both those in power and opposition and civil society actors failed to both include the People in the process and more vehemently resist the process. The most shocking abdication of responsibility was however by the Supreme Court, which failed to perform its most basic function-upholding the Constitution and protecting the People from the wielders of political power.

Chapter IV

A Critique of the 18th Amendment Bill Special Determination

Niran Anketell

Introduction

The Supreme Court's Special Determination in the matter concerning the 18th Amendment¹ to the Constitution is remarkable for a number of reasons, mostly for what it fails to say. The Court faced a number of debilitating limitations brought about on the one hand by the vagaries of a Constitution that permits the complete subversion of the judicial process by executive fiat, and the Court's own unwillingness to check the naked intrusion by the executive into the judicial process on the other.

This chapter will look at the principal legal arguments made by the Intervient Petitioners opposing the Bill and the Court's treatment of those claims in Part 1, while Part 2 will focus on the Court's failure to provide for a meaningful process by which the Bill could be challenged effectively.

¹ SC (Special Determination) No. 01/2010.

Parts 3 and 4 will consider some specific legal issues relating to the usurpation of judicial functions by the legislature with respect to certain provisions in the Bill and the issue of whether Parliament was empowered to pass the Bill without first obtaining the views of the Provincial Councils.

Part I Principal arguments against the Bill

The principal contentions of the opponents of the Bill other than those dealt with in parts 3 and 4 of this Chapter were centred on the alleged violations of articles 3 and 4 of the Constitution by certain clauses in the 18th Amendment Bill. Article 83 entrenches certain articles of the Constitution including Article 3, with the effect that any amendment to those articles can become law only if it is passed in Parliament with a two-third majority and also by the People at a referendum. A ruling by the Court that the Bill was inconsistent with Article 3 would have necessitated it being placed before the People at a referendum before finding legislative passage. Article 3 of the Constitution recognises that sovereignty “is in the People and is inalienable” and “includes the powers of government, fundamental rights and the franchise.” Article 4 sets out in further detail how each of those powers are to be exercised.

The Interveniants contended that Clause 2 of the Bill, which eliminates term limits for the office of the President altered the exercise of executive power and the nature of the franchise. They pointed out that term limits are a salient and necessary safeguard against abuse of executive power, especially in the context of a constitutionally strong President enjoying complete immunity from suit. They also referred to term limits being a common feature of jurisdictions with an Executive Presidency, except states governed by authoritarian one party regimes. The Court’s response to these arguments

on the manner in which executive power would be exercised in a system without term limits was rather perfunctory. The Court was satisfied to place simple reliance on the argument that the elimination of term limits augments rather than restricts the franchise because it expands the choice available to the electorate by including a President who was elected twice previously.

The Interveniants also argued that the weakening of checks on the Presidency by the effective repeal of important provisions in the 17th Amendment also violated the exercise of sovereignty by the People. The argument posited that the system of checks and balances introduced by the 17th Amendment enhanced the sovereignty of the People by reducing the politicisation of key appointments to government and judicial offices. Further, the 17th Amendment strengthened the sovereignty of the People by introducing independent commissions for human rights, elections, police and others to function critical roles in the administration of government. The Court once again was satisfied to agree with the rather simple response by the Attorney General that prior to the passing of the 17th Amendment, the exercise of Presidential power was subject to sufficient checks and balances to the satisfaction of Article 3. Thus, the Court ruled that the repeal of the gamut of 17th Amendment safeguards did not violate any entrenched provisions of the Constitution.

The Court's response to these and other arguments did not attempt to refute the theoretical premises that formed the basis for the Interveniants' arguments. Instead, it ignored those premises while relying mostly on simple refutations and counter arguments of the sort advanced by the Attorney General.

Part II Failure of Process

The Cabinet's decision to declare the Bill to be urgent in the national interest has been the subject of protest and criticism. The effect of this declaration in terms of Article 122 of the Constitution was to amongst other things, limit the time frame within which the Supreme Court was required to make their determination to "...twenty-four hours (or such longer period not exceeding three days as the President may specify) of the assembling of the Court."

Any critique of the Special Determination must bear in mind the fact that the Court had such a limited period of time within which to determine the constitutionality of an amendment that has irrevocably changed the exercise of executive power in the country. It is perhaps not cause for surprise therefore that the Court's treatment of the effect of the Amendment on the exercise of executive power is cursory and bordering on the superficial.

Moreover, the Interveniants opposing the passage of the Bill did not have a copy of the Amendment that was formally before Court at the commencement of proceedings, which in fact became apparent during the course of oral arguments. While these limitations result from the constitutional provisions relating to Bills that are "urgent in the national interest", the Intervenant Petitioners invited the Court to scrutinise and review the endorsement that the Bill was in fact "urgent in the national interest. The Intervenant Petitioners urged the Court to at the very least treat the requirement that the Determination be made within twenty-four hours as directory, similar to the Court's interpretation of the two month time limit in relation to fundamental rights applications. The Court did not consider these arguments however, presumably on the basis that the Court is powerless

to review the endorsement that the Bill was “urgent in the national interest” because the relevant provisions narrowly circumscribe the jurisdiction of the Court.² This approach is problematic because it effectively gives the Cabinet of Ministers carte blanche to abuse the judicial process by declaring a Bill to be urgent in the national interest even when it is patently not. In this case, the government provided no reasons for why the Bill was declared “urgent in the national interests” The only inference to be drawn is that the declaration was intended to stifle and deprive citizens of the opportunity to challenge the Bill. Even if the Cabinet were to declare every single Bill placed on the Order Paper of Parliament to be “urgent in the national interest”, the Court’s approach would ostensibly preclude any judicial check on such a stark abuse of process. While it is inconceivable that the framers of the Constitution intended to permit the Cabinet to exercise the kind of unfettered power that could render the right of citizens to challenge the constitutionality of a Bill redundant; the more critical argument is that the Court’s unwillingness to acknowledge some limited check on the Cabinet’s power could potentially result in a mockery of the judicial process if the Cabinet so wills. That the only bar to the complete extinction of the right of citizens to petition the Supreme Court in respect of a Bill is the charity and goodwill of the Cabinet is hardly an endorsement of the health of the democratic process in our Constitution.

I would suggest that a complete unwillingness to review a declaration purported to be made by Cabinet is an untenable

² Article 122 (1) “In the case of a Bill which is, in the view of the Cabinet of Ministers, urgent in the national interest, and bears an endorsement to that effect under the hand of the Secretary to the Cabinet – ... (c) the Supreme Court shall make its determination within twenty-four hours...of the assembling of the Court.”

position. If in a hypothetical case, a majority of the Cabinet of Ministers reject the view that a Bill is urgent in the national interest, but the Secretary to the Cabinet nevertheless endorses the Bill as being so – the Court would necessarily have to inquire into the whether the Secretary’s endorsement is consistent with the decision of the Cabinet. Thus, the endorsement of the Secretary of the Cabinet cannot be beyond review. If the Court must in appropriate cases review the endorsement of the Secretary, there is no reason why it should not review the decision of Cabinet. Given the Court’s inherent jurisdiction to prevent abuse of process of Court, and more importantly, its role as guardian of the Constitution, there is no reason why the Court cannot review the decision of Cabinet. The exercise of such review is a necessary check in preventing the potential deprivation of citizens’ constitutional rights.

Part III “Declarations for the avoidance of doubts”

Clause 31 of the Bill contains ‘declarations’ ‘for the avoidance of doubts’ which seek to preempt challenges to inter alia the validity of appointments made in apparent breach of the 17th Amendment to the Constitution. At least three Intervient Petitioners took up the position that these declarations constitute legislative judgments usurp judicial functions, and thus violate Article 4(c) of the Constitution (“... the judicial power of the People shall be exercised by Parliament through Courts...”) and with it Article 3, which is entrenched. This position is buttressed by landmark authorities, one of which is *Liyanage and others v. The Queen*, where the Privy Council declared the ex post facto limitation on a judge’s discretionary sentencing power to have “constituted a grave and deliberate incursion into the judicial

sphere.”³ Lord Pearce, who delivered the judgment of the Court noted “[q]uite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences.” The Supreme Court of Sri Lanka has also held, in the Special Determination of the Supreme Court in re the 19th Amendment to the Constitution, that the doctrine of separation of powers is part of our Constitution. The Intervient Petitioners in the 18th Amendment case in fact brought to the notice of Court the fact that there were cases pending before the Supreme Court - SC(FR) 297/2008 and SC(FR) 578/2008, that would potentially be affected by the Bill’s ‘declarations’.⁴

Unfortunately, the Determination of the Court does not acknowledge or respond to the argument raised by Counsel for the Intervient Petitioners on this point. Precisely because the argument above raises fundamental questions relating to the separation of powers and interference with the exercise of judicial power, the silence of the Court on this matter evinces the dysfunctional nature of our constitutional framework that allows the Supreme Court a mere twenty four hours within which to reach and deliver their decision.

³ *Liyanage v The Queen* 68 NLR 265, 284

⁴ These two Fundamental Rights applications challenged the non-constitution of the Constitutional Council by the President and the appointment of an Attorney General directly by the President. The basis of the claim in each of those cases was that the President was bound by the duty to formally constitute the Constitutional Council and that all acts done by him that contravened the 17th Amendment were illegal.

Part IV Reference to Provincial Councils?

The Court's Determination refers to arguments made by Counsel on the question of whether Clause 21 of the Bill requires that it be referred to the Provincial Councils for their views in pursuance of Article 154G(2). Article 154G(2) requires that any Bill that seeks to amend XVIIA of the Constitution or the 9th Schedule; or deal with any item listed in the Provincial Council list be sent to the Provincial Councils to obtain their views before it can become law. The argument urged by Counsel was that Clause 21 of the Bill which amended the mode of appointment of members of the Finance Commission, had the effect of amending Chapter XVIIA of the Constitution and thus *ex facie* attracted the provisions of Article 154G(2). The Court agreed however with the Attorney General's submission, that because this original provision was introduced by Clause 19 of the 17th Amendment; and because the Supreme Court in the 17th Amendment Determination treated Clause 19 as a "consequential amendment", the 'amendment to the amendment' did not attract the provisions of Article 154G(2).

However, upon a close reading of the 17th Amendment Determination, it is evident that the Determination does not in any way rule on the constitutionality of Clause 19. It merely describes Clause 19 as being a "consequential amendment." There is no indication that the constitutionality of Clause 19 was even raised by the Intervening Petitioners in those proceedings. Thus, the Court's reliance on the Determination of the Supreme Court in re the 17th Amendment as support for the proposition that the amendment introduced by the 18th Amendment does not attract Article 154G(2) is based on an exaggerated misreading of the 17th Amendment Determination.

However, even assuming the Court's argument to be valid, it is not just Clause 21 that potentially requires reference to the Provincial Councils. Mr. M.A. Sumanthiran's speech at the debate in Parliament on the 8th of September asserts this point:

Clauses 20 and 22 of the Bill have provisions in respect of matters set out in the Provincial Council List and seeks to amend and/or repeal the provisions with regard to Provincial Public Service Commission and Provincial Police Commission, both of which are referred to in the Ninth Schedule to the Constitution.

He went on to remind Parliament that "[a]rticles 154 G (2) and (3) of the Constitution are very clear and specific that if such a Bill is not published in the Gazette first and/or not referred to every Provincial Council, then it will not become law" and that as a consequence "[t]his Bill therefore is in danger of being later ruled as not having become law." The Court did not refer to Clauses 20 and 22 in its Determination.

The argument raised by Mr. Sumanthiran highlights the issue of whether the Determination by the Supreme Court precludes a subsequent challenge to the validity of the 18th Amendment. Article 154G (2) and (3) lay down that no Bill which seeks to amend or repeal Chapter XVIIA or the Ninth Schedule, or deal with any matter set out in the Provincial Council List shall become law unless the Bill is referred to the Provincial Councils for their views.

The Supreme Court has since heard arguments and reserved judgment in SC(FR) 297/2008,⁵ where the Petitioner took up the position in oral arguments that the 18th Amendment was

⁵ See note 6.

not law because it was not duly passed in accordance with Article 154G(3). In any event, the jurisdiction of the Supreme Court in respect of Bills which are described in the long title as being for the amendment of any provision of the Constitution, is limited strictly to the question of whether such Bill requires approval by the People at a referendum⁶, and not of deciding whether Parliament has the power to enact law on matters attracting Article 154G(2) or (3) without the concurrence of some or all of the Provincial Councils. The Court's ruling in the *Water Services Reform Bill of 2003* and the *Local Authorities Special Provisions Bill of 2010* that those Bills would not become law unless they had been referred to all Provincial Councils did admittedly evince a purported expansion of the Court's jurisdiction. In those Determinations, the Court declined to proceed on the other grounds of challenge on the basis that there was no compliance with Article 154G(2). However, given the clear Constitutional assertion that no Bill which attracts Article 154G(2) or (3) shall become law unless referred to the Provincial Council, and the equally clear limitation of the jurisdiction of the Court to decide only whether a referendum is necessary – the Court's declaration that those Bills “shall not become law unless [they] have been referred by the President to every Provincial Council” must be deemed to have been a healthy exercise in inter-branch comity. In other words, while the Court lacked the specific jurisdiction to strike down the Bills on the ground that Parliament did not have the authority to pass such a Bill, because the Court discovered that non-compliance would necessarily lead to the Bill being rendered a nullity - it assisted the legislature by warning it of the futility of proceeding to pass the Bill. Thus, those decisions must not be seen as an exercise of the jurisdiction of the Supreme

⁶ Article 123 of the Constitution.

Court granted in terms of Article 120 of the Constitution, and not laying down a principle that the Determination of the Supreme Court is a final determination on whether a Bill attracts Article 154G(2) or (3). The Constitution does not grant the Supreme Court that power. Thus, the failure of the Court to rule that Clauses 20, 21 and 22 of the 18th Amendment Bill did not attract Article 154G(2) or (3) cannot be seen as a final determination whether 18th Amendment was duly passed. That question is yet to be determined, and any Court may yet declare it a nullity.

Article 124 of the Constitution does however attempt to preclude challenges to the constitutionality of a Bill or its due compliance with legislative process on any ground whatsoever by any Court save as otherwise provided in Articles 120, 121 and 122. I would suggest however that Article 124 is not relevant to the question of whether or not some provision purporting to be law is in fact law. The question of whether the requirements of Article 154G(2) or (3) have been met are neither questions related to the constitutionality of a Bill nor that of due compliance with legislative process. The question of constitutionality goes to whether the substantive provisions of the Bill violate any provision of the Constitution, while the question of due compliance with legislative process goes to the procedure adopted in Parliament in respect of the passage of the Bill. The question of compliance with Article 154G(2) and (3) however goes to the question of the very competence or jurisdiction of Parliament to pass certain types of Bills. Under 154G(3), where a Provincial Council does not agree to the passing of the Bill, that Bill will have no effect within that Province, even if passed in Parliament with a two-thirds majority. Thus, the requirement that certain Bills be referred to the Provincial Councils is no mere procedural requirement.

Instead it is a jurisdictional check on the power of Parliament. The terms of Article 124 are irrelevant to such Bills.

However, even assuming without conceding Article 124 to be relevant, it stands in direct contradiction to Article 154G(2) and (3) – which are both later in time and *lex specialis*.

A further complication arises in respect of the requirement of consultation with each Provincial Council. The Northern Provincial Council is defunct and has yet to be constituted, and thus, full compliance with Article 154G (2) and (3) is impossible. Further, because the non-constitution of the Council is caused by an act of omission by the President, who is also charged with the responsibility of consulting the Provincial Councils, the defence of necessity should not, in principle, be applicable to cure any default.

Conclusion

The Special Determination of the Supreme Court in the matter concerning the 18th Amendment Bill suffered the serious flaw of being rushed through the judicial process by virtue of a Cabinet decision to treat the Bill as “urgent in the national interest.” Thus, the process excluded many Petitioners who would otherwise have been able to challenge the Bill from the judicial process, severely limited those who did manage to intervene in the proceedings, limited the time available to the judiciary to hear and determine the full gamut of arguments placed before it. The Supreme Court must remedy this abuse of process by adopting strict guidelines on the use of the expedited process by Cabinet.

The argument that the declarations for the avoidance of doubt found in the Bill constitute legislative judgments has not received any attention from the Court. The consequences of this oversight could be far reaching because the Bill

patently interferes with the judicial process on crucial questions of constitutional governance. Further, the fact that certain Clauses of the Bill are ex facie matters that attract Article 154G (2) and (3) of the Bill raises serious questions about whether the Bill is in fact law. This Chapter suggests that it is open for any court to declare the 18th Amendment to be a nullity.

Chapter V

The Eighteenth Amendment and the Abolition of the Presidential Term Limit

A Brief History of the Gradual Diminution of Temporal Limitations on Executive Power since 1978

Asanga Welikala

The 18th Amendment to the Constitution was enacted by Parliament and certified by the Speaker on 9th September 2010. There are two main substantive elements to it: firstly, the removal of the two-term limitation on the election to the office of the executive President of the Republic; and secondly, the repeal and replacement of the framework for appointments to certain high public offices and independent commissions that was established by the Seventeenth Amendment of 2001. The 18th Amendment was enacted through the special procedure for 'bills urgent in the national

interest', with a two-thirds majority in Parliament, but without a referendum. In a pre-enactment review of the Bill, the Supreme Court declared that the changes proposed therein did not require the consent of the People at a referendum and that the supra-majority in Parliament would suffice.

Both the substance of the changes embodied in the 18th Amendment as well the attenuated process adopted by the government in its promulgation have attracted considerable controversy. Neither its detractors nor its proponents would disagree, however, that the passage of the 18th Amendment represented a major milestone in the constitutional evolution of Sri Lanka in general, and the Sri Lankan form of presidentialism in particular. Since other contributors to this volume deal with the details of the political context, the enactment process (including the Supreme Court's determination as to constitutionality), and the substance of the 18th Amendment, there is no need to regurgitate those issues here.

The focus of this paper is on the evolution of the institutional form of the Executive Presidency – the centrepiece of the Second Republican Constitution of 1978 – by reference to the *temporal* rather than the institutional limitations imposed on the presidency, and the questions of constitutional law and theory that arise in that context. Virtually all presidential systems feature temporal limitations, but a comparative gaze is useful especially at the American experience, in which the desirability or otherwise of term limits is a debate stretching well over two centuries. The focus here is *not* on the broader framework of substantive limitations and procedural restrictions on the exercise of presidential power within the structure of government set out in the 1978 Constitution, and there will thus be little or no discussion here about the repeal of the

Seventeenth Amendment by the 18th Amendment, or the more conventional parliamentary and judicial controls established by the constitutional separation of powers.

While comparative experiences illuminate choices in regard to constitutional design, local conditions and imperatives are the ultimate determinant of the soundness of particular choices. Arguments for and against term limits can both draw upon democratic rationales, but from the perspective of liberal constitutionalism, this paper argues that the removal of the term limit is a regressive step that would further skew the institutional imbalance at the heart of the 1978 Constitution in favour of what is already an ‘over-mighty executive’.⁷ Moreover, the post-18th Amendment constitutional scheme would encourage rather than restrain tendencies to leader-centrism, authoritarianism and centralisation that characterise our cultures of democracy, politics and governance, with adverse consequences for the constitutional promotion of democracy and pluralism, and perhaps even inaugurate a culture of elective monarchism in Sri Lanka.

The Changing Shape of Presidential Terms

The constitutional provisions with regard to the duration that one person may hold the office of executive president have been formally amended twice from the original position of 1978. The first was the Third Amendment to the 1978 Constitution, certified on 27th August 1982, which altered the principle of the fixed term, and the second is the 18th Amendment itself, which abolished the two-term limit. In addition, there have been two important pronouncements by the Supreme Court that have contributed to the evolution the

⁷ C.R. de Silva, ‘*The Overmighty Executive? A Liberal Viewpoint*’ in C. Amaratunga (Ed.) (1989) ***Ideas for Constitutional Reform*** (Colombo: Council for Liberal Democracy): p.313

constitutional position. In *Ven. Omalpe Sobhitha v. Dissanayake* (2005), the Supreme Court adopted an activist approach in attempting to curtail the scope of the Third Amendment, whilst in an Advisory Opinion in 2010, it appeared to have resiled from its earlier activism and restored the application of the Third Amendment to its intended meaning. It would be useful to consider these several positions in chronological order so as to illustrate the manner in which the institutional form of the presidency has evolved with respect to its temporal span. It is important to remember that there are two distinct devices of limitation involved in these developments: the fixed term, which demarcates the duration of a single term of office between elections;⁸ and term limits (or more precisely, limitation of the number of terms), which demarcate the total duration of time to which one person is entitled, by election or otherwise, to serve as executive president.

⁸ In anticipation of one of the arguments made by government spokesmen in the Eighteenth Amendment debate, an important clarification is necessary at the outset. There are two senses in which the phrase ‘fixed term’ is used here: (a) the constitutional provision for a *fixed duration* of a single presidential term; and (b) the express constitutional provision of a *fixed date* for the commencement (and/or termination) of a presidential term. As will be seen, the 1978 Constitution began by reflecting both these precepts in Articles 30 (2) and 31 (4) respectively. With regard to (a), the introduction of the early re-election mechanism of Article 31 (3A) (a) (i) by the Third Amendment to the Constitution in 1982 meant that while the *maximum* duration of a single presidential term remained fixed at six years, the *actual* duration could vary where the incumbent chooses to call an early (re)-election. While under the Third Amendment this applied only to the first term of a President, after the Eighteenth Amendment’s abolition of the two-term limit, it applies to the current term of the President. With regard to (b), the Third Amendment simply repealed and replaced the original Article 31 (4). These provisions are discussed below.

The Original Constitutional Framework as Established in 1978

The institution of the executive president was introduced by the Second Amendment to the First Republican Constitution of 1972,⁹ in terms of which J.R. Jayewardene became the first executive President of the Republic on 4th February 1978. The amendment radically altered the constitutional landscape of Sri Lanka, where the two previous constitutions, those of 1972 and 1947-8, had provided for a parliamentary executive. The essence of the Second Amendment was to provide for the exercise by one person of the executive powers hitherto exercised under the 1972 Constitution by the (titular) President and the Prime Minister. The new executive President was to be both head of state as well as head of the government, but would not be a member of the legislature. He would be directly elected by the People for a fixed term of six years. The Second Amendment also made provision for Mr. J.R. Jayewardene, the then Prime Minister, to become the first executive President by operation of law rather than election. Later in the same year, this arrangement was incorporated into the new Second Republican Constitution of 1978,¹⁰ which was thus the constitutional instrument that consolidated the presidential form of government in Sri Lanka.

J.R. Jayewardene had been an advocate of presidentialism long before he had the opportunity and the power to introduce it to Sri Lanka. Inspired by Charles de Gaulle and

⁹ See *National State Assembly Debates*, Vol.23, No.10, 4th October 1977.

¹⁰ Article 160. Ch. VII provides for the President of the Republic. See also *Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution* (1978) Parliamentary Series No.14 of the Second National State Assembly, 22nd June 1978: p.143.

the Constitution of the French Fifth Republic, he advocated a presidential form of government for the country on the basis of two rationales: executive stability and consensual politics, both of which were intended to create the political environment for economic development.¹¹

The original provisions of the 1978 Constitution reflected three important temporal features. Article 30 (2) provided that the President of the Republic shall be elected by the People and shall hold office for a term of six years, and Article 31 (4) provided that the term of office of the President shall commence on the fourth day of February next succeeding the date of his election. These two provisions constituted the principle of the fixed term, by express reference to the six-year duration and the date of commencement of the presidential term.

Article 31 (2)¹² provided that no person who has been twice elected by the People to the office of President shall be qualified thereafter to be elected to such office, establishing thereby the principle of the two-term limit, or in other words, a maximum of twelve years in office. It is important to note that the prohibition applied only to persons who had been *elected by the People more than twice* to the presidency. The durational limit was not on *service* in the office, excluding thereby a person who succeeds to the office upon a vacation

¹¹ For a sympathetic, and ultimately over-sanguine, commentary on the 1978 Constitution, its underlying principles, and its architect, see A.J. Wilson (1980) *The Gaullist System in Asia: The Constitution of Sri Lanka* (1978) (London: Macmillan): Chs. 1, 3, 4. For a more sceptical account, see C. Amaratunga, 'Alternative Institutional Forms for the Sri Lankan State' in Amaratunga (1989), op cit.: p. 327

¹² Read with Article 92 (c); both provisions repealed by the Eighteenth Amendment.

of the office by an elected incumbent in terms of Article 40.¹³ Such a person, who must be a Member of Parliament elected by Parliament to the presidency, holds office for the remainder of the previous incumbent's term. Since such a succeeding President is elected by Parliament and not by the People, Article 31 (2) did not apply to him.¹⁴

The final feature of this original framework was to assume importance in the 18th Amendment debate. Article 83, which enumerates the constitutional provisions that are accorded the special protection of procedural entrenchment by the requirement of a referendum (in addition to the two-thirds majority in Parliament required for general constitutional amendments), includes Article 30 (2), but not Article 31 (2). Thus, any attempt to alter the six-year duration of the presidential term of office would require a referendum, but the abolition of the two-term limit could be effected by only a two-thirds majority in Parliament.

¹³ The distinction between 'election' and 'service' has proved to be especially important in the American context, given the wording of the Twenty Second Amendment to the US Constitution. See B.G. Peabody & S.E. Gant (1999) *The Twice and Future President: Constitutional Interstices and the Twenty Second Amendment*, 83 **Minnesota Law Review** 565

¹⁴ Technically, therefore, such a person could have served as President for two full elected terms of twelve years, in addition to the remaining period of the previous incumbent's term he serves as a successor, establishing thereby an outer time limit of eighteen years assuming that the vacation of office occurs within the same year as the assumption of office by the previous President. Likewise, it would have been possible for a person who had previously been elected and served twice as President to be elected subsequently by Parliament as a successor President in terms of Article 40, because Article 31 (2) only barred an election by the People. A person who has previously served as executive president is entitled to stand for election to Parliament, and Article 91 (1) (c) only disqualifies the serving President of the Republic from being elected as a Member of Parliament. With the abolition of the two-term limit, these provisions are moot.

The Third Amendment to the Constitution of 1982

In 1982, the Third Amendment effected the first alteration to this scheme by providing for a flexible *first* term, whilst maintaining the six-year limit as the maximum duration of a single presidential term. The basic purpose of the Third Amendment was to give a discretionary power to the sitting President to fix the date of his re-election, at a time of his choosing, anytime after the expiration of four years of his first term. It therefore also deleted the reference to the fixed date for the commencement of presidential terms in the original Article 31 (4), which stated that the term of office of the President commences on the fourth day of February next succeeding the date of his election.¹⁵ However, the amendment was worded in such a way as to tailor to the circumstances and political objectives of President Jayewardene in 1982, but, as will be seen, it thereafter resulted in ensuring that a re-elected President would not automatically relinquish all of the period of his first term remaining after an early election. This departure from the fixed term principle was reflected in Article 31 (3A) (a) (i) inserted by the Third Amendment. The discretion to call an early (re)-election was only available during the first term of a President, for the obvious reason that prior to the 18th Amendment, a President serving his second term was ineligible for re-election. Having removed the two-term limit, the 18th Amendment now makes this discretion available to the President after the expiration of four years of his current term.

The discretion to choose the timing of an election is an adaptation of the traditional prime ministerial prerogative in Westminster-model systems, in which the life of the

¹⁵ 4th February is the national independence day.

government is dependent on the responsibility doctrine. That is, a government may only hold office so long as it commands the confidence of Parliament, which usually means having the support of a majority of members of Parliament. When the government of the day loses the 'confidence' of Parliament for whatever reason, then a new government must be formed, which could entail the dissolution of Parliament and a general election. Flexible terms therefore are a consequence of the immanent logic of the Westminster system, although the United Kingdom is currently moving towards fixed term Parliaments.¹⁶ Presidential systems, which are characterised by a stricter separation of powers and governmental institutions elected separately from each other, do not require this. For this and other normative reasons such as the containment of the power of the chief executive, presidential systems favour fixed terms.

¹⁶ The Fixed Term Parliaments Bill, which is part of the terms of the Coalition Agreement between the Conservative and Liberal Democrat parties, is currently at Committee Stage in the House of Lords. Clause 1 of the Bill provides that the date for the next general election will be 7th May 2015 (i.e., exactly five years from the last election), and general elections thereafter to be held every five years on the first Thursday of May. This would effect major constitutional changes in two ways. Firstly, by removing the power now held by the Prime Minister to dissolve Parliament, at his sole discretion, at any time during the life of a Parliament. Secondly, in setting the life of a Parliament at five years, it departs from the current convention of four years (the Parliament Act 1911 provides that the *maximum* lifespan of a Parliament shall be five years). In Clause 2, the Bill envisages two exceptions to this: (a) where the Commons passes a motion by a two-thirds majority for an early general election; and (b) where a no confidence motion is passed on the government, in this case by simple majority. In both cases, the date of the election will be appointed in the proclamation of dissolution. See R. Blackburn, 'The 2010 General Election Outcome and the Formation of the Conservative-Liberal Coalition Government', *Public Law*, January 2011, 30; R. Blackburn, 'The Prerogative Power of Dissolution of Parliament: Law, Practice and Reform', *Public Law*, October 2009, 766.

While the ‘hybrid’¹⁷ system of government established by the 1978 Constitution does not feature the strict separation of powers that is classically reflected in the American constitution, there seems to be no constitutional imperative within the logic of this hybrid structure that necessitates flexible terms for the chief executive. The executive President is not only elected separately, but he is also not dependent on the confidence of Parliament to the same extent as a government under the Westminster system. If there was a reason inherently necessitated by the system, it could have been expected that the framers would have provided for flexible terms from the very outset in 1978, when they had two occasions to do so. In this context, it seems that the motivation for the Third Amendment was something other than the effectiveness of the constitutional system, pointing to considerations of electoral politics and calculations of partisan advantage by the government of the day.¹⁸ Whatever the motive, the Third Amendment diluted an important temporal limitation on the Executive Presidency and institutionalised an in-built advantage for the incumbent President in the re-election contest. That advantage was not only in the incumbent’s power to determine the most propitious timing for his own re-election, without, at the same time, automatically relinquishing all of the unexpired remainder of his first term, but also the inevitable extra-legal advantages accruing to the ruling party by virtue of access to (and misuse of) state resources and public property that are an unfortunate characteristic of the Sri Lankan electoral process.

¹⁷ H.M. Zafrullah (1981) ***Sri Lanka’s Hybrid Presidential and Parliamentary System & the Separation of Powers Doctrine*** (Kuala Lumpur: Univ. of Malaya Press).

¹⁸ See Amaratunga in Amaratunga (1989), op cit.

The major and recurring problem in the operation of the Third Amendment has been in relation to its unduly convoluted method of determining the date of commencement of the second term where the incumbent President has won re-election. This has caused considerable confusion and litigation in recent years, leads to unpredictable, uncertain and inconsistent outcomes in application, and sometimes to the absurdity of an unusually lengthy period between an early presidential election and the commencement of a second where the incumbent was won re-election. Article 31 (3A) (d) (i) governs this situation in the following way:

“The person declared elected at an election held under this paragraph shall, if such person is the President in office, hold office for a term of six years commencing on such date in the year in which that election is held (being a date after such election) or in the succeeding year, as corresponds to the date on which his first term of office commenced, whichever date is earlier.”

While it is not surprising that such a contorted provision has given rise to doubt, the Supreme Court has given two conflicting interpretations to it in recent years, which adds to the confusion and uncertainty.

The Position after *Ven. Omalpe Sobhitha's Case*

In the first case, *Ven. Omalpe Sobhitha Thero v. Dissanayake* (2005)¹⁹, the Supreme Court was called upon to determine the date at which President Chandrika Kumaratunga's

¹⁹ *Ven. Dr. Omalpe Sobhitha Thero v. Dayanada Dissanayake* (2005), SC (FR) 278/2005, SCM 26th August 2005.

second term *began* after she had availed herself of an early re-election, so as to ascertain the date at which it would *end* and fresh presidential elections due. President Kumaratunga's first term commenced upon her election on 10th November 1994, which meant that in ordinary course, her first six-year term would have ended on 10th November 2000. However, after calling an early election for a second term on 21st December 1999 (i.e., eleven months prior to the expiry of her first term), she was declared elected on 22nd December 1999 for a second term. In light of Article 31 (3A) (d) (i), the question arose as to when her second term legally began. The submission of the petitioner in this respect was that the provision should be altogether ignored and effect be given to the fundamental principle in Article 30 (2) that the presidential term is six years. On this argument, the expiration of the second term should simply be computed from the date at which the President was declared elected for the second term, which means the date of expiry would be 22nd December 2005. It should be noted that this application was filed in the context of speculation that President Kumaratunga was contemplating staying on in office until 22nd December 2006 by taking advantage of Article 31 (3A) (d) (i). Silva C.J., speaking for the five-judge Bench, rejected the petitioner's argument that the Court should ignore or disregard Article 31 (3A) (d) (i), but relied on a separate line of reasoning in arriving nonetheless at the same date (22nd December 2005) as averred by the petitioner as being the date on which the second term ended.

Counsel for intervenient petitioners²⁰ and the Attorney General argued that although the wording of the provision was convoluted, a plain and single meaning could be derived from the words. In this construction of the provision, the date the second term of a re-elected President commences after an early election should be determined by reference to the date his first term commenced, either within the same year as the re-election, or the succeeding year, whichever is earlier, depending on whether the date corresponding to the date of commencement of the first term is a date after the date of election to the second term. Thus, President Kumaratunga's first term commenced on 10th November 1994. However, although she was declared elected for her second term on 22nd December 1999, the application of Article 31 (3A) (d) (i) meant that she legally commenced her second term only on 10th November 2000, this being the earliest date *after* the date of her second election that corresponds to the date of commencement of her first term. The date *within the election year* corresponding to the date of commencement of the first term has to be disregarded because it (10th November 1999) occurs *before* the date of the second election, and therefore the 'corresponding date' is the one in the *succeeding* year. Consequently, her second term would end on 10th November 2006. Silva C.J., rejected this argument as well, on the grounds that this construction opened the possibility of a relatively long period between the date of re-election and the commencement of the second term, having the effect, in his view, of a second term extending beyond six years.

²⁰ Applications for intervention were not allowed by the Court but counsel for all such parties were allowed to make submissions on the question of interpretation as *amici curiae* given the general and public importance of the matter (Article 132 (3) (iii)).

The Chief Justice reviewed the political context and motives underpinning the Third Amendment in very critical terms, concluding that the changes introduced by it “...are inexplicable in logic and commonsense. They do not even remotely advance a general legislative purpose based on good governance and transparency. They are explicable only on the basis of personal and partisan interests, advanced regrettably through the medium of the law.”²¹ It is on this view that he felt able to reject the argument of the *amici curiae* and the Attorney General that, to the extent the textual formulation in the constitution was capable of making sense, then that meaning should be given effect to regardless of an abhorrent outcome, and regardless of the possibility of inconsistent outcomes in different cases. Silva C.J., adopted instead what he called the principles of ‘consequential construction’ in interpreting Article 31 (3A) (d) (i). On this basis, his reasoning was as follows:

“It is plain that sub-paragraph (d) (i) brings into the formula the date of the commencement of the first term of office. If the words are taken by themselves all counsel conceded that it makes no sense whatsoever to incorporate a reference to the date of the commencement of the first term...Applying the formula to the dates relevant to this case we arrive at the date 10th November 2000. But that it is not the end of the provision. The vital words in my view, are found after the comma in the final phrase that reads as ‘whichever date is earlier’. The preceding words of the sub-paragraph provide for a mere artificial fixation of a date. The words that require interpretation is the phrase at

²¹ *Ven. Dr. Omalpe Sobhitha Thero v. Dayanada Dissanayake* (2005), SC (FR) 278/2005, SCM 26th August 2005.

the end. The earlier date could be determined only on a comparison of two dates...the submission that the words 'whichever date' means [a] month and day only, cannot be accepted. This phrase is separated from [the] rest [of the] sub-paragraph with a comma and each of the dates contemplated therein should be identifiable with reference to a day, month and the year. Hence we have to necessarily compare two dates, with reference to day, month and year from which the earlier one is taken as the date of commencement of office of the second term.

The first date referred to in the sub-paragraph is the date of the election. It is only with reference to the date of election that the other date as corresponds to the date of the commencement of the first term office is fixed. If the corresponding date is before the date of election, it is shifted to the succeeding year. If the corresponding date is after the date of election it would remain in the year of election itself. Thus the date of election in effect is the pivotal date in the sub-paragraph and should be reckoned as one of the dates in the comparison that is required. When considered in light of the third principle stated by Lord Salmon (cited above) the inclusion of the date of election as one of the dates to be reckoned, does not lead to absurdity or injustice or repugnancy with the statutory objective. On the contrary, the reckoning of a date that corresponds to the date of the commencement of the first term fixed according to the formula that is given either in the year of the election or the succeeding year, attracts all the negative considerations of absurdity, injustice and repugnancy with the statutory objective. Therefore in my view, in the absence of an express provision to that

effect either way, the correct interpretation consistent with the principles stated above is to interpret the provisions of sub-paragraph (d) (i) on the basis that the date of election being the pivotal date is one of the dates to be reckoned in applying the provisions. The other date has to be fixed corresponding to the commencement of the first term of office either in the year of the election or the succeeding year, according to the formula given in the sub-paragraph. When applied to the present case, the date of the election was the 22nd December 1999. The first term of office commenced on 10th November 1994. The corresponding date fixed according to the formula in the sub-paragraph would be 10th November 2000. Hence, as between these two dates, the earlier date is 22nd December 1999. The strength and credibility of this interpretation lies in the fact that on whatever combination of dates adopted in applying the formula in the sub-paragraph, the invariable result would be that the date of commencement of office will be the date of election for the second term. This would avoid the widely varying dates that will result from adopting the interpretation contended for by counsel [for intervenient petitioners] referred above.”²²

The effect of the decision in *Ven. Omalpe Sobhitha* was far-reaching. In essence, it meant that once an incumbent President in his first term had decided to avail himself of an early election under Article 31 (3A) (d) (i), he would, upon successful re-election, forfeit the remainder of the first term. There is an intuitive attraction about the outcome of this reasoning from the viewpoint of political morality, in that the

²² Ibid.

judgment seems to redress a constitutional anomaly introduced by an act of manipulation. The advantage given by the Third Amendment to the incumbent is balanced by the forfeiture of the remainder of his first term. It is less clear whether the Chief Justice's reasoning is completely persuasive.

Silva C.J.'s preceding analysis of the political context leaves no room for doubt as to his disapproval of President Jayewardene's motivations, and he ruled out a genuine interpretative dilemma arising out of the textual formulation. Against the arguments of the *amici curiae* and the Attorney General – that in spite of the complexity of its formulation and the dubious motives of its drafters, the provision admitted of an unequivocal construction – what he sought to do therefore was to judicially alter the meaning of Article 31 (3A) (d) (i) so as to put right something that he clearly regarded as an obnoxious imposition on the constitution.

It can be argued that this is the essence of the judicial role in constitutional interpretation, but the range of the judge's interpretative options is defined by the framer's intent, the semantic possibilities of the wording, precedent, and where relevant the theoretical underpinnings of the constitution (at various levels of abstraction).²³ Since this was the first time that a dispute had arisen with regard to the timing of the departure of a two-term President, or at least a clarification of the constitutional position on it had been asked of the Supreme Court, there was no direct precedent on the main issue. Therefore, the question is whether Silva C.J.'s 'consequential interpretation' is one that is defensible within

²³ See A. Barak (2006) *The Judge in a Democracy* (Princeton, NJ: Princeton UP): p.127 et seq.

the semantic scope of the words of Article 31 (3A) (d) (i). Perhaps the weakest element of his reasoning is the assertion that the term ‘date’ should mean a day, a month and a year, rather than whether in the context of the formulation, what is required is the determination of only the day and month within the election year itself or the succeeding year. In this respect, the submissions of the *amici curiae* and the Attorney General rather than the Chief Justice’s reasoning seem more plausible.

Moreover, his strongest argument against the interpretation urged by the *amici curiae* and the Attorney General – that it could lead to an inordinate delay between the second/early election and the commencement of the second term, with a resulting elongation of the second term beyond six years – is itself entirely dependent on whether his argument about when the first term ends (with a forfeiture of the remaining balance) is accepted. The more plausible construction seems to be that this period between the re-election and the date of commencement of the second term, the exact duration of which is determined by the application of the formula set out in Article 31 (3A) (d) (i) to the specific facts of each case, is a *continuation* of the first term, rather than an *extension* of the second. Indeed, the Third Amendment manifests the contrary intention; that is, it sought to give the incumbent the advantage of a discretion to call an early election, without at the same time imposing on him an automatic ‘sacrifice’ of giving up the entirety of the remainder of his first term. The extent of the duration that is forfeited depends on the date of commencement of the first term and the date of re-election. It is by comparing these two dates that the ‘corresponding date’ mentioned in Article 31 (3A) (d) (i), in other words the date of commencement of the second term, can be determined. This is the import of the text, and while one can

wholly agree with the Chief Justice as to the insidiousness of the measure as well the unpredictability of outcomes in its application,²⁴ there is much merit in maintaining fidelity to the text, as opposed to adopting a trajectory of reasoning that, notwithstanding noble goals, can have only the most tenuous relationship with the reasonable meaning derivable from the text.

Insofar as the framer's intent with regard to the Third Amendment was concerned, Silva C.J. described it in terms he clearly did not intend to follow. Given that the 1978 Constitution as a whole was architected by the same person responsible for the Third Amendment – President Jayewardene – it would seem that there would be little in terms of underlying normative principles that could be used in formulating an interpretation of the Third Amendment restricting its scope and ameliorating its more pernicious consequences. Indeed, it could be argued, the Third Amendment was merely a logical extension, a practical refinement, of the fundamental rationale of the 1978 Constitution: the facilitation of executive convenience. However, Silva C.J. seemed to regard (the literal interpretation of) Article 31 (3A) (d) (i) as an incongruous anomaly distinguishable from the broader constitutional instrument and its underlying theory of democracy and popular sovereignty. Accordingly, he was able to hold that:

“The foregoing interpretation will result in the provisions of sub-paragraph (d)(i) being consistent with the other provisions that deal with the commencement of the term of office of the President and also being

²⁴ Which the Chief Justice illustrated by way of two hypothetical dates to show how a difference of two days could result in an outcome that can be as much as one year apart.

consistent with other basic provisions of the Constitution.

Article 4 which lays down the manner in which the sovereignty of the People is exercised states in paragraph (b) as to the exercise of executive power as follows:

“(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;

Thus the authority for the exercise of executive power stems from the election by the People. The franchise which forms part of the sovereignty of the People as stated in Article 3 of the Constitution is exercised inter alia at the election of the President as provided in Article 4(e). Similarly Article 30(2) reproduced above directly links the term of office of six years to the election by the People. Accordingly the provisions for the exercise of sovereignty of the People, the franchise and the term of office of the President have a vital common factor that connects the exercise of executive power by the President, to the election by the People. These are entrenched provisions of the Constitution, the repeal or amendment of or, any inconsistency with, would require not only 2/3rd majority in Parliament but also approval by the People at a Referendum in terms of Article 83. Commencement of the term of office of the President, signifies the commencement of the exercise of the executive power of the People on the authority of the mandate received at the election. The mandate is based on the exercise of the franchise at the election of the President in terms of Article 3 read with Article 4(e) of the Constitution. Viewed from this

perspective it is in accord with the basic premise of the Constitution that the term of office of the President should commence on the date of election. The interpretation given above to the provisions of Article 31(3A)(d)(i) which produce the same result draws its highest strength from this basic premise of the Constitution.”²⁵

In 2005, the Supreme Court’s activism in *Ven. Omalpe Sobhitha’s Case* cut short any further speculation as to President Kumaratunga’s staying on until November 2006, and paved the way for a fresh presidential election in November 2005 at which Mr. Mahinda Rajapaksa, the then Prime Minister, won his first presidential term. Given the inherent tenuousness of the reasoning due to the palpable ‘disconnection’ between Silva C.J.’s reasoning and the text of Article 31 (3A) (d) (i), it was perhaps only a matter of time before the decision would be impugned.

Arguably the more germane factor encouraging an early reconsideration of the decision was that it imposed a significant limitation on the Executive Presidency, a political implication that was not to be kindly received by those standing to gain from the existence of an untrammelled presidency. Equally pertinent was the commencement of the final phase of the war against the Liberation Tigers of Tamil Eelam (LTTE) during the Rajapaksa presidency. In addition of course to the nationalist tropes of marshal kingship that is a defining leitmotif the Rajapaksa presidency, as scholars of emergency powers have pointed out, the escalation of conflict has the inevitable effect of raising the popular prestige of the executive branch, and a resultant accretion of powers and privileges to it that would not ordinarily be

²⁵ *Ven. Dr. Omalpe Sobhitha Thero v. Dayanada Dissanayake* (2005), SC (FR) 278/2005, SCM 26th August 2005.

countenanced in peacetime.²⁶ President Rajapaksa won the war in May 2009, and the ensuing popularity for this unprecedented achievement was a major if not the determining factor in his decision to seek early re-election. At the very next occurrence of the incumbent winning re-election after the Kumaratunga presidency, therefore, the question was put to the Supreme Court as to when President Rajapaksa's second term would begin after the early election of January 2010.

Restoring the Status Quo Ante? The Supreme Court's Advisory Opinion of 2010

Ven. Omalpe Sobhitha's Case arose by way of a fundamental rights petition before the Supreme Court under Article 126. Immediately after his re-election at the presidential election held on 26th January 2010, President Rajapaksa himself initiated the process of clarification by addressing a written reference to the Supreme Court under Article 129 (1) to determine the precise date in law that his second term would begin. After a public hearing before a seven-judge Bench, at which interveners were allowed to make submissions, the Supreme Court communicated its opinion to the President on 2nd February 2010. This opinion has never been published or otherwise released to the public, and the only intimation we have of its contents is from media reports quoting a presidential spokesman,²⁷ to the effect that the Court had

²⁶ See O. Gross & F. Ní Aoláin (2006) ***Law in Times of Crisis: Emergency Powers in Theory and Practice*** (Cambridge: CUP): Ch. 4; A. Welikala (2008) ***A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*** (Colombo: Centre for Policy Alternatives): Ch. 3.

²⁷ Jamila Najmuddin, 'MR's term from November 2010', ***Daily Mirror Online***, 2nd February 2010.

advised the President that the date of commencement of his second term would be 19th November 2010. This is the next date *after* the date of President Rajapaksa's re-election that *corresponds* to the date at which his *first term* commenced (i.e., 19th November 2005).

From its conclusion as to the date at which, in law, President Rajapaksa's second term should commence, it appears that the Supreme Court in this instance adopted the interpretation of Article 31 (3A) (d) (i) urged by the *amici curiae* and the Attorney General in *Ven. Omalpe Sobhitha* (reiterated by certain interveners at the hearing in January 2010), rather than its own unanimous decision in that case. While the question as to how the Supreme Court dealt with the precedent of *Ven. Omalpe Sobhitha* in the interpretation of the same provision therefore naturally arises, there is no way of conclusively answering it due to the absence of the Court's opinion in the public domain.²⁸ The resulting position is an incoherent muddle of common law, but it sufficed for settling the question of when President Rajapaksa's second term should commence for all political intents and purposes.

²⁸ In coming to the conclusion it did, the doctrine of *stare decisis* would require that the Court had to necessarily distinguish, overrule or on some other ground refuse to follow its own decision in *Ven. Omalpe Sobhitha*. Without access to the opinion, we are left in the unsatisfactory position of knowing that the Court in 2010 did not follow *Ven. Omalpe Sobhitha*, but oblivious as to the process of reasoning it adopted in doing so. A further complication from a common law viewpoint is as to the relative status of the two decisions. The decision in *Ven. Omalpe Sobhitha* was a judgment proper in the exercise of the Court's jurisdiction under Article 126, whereas the 2010 pronouncement was an opinion communicated to the President upon a written reference in the exercise of the Court's consultative jurisdiction under Article 129 (1). Which one takes precedence? These unanswered questions do nothing to advance the coherence of the Supreme Court's constitutional jurisprudence, nor indeed, public confidence in the judicial process.

The return to the literal interpretation of Article 31 (3A) (d) (i) has also illustrated one of the problems that Silva C.J. anticipated in *Ven. Omalpe Sobhitha*. Even though President Rajapaksa was re-elected in January, he did not commence his second term until November 2010. A ten-month interval between election and swearing-in is patently absurd. While this is consistent with the constitution, it is nonetheless an extraordinary situation in a democracy, and highlights the extent to which the 1978 Constitution privileges the Executive Presidency, encourages inconsistency, and devalues accountability and transparency. From the perspective of constitutional design and temporal limits on presidencies, it reflects a position bereft of any principle whatsoever.

The Eighteenth Amendment to the Constitution of 2010 in Comparative Context

Perhaps it would be appropriate to preface the discussion on the 18th Amendment with a recapitulation of the constitutional position with regard to temporal limits on the Executive Presidency, as the position was on the eve of its enactment, in the light of the preceding discussion. It will be recalled that there were two principles or devices of limitation informing this discussion: the fixed term principle²⁹ and the term limit principle.³⁰ While maintaining the maximum limit of six years for each individual presidential term, the Third Amendment introduced an alteration to the fixed term in two ways: by empowering the incumbent President to choose the timing of his re-election anytime within the last two years of

²⁹ Reflected in original Articles 30 (2) and 31 (4).

³⁰ Reflected in original Article 31 (2).

his first six-year term;³¹ and by deleting the fixed date for the commencement of the presidential term.³² Rejecting the clarity and simplicity of the original position, it also established a complicated formula for determining the date of commencement of the second term when the incumbent President has been re-elected as a result of an early election,³³ which has been the subject of two Supreme Court pronouncements. In the case of *Ven. Omalpe Sobhitha* (2005), the Court interpreted Article 31 (3A) (d) (i) to mean that upon re-election, the incumbent forfeits the remainder of his first term, and commences his second term upon being declared elected. This interpretation, whilst appealing to democratic norms, seemed to stretch the wording of the constitutional text too far. In its advisory opinion upon a written reference by the President under Article 129 (1) in 2010, the Supreme Court did not seem to follow the interpretation in *Ven. Omalpe Sobhitha*, and appeared instead to re-affirm the literal meaning of Article 31 (3A) (d) (i). The application of this provision renders the determination of the date of commencement of the second term where an incumbent has won re-election at an early election a question of fact in each case. Consequently, it can be asserted that the post-Third Amendment constitution has substantially departed from the principle of the fixed term, except in maintaining that the maximum duration of any single term of presidential office is six years. However, it did not touch the principle of the two-term limitation on the election to presidential office.

³¹ New Article 31 (3A) (a) (i).

³² Section 2 (2) of the Third Amendment Act.

³³ Article 31 (3A) (d) (i).

For the purposes of this discussion, the principal change contemplated by the 18th Amendment was that it abolished the two-term limit by repealing Article 31 (2), which had emerged unscathed by the Third Amendment. However, it provided for the Third Amendment discretion of an early election to be available to the incumbent President at any time after the expiration of four years of his current term of office.³⁴ There is thus no more a constitutional bar on one person standing for election to the presidency as many times as he is inclined to. Provided he is able to win elections, he may continue to hold office until he dies. As the proponents of the 18th Amendment have claimed, nothing can be more democratic than this, and it is necessary therefore to briefly explore, by recourse to comparative experience, the rationale for the term limit principle and why presidential systems generally adopt rather than reject this temporal limitation on the presidential institution.

The starting point for this must be the constitutional experience of the United States as the oldest and archetypical presidential system in the world, and which introduced its two-term limit on presidential tenure by the Twenty Second Amendment that came into force in 1951, i.e., a little more than a century and a half since the adoption of the US Constitution in 1789. While the 'proximate impetus' for the Twenty Second Amendment was clearly the legacy of the policies and unprecedented four-term presidency of Franklin Delano Roosevelt, the debate about the desirability or otherwise of term limits predates even the constitution in the US. American proponents of terms limits point to the informal convention of adhering to a two-term limit that had been followed by all Presidents since Washington, before

³⁴ Section 2 (2) of the Eighteenth Amendment Act.

Roosevelt's third term in 1940. As Bruce Peabody and Scott Gant have shown, although such a convention was clearly discernible, it was by no means an entirely unchallenged one, with Presidents Ulysses S. Grant and Theodore Roosevelt among the prominent politicians who were willing to disregard it.³⁵

Given the anti-autocratic and anti-monarchic sentiments that frame the context of the Declaration of Independence from Great Britain by the American colonies in 1776, it is unsurprising that many of the former colonies adopted post-independence constitutions that favoured weak executives, short terms of office and prohibitions on re-election. This scepticism about strong executives percolated to the arrangements of the Continental Congress, the Articles of Confederation, and into the debates at the Constitutional Convention in the summer of 1787. At the convention, the argument for a presidential term limit was advanced by Edmund Randolph, and was opposed by Alexander Hamilton and Gouverneur Morris. The opponents prevailed and the framework of a four-year presidential term, election by the electoral college, but no restriction on eligibility for re-election was incorporated in the US Constitution. The question persisted even after the adoption of the constitution, with Hamilton again defending open-ended terms in Federalist No. 69.³⁶

Constitutional historians, however, point to the beginning of a two-term limit by convention from the very outset with

³⁵ Peabody & Gant (1999), op cit. The historical account of the US debate outlined here is based on Peabody & Gant's excellent piece.

³⁶ C. Rossiter (Ed.) (1999) *The Federalist Papers* (New York: Mentor): p. 383; see also Federalist No. 72, *ibid*: p. 403.

Presidents Washington and Jefferson refusing to serve more than two terms. David Kyvig in his history of constitutional amendments argues that the convention was “...established by George Washington, reinforced by Thomas Jefferson, and observed for one reason or another by the seven other once-reelected chief executives” until Franklin D. Roosevelt.³⁷ Doris Kearns Goodwin, a historian of the FDR presidency, avers that “...ever since George Washington refused a third term, no man had even tried to achieve the office of the Presidency more than twice.”³⁸ However, as Peabody and Gant demonstrate through their account of political and constitutional history and the existence of 270 Congressional proposals to constitutionally entrench a term limit between 1789 and 1939 (i.e., the year before FDR’s third election in 1940), “...the custom of a two-term limit on presidential service appears to have been upheld somewhat contingently.”³⁹

Nonetheless, the evidence shows that until the context of the Second World War facilitated the third and fourth terms of President Roosevelt, no other two-term President in fact chose to stand for a third term, although admittedly in the case of Grant and Theodore Roosevelt, their willingness to break the tradition was only vitiated by extraneous political factors. The roots of the convention commence with the first President, George Washington, who refused a third term despite popular pressure. One of the key pieces of evidence that those who portray Washington as the father of the two-term convention use is his 1792 farewell address at the end

³⁷ Cited in Peabody & Gant (1999), op cit.: n.43.

³⁸ Cited in *ibid*: n.44.

³⁹ *Ibid*: p. 585.

of his first term, written by James Madison. Although this was never delivered because Washington went on to serve a second term, the text of the address contains strong suggestions in favour of limited tenure and as to the desirability of setting “...an early example of rotation in an office of so high and delicate a nature,” and indicating that ‘rotation in office’ would “...accord with the republican spirit of our Constitution, and the ideas of liberty and safety entertained by the People.”⁴⁰

The next President to serve two terms, Thomas Jefferson, has been the most unambiguous and consistent proponent of terms limits among the founders’ generation. In a letter to Madison in 1787, he wrote of the “...necessity of rotation in office, and most particularly in the case of the President.” He was strongly in favour of the precedent established by Washington of serving only two terms and stated that “[A] few more [such] precedents will oppose the obstacle of habit to anyone after a while who shall endeavour to extend his term” beyond eight years. In favouring the principle of rotation, Jefferson expressed his opposition to the ‘perpetual re-eligibility of the same President’, and thought that “...the indulgence and attachments of the People will keep a man in the chair after he becomes a dotard, that re-election through life shall become habitual, and election for life follow that.”⁴¹ Much after Jefferson, two-term limitation once again became a political issue when it appeared that President Grant was contemplating running a third time. The response of Congress to this however is revealing, where in a House resolution of December 1875, it was proclaimed that the two-term convention was a ‘time-honoured’ custom, and that a

⁴⁰ Ibid: p. 576.

⁴¹ Ibid: p. 578.

departure from it would be “...unwise, unpatriotic, and fraught with peril to our free institutions.”⁴²

President Roosevelt’s behaviour prior to his decision to stand for election for a third term 1940 is also revealing. As Kyvig has observed, he engaged in “...an elaborate charade of not running and only accepting a Democratic draft”⁴³ for the nomination, which he would not have taken the trouble to do if the convention was easily ignored. In any event, FDR’s third and fourth are terms explained in part by the context of global conflict in which continuity in leadership was easier justified than in normal circumstances. It is important to remember, however, that this course of action was heavily criticised at the time (including in being compared to the Axis dictators) and, together with mounting displeasure against the massive expansion of the executive branch he presided over, paved the way for the introduction of constitutional term limits soon after. After FDR’s death in office, in 1946 the Republicans gained control of Congress for the first time since 1929 and, determined to avoid another FDR-type presidency, the term limit was advanced to the top of the legislative agenda. The Senate and House passed the Twenty Second Amendment Bill in March 1947, which was then communicated to the states for ratification. This process was concluded only in 1951 and the Twenty Second Amendment came into force that year.

While this established the legal restriction of two presidential terms, the debate about the broad principle of terms limits as well as the interpretational questions arising out of the particular wording of the Twenty Second Amendment (the

⁴² Ibid: p. 581.

⁴³ Cited in ibid: p. 588.

result of political compromise) have not subsided with its passage, including the precise delineation of what the amendment permits and prohibits. In particular, this has related to the use of the term ‘election’ rather than ‘service’ in the operative provision, potentially meaning that what is prohibited is only election more than twice, without precluding service as President by accession to the office by some means other than election.⁴⁴ This debate has some resonance with the manner in which the original Article 31 (2) was formulated in Sri Lanka’s 1978 Constitution, which provided that no person who has been twice elected to the office of President shall be qualified thereafter to be elected to such office by the People. The comparison of course ends there, for the phrase ‘elected by the People’ in this formulation is intended to distinguish a direct election with the procedure for election by Parliament as envisaged by Article 40 (1) (a), which sets out the succession process when an elected President has vacated office before the expiry of his term. This arrangement is there because there is no office comparable to the US Vice-President in the Sri Lankan system.

In presidential system elsewhere also, there have been movements to entrench term limits. The constitution of the French Fifth Republic, as we have seen, served as an inspiration to the pioneering advocate of presidentialism and architect of the 1978 Constitution, J.R. Jayewardene. The Gaullist Constitution of 1958 originally envisaged not only a relatively long seven-year presidential term, but also no restriction on continuous re-election. Following a referendum in 2000, the length of the presidential term was reduced to five years. In 2008, in fulfilment of an election pledge by

⁴⁴ See generally Peabody & Gant (1999).

President Sarkozy, the ‘Constitutional law on the modernisation of the institutions of the Fifth Republic’ was promulgated, which amended Title II: The President of the French Republic, Article 6 of the 1958 Constitution. The operative sections of Article 6 now provide that the President of the Republic is elected for five years by direct universal suffrage and that he may not serve more than two consecutive terms in office.⁴⁵ The limitation here is more specific and less absolute than the US Twenty Second Amendment or the old Article 31 (2) of the Sri Lankan constitution, in that it only bars a *consecutive* third term.⁴⁶

The quasi-presidential system in South Africa is closer to the American and former Sri Lankan position, where Section 88 (2) of the 1996 Constitution states that ‘No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.’ The second limb of that provision seeks, in common with other presidential systems, to ensure that a successor filling a vacancy is not ‘penalised’ should he wish to stand for election in his own right. Aside from this two-term limitation, the South African arrangement concerning the duration of the individual presidential term is

⁴⁵ Author’s translation of original at: Constitution du 4 octobre 1958, Titre II: Le Président de la République, Article 6 (modifié par Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République):

Le Président de la République est élu pour cinq ans au suffrage universel direct.

Nul ne peut exercer plus de deux mandats consécutifs.

⁴⁶ See generally, M.A. Rogoff (2010) ***French Constitutional Law: Cases and Materials*** (Durham, NC: North Carolina Academic Press).

unusual and is a function of its mixed (neither purely parliamentary nor presidential) structure of national government. The President, who is head of state and head of the national executive,⁴⁷ is elected by the National Assembly from among its members, at its first sitting after its election, and whenever necessary to fill a vacancy.⁴⁸ The National Assembly is elected for a term of five years,⁴⁹ and by implication, therefore, in the ordinary course the President's term is also of five years duration. The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.⁵⁰ The President ceases to be a member of the National Assembly upon election and assumption of office.⁵¹ As Heinz Klug explains,

“In South Africa, the tying of normal presidential terms to the temporal life of the National Assembly means that to force the President out of office on purely political grounds [i.e., other than under Section 89 which provides for causes of removal akin to impeachment], a majority of members of the national legislature must agree to once again subject themselves to the electorate, or a majority of members must support a no-confidence vote in the President. A decision to dissolve the National Assembly is, however, restricted by the requirement that the President must only dissolve Parliament if the National Assembly's

⁴⁷ Section 83 (a) of the Constitution of the Republic of South Africa of 1996.

⁴⁸ Section 86 (1).

⁴⁹ Section 49 (1).

⁵⁰ Section 88 (1).

⁵¹ Section 87.

decision to dissolve is adopted at least three years after the election of that Assembly.”⁵²

This framework provides for a fairly rigid security of tenure for the President, but it is more than apparent that the South African arrangements reflect clear and robust temporal limitations on the presidency. That is unsurprising given the strong compulsions towards entrenching democracy and constitutional government that were at the heart of the post-apartheid constitution-making process.⁵³

This brief survey of term durations and term limits in the United States, France and South Africa suggests that the general trend in constitutional democracies is towards the introduction or further strengthening of limitations, reflecting a republican distaste for elective monarchism as well as the desire to embed the liberal value of limited government in the institutional architecture of executive power. As scholars and observers of presidentialism have pointed out, however, there is a parallel trend in the opposite direction in many countries in Asia, Africa, Latin America and Eurasia, where term limits are increasingly being done away with in the institutionalisation of monarchical presidencies.⁵⁴ Most of these countries are in the developing world, and feature weak

⁵² H. Klug (2010) *The Constitution of South Africa: A Contextual Analysis* (Oxford: Hart): pp. 195-196; see also Section 50 (1) of the South African Constitution.

⁵³ See *ibid*: Chs. 1,2.

⁵⁴ See for e.g., F. Guliyev, ‘End of Term Limits: Monarchical Presidencies on the Rise’, *Harvard International Review*, 28th February 2009; A. Hicken & Y. Kasuya, ‘A Guide to the Constitutional Structures and Electoral Systems of East, South and Southeast Asia’, *Electoral Studies*, Vol. 22, Issue 1, March 2005, pp.121-151; J.J. Linz (2001) *Presidential Government*, *Encyclopaedia of Social and Behavioural Sciences*: pp.12000-12006.

traditions of democracy and the rule of law, previous histories of authoritarianism, enervated legislative and judicial institutions and other checks and balances, and pervasive social and political cultures that reify cultist leadership (including through nationalist discourses), populism and clientelism. Some, such as the former Soviet republics in Eurasia, are resource-rich but have an extremely uneven distribution of wealth. With the removal of term limitations on an Executive Presidency that is already relatively untrammelled by meaningful constitutional controls, it would seem that Sri Lanka is increasingly associating itself with this unpalatable category of authoritarian presidencies. In this context, it is pertinent to give consideration to the response of the Supreme Court to the removal of term limits in its pre-enactment determination of constitutionality on the 18th Amendment Bill, the views expressed on behalf of the government and opposition in the parliamentary debate on it, as well as what professional and civil society organisations had to say.

The Supreme Court Special Determination on the Eighteenth Amendment Bill

The constitutional provisions with regard to the procedure adopted for the promulgation of the 18th Amendment will neither be exhaustively described nor commented upon here, except to set out an outline of the process necessary to

understand the circumstances of the case.⁵⁵ The Bill was endorsed by the Cabinet of Ministers as being urgent in the national interest, thus engaging the procedure set out in Article 122 for its enactment. Under Article 122 (1) (b),⁵⁶ such a Bill must be referred by the President to the Supreme Court for a special determination as to its constitutionality, which must generally be delivered within twenty-four hours (unless the President specifies a longer period not exceeding three days). Article 123 (3) establishes the Supreme Court's jurisdiction in respect of urgent Bills. This includes consideration of whether the Bill requires the approval of the People at a referendum in addition to being passed by a special majority of not less than two-thirds of the whole number of members in Parliament in terms of Article 83. The provisions of the constitution that are thus procedurally entrenched are enumerated in Article 83. This includes Article 30 (2), which establishes the maximum duration of a single presidential term as six years, but does not include Article 31 (2), which established the two-term limit on presidential election.

The 18th Amendment Bill sought to repeal Article 31 (2), but did not seek to amend Article 30 (2), and therefore did not attract the provisions of Article 83 directly. However, the

⁵⁵ These include the impropriety of the use of the bills 'urgent in the national interest' procedure for the ramming through of constitutional amendments without remotely adequate public consultation and discussion; the attenuated nature of the procedure itself, which precludes adequate time for reflection and argument by and before the Supreme Court on constitutional amendments of fundamental importance; the restriction of the Supreme Court's review jurisdiction to narrow questions; and many other such issues critical to the democratic process. Many of these aspects are dealt with in other chapters of this volume, in the written submissions tendered to court by the petitioners in SC (SD) No. 1 of 2010, and in contemporaneous civil society statements.

⁵⁶ Read with Article 121 (2).

petitioners contended that even though Article 83 did not make express mention of Article 31 (2), to the extent the amendments proposed in the Bill impinged on any of the provisions entrenched therein, they would fall within the ambit of Article 83. They argued that the proposed abolition of the two-term limit established by Article 31 (2) contained in Clause 2 of the Bill would affect the sovereignty of the People and the manner of its exercise. Article 3 provides that in the Republic of Sri Lanka, sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise. Article 4 sets out the manner in which the sovereignty of the People shall be exercised and enjoyed, and that the executive power of the People shall be exercised by the President of the Republic elected by the People,⁵⁷ and further, that the franchise shall be exercisable at the election of the President.⁵⁸ While Article 3 is entrenched by Article 83, Article 4 is not, but the petitioners argued that the two provisions must be read and construed together. The Supreme Court agreed with this argument for which there was strong authority.⁵⁹ However, the Court rejected the substantive argument of the petitioners that the abolition of the term limit affected the sovereignty of the People and the manner of their exercise of executive power in such a way as to require their approval at a referendum. It therefore upheld Clause 2 of the 18th Amendment Bill, in the following terms:

“It is to be noted that the aforesaid Article 4 (e) of the Constitution refers to the exercise of the franchise of the

⁵⁷ Article 4 (b).

⁵⁸ Article 4 (e).

⁵⁹ SC (SD) No.01/2010: p.6.

People and the amendment to Article 31 (2) of the Constitution by no means would restrict the said franchise. In fact, in a sense, the amendment would enhance the franchise of the People granted to them in terms of Article 4 (e) of the Constitution since the Voters would be given a wide choice of candidates including a President who had been elected twice by them. It is not disputed that the President is directly elected by the People for a fixed tenure of office. The constitutional requirement of the election of their President by the People of the Republic, strengthens the franchise given to them under Article 4 of the Constitution.

In such circumstances the said amendment does not restrict or curtail the provisions contained in Article 4 of the Constitution and accordingly there is no inconsistency either with Article 3 and/or 4 of the Constitution.”⁶⁰

While at first glance there appears to be an intuitive and clear democratic rationale to this conclusion, we should recall that in a constitutional democracy, there are competing normative considerations to be weighed against simplistic democratic proceduralism. If the Court did consider arguments drawn from republican theory and liberal constitutionalism⁶¹ or from comparative experience⁶² in their deliberations, there is no evidence of it in the determination. The tremendous time pressure under which the five-judge Bench had to arrive at

⁶⁰ Ibid: p. 8.

⁶¹ Written Submissions of the Intervient Petitioner Rohan Edrisinha, appearing in person in SC (SD) No. 01/2010.

⁶² Written Submissions of the Intervient Petitioners Chandra Jayaratne and Lal Wijenaik, represented by Dr. Jayampathy Wickramaratne, P.C., in SC (SD) No. 01/2010: paras. 5-16.

their determination by virtue of the government adopting the urgent bills procedure must be appreciated. Even within those constraints, however, it is gravely dissatisfying that the conceptual and empirical arguments for and against term limits were not even cursorily discussed in the determination.

Haste and inattention to detail are signified in other aspects of the opinion as well. Examples include the idiosyncratic use of the word ‘amendment’ to describe the purpose of Clause 2 of the Bill, when in fact what it sought to do was repeal Article 31 (2) *in toto*, or more culpably, the use of the phrase ‘fixed tenure of office’ to refer to the six-year term in Article 30 (2), which is an unforgivable simplification of the matter. There were several devices of temporal limitation that the 1978 Constitution commenced with, but as the preceding discussion has shown, are in the process of being gradually whittled down in the pursuit of partisan political advantage by governments and Presidents of the day. Regrettably, there is nothing in the determination to show that the Supreme Court – the highest deliberative institution of the republic and the ultimate guardian of its constitution (against depredators that notoriously include elected governments) – gave serious thought to these matters.

The Parliamentary Debate and Civil Society Responses to the Eighteenth Amendment Bill

There were a number of statements released by political parties and civil society bodies including the Bar Association, university academics, trade unions, human rights organisations and think tanks criticising various aspects of the 18th Amendment. The concerns raised included process issues such as the inappropriateness of the urgent bill procedure to initiate constitutional change, to its substantive elements of the removal of the term limit and the repeal of the

Seventeenth Amendment. Of particular interest was the statement by the Civil Rights Movement (CRM) in which it was argued that there was an inseparable link between the presidential term limit and presidential immunity.⁶³ Article 35 provides blanket immunity to the President whilst in office, the only amelioration of which privilege was that it was unavailable as a shield against accountability once a person had left office. The CRM's argument was that with the removal of the term limit and the possibility that a President may continue getting re-elected for life, this also meant such a person had immunity for life.⁶⁴

In the parliamentary debate on the 18th Amendment Bill, the principal argument advanced in justification of the removal of the two-term limit by government speakers was that it was in the nature of lifting an arbitrary constitutional bar on the democratic will of the people. The following extracts from the speeches of two Cabinet Ministers participating in the debate provide a fair summation of the arguments on the government side:

The Hon. (Prof.) G.L. Peiris, M.P., Minister of External Affairs:

“The other myth...is that an attempt is being made by the Government to extend the term of office of His Excellency the President. Nothing could be further than the truth. That

⁶³ S. Wickremasinghe, *‘If Term Limit Goes – So Must Immunity!!!’*, CRM Statement on the 18th Amendment to the Constitution, CRM E/02/08/2010, 31st August 2010.

⁶⁴ A slightly different argument relating to presidential immunity based on Clause 3 of the Bill, which extended parliamentary privileges and immunities to the President, was unsuccessfully canvassed before the Supreme Court. See SC (SD) No. 01/2010: p. 9.

is not the case. All we are doing is removing Article 31(2) which restricts the number of terms of any President, not just this President, but any President at all and we are also removing provision (c) from Article 92 which prevents a person who has held office as the President on two occasions to be a candidate for a third time.

What we are doing is giving the People of Sri Lanka the opportunity of electing the candidate of their choice. There is no question of extending the term of office of any particular President. To our mind, Sir, that is an enlargement; a strengthening of the franchise of the People of this country. It is not a restriction; it is not a curtailment of the franchise, but precisely the opposite of that. What is wrong in allowing a person to be elected a third time if that is the declared wish of the sovereign People of this land? That is all we are doing; we are paving the way for the sovereign electorate of this country to exercise their freedom of choice in a manner that is not trammelled or restricted by the law.”⁶⁵

The Hon. Mahinda Samarasinghe, M.P., Minister of Plantation Industries:

“Sir, one of the aspects of this Bill, which its opponents seek to portray as controversial, is the removal of the two-term limit that hitherto has been attached to the Presidency. The proposed removal of this limit has been criticised as undemocratic. This is the complete opposite from the truth. This is especially the case in a relatively mature democracy such as Sri Lanka. We are quite capable as a People of changing our leaders and Governments democratically and periodically. We have

⁶⁵ Parliamentary Debates, 8th September 2010, Col. 281.

proven this over and over again. Sir, a two-term President presenting himself at a third presidential ballot will have to convince the People that he is a deserving candidate among all other candidates. The People will have a wider choice as to who they want to lead the country. The People ultimately will decide upon their preferred choice. This is the pith and substance of democracy. Sir, how then can this be characterised as undemocratic or tending towards authoritarianism

One outstanding example from relatively recent memory is the case of President Franklin D. Roosevelt of the United States. Sir, despite an informal tradition of a two-term limit from the time of President George Washington, FDR - as he is popularly known - died in office while commencing a fourth term. It is commonly known that FDR led the United States through some of the most difficult periods in its modern history - the recovery from the Great Depression and World War II. The legislative intervention by Congress to formalise the original informal two-term limit was only made in 1951, six years after his death in 1945...If the People wish to continue to repose their faith in his [i.e., President Rajapaksa] leadership and reap the obvious rewards for a longer period, who are we to stand in their way by continuing to maintain an arbitrary time limit on the Presidency?"⁶⁶

It fell to the Tamil National Alliance (TNA) and the Janatha Vimukthi Peramuna (JVP) led Democratic National Alliance (DNA) to lead the opposition to the Bill in Parliament, in the absence of the United National Party (UNP), which boycotted the debate. The Hon. M.A. Sumanthiran, M.P. of the TNA

⁶⁶ Ibid: Cols. 336-337.

focussed almost exclusively on the opposition's procedural objections to the Bill. The Hon. Anura Dissanayake, M.P. of the DNA stated his party's objections to the Bill on a number of counts. On the question of term limits, Mr. Dissanayake adverted to the examples of Afghanistan, Armenia, Bangladesh, Georgia and Indonesia and dwelt on some length on the US experience. He recalled that George Washington had set the precedent of a two-term limit, which crystallised into an informal convention before being enacted as the Twenty Second Amendment to the US Constitution. His remarks also alluded to the fact that President Franklin D. Roosevelt's unprecedented third and fourth terms directly led to that constitutional change.⁶⁷ The fact that the FDR example was pressed into service by both sides of the House is only typical of the term limit debate elsewhere, in that both sides of the argument can draw upon respectable democratic rationales. As Peabody and Gant observed,

“Whether or not there was a presidential custom limiting service to two terms, Roosevelt's re-elections in 1940 and 1944 demonstrated that it was not a custom deemed binding by either him or the electorate. And when political interest in limiting presidential tenure resurfaced following FDR's death and the conclusion of the war, Roosevelt and his unprecedented four terms of service became the common referent for those arguing for (as well as against) setting a constitutional limit. In the eyes of some, the case for limiting presidential tenure was made vivid by perceived excesses of the New Deal, FDR's aggressive attempts at power accretion (like the Court-packing plan of 1937 and his dramatic re-organisation of the executive branch) and the overall growth of a powerful “modern”

⁶⁷ Ibid: Cols. 253-254.

presidency. For those who saw Roosevelt as a symbol of economic recovery, national unity, and victory in the war against the Axis powers, FDR served as the perfect argument for retaining open-ended presidential service.”⁶⁸

In many ways, the parliamentary debate on the 18th Amendment was only of academic value. The government had won a very substantial majority in the general elections of April 2010, to which were added the numbers of those MPs who crossed over to the government from the opposition (including some during the course of the debate) and the Sri Lanka Muslim Congress’s (SLMC) decision to support the government on the Bill. This secured for the government the requisite two-thirds majority, the Supreme Court having already determined that no referendum was necessary. Accordingly, following a division by name at the end of the debate on the second reading, the 18th Amendment was passed by Parliament on 8th September⁶⁹ and received the Speaker’s certificate on the following day, thereby completing the process of valid enactment.

Conclusion

The Executive Presidency instituted in Sri Lanka in 1978, and consolidated within the framework of the Second Republican Constitution, is the defining institutional feature of the Sri Lankan state. Although deep partisan objectives characterised the formative compulsions underlying that instrument, it has now seemingly become a permanent feature of the Sri Lankan constitutional landscape, the allure of its authoritarian powers and quasi-monarchical nature proving both irresistible and addictive to those who occupy

⁶⁸ Peabody & Gant (1999), op cit.: pp. 588-589.

⁶⁹ Ayes: 161; Noes: 17; Absent: 46.

its office. Its progenitor, J.R. Jayewardene, explicitly deployed the imagery and metaphors of the ancient Sinhala-Buddhist kingship and traditions of religiously sanctioned moral governance in his envisioning of the modern presidency. This appeal to a powerfully resonant, historicist, mythic institution in the construction of a modern constitutional institution has been especially successful, given the rise and rise of Sinhala-Buddhist nationalism as the dominant current of Sri Lankan politics during the post-colonial era. In the triumphalist euphoria post-war in particular, the reproduction of the Dutugemunu kingship model has been both regime-led as well as spontaneous. Interlocked with this powerful current of majoritarian, populist nationalism are other characteristics of Sri Lankan politics, including paternalism, dynasticism, clientelism, statism, centralisation and ethnicisation, all of which sustain, and are sustained by, the institutional form of political leadership embodied in the Sri Lankan Executive Presidency.⁷⁰

Seen in this light, the gradual whittling away of what began as fairly robust temporal limitations on the presidency, in response to political expedience and temptations over time, is perhaps cause for little wonder. Although the six-year term survived the Third Amendment in enervated form, the 18th Amendment did away with the two-term limit altogether, and with it, the final republican constitutional bulwark against what could eventuate in an elective monarchy.

⁷⁰ See D. Rampton & A. Welikala, 'Would the Real Dutugemunu Please Stand Up? The Politics of Sinhala Nationalist Authenticity and Populist Discontent' in J. Goodhand, J. Spencer & B. Korf (Eds.) (2010) **Conflict and Peacebuilding in Sri Lanka: Caught in the Peace Trap?** (London: Routledge Contemporary South Asia Series): Ch. 6 and esp. references therein.

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Appendix I: Summary of Changes under the 18th Amendment

Summary of changes under the 18th Amendment

The table below in summary form compares the previous provisions of the Constitution and the changes under the 18th Amendment.

Previous Provision	Change under the 18 th Amendment	Consequences
Removal of the two term limit		
Article 31 (2) No person who has been twice elected to the office of President by the People shall be qualified thereafter to be elected to such office by the People.	Repealed Article 31(2)	<ul style="list-style-type: none"> Removal of two term limit could lead to authoritarianism mainly due to the tendency of the incumbent to be re-elected consecutively
Mandatory attendance at Parliament by President		
Article 32 (3) The President shall, by virtue of his office, have the right at any time to attend, address and send messages to Parliament. In the exercise of such right the President shall be entitled to all the privileges, immunities and powers, other than the right to vote, of a Member of Parliament and shall not be liable for any breach of the privileges of Parliament, or of its Members.	<p>Repeals Article 32(3) and substitutes the following.:</p> <p>The President shall by virtue of his office attend Parliament once in every three months ...</p> <p>And the immediate insertion of the following paragraph 32(4):</p> <p>The President shall by virtue of his office, also have the right to address and send messages to Parliament.</p>	<ul style="list-style-type: none"> Allows the President greater access and influence over the Parliamentary process. Undermines the Separation of Powers (Separation of Powers requires the three branches of government to be kept independent of one another to avoid abuse of power).

Previous Provision	Change under the 18th Amendment	Consequences
<p>Replacing the Constitutional Council with a Parliamentary Council</p> <p>Article 41A (Amended by 17th Amendment)</p> <p>Establishes the Constitutional Council</p> <p>The Constitutional Council was composed by the following:</p> <ol style="list-style-type: none"> 1) The Prime Minister 2) The Speaker 3) The Leader of the Opposition in Parliament 4) One person appointed by the President 5) Five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition 6) One person nominated by the agreement of the majority of the Members of Parliament belonging to political parties or independent groups to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President. 	<p>Repeals Articles 41A to 41H and inserts a new Article 41A</p> <p>Creates a <u>Parliamentary Council</u></p> <p>The Parliamentary Council is composed of the following:</p> <ol style="list-style-type: none"> 1) The Prime Minister 2) The Speaker 3) The Leader of the Opposition 4) A nominee of the Prime Minister, who shall be a member of the Parliament 5) A nominee of the Leader of the Opposition, who shall be a Member of Parliament. <p>The persons appointed in terms (4) and (5) shall be nominated in such a manner that would ensure that the nominees would belong to communities which are communities other than those to which the persons specified in (1),(2),(3) above belong.</p>	<ul style="list-style-type: none"> • All members of the Parliamentary council must be Members of Parliament • Therefore, the Parliamentary Council can be constrained by the demands of the electorate and their party. • In contrast persons nominated to the Constitutional Council had to act in an independent capacity. • Under the Parliamentary Council there are a lesser number of nominees to represent minority interests. • Both Councils do not seek to represent diversity in gender among its members.

Previous Provision	Change under the 18th Amendment	Consequences
Parliamentary Council to have limited influence		
<p>Article 41B(1)</p> <p>No person shall be appointed by the President as the Chairman or a member of any of the Commissions (mentioned below), <u>except on a recommendation of the Council.</u></p> <p>The Commissions are as follows:</p> <ol style="list-style-type: none"> 1) The Election Commission 2) The Public Service Commission 3) The National Police Commission 4) The Human Rights Commission of Sri Lanka 5) The Permanent Commission to Investigate Allegations of Bribery and Corruption 6) The Finance Commission 7) The Delimitation Commission <p>Article 41C</p> <p>(1) "No person shall be appointed by the President to any of the Offices (mentioned below) <u>unless such appointment has been approved by the Council upon a recommendation made to the Council by the President."</u></p> <p>Specified Offices are as follows:</p> <ol style="list-style-type: none"> 1) The Chief Justice and the Judges of the Supreme Court 2) The President and the Judges of the Court of Appeal 	<p>Repeals 41B and inserts the following:</p> <p>Article 41A</p> <p>(1) <u>The Chairman and members of the Commissions and the specified Offices shall be appointed by the President.</u> In making such appointments the President shall seek the observations of a <u>Parliamentary Council.</u></p> <p>[The specified list of Commissions and Offices remains unchanged except for the Inspector General of Police, whose appointment no longer falls within the purview of the Parliamentary Council]</p> <p>Article 41A(2)</p> <p>(1) The Speaker shall require the Prime Minister and the Leader of the Opposition to make such nominations within one week of the date of the coming of the operation of this Act: provided that if the Prime Minister and the Leader of the Opposition fails to make such nominations the Speaker shall proceed to nominate any Members of Parliament to be nominees [on their behalf]</p> <p>(8) When the President seeks observations of the Parliamentary Council.... the observations must be communicated</p>	<ul style="list-style-type: none"> • The Constitutional Council had the power to make recommendations but the Parliamentary Council only has the power to make observations. • The President is under no duty to consider the observations of the Parliamentary Council. • Therefore, the Parliamentary Council is much weaker than the Constitutional Council. • The President's power to make key public service appointments is unfettered.

Previous Provision	Change under the 18th Amendment	Consequences
3) The members of the Judicial Service Commission other than the Chairman 4) The Attorney General 5) The Auditor General 6) The Parliamentary Commissioner for Administration (Ombudsman) 7) The Secretary General of Parliament	within one week. If the council fails to communicate its observations within one week then the President shall proceed to make the appointments.	

Previous Provision	Change under the 18th Amendment	Consequences
Reducing powers of the Election Commission		
<p>Article 104B</p> <p>(4)(a) The Commission shall have the power during the period of an election, to prohibit the use of any movable or immovable property belonging to the State or any public corporation-</p> <p>(i) for the purpose of promoting or preventing the election of any candidate or any political party or independent group contesting at such election;</p> <p>(ii) by any candidate or any political party or any independent group contesting at such election,</p> <p>by a direction in writing by the Chairman of the Commission or of the Commissioner-General of Elections on the instruction of the Commission.</p> <p>(b) It shall be the duty of every person or officer in whose custody or under whose control such property is for the time being, to comply with and give effect to such direction.</p> <p>(5)(a) The Commission shall have the power to issue from time to time, in respect of the holding of any election or the conduct of a Referendum, such guidelines as the Commission may consider appropriate to any</p>	<p>Inserting a new paragraph Article 104B(1)</p> <p>(4a) For the avoidance of doubt it is stated that any guideline issued by the Commission during the period commencing on the date of the making of an Order for the holding of an election or the date of the making of a Proclamation requiring the conduct of a Referendum as the case maybe, shall</p> <p>a) be limited to matters which are directly connected with the holding of the respective election or the conduct of a respective Referendum as the case maybe; and</p> <p>b) not be connected directly with any matter relating to the public service or any matter within the ambit of administration of the Public Service Commission or the Judicial Service Commission, as the case may be appointed under the Constitution; and</p> <p>(2) in paragraph (5), by the repeal of sub-paragraphs (b),(c) and (d) thereof and the substitution thereof of the following paragraph,</p> <p>(b) It shall be the duty of any broadcasting or telecasting operator or any proprietor or publisher of a newspaper as the case maybe, to take all necessary steps to ensure compliance with any guidelines as are issued to them under paragraph (a). "</p>	<ul style="list-style-type: none"> • Reduces the power of the Election Commission by imposing limitations on its jurisdiction. • The power to issue guidelines is strictly limited to matters which are directly connected to elections or referendums • Election Commission no longer has the power to issue guidelines relating to public servants or state property. For example it no longer has the power to intervene in matters of transfers of police officers during election times. • During elections both public and private media will be under a duty to comply with guidelines issued by the Election Commission. Previously only the state media had a duty to comply with direction issued by the Election Commission. • This undermines the free flow of information, during election time. It will also allow the ruling party to manipulate all media during election time. • This undermines the future of free and fair elections in Sri Lanka.

Previous Provision	Change under the 18th Amendment	Consequences
<p>Commission may consider necessary to ensure a free and fair election.</p> <p>(b) It shall be the duty of the Chairman of the Sri Lanka Broadcasting Corporation and the Chairman of the Sri Lanka Rupavahini Corporation, to take all necessary steps to ensure compliance with any guidelines as are issued to them under sub-paragraph (a).</p> <p>(c) Where the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation as the case may be, contravenes any guidelines issued by the Commission under sub-paragraph (a), the Commission may appoint a Competent Authority by name or by office, who shall, with effect from the date of such appointment, take over the management of such Broadcasting Corporation or Rupavahini Corporation as the case may be, in respect of all political broadcasts or any other broadcast, which in the opinion of the Commission impinge on the election, until the conclusion of the election and the Sri Lankan Broadcasting Corporation and the Sri Lanka Rupavahini Corporation, shall not, during such period, discharge any function connected with or relating to such management which is taken over by the Competent Authority.</p>		

Previous Provision	Change under the 18th Amendment	Consequences
Competent Authority appointed under sub-paragraph (c).		

Previous Provision	Change under the 18th Amendment	Consequences
Reducing the powers of National Police Commission		
<p>Article 155A</p> <p>(1) There shall be a National Police Commission consisting of seven members appointed by the President on the recommendation of the Constitutional Council. The Constitutional Council may in making its recommendations consult the Public Service Commission. The President shall on the recommendation of the Constitutional Council appoint one member as the Chairman.</p> <p>Article 155G</p> <p>(1)(a) The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police shall be vested in the National Police Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police.</p> <p>b) The Commission shall not in the exercise of its powers under this Article, derogate from the powers and functions assigned to the Provincial Police Service Commissions as and when such commissions are</p>	<p>Article 155A is amended as follows:</p> <p>(1) There shall be a National Police Commission consisting of not more than seven members appointed by the President. The President shall appoint one member as the Chairman.</p> <p>Insertion of new Article 155FF</p> <p>The Commission shall be empowered to entertain investigate complaints from members of the public or any aggrieved person against a police officer or the police force, and shall provide redress in accordance with the provisions of any law enacted by Parliament. For this purpose the Commission may make rules to establish procedures for entertaining and investigating complaints from members of the public or any aggrieved person.</p> <p>Insertion of new Article 155FFF</p> <p>The Commission shall from time to time make rules for such matters which require rules to be made. Every such rule shall be published in the gazette.</p> <p>Repealed the following articles:</p> <ul style="list-style-type: none"> Article 155G 	<ul style="list-style-type: none"> The powers of the National Police Commission have been significantly reduced. Its powers are now limited to investigating complaints from the members of the public against the police force. All other powers have been repealed.

Previous Provision	Change under the 18th Amendment	Consequences
<p>procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.</p> <p>(3) The Commission shall provide for and determine all matters regarding police officers including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.</p> <p>(4) The Commission shall exercise all such powers and perform all such functions and duties as are vested in it under Appendix 1 of List I contained in the Ninth Schedule of the Constitution.</p> <p>[Ninth Schedule to the Constitution was inserted by the 13th Amendment to the Constitution. List 1, provides a list of</p>	<p>Article 155L</p> <ul style="list-style-type: none"> Article 155L 	

Previous Provision	Change under the 18th Amendment	Consequences
<p>that Provincial Councils may make laws].</p> <p>Article 155H</p> <p>(1) The Commission may delegate to a Committee of the Commission powers of appointment, promotion, transfer, disciplinary control and dismissal of Police Officers.</p> <p>Article 155J</p> <p>(1) The Commission may delegate to the Inspector General of Police (IGP) or in consultation with the IGP to any police officer, its powers of appointment, promotion, transfer, disciplinary control and dismissal of police officers.</p> <p>Article 155K</p> <p>(1) A police officer aggrieved by an order relating to promotion, transfer or any order on a disciplinary matter or dismissal made by the Inspector General of Police or a Committee or Police Officer referred to in Article 155H and 155J in respect of himself, may appeal to the Commission against such order.</p> <p>Article 155L</p> <p>Any Police Officer aggrieved by any order</p>		

Previous Provision	Change under the 18th Amendment	Consequences
to the Administrative Appeals Tribunal.		

Previous Provision	Change under the 18th Amendment	Consequences
Impact on Provincial Councils - Finances		
Article 41B (1) [As noted above, no person shall be nominated to as the Chairman or a member of the Finance Commission, except on a recommendation of the Council]	Article 41A [As noted above the Chairman and members of the Finance Commission shall be appointed by the President. In making such appointments the President shall seek the observations of the Parliamentary Council]	<ul style="list-style-type: none"> The Finance Commission has an important role to play in ensuring effective fiscal devolution as it has broad powers to recommend both the amount of funds to be transferred to the provinces and to recommend principles on which funds may be granted to the Provinces. Thus, getting appointments to the Finance Commission right is an important part of ensuring effective devolution of power to the Provinces.
Impact on Provincial Councils – Police Powers		
See Article 155G(3) & (4) above [Ninth Schedule to the Constitution was inserted by the 13 th Amendment to the Constitution. List 1, provides a list of subjects in relation to which the Provincial Councils may make laws. List 1, Appendix 1 sets out matters relating to law and order that provincial councils may make laws]. 13 th Amendment to the Constitution. Ninth Schedule, List 1, Appendix 1 (As amended by the 17 th Amendment): (3) Recruitment to the National Division and Promotion of Police Officers in the Provincial Divisions to the National Division shall be made by the National	Repealed Article 155G	<ul style="list-style-type: none"> The NPC had significant powers that impact on the exercise of police powers by the Provincial Councils. Article 155G(4), which gave the NPC the power to exercise powers vested to it by the 9th Schedule has been repealed.

Previous Provision	Change under the 18th Amendment	Consequences
<p>Chief Minister of the Province. However where there is no agreement between the IGP of Police and the Chief Minister, the matter may be referred to the National Police Commission, who after due consultations with the Chief Minister, shall make the appointment.</p> <p>(7) The Cadres of Police Officers of all ranks of the National Division shall be fixed by the Government of Sri Lanka. The Cadre of Officers and other ranks of each Provincial Division shall be fixed by the Provincial Administration with the approval of the National Police Commission, having regard to</p> <ol style="list-style-type: none"> The area of the Province; Population of the Province; and Such other criteria, as may be prescribed. <p>(8) The nature, type and quality of fire arms and ammunition and other equipment for the National Division shall be determined by the National Police Commission. The nature type and quantity of fire arms and ammunition and other equipment for all Provincial Divisions shall be determined by the National Police Commission after consultation with the Provincial Police Commission.</p> <p>(9) The Government of Sri Lanka shall be responsible for the training of all recruits and of members of all Divisions of the Sri Lanka Police</p>		

Previous Provision	Change under the 18th Amendment	Consequences
training of members of any Provincial Division.		

Appendix II: Supreme Court Determination on the 17th Amendment

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article 121(1)(b) of the Constitution.

S.C. (Special Determination) No. 06/2001

Present: Sarath N. Silva – Chief Justice
P. Edussuriya - Judge of the Supreme Court
H. S. Yapa - Judge of the Supreme Court

Counsel: K. C. Kamalasabayson, P.C., Attorney-General
with Saleem Marsoof, P.C., Addl. Solicitor General, Neril
Pulle, S. C., and Harsha Fernando, S.C.

Ranjith Abeysuriya, P.C. , with Suranjith Hewamanna, J.E.
Weliamuna, Ms. Priyadarshani Dias instructed by Ms. Lilanthi
De Silva for Wijeya Publication Ltd., Upali Newspapers Ltd.,
and Leader Publications Ltd.,

J. C. Weliamuna, Janaka Samaranayake and Lilanthi De Silva
for Victor Ivan

Upul Jayasuriya with Ronald Perera for Waruna Karunatilake.

The Court assembled at 10.15 a.m. on 21st September 2001.

The President has made a reference addressed to the Chief Justice in terms of Article 122(1)(b) of the Constitution requiring the special determination of this Court as to the constitutionality of the Bill bearing the title –

“An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka.”

In the short title the Act is cited as: “the Seventeenth Amendment to the Constitution.”

The Bill bears endorsement under the hand of the Secretary to the Cabinet made in terms of Article 122(1) that, the Bill is in view of the Cabinet of Ministers, urgent in the national interest.

The Bill consists of the following parts which could be dealt with separately and are connected inter se in certain respect

–

- i. *Clause 2* – which introduces after Article 41 of the Constitution a new Chapter VIIA titled “The Constitutional Council”
- ii. *Clause 3* – which repeals Article 52(7) of the Constitution and substitutes therefore a new provision
- iii. *Clause 4* – which repeals Chapter IX of the Constitution and substitutes therefore a new Chapter IX titled

“The EXECUTIVE

The Public Service”

- iv. *Clauses 5, 6, 7 and 8* – contains certain consequential amendments to Articles 65, 89, 91 and a repeal of Articles 103 and 104 of the Constitution.
- iv. *Clause 9* – which introduces a new Chapter XIVA titled “ELECTION COMMISSION”
- v. *Clause 10* – contains certain consequential amendments.
- vi. *Clause 11, 12, 13, 14 and 15* – which relate to the appointment of Judges of the High Court, a Fiscal for the whole Island and renumbering of Articles 116 as 111C of the Constitution.
- vii. *Clause 16* – which introduces a new Chapter XVA titled “Judicial Services Commission”
- viii. *Clauses 17, 18 and 19* – contains a certain consequential amendments and repeals of Articles
- ix. *Clause 20* – which introduces a new Chapter XVIIIA titled “National Police Commission”
- x. *Clauses 21, 22, 23, 24, 25, 26, 27, 28 and 30* – contains consequential amendments and for continuance in respect of certain incumbent officers.

The Bill taken in its entirety has the objective 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 recommendations 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, to wit;

- a) The Prime Minister
- b) The Leader of the Opposition
- c) One appointed by the President
- d) Six appointed by the President upon nomination of, three by the Prime Minister and three by the Leader of the Opposition.

The guidelines for the exercise of the power of nomination vested in the Prime Minister and the Leader of the Opposition are contained in Article 41 A (3). It provides for a mandatory process of consultation with leaders of political parties and independent groups represented in Parliament. It also provides for the minimum representation of two persons to represent minority communities and one to represent political parties other than that of the Prime Minister and Leader of Opposition. Thus it is seen that although the six members are referred to in Article 41 A(1)(e) as:

“six persons of eminence and integrity who are distinguished themselves in public life

and who are not members of any political party,”

they would be nominees of the respective political parties and hold office for a period of three years (vide Article 41 A(5)). They would be broadly representative, in a political sense.

Another aspect in relation to the process of nomination as contained in sub Article (3) referred above is that it does not specify from which “allocation” (whether of the Prime Minister’s or of the Leader of the Opposition), the representative of the minority parties and of other parties would come. This process envisages a broad consensual approach on the part of the Prime Minister and Leader of the Opposition, which is not uncommon in certain matters of Parliamentary procedure. There is inherent in the guidelines a possibility for the process of consultation with the political parties and minority groups, although being Couched in mandatory terms, being ineffective in practice. In terms of Article 41 A (1)(e) the President is bound to “forthwith” make the appointments upon receipt of the nominations of the Prime Minister and the Leader of the Opposition. These aspects do not involve questions of constitutionality that require a determination by the Court at this stage. They are matters of legislative policy within the purview of Parliament.

The Bill is described in its long title as being an Act for the amendment of the Constitution. The provisions to be repealed altered or added have been expressly specified in the Bill, as noted above. Hence we are of the view that the Bill complies with

the provisions of Article 82(1) of the Constitution. The Bill will not become Law unless it is passed by the special majority provided for in Article 82(5) of the Constitution. Therefore in effect the only matter for determination by this Court is whether in addition to being passed by the special majority it should be approved by the People at a Referendum as required by Article 83 of the Constitution.

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 discretion to recommendations and approval of the Constitutional Council.

The question which comes up for consideration and dealt with by the Hon. Attorney General in his submissions is whether the amendment amounts to an erosion of the executive power of the President and is thereby inconsistent with the provisions of Article 3 read with Article 4(b) of the Constitution. In terms of Article 83(a) any bill which is inconsistent with the provisions of Article 3 would become law only if it is passed by the special majority in Parliament and is approved by the People at a Referendum.

Article 3 of the Constitution reads thus:

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

The exercise of sovereignty of the People is provided for in Article 4. In the circumstances the provisions of Article 3 is in certain respects inter linked with the provisions of Article 4. The relevant provision as to the exercise of sovereignty of the People in relation to executive power is contained in Article 4(b), which reads thus:

“executive power of the People, including the defence of the Sri Lanka, shall be exercised by the president of the Public elected by the People,”

Therefore the executive power of the People including defend is exercised by the president of Republic who is elected by the People. The power is exercised through public officers and commissions that have been referred to above. It is in this context that the President is vested with the power of appointment, in relation to these officers and bodies.

The question that has to be considered is whether the subjection of the discretion of the Precedent to the recommendation and approval of the Constitutional Council as envisaged by the Bill would amount to an effective removal of the President's executive power in this respect.

The Hon. Attorney General whilst submitting that it is a restriction on the exercise of the discretion by the President, contended that there is no removal of the

executive power of the President. We note from the comments of the Bill that there are certain matters which clearly sustain and are consistent with the exercise of the executive power by the President in this regard.

In particular we wish to note the following matters :-

- 1) In terms of Article 41 (A)(1) (d) the President is empowered to appoint one member to the Constitutional Council. The person thus appointed shall hold office for such period as the President may from time to time determine the terms of sub clause (7). The presence of this member would constitute the link between the President and the Constitutional Council. Hence the President is not removed from the process of the Constitutional Council.
- 2) As contended by the Hon. Attorney General, the appointments to the Constitutional Council provided for in Article 41 (A)(1)(e) would in any event be made by the President. Therefore although there is a restriction on the discretion of the President, the appointments as such would be act and deed of the President.
- 3) In terms of clause 3 that is Article 55(3), the appointment, promotion, transfer, disciplinary control and dismissal of all heads of departments is vested in the Cabinet of Minister, chaired by the President. It is provided that this power will be exercised

“after ascertaining the views of the Commission” (PSC).

- 4) In terms of clause 4, that is Article 61 E the President appoints the Heads of Army, Navy and Air Force. Therefore the appointments of the Heads of Forces being an integral part of the defence of Sri Lanka referred to Article 4 (b) of the Constitution would be within the purview of the President:

The four matters referred taken together, in our view support the inference that the amendment dose not remove the executive power of the President in relation to the subjects coming within the purview of the Bill. Although there is a restriction in the exercise of the discretion hitherto vested in 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.

Hon. Attorney General also dealt with certain matters in relation to specific provisions of the Bill. In relation to clause 2 that is Article 41 C (2), it was submitted that it would not be feasible to make appointments of persons to act in the offices referred to, in instances where the period of absence of the permanent holder of such office is brief. In the circumstances the Hon. Attorney General submitted that of Article 41 C (2) would be amended to restrict the application of the provision to a situation where the period for which a person is appointed to act in office exceeds one month. He also submitted that Considering the importance and standing of

the officers referred to in Article 41 C(3), the Provision would be suitably amended so that the procedure for removal would be as provided in the constitution and in accordance with the procedure laid down by law. Thus there should be express legal provision setting out the procedure for such removal.

We note that such a safeguard is necessary considering that the officers referred to should function with a degree of independence and security of tenure necessary for the due discharge of their functions. These officers are also denied an opportunity to redress any grievance before the Administrative Appeals Tribunal that will be constituted in terms of the Amendment.

The three petitions that were presented to this Court in relation to the constitutionality of the Bill are from persons representing the media of this country.

Counsel appearing for the petitioners made their submissions in relation to provisions of clause 9 they are Articles 104 B(5) (a) and 104B(6). Sub-Article(5)(a) relates to a power vested in the Election Commission to give directions to any broadcasting, telecasting operator or any proprietor or publisher of news paper. The Commission is empowered to give these directions to ensure a free and fair election. Sub-Article (6) which is connected states that the directions may be given as provided for in sub Article 5(a) will not apply to any operator, proprietor or publisher of a broadcasting or telecasting station or any newspaper, as the case may be, who informs the Commission within 7 days from the date of nomination of candidates, that he would support a particular candidate or political party or an independent group in the forthcoming election.

Therefore in terms of the legislative scheme envisaged the proprietor, operator or publisher is required to declare his support to any particular candidate or party upfront. It was submitted that the element of compulsion introduced thereby any the risk of the being subject to directions issued by the Commission would be inconsistent with the freedom of thought and conscience guaranteed by Article 10 of the constitution.

Hon. Attorney General submitted that sub-clause 6 would be deleted and that sub clause 5(a) would be suitably amended so that the Commission would only be empowered to give guidelines to the media to ensure a free and fair election.

The amendment the Hon. Attorney agreed to would in our opinion remove the basis of the objection that has been raised. It would also be necessary to make consequential amendments flowing upon the amendment agreed to by the Hon. Attorney General.

Learned Counsel for the petitioners agreed that the proposed amendment would satisfy the concern of the petitioners.

In the circumstances it would not be necessary to deal with the objections of the petitioners further.

We have examined the remaining provisions of the Bill with the assistance of the Hon. Attorney General and we do not see in any of them any issue that would require consideration by this Court in terms of Article 83 of the Constitution.

Accordingly this Court determines that the Bill titled “the Seventeenth Amendment to the Constitution” –

- a) complies with the provisions of Article 82(1) of the Constitution;

- b) requires to be passed by a special majority specified in Article 82(5) of the Constitution;
- c) that there is no provision in the bill which requires approval of the People at the Referendum in terms of the provisions of Article 83.

We wish to place on record that the valuable assistance given by the Hon. Attorney General and the Counsel who made submissions on behalf of the Petitioners.

Sarath N. Silva

Chief Justice

P. Edussuriya

Judge of the Supreme Court-Signed

H. S. Yapa

Judge of the Supreme Court-Signed

Editors note: This reproduction of the text of the 17th Amendment Supreme Court determination maintains the fidelity of the spelling used in the original document.

Appendix III: Supreme Court Determination on the 18th Amendment

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

In the matter of an application under Article 122(1) of the Constitution.

S.C. (Special Determination) No. 01/2010

Present: Dr. S. A. Bandaranayake - Judge of the Supreme Court

K. Sripavan - Judge of the Supreme Court

P. A. Ratnayake - Judge of the Supreme Court

S. I. Imam - Judge of the Supreme Court

R. K. S. Suresh Chandra - Judge of the Supreme Court

Counsel: Mohan Peiris, P.C., Attorney-General

with Sanjay Rajaratnam, D.S.G., A. H.M. D. Nawaz, D.S.G., and Nerin Pulle, S.S.C., appears on notice.

Dr. Jayampathy Wickramaratne, P.C., with Ms. Pubudini Wickramaratne and Ms. Chandrika Silva for Chandra Jayaratne and Lal Wijenayake.

J. C. Weliamuna with Maduranga Ratnayake, Pasindu Silva,

Pulasthi Hewamanna and Sanjeewa
Ranaweera for Janatha Vimukthi Peramuna.
Saliya Peiris with Asthika Devendra, Thanuka Nandasiri for K.
W. Janaranjana.

Viran Corea for the Centre for Policy Alternatives.
Chrishmal Warnasuriya with Revan Weerasinghe, Pulasthi
Hewamanna and Dulhantha Kularatne for Sunil Hadunneththi
and Vijitha Herath,
Rohan Edrisinha appears in person.

The Court assembled for hearing at 10.30 a.m. on 31st
August 2010.

His Excellency The President has made a reference in terms
of Article 122(1)(b) of the Constitution with regard to the Bill
described in its long title as ‘an Act to amend the Constitution
of the Democratic Socialist Republic of Sri Lanka’, which is
the 18th Amendment to the Constitution. The Bill bears the
endorsement of the Secretary to the Cabinet of Ministers
made in terms of Article 122(1) of the Constitution that the Bill
is urgent in the national interest.

Upon receipt of the Bill the Court issued notice on the Hon.
The Attorney-General as required in terms of Article 134(1) of
the Constitution.

Hon. The Attorney-General, the Counsel representing the
petitioners, and the petitioner, who appeared in person were
heard before this Bench at the sittings held on 31.08.2010.

The Bill proposes, inter alia, to amend the following specific
provisions of the Constitution.

A. Clause 2 - Amendment to Article 31(2) and Article 31(3A)
(a) (i) of the Constitution, which refers to the election and the
term of office of the President of the Republic.

B. Clause 3 - Amendment to Article 32(3) to make it a requirement for the President to be present in Parliament once in every three (3) months.

C. Clauses 4 and 5 - Redefining the composition and functions of the Constitutional Council referred to in Chapter VII A of the Constitution which would be hereinafter known as the Parliamentary Council.

D. Clause 6 - Amendment to Chapter IX of the Constitution with reference to the, powers and functions of the Cabinet of Ministers and of the Public Service Commission.

E. Clauses 7, 8, 9, 10, 11, 22 and 23 - Amendment to Chapters X and XVIII A of the Constitution to classify the Police officers including the Inspector General of Police within the ambit of Public Officers and to redefine the Powers of the National Police Commission

F. Clauses 13 and 14 - Amendment to Chapter XIV A of the Constitution redefines the composition, powers and functions of the Election Commission.

G. Transitional provisions which are necessary and consequential in view of the aforementioned amendments.

The main contention of the learned counsel for the petitioners was that the proposed Amendments referred to above were inconsistent with Articles 3 and/or 4 of the Constitution requiring the Amendment to be passed by the People at a Referendum in terms of Article 83 of the Constitution and specific reference was made to Clauses 2, 3, 5, 7, 8, 9, 13 and 14 of the Bill.

Clause 2

Clause 2 of the Bill seeks to Amend Article 31 (3A) (a) (i) of the Constitution, which is in the following terms:

"The Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the "Constitution") is hereby amended in Article 31 thereof, as follows:

(1) By the repeal of paragraph (2) of that Article; and

(2) in paragraph (3A) (a) (i) of that Article.

a. by the substitution for the words "at any time after the expiration of four years from the commencement of his first term of office" of the words "at any time after the expiration of four years from the commencement of his current term of office"; and

b. by the substitution for the words "by election, for a further term" of the following:

"by election, for a further term:

Provided that, where the President is elected in terms of this Article for a further term of office, the provisions of this Article shall mutatis mutandis apply in respect of any subsequent term of office to which he may be so elected".

Article 83 of the Constitution refers to the approval of certain Bills at a Referendum. This Article reads 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, 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".

It is not disputed that Article 83 makes no reference to proposed Article 31 of the Constitution. However, the contention of the learned counsel for the petitioners was that although the aforesaid Article is not referred to in Article 83, the provisions in the proposed Amendments are inconsistent with Article 3 read with Article 4 of the Constitution which is specifically mentioned in Article 83 of the Constitution.

Learned counsel for the petitioners contended that the removal of the limit on the President's term of office would affect the manner in which the executive power of the People is exercised and would therefore violate the provisions contained in Article 3 of the Constitution.

Article 3 of the Constitution deals with the sovereignty of the People and reads as follows:

"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".

The exercise of the sovereignty referred to in the said Article 3 is clearly stated in Article 4 of the Constitution. In the Supreme Court Determination on the 18th Amendment to the

Constitution (SD No. 12/2002), this Court, referring to a series of previous Determinations (SD No. 5/80, 1/82, 2/83, 1/84 and 7/87) had stated that Article 3 is linked up with Article 4 of the Constitution and therefore these two Articles must be read together. Article 4 of the Constitution reads thus:

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

a. the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

b. the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

c. the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;

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

e. the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being

qualified to be an elector as hereinafter provided, has his name entered in the register of electors".

It is to be noted that the aforesaid Article 4 (e) of the Constitution refers to the exercise of the franchise of the People and the amendment to Article 31 (2) of the Constitution by no means would restrict the said franchise. In fact, in a sense, the amendment would enhance the franchise of the People granted to them in terms of Article 4 (e) of the Constitution since the Voters would be given a wide choice of candidates including a President who had been elected twice by them. It is not disputed that the President is directly elected by the People for a fixed tenure of office. The constitutional requirement of the election of their President by the People of the Republic, strengthens the franchise given to them under Article 4 of the Constitution.

In such circumstances the said amendment does not restrict or curtail the provisions contained in Article 4 of the Constitution and accordingly there is no inconsistency either with Articles 3 and/or 4 of the Constitution.

Clause 3

Clause 3 of the Bill deals with Article 32 of the Constitution, which is to be amended in the following manner.

"(1) by the repeal of paragraph (3) thereof and the substitution therefore of the following:

"(3) The President shall by virtue of his office attend Parliament once in every three months. In the discharge of this function the President shall be entitled to all the privileges, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall

not be liable for any breach of the privileges of Parliament or of its members; and

(2) by the addition immediately after paragraph (3) thereof, of the following new paragraph:

(4) The President shall by virtue of his office, also have the right to address and send messages to parliament."

It was the contention on behalf of the petitioners that by this provision the immunity granted to the President under Article 35 of the Constitution is being extended. Accordingly it was submitted that this amendment would give rise to the divisibility of the legislative power of the People in terms of Article 3 and/or 4 of the Constitution. Learned Counsel referred to the Determination regarding the Third Amendment to the Constitution (S.D. No. 5/1980).

In that Determination, the Supreme Court had to consider the provisions which sought to seat two members for one electorate – one nominated and the other reelected. In considering the said provision, the Supreme Court had decided that the effect of that Bill was to seat two (2) members for one and the same electorate, which contravenes the provisions of Article 161(a) of the Constitution, in that it increases the composition of the first Parliament and thereby affects the franchise referred to in Article 4 of the Constitution and also infringes the sovereignty of the People entrenched in Article 3 of the Constitution.

However in the present Bill the specific provisions that are being introduced under the amendment do not contravene any of the Articles dealing with the Parliament. In fact the provisions related to President being present in Parliament on a periodically stipulated basis read with Article 42 of the Constitution would clearly ensure that the President be

answerable to People in a more meaningful manner which would enhance the provisions contemplated in Articles 3 and 4 of the Constitution.

Accordingly, this Clause has no inconsistency either with Articles 3 and/or 4 of the Constitution.

Clauses 4 and 5

It is to be noted that Clause 4 of the Bill makes provision in repealing Chapter VII A of the Constitution, which consisted of Article 41A to 41H. The said Chapter VII A of the Constitution refers to the Constitutional Council which was introduced under the 17 Amendment to the Constitution. Clause 5 of the Bill, introduces a new heading, the Parliamentary Council, and an Article having the effect as Article 41A of the Constitution.

Learned Counsel for the petitioners contended that the provisions contained in Clause 5 have the effect of diluting the independence of the judiciary and therefore has a direct impact on Article 4(c) regarding the exercise of the judicial power of the People and the sovereignty of the People in terms of Article 3 and therefore requires to be approved by the People at a Referendum in terms of Article 83 of the Constitution.

The said amendment referred to in Clause 5 is in effect to amend the provisions brought in by the 17th Amendment to the Constitution. The Constitutional Council which is proposed to be replaced by the Parliamentary Council, came into being as a result of the 17th Amendment in 2001.

Considering the Bill brought in for the establishment of the Constitutional Council under the 17th Amendment, this Court

had noted that the establishment and functions of the Constitutional Council was the core of the 17th Amendment.

The question at that time this Court had to consider was as to whether the subjection of the discretion of the President to the recommendation and approval of the Constitutional Council as envisaged by that Bill, would amount to an effective removal of the President's executive power in that regard. Considering the said question, this Court had noted the submissions made by the Hon. The Attorney-General that although there was no removal of the executive power of the President, that it was a restriction on the exercise of the discretion by the President. On a consideration of the totality of the provisions in the said Amendment, the Supreme Court had determined that the said Bill required to be passed by a special majority specified in Article 82(5) of the Constitution, but that there was no provision in the Bill, which required approval of the People at a Referendum in terms of the provisions of Article 83.

The contention of the learned Counsel for the petitioners was that the Constitutional Council was established with the intention of safeguarding the independence of the judiciary and the purpose and the objective of the said introduction was to place a restriction on the discretion of the President in appointing judges.

As stated earlier, the 17th Amendment was brought into effect only in 2001 and from 1978 up to the 17th Amendment came into effect, for a period of over 13 years, judges were appointed in terms of the provisions laid down under the 1978 Constitution. This position in fact was considered in *Silva v Bandaranayake* [(1997] 1 Sri L.R. 92), by a 7 judge Bench of this Court. In that matter consideration was given to the appointment of judges to the Supreme Court by HE the

President of the Republic under Article 107 of the Constitution. At that time, as could be clearly seen, the 17th Amendment had not come into effect and the Supreme Court had considered the matter under Article 107 of the 1978 Constitution. In that decision, the Supreme Court had clearly held thus:

"The President in exercising the power conferred by Article 107 of the Constitution has a sole discretion. The power is discretionary and not absolute. It is neither untrammelled nor unrestrained and ought to be exercised within limits.

Article 107 does not expressly specify any qualifications or restrictions. However in exercising the power to make appointments to the Supreme Court there should be cooperation between the Executive and the Judiciary, in order to fulfill the object of Article 107."

Prior to the decision in *Silva v Bandaranayake* (supra) this Court had examined the powers of the Executive with regard to appointments. In *Premachandra v Jayawickrama* ([1994] 2 Sri L.R. 90), this Court had stated that.

"There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted."

It is therefore quite apparent that even prior to the introduction of the Constitutional Council in terms of the 17th Amendment to the Constitution, there were necessary safeguards which restricted the discretion of appointing authorities since no one possessed any unfettered discretion.

The relevant provisions contained in the 1978 Constitution had not violated Article 3 and/or 4 of the Constitution and similarly the introduction of the Constitutional Council also had not violated any of the said provisions.

The present amendment refers to the introduction of the Parliamentary Council in place of the Constitutional Council, which consists of a Prime Minister, the Speaker, the Leader of the Opposition, a nominee of the Prime Minister, who shall be a Member of Parliament; and a nominee of the Leader of the Opposition, who shall be a Member of Parliament. The persons appointed as nominees of the Prime Minister and the Leader of the Opposition should be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which the Prime Minister, the Speaker and the Leader of the Opposition would belong.

On a consideration of the totality of the provision dealing with the establishment of the Parliamentary Council, it is abundantly clear for the reasons aforesaid that the proposed amendment is only a process of redefining the restrictions that was placed on the President by the Constitutional Council under the 17th Amendment in the exercise of the executive power vested in the President, which is inalienable.

Accordingly, these Clauses have no inconsistency either with Articles 3 and/or 4 of the Constitution.

Clauses 6, 7, 8 and 9

Clauses 7, 8 and 9 of the Bill deal with the powers and functions of the Cabinet of Ministers and of the Public Service Commission. By these amendments, Article 55 of the Constitution is to be repealed in order to transfer the powers which were earlier vested with the Public Service

Commission to the Cabinet of Ministers. Clause 6 clearly refers to the fact that the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers. Clauses 8 and 9 also refer to the authority which was exercised by the Public Service Commission, being given to the Cabinet of Ministers.

Articles 55, 56 and 57 of the Constitution do not attract, Article 3 and/or 4 of the Constitution and therefore there is no inconsistency which would need the approval of the People at a Referendum.

Clauses 13 and 14

Clause 13 refers to the amendment of Articles 103 and 104B of the Constitution. These amendments deal with the redefinition of the composition, powers and functions of the Election Commission.

Learned Counsel for the petitioners contended that Clause 14, which deals with the amendment to Article 104B is inconsistent with Article 3 of the Constitution as it curtails the power of the Commission.

The said clause 14 is in the following term:

"Article 104B of the Constitution is hereby amended as follows:

(1) by the insertion immediately after paragraph (4) thereof, of the following new paragraph:

4(a) For the avoidance of doubt it is stated that any guideline issued by the Commission during the period commencing with the making of an Order for the holding of an election or the making of a Proclamation requiring the conduct of a Referendum, as the case may be, shall:

a. be limited to matters which are directly connected with the holding of the respective election or the conduct of a respective Referendum as the case may be; and

b. not be connected directly with any matter relating to the public service or any matter within the ambit of administration of the Public Service Commission or the Judicial Service Commission as the case may be, appointed under the Constitution; and

(2) in paragraph (5) by the repeal of sub-paragraph (b), (c) and (d) thereof and the substitution therefore of the following paragraph:

"(b) It shall be the duty of any broadcasting or telecasting operator or any proprietor or publisher of a newspaper as the case may be, to take all necessary steps to ensure compliance with any guidelines as are issued to them under paragraph (a)."

As could be seen, the amendments are in addition to the present powers, functions and duties of the Election Commission. A careful perusal of the proposed amendments, indicate that they are for the purpose of ensuring that other organizations of the Government are not stifled in their functions during the pendency of Elections. It is to be borne in mind that Commissions such as the Public Service Commission and the Judicial Service Commission are also Independent Commissions established under the Constitution, whose functions should not be curtailed at any time. As stated by Mark Fernando, J., in *Karunathilake and Another v Dayananda Dissanayake, Commissioner of Elections and Others* ([1999] 1 Sri L.R. 157) in reference to Article 104 of the Constitution,

"Article 104 refers to the powers, duties and functions of the Commissioner of Elections. But that is not exhaustive of his powers and duties. Article 93 of the Constitution requires that voting be free, equal and secret and it follows that the Commissioner of Elections has such implied powers and duties as are necessary to ensure that voting is free, equal and secret."

It is therefore apparent that the said amendments in terms of Article 104B of the Constitution do not in any way curtail the powers of the Election Commission, but only brings a safeguard in terms of the functions of the other Commissions.

There are few other matters we wish to make note in this Determination.

In terms of Clause 10 of the Bill, an amendment is brought to Article 61F of the Constitution to bring the police officers within the ambit of public officers and subject them to the same legal regime as the other public officers. Accordingly, the police officers would be treated as any other public officer and the Inspector-General of Police would be a Head of a Department appointed by the Cabinet of Ministers.

None of these provisions would be inconsistent with Articles 3 and/or 4 of the Constitution.

Mr. Saliya Peiris submitted that Clause 21 of the Bill has the effect of amending Chapter XVII A of the Constitution. Accordingly learned Counsel contended that it is necessary to give effect to Article 154G(2) of the Constitution and therefore the Bill has to be first Gazetted and referred to the Provincial Councils. Accordingly at the conclusion of the submissions by all parties, we sought for a clarification on

this point from the Hon. The Attorney-General who had appeared on notice.

Clause 21 of the Bill which deals with Article 154R of the Constitution is as follows:

"Article 154R of the Constitution is hereby amended in subparagraph (c) of paragraph (1) thereof, by the substitution for the words "three other members who are appointed by the President on the recommendation of the Constitutional Council, to represent" of the words "three other members appointed by the President, to represent."

Hon. The Attorney-General had submitted that the objective of the aforementioned amendment is to make consequential amendments brought about by the change of the terminology to the body known as the Constitutional Council for the term "Parliamentary Council" referred to in the proposed amendment. It is an amendment to amend the provisions, which were originally contained in the 17th Amendment to the Constitution. In the Bill pertaining to the 17th Amendment to the Constitution the specific provision had been introduced as Clause 19. The said Clause was considered by this Court in that Determination as a consequential amendment, which did not require any other procedure to follow such as being Gazetted and referred to the Provincial Councils.

Accordingly it is pertinent that the said amendment does not attract the provision of Article 154(G)(2) of the Constitution.

We have examined the remaining provisions of the Bill and we do not see in any of them any issue that would require consideration by this Court in terms of Article 83 of the Constitution.

We have noted the following inconsistency between the English and Sinhala version.

"Clause 41A(6) of the English version refers to the word "Committee" which should read as "Council".

It is also observed that in view of the Repeal of Article 31(2) of the Constitution, which provides for the qualification required to enable a person to qualify to stand for election as President, it is necessary that a consequential Amendment be made to Article 92 of the Constitution that refers to disqualification for election as President by the Repeal of Article 92(c) of the Constitution.

Accordingly this Court determines that the Bill entitled "the Eighteenth Amendment to the Constitution"

- 1) complies with the provisions of Article 82(1) of the Constitution;
- 2) requires to be passed by a special majority specified in Article 82(5) of the Constitution;
- 3) that there is no provision in the Bill which requires approval of the People at a Referendum in terms of the provision of Article 83 of the Constitution.

We shall place on record our deep appreciation of the assistance given by the Hon. The Attorney-General, learned Counsel who appeared for the petitioners and the petitioner who appeared in person and made submissions in this matter.

Signed

Dr. S. A. Bandaranayake

Judge of the Supreme Court-Signed

K. Sripavan

Judge of the Supreme Court-Signed

P. A. Ratnayake

Judge of the Supreme Court-Signed

S. I. Imam

Judge of the Supreme Court-Signed

R. K. S. Suresh Chandra

Judge of the Supreme Court-Signed

Appendix IV: The 17th Amendment to the Constitution



**PARLIAMENT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF
SRI LANKA**

**SEVENTEENTH AMENDMENT TO THE
CONSTITUTION**

[Certified on 3rd October, 2001]

Printed on the Order of Government

**Published as a Supplement to Part II of the Gazette of the Democratic Socialist
Republic of Sri Lanka of October 5, 2001**

PRINTED AT THE DEPARTMENT OF GOVERNMENT PRINTING, SRI LANKA

TO BE PURCHASED AT THE GOVERNMENT PUBLICATIONS BUREAU, COLOMBO I

Price : Rs. 34.25

Postage : Rs. 7.00

Seventeenth Amendment to the Constitution

[Certified on 3rd October, 2001]

L.D. – O. 47/2001.

AN ACT TO AMEND THE CONSTITUTION OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

BE it enacted by the Parliament of the Democratic Socialist
Republic of Sri Lanka as follows :—

1. This Act may be cited as the Seventeenth Amendment
to the Constitution. Short title.

2. The Constitution of the Democratic Socialist Republic
of Sri Lanka (hereinafter referred to as the “Constitution”) is
hereby amended by the insertion immediately after Article
41 of the Constitution of the following new Chapter, which
shall have effect as Chapter VIIA of the Constitution :— Insertion of
Chapter VIIA in
the Constitution of
the Democratic
Socialist Republic
of Sri Lanka.

‘CHAPTER VIIA

THE CONSTITUTIONAL COUNCIL

Constitution
of the
Constitutional
Council.

41A. (1) There shall be a Constitutional
Council (in this Chapter referred to as the
“Council”) which shall consist of the following
members :—

- (a) the Prime Minister ;
- (b) the Speaker ;
- (c) the Leader of the Opposition in
Parliament ;
- (d) one person appointed by the President;
- (e) five persons appointed by the President,
on the nomination of both the Prime
Minister and the Leader of the Opposition ;

2 *Seventeenth Amendment to the Constitution*

- (f) one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President.

(2) The Speaker shall be the Chairman of the Council.

(3) In nominating the five persons referred to in sub-paragraph (e) of paragraph (1) of this Article, the Prime Minister and the Leader of the Opposition shall consult the leaders of the political parties and independent groups represented in Parliament. Three of such persons shall, in consultation with the Members of Parliament who belong to the respective minority communities, be nominated to represent minority interests.

(4) The persons to be appointed or nominated as the case may be, under sub-paragraphs (d), (e) and (f) of paragraph (1) of this Article, shall be persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party.

(5) The President shall upon receipt of a written communication of the nominations under sub-paragraph (e) or sub-paragraph (f) of paragraph (1) of this Article, forthwith make the respective appointments.

(6) (a) On the dissolution of Parliament, notwithstanding the provisions of paragraph (2) of Article 64 of the Constitution, the Speaker shall continue to hold office as a member of the Council, until a Member of Parliament is elected to be the Speaker under paragraph (1) of the aforesaid Article ;

(b) Notwithstanding the dissolution of Parliament, the Leader of the Opposition shall continue to hold office as a member of the Council, until such time after a General Election following such dissolution, a Member of Parliament is recognised as the Leader of the Opposition in Parliament.

(7) Every member of the Council appointed under sub-paragraph (e) and sub-paragraph (f) of paragraph (1) of this Article, shall hold office for a period of three years from the date of appointment as such member, unless he earlier resigns his office by writing addressed to the President, or is removed from office by the President on both the Prime Minister and the Leader of the Opposition forming an opinion that such member is physically or mentally incapacitated and is unable to function further in office, or is convicted by a court of law for any offence involving moral turpitude or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 of the Constitution or is deemed to have vacated his office under paragraph (7) of Article 41E.

(8) In the event of there being a vacancy among the members appointed under sub-paragraph (e) or sub-paragraph (f) of paragraph (1) of this Article, the President shall, within two weeks of the occurrence of such vacancy and having regard to the provisions of the aforementioned sub-paragraphs, appoint another person to succeed such member. Any person so appointed, shall hold office during the unexpired part of the period of office of the member whom he succeeds.

4 *Seventeenth Amendment to the Constitution*

(9) The member appointed under sub-paragraph (d) of paragraph (1) of this Article shall, unless earlier removed from office by the President, hold office for a period of three years.

(10) A member appointed under sub-paragraph (e) or sub-paragraph (f) of paragraph (1) of this Article, shall not be eligible for re-appointment under those sub-paragraphs.

(11) The appointments made by the President under sub-paragraph (d), sub-paragraph (e) and sub-paragraph (f) of paragraph (1) of this Article, shall be communicated to the Speaker.

Council to
recommend
appointments.

41B. (1) No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council.

(2) The provisions of paragraph (1) of this Article shall apply in respect of any person appointed to act as the Chairman or a member of any such Commission.

(3) It shall be the duty of the Council to recommend to the President persons for appointment as Chairmen or members of the Commissions specified in the Schedule to this Article, whenever the occasion for such appointment arises, and such recommendations shall reflect the different ethnic groups.

(4) No person appointed under paragraph (1) of this Article or a person appointed to act as the Chairman or a member of any such Commission, shall be removed except as provided for in the Constitution or in any law, and where no such

provision is made, such person shall be removed by the President only with the prior approval of the Council.

SCHEDULE

- (a) The Election Commission.
- (b) The Public Service Commission.
- (c) The National Police Commission.
- (d) The Human Rights Commission of Sri Lanka.
- (e) The Permanent Commission to Investigate Allegations of Bribery or Corruption.
- (f) The Finance Commission.
- (g) The Delimitation Commission.

Council to
approve
appointments.

41C. (1) No person shall be appointed by the President to any of the Offices specified in the Schedule to this Article, unless such appointment has been approved by the Council upon a recommendation made to the Council by the President.

(2) The provisions of paragraph (1) of this Article shall apply in respect of any person appointed to act for a period exceeding fourteen days in any office specified in the Schedule to this Article.

(3) No person appointed to any Office specified in the Schedule to this Article or to act in any such Office, shall be removed from such Office except as provided for in the Constitution or in any law.

6 *Seventeenth Amendment to the Constitution*

(4) In the discharge of its function relating to the appointment of Judges of the Supreme Court and the President and Judges of the Court of Appeal, the Council may obtain the views of the Chief Justice and the Attorney-General.

SCHEDULE

PART I

- (a) The Chief Justice and the Judges of the Supreme Court.
- (b) The President and the Judges of the Court of Appeal.
- (c) The Members of the Judicial Service Commission other than the Chairman.

PART II

- (a) The Attorney-General.
- (b) The Auditor-General.
- (c) The Inspector-General of Police.
- (d) The Parliamentary Commissioner for Administration (Ombudsman).
- (e) The Secretary-General of Parliament.

Secretary
and officers
of the
Council.

41D. (1) There shall be a Secretary to the Council who shall be appointed by the Council.

(2) The Council may appoint such officers as it considers necessary for the discharge of its functions, on such terms and conditions as shall be determined by the Council.

Meetings of
the Council.

41E. (1) The Council shall meet as often as may be necessary to discharge the functions assigned to the Council by the provisions of this

Chapter or by any other law, and such meetings shall be summoned by the Secretary to the Council on the direction of the Chairman of the Council.

(2) The Chairman shall preside at all meetings of the Council, and in the absence of the Chairman, the Prime Minister, and in the absence of the Prime Minister, the Leader of the Opposition shall preside at the meetings of the Council. Where the Chairman, the Prime Minister and the Leader of the Opposition are all absent from any such meeting, the members present shall elect a member from among themselves to preside at such meeting.

(3) The quorum for any meeting of the Council shall be six members.

(4) The Council shall endeavour to make every recommendation, approval or decision it is required to make by unanimous decision, and in the absence of an unanimous decision, no recommendation, approval or decision made shall be valid, unless supported by not less than five members of the Council present at such meeting.

(5) The Chairman shall not have an original vote, but in the event of an equality of votes on any question for decision at any meeting of the Council, the Chairman or other member presiding at such meeting, shall have a casting vote.

(6) The procedure in regard to meetings of the Council and the transaction of business at such meetings shall be determined by the Council, including procedures to be followed in regard to the recommendation or approval of persons suitable for any appointment under Article 41B or Article 41C.

8 *Seventeenth Amendment to the Constitution*

(7) Any member of the Council appointed under sub-paragraph (e) of paragraph (1) of Article 41A, who without obtaining prior leave of the Council absents himself from two consecutive meetings of the Council, shall be deemed to have vacated office with effect from the date of the second of such meetings.

Council to
perform
other duties.

41F. The Council shall perform and discharge such other duties and functions as may be imposed or assigned to the Council by the Constitution, or by any other law.

Expenses to
be charged
on the
Consoli-
dated Fund

41G. The expenses incurred by the Council shall be charged on the Consolidated Fund.

Finality of
decisions of
the Council.

41H. Subject to the provisions of paragraphs (1), (2), (4), and (5) of Article 126, no court shall have the power or jurisdiction to entertain, hear or decide or call in question on any ground whatsoever, or in any manner whatsoever, any decision of the Council or any approval or recommendation made by the Council, which decision, recommendation or approval shall be final and conclusive for all purposes.’.

Amendment of
Article 52 of the
Constitution.

3. Article 52 of the Constitution is hereby amended by the repeal of paragraph (7) of that Article, and the substitution therefor of the following paragraph :—

“(7) For the purposes of this Article –

- (a) the Office of the Secretary-General of Parliament, the Office of the Parliamentary Commissioner for Administration (Ombudsman), the Constitutional Council, the Public Service Commission, the Election Commission, the National Police Commission and the Office of the Secretary to the Cabinet of Ministers; and

(b) the Department of the Auditor-General,
shall be deemed not to be departments of Government.”.

4. Chapter IX of the Constitution is hereby repealed and the following Chapter substituted therefor :—

Replacement of
Chapter IX of
Constitution.

‘CHAPTER IX

THE EXECUTIVE

THE PUBLIC SERVICE

Public
Service
Commission.

54. (1) There shall be a Public Service Commission (in this Chapter referred to as the “Commission”) which shall consist of nine members appointed by the President on the recommendation of the Constitutional Council, of whom not less than three members shall be persons who have had over fifteen years experience as a public officer. The President on the recommendation of the Constitutional Council shall appoint one member as its Chairman.

(2) No person shall be appointed as a member of the Commission or continue to hold office as such member if he is or becomes a member of Parliament, a Provincial Council or a local authority.

(3) Every person who immediately before his appointment as a member of the Commission was a public officer in the service of the State or a judicial officer, shall, upon such appointment taking effect cease to hold such office and shall be ineligible for further appointment as a public officer or a judicial officer:

10 *Seventeenth Amendment to the Constitution*

Provided that any such person shall, until he ceases to be a member of the Public Service Commission, or while continuing to be a member, attains the age at which he would, if he were a public officer or a judicial officer, as the case may be, be required to retire, be deemed to be a public officer or a judicial officer and to hold a pensionable office in the service of the State, for the purpose of any provision relating to the grant of pensions, gratuities and other allowances in respect of such service.

(4) Every member of the Commission shall hold office for a period of three years from the date of his appointment, unless he becomes subject to any disqualification under paragraph (2) of this Article or earlier resigns from his office by writing addressed to the President or is removed from office by the President on the recommendation of the Constitutional Council or is convicted by a court of law of any offence involving moral turpitude or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 or is deemed to have vacated his office under paragraph (5) of this Article.

(5) A member of the Commission shall be eligible for reappointment as a member, but shall not be eligible for appointment as a public officer or a judicial officer after the expiry of his term of office as a member. No member shall be eligible to hold office as a member of the Commission for more than two terms.

(6) A member of the Commission who without obtaining prior leave of the Commission absents himself from three consecutive meetings of the Commission, shall be deemed to have vacated office with effect from the date of the

third of such meetings, and shall not be eligible thereafter to be reappointed as a member of the Commission.

(7) The President may grant a member leave from the performance of his duties relating to the Commission for a period not exceeding two months and shall for the duration of such period on the recommendation of the Constitutional Council, appoint a person qualified to be a member of the Commission to be a temporary member for the period of such leave.

(8) A member of the Commission shall be paid such emoluments as may be determined by Parliament. The emoluments paid to a member of the Commission shall be charged on the Consolidated Fund and shall not be diminished during the term of office of such member.

(9) The Commission shall have the power to act notwithstanding any vacancy in its membership, and no act, proceeding or decision of the Commission shall be or be deemed to be invalid by reason only of such vacancy or any defect in the appointment of a member.

(10) There shall be a Secretary to the Commission who shall be appointed by the Commission.

(11) The members of the Commission shall be deemed to be public servants, within the meaning and for the purposes of Chapter IX of the Penal Code.

Powers and
functions of
Cabinet of
Ministers
and of the
Commission.

55. (1) The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission.

(2) The Commission shall not derogate from the functions and powers of the Provincial Public Service Commissions established by law.

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(3) Notwithstanding the provisions of paragraph (1) of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.

(4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers.

(5) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions, and shall forward to Parliament in each calendar year, a report of its activities for such year.

Committees
of the
Commission.

56. (1) The Commission may delegate to a Committee consisting of three persons (not being members of the Commission) appointed by the Commission, the powers of appointment, promotion, transfer, disciplinary control and dismissal of such categories of public officers as are specified by the Commission.

(2) The Commission shall cause the appointment of any such Committee to be published in the Gazette.

(3) The procedure and quorum for meetings of any such Committee shall be as determined by the Commission by rules made in that behalf. The Commission shall cause such rules to be published in the Gazette.

(4) There shall be a Secretary to each Committee, who shall be appointed by the Commission. .

Delegation
of powers to
a public
officer.

57. (1) The Commission may delegate to a public officer, subject to such conditions and procedure as may be determined by the Commission, its powers of appointment, promotion, transfer, disciplinary control and dismissal of such category of public officers as are specified by the Commission.

(2) The Commission shall cause any such delegation to be published in the Gazette, including the conditions and procedure determined by the Commission for such purpose.

Right of
appeal.

58. (1) Any public officer aggrieved by an order relating to a promotion, transfer, dismissal or an order on a disciplinary matter made by a Committee or any public officer under Article 56 or Article 57, in respect of the officer so aggrieved, may appeal to the Commission against such order in accordance with such rules made by the Commission from time to time, relating to the procedure to be followed in the making, hearing and determination of an appeal made to the Commission and the period fixed within which an appeal should be heard and concluded.

(2) The Commission shall have the power upon such appeal to alter, vary, rescind or confirm an order against which an appeal is made, or to give directions in relation thereto, or to order such further or other inquiry as to the Commission shall seem fit.

(3) The Commission shall cause to be published in the Gazette the rules made by it under paragraph (1) of this Article.

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Administrative
Appeals
Tribunal.

59. (1) There shall be an Administrative Appeals Tribunal appointed by the Judicial Service Commission.

(2) The Administrative Appeals Tribunal shall have the power to alter, vary or rescind any order or decision made by the Commission .

(3) The constitution, powers and procedure of such Tribunal, including the time limits for the preferring of appeals, shall be provided for by law.

Commission
not to
exercise
power where
there is
delegation

60. Upon delegation of any of its powers to a Committee or a public officer appointed under Article 56 or Article 57 as the case may be, the Commission shall not, while such delegation is in force, exercise or perform its functions or duties in regard to the categories of public officers in respect of which such delegation is made, subject to the provisions contained in paragraphs (1) and (2) of Article 58.

Procedure at
meetings.

61. (1) The quorum for a meeting of the Commission shall be five members.

(2) All decisions of the Commission shall be made by a majority of votes of the members present at the meeting. In the event of an equality of votes, the member presiding at the meeting shall have a casting vote.

(3) The Chairman of the Commission shall preside at all meetings of the Commission, and in his absence, a member elected by the members present from amongst themselves, shall preside at such meeting.

Immunity
from legal
proceedings.

61A. Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to

inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

Savings of
rules and
regulations
in force.

61B. Until the Commission otherwise provides, all rules, regulations and procedures relating to the public service as are in force on the date of the coming into operation of this Chapter; shall, *mutatis mutandis*, be deemed to continue in force as rules, regulations and procedures relating to the public service, as if they had been made or provided for under this Chapter.

Interference
with the
Commission.

61C. (1) Every person who, otherwise than in the course of such person's lawful duty, directly or indirectly by himself or by or with any other person, in any manner whatsoever influences or attempts to influence or interferes with any decision of the Commission, or a Committee or a public officer to whom the Commission has delegated any power under this Chapter, or to so influence any member of the Commission or a Committee, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(2) Every High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1) of this Article.

Oath or
affirmation
of office.

61D. A person appointed to any office referred to in this Chapter shall not enter upon the duties of his office until he takes and

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subscribes the oath or makes and subscribes the affirmation set out in the Fourth Schedule to the Constitution.

Appointments
by the
President.

61E. The President shall appoint –

- (a) the Heads of the Army, the Navy and the Air Force; and
- (b) subject to the provisions of Article 41C, the Attorney-General and the Inspector-General of Police.

Interpretation.

61F. For the purposes of this Chapter, “public officer” does not include a member of the Army, Navy, or Air Force, an officer of the Election Commission appointed by such Commission, a police officer appointed by the National Police Commission or a scheduled public officer appointed by the Judicial Service Commission.’.

Amendment of
Article 65 of the
Constitution.

5. Article 65 of the Constitution is hereby amended as follows :—

- (1) in paragraph (1) of that Article, by the substitution for the words “shall be appointed by the President”, of the words “shall, subject to the provisions of Article 41C, be appointed by the President ” ; and
- (2) in paragraph (6) of that Article, by the substitution for the words “President may appoint a person”, of the words “President may, subject to the provisions of Article 41C, appoint a person”.

Amendment of
Article 89 of the
Constitution.

6. Article 89 of the Constitution is hereby amended in paragraph (j) of that Article, by the substitution for the words and figures “Article 116”. of the words and figures “Article 116 or Article 111C, as the case may be”.

7. Article 91 of the Constitution is hereby amended in paragraph (1) thereof, as follows :—

Amendment of
Article 91 of the
Constitution.

- (1) by the insertion immediately after sub-paragraph (d)(iv) of that paragraph, of the following new sub-paragraph :—

“(iva) a member of a Provincial Public Service Commission,”

- (2) by the substitution for sub-paragraph (d)(v) of that paragraph, of the following sub-paragraph :—

“(v) the Commissioner-General of Elections,”;

- (3) by the insertion immediately after sub-paragraph (d)(v) of that paragraph, of the following new sub-paragraphs :—

“(va) a member of the Election Commission,

(vb) a member of the Constitutional Council,

(vc) a member of the National Police Commission,” ; and

- (4) by the insertion immediately after sub-paragraph (d)(viii) of that paragraph, of the following new sub-paragraph :—

“(viiiia) an officer of a Provincial Public Service holding any office created after February 01, 1988, the initial of the salary scale of which is, on the date of the creation of that office, not less than such amount as determined by resolution of Parliament, or such other amount *per annum* as would, under any subsequent revision of such salary scales, correspond to such initial,”.

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Repeal of Articles
103 and 104 of the
Constitution.

8. Article 103 and Article 104 of the Constitution are hereby repealed.

Insertion of
Chapter XIVA in
the Constitution.

9. The following new Chapter is hereby inserted immediately after Article 102 of the Constitution and shall have effect as Chapter XIVA of the Constitution :—

‘CHAPTER XIVA

ELECTION COMMISSION

Election

Commission.

103. (1) There shall be an Election Commission (in this Chapter referred to as the “Commission”) consisting of five members appointed by the President on the recommendation of the Constitutional Council, from amongst persons who have distinguished themselves in any profession or in the fields of administration or education. The President shall on the recommendation of the Constitutional Council, appoint one member as its Chairman.

(2) The object of the Commission shall be to conduct free and fair elections and Referenda.

(3) No person shall be appointed as a member of the Commission or continue to hold office as such member if he is or becomes a member of Parliament, a Provincial Council or a local authority, or is or appointed a judicial officer or public officer, or is or enters into the employment of the State in any capacity whatsoever.

(4) The provisions of the Constitution and any other law relating to the removal of judges of the Supreme Court and the Court of Appeal from office shall, *mutatis mutandis*, apply to the removal of a member of the Commission from office.

(5) A member of the Commission who without obtaining prior leave of the Commission, absents himself from three consecutive meetings

of the Commission, shall be deemed to have vacated office with effect from the date of the third of such meetings.

(6) A member of the Commission shall hold office for a period of five years from the date of appointment, unless he becomes subject to any disqualification under paragraph (3) of this Article or earlier resigns from office by writing addressed to the President or is removed from office under paragraph (4) of this Article, or is convicted by a court of law of any offence involving moral turpitude, or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 or is deemed to have vacated office under paragraph (5) of this Article.

(7) The President may grant a member leave from the performance of his duties relating to the Commission for a period not exceeding two months and may appoint a person qualified to be a member of the Commission to be a temporary member for the period of such leave. Every such appointment shall be made on the recommendation of the Constitutional Council.

(8) A member of the Commission shall be paid such emoluments as may be determined by Parliament. The emoluments paid to a member of the Commission shall be charged on the Consolidated Fund and shall not be diminished during the term of office of the member.

(9) All members of the Commission shall be deemed to be public servants within the meaning and for the purposes of Chapter IX of the Penal Code.

Meetings of the Commission **104.** (1) The quorum for any meeting of the Commission shall be three members.

(2) (a) The Chairman of the Commission shall preside at all meetings of the Commission and, in the absence of the Chairman from any meeting of the Commission, a member elected by the members present from amongst themselves shall preside at such meeting.

(b) Decisions of the Commission shall be by a majority of the members present and voting at the meeting at which the decision is taken, and in the event of an equality of votes, the Chairman or the member presiding at the meeting shall have a casting vote.

(3) The Commission shall have power to act notwithstanding any vacancy in the membership of the Commission, and no act or proceeding or decision of the Commission shall be invalid or be deemed to be invalid by reason only of such vacancy or any defect in the appointment of a member.

Finality of
decisions
and
immunity
from suit.

104A. Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, Article 104H and Article 130, and on the Court of Appeal by Article 144, and the jurisdiction conferred on any court by any law to hear and determine election petitions or Referendum petitions,—

(a) no court shall have the power or jurisdiction to entertain or hear or decide or call in question on any ground and in any manner whatsoever, any decision, direction or act of the Commission, made or done or purported to have been made or done under the Constitution or under any law relating to the holding of an election or the conduct of a Referendum as the case may be, which decisions, directions or acts shall be final and conclusive; and

- (b) no suit or prosecution or other proceeding shall lie against any member or officer of the Commission for any act or thing which in good faith is done or purported to be done by him in the performance of his duties or the discharge of his functions under the Constitution or under any law relating to the holding of an election or the conduct of a Referendum as the case may be.

Powers,
functions
and duties of
the
Commission.

104B. (1) The Commission shall exercise, perform and discharge all such powers, duties and functions conferred or imposed on or assigned to—

(a) the Commission; or

(b) the Commissioner-General of Elections,

by the Constitution, and by the law for the time being relating to the election of the President, the election of Members of Parliament, the election of members of Provincial Councils, the election of members of local authorities and the conduct of Referenda, including but not limited to all the powers, duties and functions relating to the preparation and revision of registers of electors for the purposes of such elections and Referenda and the conduct of such elections and Referenda.

(2) It shall be the duty of the Commission to secure the enforcement of all laws relating to the holding of any such election or the conduct of Referenda, and it shall be the duty of all authorities of the State charged with the enforcement of such laws, to co-operate with the Commission to secure such enforcement.

(3) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament

for the exercise, performance and discharge of its powers, duties and functions, and shall forward to Parliament for each calendar year a report of its activities for such year.

(4) (a) The Commission shall have the power during the period of an election, to prohibit the use of any movable or immovable property belonging to the State or any public corporation —

(i) for the purpose of promoting or preventing the election of any candidate or any political party or independent group contesting at such election ;

(ii) by any candidate or any political party or any independent group contesting at such election,

by a direction in writing by the Chairman of the Commission or of the Commissioner-General of Elections on the instruction of the Commission.

(b) It shall be the duty of every person or officer in whose custody or under whose control such property is for the time being, to comply with and give effect to such direction.

(5) (a) The Commission shall have the power to issue from time to time, in respect of the holding of any election or the conduct of a Referendum, such guidelines as the Commission may consider appropriate to any broadcasting or telecasting operator or any proprietor or publisher of a newspaper as the case may be, as the Commission may consider necessary to ensure a free and fair election.

(b) It shall be the duty of the Chairman of the Sri Lanka Broadcasting Corporation and the Chairman of the Sri Lanka Rupavahini Corporation, to take all necessary steps to ensure compliance with any guidelines as are issued to them under sub-paragraph (a).

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

(d) Parliament may by law provide for the powers and functions of the Competent Authority appointed under sub-paragraph (c).

Deployment
of Police by
the
Commission.

104C. (1) Upon the making of an Order for the holding of an election or the making of a Proclamation requiring the conduct of a Referendum, as the case may be, the Commission shall notify the Inspector-General of Police of the facilities and the number of police officers required by the Commission for the holding or conduct of such election or Referendum, as the case may be.

(2) The Inspector-General of Police shall make available to the Commission the facilities and police officers specified in any notification made under paragraph (1) of this Article.

(3) The Commission may deploy the police officers and facilities made available to the Commission in such manner as is calculated to promote the conduct of a free and fair election or Referendum, as the case may be.

(4) Every police officer made available to the Commission under paragraph (2) of this Article, shall be responsible to and act under the direction and control of the Commission during the period of an election.

(5) No suit, prosecution or other proceeding, shall lie against any police officer made available to the Commission under this Article for any lawful act or thing in good faith done by such police officer, in pursuance of a direction of the Commission or his functioning under the Commission.

Deployment
of Armed
Forces.

104D. It shall be lawful for the Commission, upon the making of an Order for the holding of an election or the making of a Proclamation requiring the conduct of a Referendum, as the case may be, to make recommendations to the President regarding the deployment of the armed forces of the Republic for the prevention or control of any actions or incidents which may be prejudicial to the holding or conducting of a free and fair election or Referendum, as the case may be.

Commissioner-
General of
Elections
and other
officers of
the
Commission.

104E. (1) There shall be a Commissioner-General of Elections who shall, subject to the approval of the Constitutional Council, be appointed by the Commission on such terms and conditions as shall be determined by the Commission.

(2) The Commissioner-General of Elections shall be entitled to be present at meetings of the Commission, except where any matter relating to him is being considered by the Commission. He shall have no right to vote at such meetings.

(3) The Commission may appoint such other officers to the Commission on such terms and conditions as may be determined by the Commission.

(4) The salaries of the Commissioner-General of Elections and the other officers of the Commission, shall be determined by the Commission and shall be charged on the Consolidated Fund.

(5) The Commissioner-General of Elections shall, subject to the direction and control of the Commission, implement the decisions of the Commission and exercise supervision over the officers of the Commission.

(6) The Commission may delegate to the Commissioner-General of Elections or other officer of the Commission, any power, duty or function of the Commission, and the Commissioner-General of Elections or such officer shall exercise, perform and discharge such power, duty or function, subject to the direction and control of the Commission.

(7) The office of the Commissioner-General of Elections shall become vacant—

- (a) upon his death ;
- (b) on his resignation in writing addressed to the Commission ;
- (c) on his attaining the age of sixty five years ;
- (d) on his removal by the Commission on account of ill health or physical or mental infirmity ; or
- (e) on his removal by the Commission on the presentation of an address of Parliament in compliance with the provisions of paragraph (8), for such removal on the ground of proved misbehaviour or incapacity.

(8) (a) The address referred to in subparagraph (e) of paragraph (7) of this Article shall be required to be supported by a majority of the total number of Members of Parliament (including those not present) and no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity

(b) Parliament shall by law or by Standing Orders, provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of the Commissioner- General of Elections to appear and to be heard in person or by representatives.

Returning
Officers.

104F. (1) The Commission shall from time to time by notice published in the Gazette appoint by name or by office a person to be a Returning Officer to each electoral district, and may appoint by name or by office one or more persons to assist the Returning Officer in the performance of his duties.

(2) Every Officer appointed under paragraph (1) shall in the performance and discharge of such duties and functions as are assigned to him, be subject to such directions as may be issued by the Commission and shall be responsible and answerable to the Commission therefor.

Public
officers.

104G. All public officers performing duties and functions at any election or Referenda shall act in the performance and discharge of such duties and functions under the directions of the Commission, and shall be responsible and answerable to the Commission therefor.

Power of
Supreme
Court to
issue writs.

104H. (1) The jurisdiction conferred on the Court of Appeal under Article 140 of the Constitution shall, in relation to any matter that may arise in the exercise by the Commission of the powers conferred on it by the Constitution or by any other law, be exercised by the Supreme Court.

(2) Every application invoking the jurisdiction referred to in paragraph (1), shall be made within one month of the date of the commission of the act to which the application relates. The Supreme Court shall hear and finally dispose of the application within two months of the filing of the same.

Interpretation.

104J. In this Chapter "during the period of an election" shall mean the period commencing on the making of a Proclamation or Order for the

conduct of a Referendum or for the holding of an election, as the case may be, and ending on the date on which the result of poll taken at such Referendum or election, as the case may be, is declared.’.

Amendment of
Article 107 of the
Constitution.

10. Article 107 of the Constitution is hereby amended in paragraph (1) of that Article, by the substitution for the words “shall be appointed by the President of the Republic by warrant under his hand.”, of the words “shall, subject to the provisions of Article 41C, be appointed by the President by warrant under his hand.”.

Amendment of
Article 109 of the
Constitution.

11. Article 109 of the Constitution is hereby amended as follows :—

- (1) in paragraph (1) of that Article, by the substitution for the words “the President shall appoint”, of the words “the President shall, subject to the provisions of Article 41C, appoint” ; and
- (2) in paragraph (2) of that Article, by the substitution for the words “the President may appoint”, of the words “ the President may, subject to the provisions of Article 41C, appoint”.

Amendment of
Article 111 of the
Constitution.

12. Article 111 of the Constitution is hereby amended as follows :—

- (1) by the repeal of paragraph (2) of that Article and the substitution therefore of the following paragraph :—

“(2) The Judges of the High Court shall —

 - (a) on the recommendation of the Judicial Service Commission, be appointed by the President by warrant under his hand and such recommendation shall be made after consultation with the Attorney-General ;
 - (b) be removable and be subject to the disciplinary control of the President on the recommendation of the Judicial Service Commission.” ; and

(2). by the addition immediately after paragraph (3) of that Article, of the following new paragraph :—

“(4) Any Judge of the High Court may resign his office by writing under his hand addressed to the President.”.

13. Article 111A of the Constitution is hereby amended in paragraph (1) of that Article, by the substitution for the words “the President may, by warrant, appoint” of the words “the President may, on the recommendation of the Judicial Service Commission, by warrant, appoint ”.

Amendment of Article 111A of the Constitution.

14. The following Article is hereby inserted immediately after Article 111A of the Constitution, and shall have effect as Article 111B of the Constitution :—

Insertion of new Article 111B in the Constitution.

“Fiscal for the whole island. 111B. There shall be a Fiscal, who shall be the Fiscal for the whole Island and who shall exercise supervision and control over Deputy Fiscals attached to all Courts of First Instance.”.

15. Article 116 of the Constitution is hereby re-numbered as Article 111C of the Constitution.

Re-numbering of Article 116 of the Constitution as Article 111C.

16. The following new Chapter is hereby inserted immediately after Article 111C of the Constitution, and shall have effect as Chapter XVA of the Constitution :—

Insertion of Chapter XVA in the Constitution.

‘CHAPTER XVA

JUDICIAL SERVICE COMMISSION

Constitution of the Judicial Service Commission. **111D.** (1) There shall be a Judicial Service Commission (in this Chapter referred to as the “Commission”) consisting of the Chief Justice and two other Judges of the Supreme Court appointed by the President, subject to the provisions of Article 41C.

(2) The Chief Justice shall be the Chairman of the Commission.

Meetings of
the
Commission.

111E. (1) The quorum for any meeting of the Commission shall be two members of the Commission.

(2) A Judge of the Supreme Court appointed as a member of the Commission shall, unless he earlier resigns his office or is removed therefrom as hereinafter provided or ceases to be a Judge of the Supreme Court, hold office for a period of three years from the date of his appointment, but shall be eligible for re-appointment.

(3) All decisions of the Commission shall be made by a majority of the members present, and in the event of an equality of votes, the Chairman of the meeting shall have a casting vote.

(4) The Commission shall have power to act notwithstanding any vacancy in its membership and no act or proceeding of the Commission shall be, or be deemed to be invalid by reason only of such vacancy or any defect in the appointment of a member.

(5) The President may grant to any member of the Commission leave from his duties and may appoint on the recommendation of the Constitutional Council, a person qualified to be a member of the Commission to be a temporary member for the period of such leave.

(6) The President may, on the recommendation of the Constitutional Council, for cause assigned, remove from office any member of the Commission.

Allowances
of members
of the
Commission.

111F. A member of the Commission shall be paid such allowances as may be determined by Parliament. Such allowances shall be charged on the Consolidated Fund and shall not be reduced during the period of office of a member, and shall be in addition to the salary and other allowances attached to, and received from, the substantive appointment:

Provided that until the amount to be paid as allowances is determined under the provisions of this Article, the members of the Commission shall continue to receive as allowances, such amount as they were receiving on the day immediately preceding the date on which this Chapter comes into operation.

Secretary to
the
Commission.

111G. There shall be a Secretary to the Commission who shall be appointed by the Commission from among senior judicial officers of the Courts of First Instance.

Powers of
the
Commission.

111H. (1) The Judicial Service Commission is hereby vested with the power to—

- (a) transfer judges of the High Court ;
 - (b) appoint, promote, transfer, exercise disciplinary control and dismiss judicial officers and scheduled public officers.
- (2) The Commission may make –
- (a) rules regarding training of Judges of the High Court, the schemes for recruitment and training, appointment, promotion and transfer of judicial officers and scheduled public officers;
 - (b) provision for such matters as are necessary or expedient for the exercise, performance and discharge of the powers, duties and functions of the Commission.

(3) The Chairman of the Commission or any Judge of the Supreme Court or Judge of the Court of Appeal as the case may be, authorized by the Commission shall have power and authority to

inspect any Court of First Instance, or the records, registers and other documents maintained in such Court, or hold such inquiry as may be necessary.

(4) The Commission may by Order published in the Gazette delegate to the Secretary to the Commission the power to make transfers in respect of scheduled public officers, other than transfers involving increase of salary, or to make acting appointments in such cases and subject to such limitations as may be specified in the Order.

Judicial
officers and
scheduled
public
officers may
resign.

111J. Any judicial officer or scheduled public officer may resign his office by writing under his hand addressed to the Chairman of the Commission.

Immunity
from legal
proceedings.

111K. No suit or proceeding shall lie against the Chairman, member or Secretary or officer of the Commission for any lawful act which in good faith is done in the performance of his duties or functions as such Chairman, member, Secretary, or officer of the Commission.

Interference
with the
Commission
an offence.

111L. (1) Every person who otherwise than in the course of such persons lawful duty, directly or indirectly, alone or by or with any other person, in any manner whatsoever, influences or attempts to influence any decision or order made by the Commission or to so influence any member thereof, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding three years or to both such fine and imprisonment:

Provided however that the giving of a certificate or testimonial to any applicant or candidate for any judicial office or scheduled public office shall not be an offence.

(2) Every High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1).

Interpretation.

111M. (a) In this Chapter –

“appointment” includes the appointment to act in any office referred to in this Chapter.

“judicial officer” means any person who holds office as judge, presiding officer or member of any Court of First Instance, tribunal or institution created and established for the administration of justice or for the adjudication of any labour or other dispute, but does not include a Judge of the Supreme Court or of the Court of Appeal or of the High Court or a person who performs arbitral functions, or a public officer whose principal duty is not the performance of functions of a judicial nature; and

“scheduled public officer” means the Registrar of the Supreme Court, the Registrar of the Court of Appeal, the Registrar, Deputy Registrar or Assistant Registrar of the High Court or any Court of First Instance, the Fiscal, the Deputy Fiscal of the Court of Appeal or High Court and any Court of First Instance, any public officer employed in the Registry of the Supreme Court, Court of Appeal or High Court or any Court of First Instance included in a category specified in the Fifth Schedule or such other categories as may be specified by Order

made by the Minister in charge of the subject of Justice and approved by Parliament and published in the Gazette.

(b) No court, tribunal or institution shall have jurisdiction to entertain or to determine the question whether or not a person is a judicial officer within the meaning of the Constitution, but such question shall be determined solely by the Commission, whose decision thereon shall be final and conclusive.

(c) No act of such person or proceeding held before such person, prior to such determination as is referred to in sub-paragraph (b), shall be deemed to be invalid by reason of such determination.’.

Repeal of Articles 112, 113, 113A, 114, 115 and 117 of the Constitution.

17. Articles 112, 113, 113A, 114, 115 and 117 of the Constitution are hereby repealed.

Amendment of Article 153 of the Constitution.

18. Article 153 of the Constitution is hereby amended as follows :—

- (1) in paragraph (1) of that Article, by the substitution for the words “shall be appointed by the President”, of the words “shall, subject to the provisions of Article 41C, be appointed by the President”; and
- (2) in paragraph (4) of that Article, by the substitution for the words “the President may appoint”, of the words “the President may, subject to the provisions of Article 41C, appoint”.

Amendment of Article 154R of the Constitution.

19. Article 154R of the Constitution is hereby amended in sub-paragraph (c) of paragraph (1) of that Article, by the substitution for the words “three other members to represent”,

of the words “three other members who are appointed by the President on the recommendation of the Constitutional Council, to represent”.

20. The following new Chapter is hereby inserted immediately after Article 155 of the Constitution and shall have effect as Chapter XVIII A of the Constitution :—

Insertion of new Chapter XVIII A in the Constitution.

“CHAPTER XVIII A

NATIONAL POLICE COMMISSION

Constitution
of the
National
Police
Commission.

155A. (1) There shall be a National Police Commission (in this Chapter referred to as the “Commission”) consisting of seven members appointed by the President on the recommendation of the Constitutional Council. The Constitutional Council may, in making its recommendation, consult the Public Service Commission. The President shall on the recommendation of the Constitutional Council appoint one member as the Chairman.

(2) No person shall be appointed as a member of the Commission or continue to hold office as such member if he is or becomes a member of Parliament, a Provincial Council or a local authority.

(3) Every person who immediately before his appointment as a member of the Commission , was a public officer in the service of the State or a judicial officer, shall upon such appointment taking effect, cease to hold such office, and shall be ineligible for further appointment as a public officer or a judicial officer:

Provided that any such person shall, until he ceases to be a member of the Commission, or while continuing to be a member, attains the age

at which he would, if he were a public officer or a judicial officer, as the case may be, be required to retire, be deemed to be a public officer or a judicial officer and to hold a pensionable office in the service of the State, for the purpose of any provision relating to the grant of pensions, gratuities and other allowances in respect of such service.

(4) Every member of the Commission shall hold office for a period of three years from the date of his appointment, unless he becomes subject to any disqualification under paragraph (2) of this Article, or earlier resigns from his office by writing addressed to the President or is removed from office by the President on the recommendation of the Constitutional Council or is convicted by a Court of law of any offence involving moral turpitude or if a resolution for the imposition of civic disability upon him has been passed in terms of Article 81 or is deemed to have vacated his office under paragraph (6) of this Article.

(5) A member of the Commission shall be eligible for reappointment as a member, but shall not be eligible for appointment as a public officer or a judicial officer after the expiry of his term of office as a member. No member shall be eligible to hold office as a member of the Commission for more than two terms.

(6) In the event of the Chairman or a member of the Commission absenting himself from three consecutive meetings of the Commission without the prior leave of the Commission, he shall be deemed to have vacated his office from the date of the third of such meetings and shall not be eligible to be reappointed as a member or as Chairman of the Commission.

(7) The Chairman and members of the Commission shall be paid such allowances as are determined by Parliament. Such allowances shall be charged on the Consolidated Fund and shall not be diminished during the term of office of the Chairman or member.

(8) The Chairman and members of the Commission shall be deemed to be public servants within the meaning and for the purposes of Chapter IX of the Penal Code.

Meetings of
the
Commission.

155B. (1) The quorum for a meeting of the Commission shall be four members.

(2) The Chairman shall preside at all meetings of the Commission and in his absence a member elected by the members present from amongst the members shall preside at such meeting.

(3) Decisions of the Commission shall be by a majority of members present and voting at the meeting at which the decision is taken, and in the event of an equality of votes the Chairman or the person presiding shall have a casting vote.

(4) The Commission shall have power to act notwithstanding any vacancy in its membership, and any act or proceeding or decision of the Commission shall not be invalid or deemed to be invalid by reason only of such vacancy or any defect in the appointment of the Chairman or member.

Immunity
from legal
proceedings.

155C. (1) Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, no court or tribunal shall have the power or jurisdiction to inquire into, or

pronounce upon or in any manner call in question any order or decision made by the Commission or a Committee, in pursuance of any power or duty, conferred or imposed on such Commission or Committee under this Chapter or under any other law.

Secretary to
the
Commission.

155D. There shall be a Secretary to the Commission and such other officers appointed by the Commission on such terms and conditions as may be determined by the Commission.

Costs and
Expenses.

155E. The costs and expenses of the Commission shall be a charge on the Consolidated Fund.

Interference
with the
Commission.

155F. (1) Every person who, otherwise than in the course of such person's lawful duty, directly or indirectly by himself or by or with any other person, in any manner whatsoever influences or attempts to influence or interferes with any decision of the Commission or a Committee, or to so influence any member of the Commission or a Committee, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(2) A High Court established under Article 154P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1).

Powers of
the
Commission.

155G. (1) (a) The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of

promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police.

(b) The Commission shall not in the exercise of its powers under this Article, derogate from the powers and functions assigned to the Provincial Police Service Commissions as and when such Commissions are established under Chapter XVIIIA of the Constitution.

(2) The Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.

(3) The Commission shall provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.

(4) The Commission shall exercise all such powers and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule of the Constitution.

Committees
of the
Commission.

155H. (1) The Commission may delegate to a Committee of the Commission (not consisting of members of the Commission) as shall be nominated by the Commission, the powers of appointment, promotion, transfer, disciplinary control and dismissal of such categories of police officers as are specified by the Commission.

(2) The Commission shall cause to be published in the Gazette the appointment of any such Committee.

(3) The procedure and quorum for meetings of such a Committee shall be according to rules made by the Commission. The Commission shall cause such rules to be published in the Gazette.

Delegation
of functions
by the
Commission.

155J. (1) The Commission may, subject to such conditions and procedures as may be prescribed by the Commission, delegate to the Inspector-General of Police or in consultation with the Inspector-General of Police to any Police Officer, its powers of appointment, promotion, transfer, disciplinary control and dismissal of any category of police officer.

(2) The Commission shall cause any such delegation to be published in the Gazette.

Right of
appeal.

155K. (1) A police officer aggrieved by any order relating to promotion, transfer or any order on a disciplinary matter or dismissal made by the Inspector-General of Police or a Committee or Police Officer referred to in Article 155H and 155J in respect of himself, may appeal to the Commission against such order in accordance with rules made by the Commission from time to time regulating the procedure and the period fixed for the making and hearing of an appeal by the Commission.

(2) The Commission shall have the power to alter, vary, rescind or confirm such order upon such appeal, or to give directions in relation thereto, or to order such further or other inquiry, as to the Commission shall seem fit.

(3) The Commission shall from time to time cause to be published in the Gazette, rules made by it under paragraph (1) of this Article.

(4) Upon any delegation to the Inspector-General of Police or a Committee or Police Officer under Article 155H and 155J of this Chapter as the case may be, the Commission shall not, whilst such delegation of its powers is in force, exercise or perform its functions or duties in respect of the categories of Police Officers in respect of which such delegation is made, subject to the right of appeal hereinbefore provided.

Appeals to
the
administrative
Appeals
Tribunal.

155L. Any Police Officer aggrieved by any order relating to promotion, transfer, or any order on a disciplinary matter or dismissal made by the Commission, in respect of himself, may appeal therefrom to the Administrative Appeals Tribunal established under Article 59, which shall have the power to alter, vary or rescind any order or decision made by the Commission.

Saving of
existing
rules and
regulations.

155M. Until the Commission otherwise provides, all rules, regulations and procedures relating to the police force as are in force shall continue to be operative and in force.

Commission
answerable
to
Parliament.

155N. The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise, performance and discharge of its powers, duties and functions, and shall forward to Parliament in each calendar year a report of its activities in such year.”.

Amendment of
Article 156 of the
Constitution.

21. Article 156 of the Constitution is hereby amended as follows :—

- (1) in paragraph (2) of that Article, by the substitution for the words “shall be appointed by the President”, of the words “shall, subject to the provisions of Article 41C, be appointed by the President”; and
- (2) in paragraph (5) of that Article, by the substitution for the words “the President shall appoint”, of the words “the President shall, subject to the provisions of Article 41C, appoint ”.

Amendment of
Article 170 of the
Constitution.

22. Article 170 of the Constitution is hereby amended as follows :—

- (1) in the definition of the expression “judicial officer”, by the substitution for the words “other than in Article 114,”, of the words “other than in Article 111M.”; and
- (2) in the definition of the expression “public officer”, by the insertion immediately after paragraph (c), of the following new paragraphs :—

“(ca) a member of the Constitutional Council ;

(cb) a member of the Election Commission ;

(cc) a member of the National Police Commission ;

(cd) the Commissioner - General of Elections ;

(ce) officers appointed to the Election Commission, by the Election Commission ; ”.

23. The Ninth Schedule to the Constitution is hereby amended in Appendix I to List I as follows :—

Amendment of the Ninth Schedule to the Constitution.

(1) by the substitution for item 3 of that Appendix of the following :—

“3. Recruitment to the National Police Division and promotion of Police Officers in the Provincial Divisions to the National Division, shall be made by the National Police Commission.”;

(2) in item 6 of that Appendix by the substitution for the words “will be referred to the President,”, of the words “will be referred to the National Police Commission,”;

(3) in item 7 of that Appendix, by the substitution for the words “with the approval of the President,”, of the words “ with the approval of the National Police Commission,”; and

(4) in item 9:2 of that Appendix, by the substitution for the words “The President may, where he considers it necessary provide for alternate training for members of any Provincial Division”, of the words “ The National Police Commission may, where he considers it necessary provide for alternate training for members of any Provincial Division.”.

24. (1) The persons holding office on the date prior to the date of commencement of this Act, as members of the Public Service Commission and the Judicial Service Commission established by Article 56 and Article 112 respectively, of the Constitution, shall continue to hold office as such members continue to exercise the powers vested in those Commissions under the Constitution, prior to the date of commencement of this Act, until the date on which the members of the Public Service Commission and the Judicial Service Commission respectively, are appointed under Article 54 and Article 111D respectively of the Constitution.

Commissions under repealed Articles 56 and 112 of the Constitution to continue.

(2) The persons holding office on the day prior to the date of commencement of this Act, as the Secretary to the Public Service Commission and as the Secretary to the Judicial Service Commission appointed under paragraph (7) of Article 56 and Article 113 respectively, of the Constitution, shall continue to hold such office under the same terms and conditions.

Chief Justice,
Judges of the
Supreme Court,
President of the
Court of Appeal
&c., to continue to
hold office.

25. (a) The Chief Justice and all the Judges of the Supreme Court and the President and all the Judges of the Court of Appeal holding office on the day prior to the date of the commencement of this Act, shall, subject to the provisions of paragraph (3) of Article 41C, continue to hold office.

(b) Every person holding office on the day prior to the date of the commencement of this Act, as the Attorney-General, the Auditor-General, the Inspector-General of Police, the Parliamentary Commissioner for Administration (Ombudsman) and the Secretary-General of Parliament shall, subject to the provisions of paragraph (3) of Article 41C, continue to hold such office under the same terms and conditions.

Judges of the
High Court &c., to
continue to hold
office.

26. Every person holding office on the day prior to the date of the commencement of this Act –

(a) as a Judge of the High Court;

(b) as a judicial officer, a scheduled public officer, a public officer or a police officer,

shall, continue to hold such office under the same terms and conditions.

Substitution and
savings .

27. (1) Unless the context otherwise requires, there shall be substituted for the expressions “Commissioner of Elections” and “Department of the Commissioner of Elections” wherever such expressions occur in the

Constitution and in any written law or in any contract, agreement or other document, of the expression "Election Commission".

(2) The person holding office as the Commissioner of Elections on the day immediately preceding the date of the commencement of this Act, shall continue to exercise and perform the powers and functions of the office of Commissioner of Elections as were vested in him immediately prior to the commencement of this Act, and of the Election Commission, until an Election Commission is constituted in terms of Article 103, and shall, from and after the date on which the Election Commission is so constituted, cease to hold office as the Commissioner of Elections.

(3) All suits, actions and other legal proceedings instituted by or against the Commissioner of Elections appointed under Article 103 of the Constitution prior to the amendment of such Article by this Act, and pending on the day immediately prior to the date of commencement of this Act, shall be deemed to be suits, actions and other legal proceedings instituted by or against the Election Commission, and shall be continued and completed in the name of the Election Commission.

(4) Any decision or order made, or ruling given by the Commissioner of Elections appointed under Article 103 of the Constitution prior to the amendment of that Article, by this Act, and under any written law on or before the date of the commencement of this Act, shall be deemed to be a decision or order made or ruling given, by the Election Commission.

28. All matters pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of any police officer pending before the Public Service Commission, on or before the date of the commencement of this Act, shall stand removed to the National Police Commission established by Chapter XVIII A of the Constitution and accordingly such matter shall be continued and completed before such National Police Commission.

Pending matters
before the Public
Service
Commission to
stand removed to
the National
Police
Commission.

Sinhala text to
prevail in case of
inconsistency.

29. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

Annual subscription of English Bills and Acts of the Parliament Rs. 385 (Local), Rs. 1,180 (Foreign), Payable to the SUPERINTENDENT, GOVERNMENT PUBLICATIONS BUREAU, No. 32, TRANSWORKS HOUSE, LOTUS ROAD, COLOMBO 01 before 15th December each year in respect of the year following.

Appendix V: The 18th Amendment to the Constitution



**PARLIAMENT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF
SRI LANKA**

**EIGHTEENTH AMENDMENT TO THE
CONSTITUTION**

[Certified on 09th September, 2010]

Printed on the Order of Government

Published as a Supplement to Part II of the **Gazette of the Democratic
Socialist Republic of Sri Lanka** of September 09, 2010

PRINTED AT THE DEPARTMENT OF GOVERNMENT PRINTING, SRI LANKA
TO BE PURCHASED AT THE GOVERNMENT PUBLICATIONS BUREAU, COLOMBO 5

Price : Rs. 12.00

Postage : Rs. 10.00

Eighteenth Amendment to the Constitution

[Certified on 09th September, 2010]

L. D.—O. 19/2010

AN ACT TO AMEND THE CONSTITUTION OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

BE it enacted by the Parliament of the Democratic Socialist
Republic of Sri Lanka as follows:—

- | | |
|--|---|
| <p>1. This Act may be cited as the Eighteenth Amendment to the Constitution.</p> <p>2. The Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the “Constitution”) is hereby amended in Article 31 thereof, as follows:—</p> <p>(1) by the repeal of paragraph (2) of that Article; and</p> <p>(2) in paragraph (3A) (a)(i) of that Article—</p> <p>(a) by the substitution for the words “at any time after the expiration of four years from the commencement of his first term of office” of the words “at any time after the expiration of four years from the commencement of his current term of office”; and</p> <p>(b) by the substitution for the words “by election, for a further term.” of the following:—</p> <p>“by election, for a further term:</p> <p>Provided that, where the President is elected in terms of this Article for a further term of office, the provisions of this Article shall <i>mutatis mutandis</i> apply in respect of any subsequent term of office to which he may be so elected.”.</p> | <p>Short title.</p> <p>Amendment of Article 31 of the Constitution of the Democratic Socialist Republic of Sri Lanka.</p> |
|--|---|

Amendment of Article 32 of the Constitution.

3. Article 32 of the Constitution is hereby amended as follows:—

- (1) by the repeal of paragraph (3) of thereof, and the substitution therefor of the following:—

“(3) The President shall by virtue of his office attend Parliament once in every three months. In the discharge of this function the President shall be entitled to all the privileges, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall not be liable for any breach of the privileges of Parliament or of its members”; and

- (2) by the addition immediately after paragraph (3) thereof, of the following new paragraph:—

“(4) The President shall by virtue of his office, also have the right to address and send messages to Parliament.”.

Repeal of Chapter VIIA of the Constitution.

4. Chapter VIIA of the Constitution (Articles 41A to 41H) is hereby repealed.

Insertion of new Article 41A in the Constitution.

5. The following new Heading and Article is hereby inserted immediately after Article 41 of the Constitution and shall have effect as the Heading and Article 41A thereof:—

“CHAPTER VIIA

THE EXECUTIVE

THE PARLIAMENTARY COUNCIL

President to make the appointments in respect of the Commissions and offices referred to in the Schedules.

41A. (1) The Chairman 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 of this Article, shall be appointed to the Commissions and the offices referred to in the said Schedules, by the President. In

making such appointments, the President shall seek the observations of a Parliamentary Council (hereinafter in this Article referred to as “the Council”), comprising —

- (a) the Prime Minister;
- (b) the Speaker;
- (c) the Leader of the Opposition;
- (d) a nominee of the Prime Minister, who shall be a Member of Parliament; and
- (e) a nominee of the Leader of the Opposition, who shall be a Member of Parliament:

Provided that, the persons appointed in terms of sub-paragraphs (d) and (e) above shall be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which the persons specified in paragraphs (a), (b) and (c) above, belong.

SCHEDULE I

1. The Election Commission.
2. The Public Service Commission.
3. The National Police Commission.
4. The Human Rights Commission of Sri Lanka.
5. Commission to Investigate Allegations of Bribery or Corruption.
6. The Finance Commission.
7. The Delimitation Commission.

SCHEDULE II**PART I**

1. The Chief Justice and the Judges of the Supreme Court.
2. The President and Judges of the Court of Appeal.
3. The Members of the Judicial Service Commission, other than the Chairman.

PART II

1. The Attorney-General.
2. The Auditor-General.
3. The Parliamentary Commissioner for Administration (Ombudsman).
4. The Secretary-General of Parliament.

(2) The Speaker shall require the Prime Minister and the Leader of the Opposition to make such nominations within one week of the date of the coming into operation of this Act: provided that if the Prime Minister and the Leader of the Opposition fails to make such nominations the Speaker shall proceed to nominate any Members of Parliament to be nominees for the purposes of sub-paragraphs (d) and (e) of paragraph (1), taking into consideration the criteria specified in the proviso to paragraph (1) of this Article.

(3) If at the time the President seeks the observations of the Parliamentary Council as specified above, the Prime Minister and the Leader of the Opposition have failed to name the persons who shall be their nominees in the Council, the Speaker shall nominate such Members of Parliament to be nominees for the purposes of sub-paragraphs (d) and (e) of paragraph (1), taking into consideration the criteria specified in the proviso to paragraph (1) of this Article.

(4) Notwithstanding the provisions of paragraph (2) of Article 64 of the Constitution, the Speaker shall for the purposes of this Article, continue as Speaker on the dissolution of Parliament, until a Member of Parliament is elected to be the Speaker under paragraph (1) of the aforesaid Article. The new Speaker shall thereupon be a member of the above Council.

(5) Notwithstanding the dissolution of Parliament, the Leader of the Opposition shall for the purposes of this Article, continue as Leader of the Opposition, until such time after a General Election following such dissolution, a Member of Parliament is recognized as the Leader of the Opposition in Parliament. The new Leader of the Opposition shall thereupon be a member of the above Council.

(6) Notwithstanding the dissolution of Parliament, the nominee of the Prime Minister and the Leader of the Opposition respectively who are Members of Parliament shall continue as members until such time after a General Election following such dissolution, Members of Parliament are elected to Parliament. The Prime Minister and the Leader of the Opposition shall thereupon respectively nominate two new members of Parliament to be their nominees in terms of sub-paragraphs (d) and (e) of paragraph (1) of this Article.

(7) The tenure of the Council constituted under this Article shall extend for such period as specified in paragraph (2) of Article 62 and such tenure shall not be affected by any prorogation of Parliament in terms of Article 70 :

Provided that, the persons appointed as nominees of the Prime Minister and the Leader of the Opposition respectively, may during such tenure be removed by the President or in the event of an incapacity of such nominee the President may require the Prime Minister or Leader of the Opposition, as the case may be, to nominate another Member of Parliament to be his nominee in such Council. In such an event the Member of Parliament nominated to fill the vacancy created by either removal or incapacity, as the case may be, shall continue as a member of such Council only for the unexpired period of the tenure of the member for whose vacancy he was nominated.

(8) When the President seeks the observations of the Council referred to in paragraph (1) for the purpose of making the appointments of the Chairman and members of the Commissions referred to in Schedule I and the persons to be appointed to the offices referred to in Part I and Part II of Schedule II to paragraph (1) of this Article, he shall require the Council to convey through the Speaker the observations of the Council, on the persons proposed by him for such appointments, within a period of one week from the date of such communication. If such Council fails to communicate its observations to him within the specified period, the President shall forthwith proceed to make the aforesaid appointments.

(9) Where the Leader of any recognized political party represented in Parliament desires to propose the name of any person for appointment as Chairman or member of a Commission referred to in Schedule I to paragraph (1) of this Article, he may within the period of one week specified above, forward to

the Speaker the name of any person in relation thereto. The President may take such names into consideration when making such appointments.

(10) No person appointed to be the Chairman or member of a Commission referred to in Schedule I of this Article or any of the persons appointed to the offices referred to in Part I and Part II of Schedule II of this Article shall be removed, otherwise than in the manner provided for in the Constitution or in any law enacted for such purpose. Where no such provision is made, such person shall be removed by the President.

(11) The procedure to be followed in obtaining the observations of the persons specified in sub-paragraph (a), (b), (c), (d) and (e) to paragraph (1) shall be as determined by the Speaker.”.

6. Article 52 of the Constitution is hereby amended in paragraph (7) thereof, by the substitution for the words “the Constitutional Council, the Public Service Commission” of the words “the Public Service Commission”.

Amendment of
Article 52 of the
Constitution.

7. Article 54 of the Constitution is hereby amended as follows:—

Amendment of
Article 54 of the
Constitution.

- (1) by the repeal of paragraph (1) thereof, and the substitution therefor of the following:—

“(1) There shall be a Public Service Commission (in this Chapter referred to as the “Commission”) which shall consist of not more than nine members appointed by the President, of whom, not less than three members shall be persons who have had over fifteen years experience as public officers. The President shall appoint one of such members as its Chairman.”;

- (2) in paragraph (4) thereof, by the substitution for the words “removed from office by the President on the recommendation of the Constitutional Council, or” the words “removed from office by the President, or”; and
- (3) in paragraph (7) thereof, by the substitution for the words “for the duration of such period on the recommendation of the Constitutional Council appoint” the words “for the duration of such period appoint”.

Replacement of Article 55 of the Constitution.

8. Article 55 of the Constitution is hereby repealed and the following Article substituted therefor:—

“Powers and functions of the Cabinet of Ministers and of the Commission.

55. (1) The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal.

(2) The appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Department shall, vest in the Cabinet of Ministers.

(3) Subject to the provisions of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Public Service Commission.

(4) The Commission shall not derogate from the powers and functions of the Provincial Public Service Commissions as are established by law.

(5) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of

Parliament for the exercise and discharge of its powers and functions. The Commission shall also forward to Parliament in each calendar year, a report of its activities in respect of such year.”.

9. Article 56 of the Constitution is hereby amended in paragraph (1) thereof, by the substitution for the words “as are specified by the Commission” of the words, “as are specified by the Cabinet of Ministers”.

Amendment of Article 56 of the Constitution.

10. Article 57 of the Constitution is hereby amended in paragraph (1) thereof, by the substitution for the words “as are specified by the Commission” of the words, “as are specified by the Cabinet of Ministers”.

Amendment of Article 57 of the Constitution.

11. Article 61E of the Constitution is hereby amended by the repeal of paragraph (b) thereof and the substitution therefor of the following:—

Amendment of Article 61E of the Constitution.

“(b) the Attorney- General.”.

12. Article 61F of the Constitution is hereby amended by the omission of the words “a police officer appointed by the National Police Commission” from the definition of the expression “public officer”.

Amendment of Article 61F of the Constitution.

13. Article 65 of the Constitution is hereby amended as follows:—

Amendment of Article 65 of the Constitution.

- (1) in paragraph (1) thereof, by the substitution for the words and figures “shall, subject to the provisions of Article 41c, be appointed by the President,” of the words “shall be appointed by the President”; and
- (2) in paragraph (6) thereof, by the substitution for the words and figures “President may, subject to the provisions of Article 41c, appoint a person” of the words “President may appoint a person”.

Amendment of
Article 91 of the
Constitution.

14. Article 91 of the Constitution is hereby amended in paragraph (1) thereof, by the repeal of sub-paragraph (d) (vb) of such paragraph.

Amendment of
Article 92 of the
Constitution.

15. Article 92 of the Constitution is hereby amended by the repeal of paragraph (c) of such Article.

Amendment of
Article 103 of
the Constitution.

16. Article 103 of the Constitution is hereby amended as follows: —

- (1) in paragraph (1) thereof, by the substitution for the words: —
 - (a) “consisting of five members” of the words “consisting of three members”; and
 - (b) “The President shall on the recommendation of the Constitutional Council,” of the words “The President shall,”; and
- (2) in paragraph (7) thereof, “for the period of such leave. Every such appointment shall be made on the recommendation of the Constitutional Council.” of the words “for the period of such leave.”.

Amendment of
Article 104B of
the Constitution.

17. Article 104B of the Constitution is hereby amended as follows: —

- (1) by the insertion immediately after paragraph (4) thereof, of the following new paragraph: —

“(4a) For the avoidance of doubt it is stated that any guideline issued by the Commission during the period commencing on the date of the making of an Order for the holding of an election or the date of the making of a Proclamation requiring the conduct of the Referendum, as the case may be, shall —

 - (a) be limited to matters which are directly connected with the holding of the respective election or the conduct of the respective Referendum, as the case may be; and

- (b) not be connected directly with any matter relating to the public service or any matter within the ambit of administration of the Public Service Commission or the Judicial Service Commission, as the case may be, appointed under the Constitution.”; and
- (2) in paragraph (5), by the repeal of sub-paragraphs (b), (c) and (d) thereof and the substitution therefor of the following paragraph:—

“(b) It shall be the duty of any broadcasting or telecasting operator or any proprietor or publisher of a newspaper, as the case may be, to take all necessary steps to ensure compliance with any guidelines as are issued to them under paragraph (a).”.

18. Article 104E of the Constitution is hereby amended in paragraph (1) thereof, by the substitution for the words “who shall, subject to the approval of the Constitutional Council,” of the words “who shall”.

Amendment of Article 104E of the Constitution.

19. Article 107 of the Constitution is hereby amended in paragraph (1) thereof, by the substitution for the words and figures “shall, subject to the provisions of Article 41c, be appointed by the President by Warrant under his hand” of the words, “shall be appointed by the President by Warrant under his hand”.

Amendment of Article 107 of the Constitution.

20. Article 109 of the Constitution is hereby amended as follows:—

Amendment of article 109 of the Constitution.

- (1) in paragraph (1) thereof, by the substitution for the words and figures “the President shall, subject to the provisions of Article 41c, appoint,” of the words “the President shall appoint”; and

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- (2) in paragraph (2) thereof, by the substitution for the words and figures “the President may, subject to the provisions of Article 41c, appoint another person” of the words “ the President may appoint another person”.

Amendment of
Article 111D of
the Constitution.

21. Article 111D of the Constitution is hereby amended in paragraph (1) thereof, by the substitution for the words and figures “appointed by the President subject to the provisions of Article 41c” of the words “appointed by the President”.

Amendment of
Article 111E of
the Constitution.

22. Article 111E of the Constitution is hereby amended as follows:—

- (1) in paragraph (5) thereof, by the substitution for the words “and may appoint on the recommendation of the Constitutional Council” of the words “and may appoint”; and
- (2) in paragraph (6) thereof, by the substitution for the words “may, on the recommendation of the Constitutional Council”, of the word “may”.

Amendment of
Article 153 of
the Constitution.

23. Article 153 of the Constitution is hereby amended as follows:—

- (1) in paragraph (1) thereof, by the substitution for the words and figures “shall, subject to the provisions of Article 41c, be appointed by the President,” of the words “shall be appointed by the President”; and
- (2) in paragraph (4) thereof, by the substitution for the words and figures “the President may, subject to the provisions of Article 41c, appoint” of the words “the President may appoint”.

24. Article 154 of the Constitution is hereby amended in paragraph (1) thereof by the substitution for the words “the Public Service Commission” of the words, “the Public Service Commission, the Provincial Public Service Commissions”.

Amendment of Article 154 of the Constitution.

25. Article 154R of the Constitution is hereby amended in sub-paragraph (c) of paragraph (1) thereof, by the substitution for the words “three other members who are appointed by the President on the recommendation of the Constitution Council, to represent” of the words “three other members appointed by the President, to represent”.

Amendment of Article 154R of the Constitution.

26. Article 155A of the Constitution is hereby amended as follows:—

Amendment of Article 155A of the Constitution.

- (1) by the repeal of paragraph (1) thereof, and the substitution therefor of the following:—

“(1) There shall be a National Police Commission (in this Chapter referred to as “the Commission”) consisting of not more than seven members appointed by the President. The President shall appoint one member as the Chairman.”; and

- (2) in paragraph (4) thereof, by the substitution for the words “from office by the President on the recommendation of the Constitutional Council, or” of the words “from office by the President, or”.

27. The following new Articles are hereby inserted immediately after Article 155F of the Constitution and shall have effect as Articles 155FF and 155FFF thereof:—

Insertion of new Articles 155FF and 155FFF in the Constitution.

“Powers of the Commission 155FF. The Commission shall be empowered to entertain and investigate complaints from members of the public or any aggrieved person against a police officer or the police force, and shall provide redress in accordance with the

provisions of any law enacted by Parliament. For this purpose the Commission may make rules to establish procedures for entertaining and investigating complaints from members of the public or any aggrieved person.

Commission to make rules. 155FFF. The Commission shall from time to time, make rules for such matters which require rules to be made. Every such rule shall be published in the *Gazette*.”.

Repeal of Article 155G of the Constitution. **28.** Article 155G of the Constitution is hereby repealed.

Repeal of Article 155H of the Constitution. **29.** Article 155H of the Constitution is hereby repealed.

Repeal of Article 155J of the Constitution. **30.** Article 155J of the Constitution is hereby repealed.

Repeal of Article 155K of the Constitution. **31.** Article 155K of the Constitution is hereby repealed.

Repeal of Article 155L of the Constitution. **32.** Article 155L of the Constitution is hereby repealed.

Replacement of Article 155M of the Constitution. **33.** Article 155M of the Constitution is hereby repealed and the following Article substituted therefor:—

“Saving of existing rules and regulation. 155M. All rules and regulations and procedures in force on the date of the commencement of this Article relating to police officers shall be deemed to continue to be operative, until rules, regulations and procedures are made hereunder by the Public Service Commission.”.

Amendment of Article 156 of the Constitution. **34.** Article 156 of the Constitution is hereby amended as follows:—

- (1) in paragraph (2) thereof, by the substitution for the words and figures “shall, subject to the provisions

of Article 41c, be appointed by the President,” of the words “shall be appointed by the President”;

- (2) in paragraph (5) thereof, by the substitution for the words and figures “the President shall, subject to the provisions of Article 41c, appoint” of the words “the President shall appoint”.

35. Article 170 of the Constitution is hereby amended in the definition of the expression “public officer” by the repeal of paragraph (*ca*) thereof.

Amendment of Article 170 of the Constitution.

36. For the avoidance of doubts it is hereby declared that:—

Avoidance of doubts.

- (1) the members of the Judicial Service Commission established under Article III_D of the Constitution and holding office on the date prior to the commencement of this Act, shall from and after the date of the commencement of this Act, continue to hold office as such members and to exercise and discharge the powers and functions vested in the Commission under the Constitution.
- (2) the Chief Justice and the other Judges of the Supreme Court and the President and the other Judges of the Court of Appeal and the Judges of the High Court holding office on the date prior to the commencement of this Act, shall from and after the date of the commencement of this Act, continue to hold office and exercise and discharge the powers and functions vested in them under the Constitution.
- (3) the persons holding office as the Secretary of the Judicial Service Commission, the Attorney-General, the Auditor-General, the Inspector-General of Police, the Parliamentary Commissioner for Administration (Ombudsman) and the Secretary-

General of Parliament holding office on the date prior to the commencement of this Act, shall from and after the date of the commencement of this Act, continue to hold office and exercise and discharge the powers and functions vested in them under the Constitution.

- (4) the person holding office as the Commissioner of Elections on the date prior to the commencement of this Act, shall from and after the date of the commencement of this Act, continue to hold office and exercise and discharge the powers and functions vested in him under the Constitution as Commissioner of Elections until the Election Commission is constituted in terms of Article 103 and from and after the date of the constitution of the Election Commission, cease to hold office as the Commissioner of Elections:

Provided that the President may, if he considers it expedient to do so or if the exigencies of a situation so requires it, at any time prior to the constitution of the Election Commission, appoint to the office of Commissioner of Elections, a person holding office as an Additional Commissioner of Elections or a Deputy Commissioner of Elections to discharge the functions presently conferred on the Commission by the Constitution.

- (5) all matters pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of Police Officers pending before the National Police Commission established under Chapter XVIII A of the Constitution on the date prior to the commencement of this Act, shall from and after the date of the commencement of this Act, be vested in the Public Service Commission and any appeal made by a police officer pending before the National Police Commission on the date prior

to the commencement of this Act, shall, from and after the date of the commencement of this Act, stand transferred to the Public Service Commission and shall be heard and completed accordingly.

- (6) all appointments made in respect of the Commissions and officers described in the foregoing sections of this Act, by the Constitutional Council prior to its repeal during the period commencing on the day on which the term of the aforesaid Council expired and the date of the coming into operation of this Act, shall be deemed to be valid and effectual.
- (7) the staff of the Public Service Commission shall be members of the public service and be subject to the rules as are applicable to a public officer in relation to the rank of such officer.
- (8) from and after the appointment of the Election Commission in terms of the Constitution, the Department of Elections shall be deemed to be the staff of such Commission for the purposes of Chapter XIV^A of the Constitution and shall whenever it is so required for the duration of an election or a referendum, perform the functions of a Secretariat.

37. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

Sinhala text to prevail in case of inconsistency.

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Acknowledgements

The editors would like to thank the financial support of Freidrich Naumann Stiftung and in particular the support of Sri Lanka country representative Mrs Sagarica Delgoda. We would like to thank all our contributors for their thoughtful and insightful commentary and research. We would like to also thank several researchers who assisted at various points of the publication, Malsirini De Silva, Bhagya Wickramasinghe and Thileni Wickremaratne. We would like to thank Sanjana Hattotuwa and Nigel Nugawela for assisting with the typesetting of the book. We would also like to thank several people who assisted in managing various administrative aspects of the book Kishani Ganegoda, Araliya Kannangara, Vinura Ladduwahetty and Amila Michael.