

# A brief Q & A on the Proposed 20th Amendment to the Constitution

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Centre for Policy Alternatives

## **What is the Twentieth Amendment?**

The Twentieth Amendment to the Constitution Bill (“proposed Amendment”) was [published in the Gazette Supplement](#) dated 2<sup>nd</sup> September 2020 (and made available to the public on the 3<sup>rd</sup> of September 2020). The crux of the proposed Amendment is that it does away with most of what was introduced by way of the [Nineteenth Amendment](#) to the Constitution in 2015, and reintroduces much of what was in place under the [Eighteenth Amendment](#) to the Constitution, in 2010.

## **Why was the Nineteenth Amendment enacted?**

- **To reduce the powers of the Executive President, and make him/her more accountable to Parliament and the Courts.**
- **To improve the independence of several commissions, by, among other things, depoliticizing the process of appointing members.**

The [Nineteenth Amendment](#) was passed with wide support from Parliament, with 215 MPs voting in its favour (one voted against, one abstained, and seven were absent).

## **How does a Bill become law?**

At present the proposed Amendment is just a Bill, which means that it has not yet been passed into law. There are several steps which need to take place before the proposed Amendment can be passed, and become a part of the Constitution.

- Any Bill must be published in the Gazette 14 days before it can be placed on the Order Paper of Parliament (Article 78(1) of the Constitution).
- Thereafter, it may be placed on the Order Paper of Parliament for its first reading. (This will be after the 16<sup>th</sup> of September 2020)
- Within 7 days from a Bill being placed on the order paper of Parliament, any citizen can challenge the Constitutionality of the Bill in the Supreme Court (Article 121 of the Constitution). There has already been [some indication](#) that certain parties intend on challenging the proposed Amendment in this manner.

### **What happens if the proposed Amendment is not challenged in the Supreme Court?**

The proposed Amendment can be taken up for a [second reading](#) one week from the first reading. This is the stage at which Parliament debates the proposed Amendment. Thereafter, at the third reading, it is voted on, and if sufficient numbers vote in its favour, it is passed into law. As this is an amendment to the Constitution and not an ordinary law, 2/3rds of the total number of MPs must vote in its favour in order for it to be passed into law (Article 82(5) of the Constitution).

### **What is the role of the Supreme Court if the proposed Amendment is challenged?**

The Court will examine if the proposed Amendment violates any entrenched provisions of the Constitution ([Article 83 of the Constitution](#)). If the Court decides that any one or more provisions of the proposed Amendment violate one or more of these entrenched provisions, then, in addition to 2/3rds of the MPs voting in its favour, the proposed Amendment will also have to be voted on by the People at a Referendum. Alternatively, the Government may delete the clauses that the Supreme Court holds to violate entrenched provisions, and pass the proposed Amendment with the votes of 2/3rds of the MPs.

### **What is the Constitutional Council?**

The Constitutional Council is a body which was introduced by the Nineteenth Amendment, which replaced a body known as the Parliamentary Council which was set up by the Eighteenth Amendment.

The primary role of the Constitutional Council is to maintain and monitor the affairs of the Independent Commissions (such as the Election commission, Public Service Commission, Bribery Commission and the Human Rights Commission). This Council is mandated with multiple roles, with an important role being that it acts as a check on appointments to several important positions, including the members of these commissions (Article 41B of the Constitution), and other offices such as Judges of the Supreme Court and Court of Appeal, the Attorney – General and the Inspector General of Police (Article 41C of the Constitution).

The Council is structured in a manner to ensure wide representation, including numerous political parties. The Council acts as a check to ensure appointments are not at the sole discretion of the Executive President. Thus, by contributing to the appointment process, the Council depoliticises and makes the appointee less beholden to one person or one political party.

### **How is the structure of the Parliamentary Council different to the Constitutional Council?**

The proposed Twentieth Amendment seeks to bring back the Parliamentary Council which existed under the Eighteenth Amendment. The key differences in the structure of the two Councils are as follows;

- The Parliamentary Council only consists of Members of Parliament (the Constitutional Council has three non – political figures)

- The Parliamentary Council is most likely to consist of MPs from only the political party or alliances to which the Prime Minister (PM) and Leader of the Opposition (LO) belong.
- The absence of meaningful consultation with other political parties in the appointment process is a matter of concern.
- There is no recognition of the pluralistic nature of the Country, as the Parliamentary Council may be representative of only two communities based on the choices of the PM and LO for members No. 4 and 5.

Member No.	Constitutional Council	Member No.	Parliamentary Council
1	Prime Minister (PM)	1	Prime Minister (PM)
2	Speaker of Parliament	2	Speaker of Parliament
3	Leader of the Opposition (LO)	3	Leader of the Opposition (LO)
4	MP appointed by the President	4	An MP nominated by the PM An MP nominated by the LO  (these two members should be from communities other than the communities the other three members belong to).
5	5 persons appointed by the President on the nomination of the PM and the LO - 2 must be MPs - 3 persons of eminence and integrity, who are not associated with any political party.  When making these appointments all political parties must be consulted to ensure that the Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity	5	
6			
7			
8			
9			
10	One MP who nominated by the majority of MPs from parties/independent groups other than the party/independent group the PM and LO are from.		

## Who will appoint officials to key positions if the proposed Amendment is enacted?

The table below provides a comparison between the manner of appointment of officers to several important officers under the present constitution and the proposed amendment;

Official	Present Constitution	Proposed Amendment
<p>Members of the:-</p> <p>Election Commission.</p> <p>Public Service Commission.</p> <p>National Police Commission.</p> <p>Human Rights Commission</p> <p>Commission to Investigate Allegations of Bribery or Corruption. (Bribery Commission)</p> <p>Finance Commission.</p> <p>Delimitation Commission.</p> <p><b>Included under the present Constitution but excluded under the proposed Amendment</b></p> <p>Audit Service Commission.</p> <p>National Procurement Commission.</p>	<p>The Constitutional Council recommends persons to these Commissions, and the President must appoint someone from these recommendations. The Council is required to endeavour to ensure that such recommendations reflect the pluralistic character of Sri Lankan society, including gender (Article 41B(3).</p>	<p>As per this Amendment it is the President who will appoint both these categories of officers, and he/she shall only have to seek the observations of the Parliamentary Council (proposed Article 41A(1)).</p> <p>Unlike with the Constitutional Council, the decision of the <b><u>Parliamentary Council has no binding effect</u></b>, and the President may disregard these observations.</p>
<p>The Chief Justice and the Judges of the Supreme Court.</p> <p>The President and the Judges of the Court of Appeal.</p> <p>The Members of the Judicial Service Commission, other than the Chairman.</p> <p>The Attorney-General.</p> <p>The Auditor-General.</p> <p>The Parliamentary Commissioner for Administration (Ombudsman).</p> <p>The Secretary-General of Parliament.</p> <p><b>Included under the present Constitution but excluded under the proposed Amendment</b></p> <p>The Inspector-General of Police.</p>	<p>In these cases, the President needs the approval of the Constitutional Council before making an appointment. (Article 41C).</p>	<p>The Council will have to give their observations within one week of being asked, and if they do not give their observations within that period, the President shall proceed with the appointment (proposed Articles 41A(8) (a) &amp; (b)).</p>

## **How will the proposed Amendment affect the appointment of individuals to key positions?**

**The Parliamentary Council can only provide “observations”, there is nothing to ensure that the President has to consider these observations.** Thus, this will result in a position in which the President, more or less, has the unfettered discretion to appoint persons he/she wishes to these offices. This may result in the politicisation of these positions and affect the independence of these offices.

## **What is the current position regarding the President’s immunity in Court?**

The Nineteenth Amendment reduced the scope of the immunity of the President and allows for citizens to file Fundamental Rights Applications against the President when exercising executive power (Article 35(1)). The President is not named in these cases, as the Attorney General is named to represent the President. Thus, the President is not expected to attend Court like others but he/she will be represented by the Attorney General. Several acts of the former and current President were challenged and are presently before the Supreme Court. These include the [2018 Dissolution case](#), cases relating to the inaction preceding the Easter Sunday attacks, cases relating to attempts to reintroduce the Death Penalty, cases challenging several Presidential Pardons and the case [challenging the granting of the ‘Paget Road Mansion’](#) to president Sirisena as a retirement benefit.

## **How does the proposed Amendment affect the President’s immunity in Court?**

The proposed Twentieth Amendment seeks to revert back to the position in the original Constitution, prior to the Nineteenth Amendment, where the President is immune from both civil and criminal proceedings. As such, **Citizens will no longer be able to file Fundamental Rights Applications against the President.**

However, the Supreme Court has [previously held](#) that this immunity is only applicable during the period in which the President holds office as Article 35 of the Constitution shields only the doer of the act, and not the act itself.

## **Will the proposed Amendment reduce the Prime Minister’s powers?**

Yes, the Prime Minister’s powers are significantly reduced. Below are some examples of how the Prime Minister’s power is reduced by the proposed Amendment.

- ***Process for removal of the Prime Minister***

The present Constitution does not permit the President to remove the Prime Minister unilaterally. The Prime Minister continues to hold office until and unless he/she resigns or ceases to be an MP (Article 46(2)) or if the government is defeated by a No-Confidence Motion (Article 48(2)).

**Under the proposed Amendment, however, the President can remove the Prime Minister unilaterally (Article 47(a) of the proposed Amendment).**

- ***In appointing Ministers***

At present, it is the President who decides on **how many** Ministers there are (subject to the limitation of it being 30 or less) and what subjects and functions are allocated to them, consulting the Prime Minister when the President considers such consultation to be necessary (Article 43(1) of the Constitution).

However, when deciding **which MPs to appoint as Ministers** to such Ministries, the President is required to act on the advice of the Prime Minister.

**Under the proposed Amendment, even when appointing Ministers, the President only needs to consult the Prime Minister when he/she considers such consultation to be necessary.**

- ***In removing Ministers***

Under the present Constitution the President is required to act on the advice of the Prime Minister when removing a Minister (Article 46(3)(a)).

**However, under the proposed Twentieth Amendment, this requirement is dispensed with, and the President can unilaterally remove a Minister (Article 47(a) of the proposed Amendment).**

### **What is the impact of removing the Prime Minister from these decision-making roles?**

The removal of these checks will result in a Cabinet which is likely to be subservient to the President, where they hold their positions at the pleasure of the President. The result of this is the consolidation of much power in one individual, with no checks and balances, when making decisions on behalf of the country.

### **How will the Cabinet of Ministers change under the proposed Amendment?**

In addition to the President being given the sole discretion regarding Cabinet appointments, the size and structure of the Cabinet of Ministers will change with the proposed Amendment.

**The Nineteenth Amendment brought in a limitation to the number of MPs who could be appointed as Ministers (30), non – cabinet Ministers and State Ministers (40 in total) (Article 46(1) of the Constitution). The proposed Amendment removes this limit, and it will be possible to appoint any amount of MPs as Ministers.**

Another change that will happen under the proposed Amendment is that the **President will once again be able to hold Ministerial portfolios**. The Nineteenth Amendment, for the first time, disallowed the President from holding Ministerial portfolios. It provided transitional provisions for the previous President, Hon. Maithripala Sirisena, to hold limited Ministerial portfolios (subjects and functions of Defence, Mahaweli Development and Environment as per Section 51 of the [Nineteenth Amendment Act](#)). Under the proposed Amendment, the President may assign to himself/herself any subject or function and shall remain in charge of any subject or function not assigned to any Minister (Article 44(2)).

## **What is the problem with the President being able to appoint an unlimited number of Ministers and Deputy Ministers?**

Firstly, these Ministers serve at the pleasure of the President and are completely beholden to the President. Thus, MPs will be loyal to the President as long as the President can offer them the perks of a Ministry and will unlikely be able to act as a check.

Secondly, when the Cabinet of Ministers proposes new laws, it is the Parliament that debates and votes on them. In the event a large percentage of MPs are also Members of the Cabinet of Ministers, this reduces the effectiveness of Parliament to act as a check.

Thirdly, having a large number of Ministries creates a large financial burden on the country.

## **How do the President's powers over Parliament change under the proposed Amendment?**

Under the Nineteenth Amendment, there is a restriction on when the President can dissolve Parliament, that is, the President can only dissolve Parliament after it has completed 4 and a half years of its five-year term. To dissolve Parliament before that point, the President needs a resolution requesting it to be dissolved, signed by at least 2/3rds of the MPs (Article 70(1)). The proposed Amendment seeks to revert back to the position that was in place prior to the Nineteenth Amendment, whereby **the President can dissolve Parliament at any time after one year from the General Elections** (except in a few limited circumstances). **The President can also dissolve Parliament before the completion of one year, if he/she is requested to do so by resolution signed by at least half the MPs.**

This position gives the President wide power over Parliament, as he/she will have wide powers to dissolve it. This may result in a situation where the Parliament has to function subservient to the President's wishes or risk dissolution, thus hampering its ability to act as an effective check.

## **How will the proposed Amendment affect the law making process?**

The proposed Amendment results in the following changes in the law making process-

- ***Reduce the time period during which the public has access to Bills before they are passed***

In the case of ordinary laws and amendments to the Constitution, citizens will still be able to challenge the constitutionality of laws before they are passed in the Supreme Court (Article 121). However, **the mandatory time period during which a law must be gazetted before it can be placed on the Order Paper of Parliament will be reduced from two weeks to one week under the proposed Amendment.** This reduces the duration of the period during which the public is noticed of a proposed law, before it can be passed in Parliament.

- ***Reintroduction of the urgent Bill process***

The Twentieth Amendment attempts to bring back a type of law known as 'Urgent Bills' (proposed Article 122). In the case of such Bills, which the Cabinet of Ministers must decide is



urgent and in the public interest, the President may refer it directly to the Chief Justice for a determination by the Supreme Court on the constitutionality of such law. **The Supreme Court is required to give its determination within 24 hours to 72 hours, which means that the right of citizens to make submissions to the Supreme Court on the constitutionality of such law is significantly hindered.**

The proposed Amendment is slightly different to the pre-Nineteenth Amendment position as it sets out that Constitutional Amendments cannot be brought as Urgent Bills (Article 122(3)). The Eighteenth Amendment itself was brought in as an Urgent Bill. Thus, the inclusion of this limitation is significant.

### **Are there features of the Nineteenth Amendment that will not be changed by the proposed Amendment?**

There are three key features introduced by the Nineteenth Amendment that will remain in tact under the proposed Amendment;

- The Nineteenth Amendment introduced the Right to Information into the Fundamental Rights chapter of the Sri Lankan Constitution (Article 14A). The proposed Twentieth Amendment does not take away this right.
- Presidential and Parliamentary elections in Sri Lanka were held every 6 years prior to the Nineteenth Amendment. After the Nineteenth Amendment both these elections are to be held every 5 years (Term of the President - Article 30(2), Term of Parliament – Article 62(2)). The proposed Amendment does not change this position.
- Prior to the Eighteenth Amendment, there was a limitation in the Constitution that any person who had been elected as President twice was not qualified to be elected a third time (two-term limit). The Eighteenth Amendment removed this limit, which is how former President Hon. Mahinda Rajapaksa was able to contest the Presidential election for a third time in 2015. The Nineteenth Amendment reversed this position, reinforcing the two-term limit (Article 31(2)). The proposed Amendment leaves the two-term limit in place.

### **Do the criteria to be the President or a Member of Parliament change with the proposed Amendment?**

The Nineteenth Amendment prevented dual citizens from becoming the President (Article 92(b)) or Members of Parliament (Article 91(1)(xiii)). The proposed Amendment removes this restriction. Thus, dual citizens will once again be able to contest these offices.

The Nineteenth Amendment also changed the minimum age for Presidency from 30 to 35 (Article 92(a)). The proposed Amendment seeks to reverse this position.

## **What happens to the Independent Commissions under the proposed Amendment?**

The following are some significant changes proposed under the proposed Amendment-

- ***Removal of the Constitutional recognition given to the Bribery Commission***

The effect of this is that a future government will be able to abolish the Commission with a simple majority (half of Parliament voting in its favour). At present, due to its Constitutional recognition, an attempt to abolish it would require a 2/3rds majority of MPs to vote in favour of doing so.

- ***President having the power to appoint and remove members of the Public Service Commission***

This would give the President unchecked power over the Commission which would adversely affect the independence of the Commission and have the effect of undermining the independence of the public service. Under the present Constitution the appointment and removal of members requires the approval of the Constitutional Council.

- ***President having the sole power to appoint members of the Judicial Service Commission***

Under the proposed Amendment, the President may appoint any two judges of the Supreme Court as members of the Judicial Service Commission, without reference to their seniority and judicial experience serving as a Judge of a Court of First Instance. The Present Constitution clearly sets out how the seniority of Judges is to be considered when making appointments (Article 111 D of the Constitution.) The President may appoint and remove such members without the requirement of approval by the Parliamentary Council.

- ***Reducing the powers of the Election Commission***

The proposed Amendment seeks to introduce Article 104B(a)(i) which limits the guidelines issued by the Election Commission to the subject matters which are directly connected with the holding of elections or a referendum. The Election Commission will not be authorized to issue guidelines pertaining to any matter relating to the public service or within the ambit of administration of the Public Service Commission or the Judicial Service Commission.

- ***Abolish the National Procurement Commission***

This was introduced by the Nineteenth Amendment (Articles 156B to 156H) and will be abolished under the proposed Amendment.

These are all important Commissions which ensure transparency and fairness within the democratic system, and the proposed Amendment will impact their independence.

## **Is there a link between the experts committee appointed by the President and this Amendment?**

According to media reports, an [experts committee](#) was appointed by the President on the 2<sup>nd</sup> of September 2020 to prepare a preliminary draft of a new Constitution. The Twentieth Amendment is not the draft prepared by the experts committee with the Bill gazetted on the same day the committee was appointed.