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Insights into Constitutional Reform in Sri Lanka

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Contents

Editor's Note

Constitutional reform was a prominent feature in political debates of both the presidential and general elections of 2015. The office of the "Executive President" was inevitably at the center of the debate, especially in view that the 18th Amendment to the Constitution, introduced in the aftermath of the conflict, is seen as entrenching and perpetuating the powers of the President. In particular, the President who is hailed as having "won the war" and is therefore best able to take Sri Lanka forward into post-war prosperity. This Amendment is popularly discussed as diluting or removing in its entirety, reforms that had earlier been ushered in by the 17th Amendment and hailed as progressive and in keeping with the liberal democratic ethos of the Constitution. Notably among its features is the Constitutional Council mandated to 'recommend' appointments to independent commissions, to ensure that all appointments are objective and politically unbiased. The 19th Amendment to the Constitution in April of 2015, re-introduced features of the 17th Amendment that would curtail or 'check' any undue centralisation of power in the office of the Executive President. The Supreme Court determination of the 19th Amendment has been included in its entirety in this edition of the LST Review.

The current edition provides some "insights" into the complexity of reforming the Constitution, the diversity of ideologies and agendas that influence the process. The two articles and court case clearly point to a linkage between the socio-economic and political climate and the justifications put-forward by the different reformist agendas.

Kalana Senaratne, in his article outlining preliminary thoughts on post-war Constitutional reform, highlights certain assumptions and obstacles to Constitutional reform in the aftermath of the civil conflict. In his analyses, the tendency to classify reformist groups through the lens of the conflict alone, - those who were opposed to a military solution and those who were not, fails to factor in the diversity of actors and priorities in the post-war political environment. That the diversity of views regarding key items on the reform agenda, - federalism and the independence of the post-war governance structures, to name a few, are not always strictly aligned to these two political camps. Among other challenges to Constitutional reform, Senaratne highlights the diverse meanings attributed to "winning the war" and "LTTE" by different groups of people. For instance, the defeat of the LTTE would signify to some, the defeat of the political solutions and reforms that the LTTE stood for; though in the post-conflict reality, these solutions may yet provide a solution to the 'ethnic problem', which is arguably larger and deep-rooted than the conflict itself.

In her article, Yoga Gunadasa discusses the 17th and 18th Amendments to the Constitution, retrospectively. The discussion provides valuable insight into the motivations behind the two Amendments and the salient points of contrast in their content. Reference is made to the court determination on the 18th Amendment, illustrating the divergent political views that underscore interpretation of concepts that are foundational to a Constitutional democracy, including – balance of power and

accountability among the different organs of government, sovereignty, the exercise and implementation of executive power, and the independent function of key democratic structures. In addition, the article includes reference to the 19th Amendment and its centrality in promoting a 'counter (political) culture' to the political environment in which the 18th Amendment was endorsed.

The LST Review intends to take forward the discourse on Constitutional Reform, especially as the implementation of the 19th Amendment unfolds, and its proponents are held accountable to its foundational precepts and doctrines. This edition of the Review thus provides some insights for further discussion and analyses of Sri Lanka's Constitution and its reform, and implications of reforms for the future governance of multi-ethnic, multi-religious Sri Lanka.

Rasika Mendis

Editor

Some Preliminary Thoughts on the Challenges Confronting Post-war Constitutional Reform in Sri Lanka

Dr. Kalana Senaratne*

Constitutional reform has once again emerged as a priority concern, in Sri Lanka's post-war political agenda. But why is the idea of constitutional reform, especially in the post-war context, a challenging one? This paper seeks to briefly set out some preliminary thoughts on this question. Arguing that the possibilities and potential for reform during this period will remain uncertain, the paper will set out three main challenges. The first: the diversity of actors and agents demanding Constitutional reform. The second: the indeterminacy surrounding the meaning attached to the idea of 'winning' a war. The third: the changing character, the reformist-revival, of Sinhala nationalism.

Demanding Constitutional Reform

With the conclusion of the war in 2009 and the annihilation of the LTTE, there emerged a sudden and hitherto unexpected absence of a 'common enemy'. The final phase of the war with the LTTE, initiated by President Mahinda Rajapaksa, galvanised a considerable majority of the Sri Lankan population in support of the claim that the LTTE could be militarily defeated. It was such a common enemy that could have brought the many forces and people together, giving the impression, at least to a general observer, that the Sri Lankan polity was somewhat neatly divided into two broad camps: comprised of those supporting the war, and those opposing it. In terms of Constitutional reform, the former group was understood as being against Constitutional reform and a political settlement; the latter, as being for a negotiated settlement, which had to be introduced through a process of constitutional reform.

The reality was perhaps a little different. Beneath the political rhetoric and discourse surrounding the war, which was very often (and even understandably) a polarizing one, each of these two camps was made up of disparate forces. For instance, the former camp – which included, among others, the ruling regime of President Mahinda Rajapaksa – included those who were both for a total war against the LTTE and a political approach to addressing the ethnic question, especially in the form of the implementation of the 13th

* The author is a Visiting Lecturer at the Department of Law, University of Peradeniya, and a Researcher at the Social Scientists' Association (SSA).

Amendment to the Constitution.[1] This approach – of fighting the LTTE while also proceeding to implement the 13th Amendment – was a policy closer to the UNP, which was, somewhat simplistically (yet understandably, given certain derisive statements made about the war and the armed forces by a few UNP-politicians), identified with the 'anti-war' camp. Furthermore, it cannot even be said that all civil society groups in Sri Lanka were advocating a single, unified, form of political reform or settlement. With diverse groups focusing on a diversity of issues – ranging from federalism, human rights violations, resettlement, etc. – even civil society was not a homogenous entity.

Interestingly, many or all of these disparate forces, belonging to both camps, were demanding some form of constitutional reform; for 'reform' has a plurality of meanings, when viewed from the perspective of their own different political and ideological perspectives. This meant that the traditional understanding that constitutional reform was the demand of the more progressive left and liberal forces in the country, as can be seen from the numerous political proposals made over the decades on the ethnic issue[2], was only partly accurate. Rather, the idea of constitutional reform has animated many of the political forces which initiated constitutional changes in the country: for example, the Sirimavo Bandaranaike-regime in the 1970-72 period, and the J.R. Jayewardene-regime in the 1977-78 period, however regressive they may have been viewed from a particular ideological perspective. Their election campaigns and manifestos made constitutional reform/change a central theme and promise.

In addition to such left and liberal forces, it needs to be noted that Sinhala nationalist forces have also demanded, or believed in the need for, constitutional reform or a radical change in the constitutional framework that governs the country today. For example, one finds in the works of some of the prominent advocates of majoritarian nationalism, the need to change the executive presidential system (by introducing a legislative body which has sole legislative power), a political structure that promotes national politics and not party politics, and a governance structure with minimum state intervention and a decentralised system of village councils.[3]

Therefore, at the very outset, we are confronted with the challenge of a plurality of voices and opinions on Constitutional reform. The idea of Constitutional reform cannot be understood to mean the demand for reform made by a singular ideological camp – most often identified as the liberal-constitutional reformist camp. Constitutional reform, in other words, is part of the political agenda of many different political and ideological forces which have not been associated with the liberal-reformist camp. Such forces, who may have been somewhat dormant in raising reformist demands during the war, now have a 'new'

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[1] Such a view was represented by certain elements of the SLFP and the Left-parties aligned with the Rajapaksa-regime. For a prominent articulation of this view, see for instance: Dayan Jayatilleka, *Long War, Cold Peace: Conflict and Crisis in Sri Lanka* (Colombo: Vijitha Yapa, 2013).

[2] For a historical survey of these political proposals and demands, see generally: Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran and Asanga Welikala (eds.), *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: CPA, 2008).

[3] Nalin de Silva, *Nidahase Pahan Temba: Sinhala Bauddha Rajya Pilibanda Hendinwimak* (Maharagama: Chinthana Parshadaya, 1998), p. 14-16.

opportunity and greater political space, to raise their own constitutional reformist project(s). One of the prominent manifestations of this was the adoption of the 18th Amendment to the Constitution, in 2010.

'Winning' the war

The second challenge confronting Constitutional reform concerns the question: how do we assess what happened in May 2009? Stated differently, what is the political understanding behind the popular claim that the war against the LTTE was won? What does 'winning' the war, mean? Or, one may even ask: what was being fought when fighting the LTTE?

Our approach to post-war Constitutional reform depends on the kind of answer we tend to give to these questions. The challenge lies in the fact that there are different understandings of what 'winning' the war meant, as well as what the LTTE actually represented.

A general view, prevalent within the 'Southern' forces that had promoted the need for Constitutional reform while opposing the war, was that however gruesome the war was, the end of it has now provided a valuable opportunity to bring about the required Constitutional reform in the country, to address both the democratic deficit and the ethnic question. If one believes in this theory, then Constitutional reform, especially in a way that addresses the ethnic question – either through the introduction of a more meaningful devolutionary framework or even a federal mechanism – was the obvious next step. One may term this the 'golden opportunity' theory; i.e. a golden opportunity/moment had now arrived to settle the conflict, through significant constitutional and political reforms.

It is interesting that on closer inspection, the view that the defeat of the LTTE necessarily provides a golden opportunity to introduce a political solution based on significant devolution of powers, appears to be based on a somewhat simple understanding about the war and the LTTE: that the LTTE was simply an outfit that represented the idea of a separate state, and therefore its defeat only means the defeat of the separate-state solution. Or, that the LTTE was a mere aberration that was removed from political realities, and its defeat does nothing to change the view that Constitutional reform that introduces a significant measure of devolution is necessary in post-war Sri Lanka.

However, to those who were fighting the war, was the LTTE an outfit to be understood in the manner just described above? The above view understands correctly that the war arose due to an unaddressed and unresolved political question, especially about equality and power-sharing. It fails to consider, however, the cumulative political impact of the following: that the LTTE was one of the principal voices, if not the principal voice, of the Tamil people for decades; that it has often rejected any kind of devolution of power to the provinces (including the 13th Amendment); that it did endorse the idea of exploring a federal solution to the conflict in 2002, and that it also proposed a more confederal solution, in the form of the Interim Self Governing Authority (ISGA) proposals in 2003.

In other words, the cumulative impact of the above is that the LTTE was a representative of many solutions ranging from federalism to separatism, representing also the only 'practical' means for the Tamil people to realise such a political demand. Having rejected all these proposals, and having believed that it could fight it out with the Sri Lankan armed forces, the LTTE then lost the war. Hence, it would not be inconceivable to think that the defeat of the LTTE, in the final battle, will be interpreted as also representing the political defeat of all of those solutions the LTTE would have, genuinely or otherwise, stood for. Such an understanding, in the minds of those who opposed the LTTE, makes the need for any significant Constitutional reform amounting to federalism redundant. More seriously, the pragmatic possibility for Constitutional reform amounting to federalism vanishes with the defeat of the LTTE.

The Sinhala nationalist forces subscribed to a view somewhat similar to the above. In their understanding, defeating the LTTE was also about defeating the political projects that the LTTE stood for, and at times, even those it did not stand for, including the 13th Amendment. War is considered to be an extension of politics; and a military solution is therefore regarded as also amounting to a political solution. Central to this understanding is the view that the LTTE represented the military-dimension of Tamil nationalism, while the Tamil politicians were considered to be the political-face of Tamil nationalism. The struggle in the post-war era would be the struggle to complete the victory achieved in May 2009; to defeat the political-face of Tamil nationalism.

What is problematic in this latter view is that it is unable and unwilling to recognise the conflict as being an issue that has to do with Tamil political aspirations, or recognise that just as there is Sinhala nationalism there can also be different forms of minority-nationalisms within a country. In such situations, the key question of managing the conflict by at least a commitment to political, economic and cultural equality and equal opportunities for all ethnic groups, be it in a unitary or united country, is the only practical option. Therefore to take the Sinhala nationalist argument to its logical conclusion, leading to a mono-ethnic hegemony dominated by the majority community, should be avoided.

However, this is to digress slightly from the issue under discussion. What needs to be noted, is that our understanding of what happened in May 2009 and our views of what the LTTE represented, can have a profound impact on the manner in which we understand the form and character of Constitutional reform in post-war Sri Lanka. Such an understanding is also subject to change, in different ways, over time, as a consequence of emerging and ever-changing political developments, whereby the weight of reform will be felt differently by different groups of people constituting the country.

Sinhala nationalist revival

The third challenge confronting the prospect of constitutional reform is the revival of Sinhala nationalism.[4]

This revival, especially during the post-war period, has often been associated with the rise of groups advocating a more militant form of majoritarian nationalism, such as the Bodu Bala Sena (BBS); which played the principal role in instigating and spreading violence against the Muslim people in Aluthgama, and which had the sympathy and support of powerful elements of the erstwhile Rajapaksa-regime. However, this is not the complete picture of Sinhala nationalism, and is not the challenge this paper refers to.

Rather, the challenge comes from the strand of Sinhala nationalism which is engaged in a prominent, and successful, campaign of reformist politics in the country. This is the approach adopted by groups such as the *Jathika Hela Urumaya* (JHU), and its representatives such as Patali Champika Ranawaka, and the emergence of groups in the form of the *Pivithuru Hetak* movement, led by prominent politically-engaged monks such as Ven. Athuraliye Rathana, also a representative of the JHU.

Their role has been particularly prominent during the campaign initiated by the opposition to defeat the former President Rajapaksa at the Presidential election held in January, 2015. Their contribution can be seen at many levels: at the level of coming forward, firstly as a reformist movement that challenged Rajapaksa to undertake certain proposed Constitutional reforms; and then, in becoming the most forceful critics of Rajapaksa, determined to defeat him at the Presidential election. In the process, the leadership of the JHU and *Pivithuru Hetak* appeared to have made a significant and defining contribution in formulating the political manifesto and policy approach of Presidential candidate, Maithripala Sirisena.[5] Central to this project is the effort made by them to successfully push, from within the common-opposition camp, a discourse of reforming the Executive Presidency[6], as opposed to abolishing it.

Developments that took place thereafter went on to affirm the pragmatic character of their proposed reforms; given that the abolition of the Executive Presidency, especially after the successful completion of the war, cannot be considered to have been a deeply felt reformist-need, at least within the Sinhala-majority community. The most significant in this regard was the adoption of the 19th Amendment to the Constitution; which, rather than abolishing the Executive Presidency (as expected by a wide variety of groups which had campaigned for the abolition of the Presidential system), ended up being an amendment that reformed

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[4] In this paper, 'Sinhala nationalism' is used as a broad idea which refers also to Sinhala-Buddhist nationalism. An explanation of the nuanced distinctions of the two is considered unnecessary for the limited purposes of this paper.

[5] An authoritative account of the role played by these groups is contained in: Asoka Abeygunawardana, *The Revolution of the Era* (E 39: Colombo, 2015).

[6] For a recent study on Presidentialism, see: Asanga Welikala (ed), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* [Volumes I & II] (Colombo: CPA, 2015)

the Presidency. It was also only such a mechanism that was realistically possible given the Parliamentary composition at the time.

The influence of these forces has not waned since then. Interestingly, key actors of the Sinhala-nationalist revival camp will, most likely, be some of the key members and policy makers of a new government led by the UNP. It will be extremely interesting to see in what ways the reformist strand of Sinhala nationalism will influence the future of the Constitutional reform project of the new government.

Conclusion

In a brief essay published recently, Professor Jayadeva Uyangoda[7] identifies three key themes central to the question of political reform in Sri Lanka: "the continuation of the Constitutional reform exercise, resuming from where it stopped with the passing of the 19th amendment"; "electoral reform" and the attempt at "moving away from the system of proportional representation to a mixed system"; and the more complex theme of "advancing the regional autonomy rights of the minorities, both Tamil and Muslim communities, through greater devolution."[8] The debates surrounding these key themes will, in turn, be shaped by concerns about the sovereignty and security of the State. Such debates, along with the form and character of the reforms adopted, will ultimately reflect the impact and influence of the challenges discussed in this paper. The present is a moment mixed with both potential and uncertainty, for Sri Lanka's much anticipated project of constitutional reform.

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[7] Jayadeva Uyangoda, 'After the Lankan Elections' available at: http://www.epw.in/comment/after-lankan-elections.html

[8] *Ibid.*

The 17th and 18th Amendment to the Constitution of Sri Lanka in Retrospect

Yoga Gunadasa*

Introduction

When considering the history of Constitutional reform, the 17th and 18th Amendments to the Constitution have had a significant effect on the rule of law, the independence of the public service and law enforcement agencies, among other effects. However the reasons for their effect and impact have been very different.

The 17th Amendment introduced, in 2001, an all party Constitutional Council for the appointment of persons to independent commissions, such as the Elections Commission, the Judicial Services Commission and the Police Services Commission, instead of vesting absolute discretion with the President in the appointment of these commissions. Hence, under the 17th Amendment the President makes appointments to these commissions on the recommendations of the Constitutional Council.

The 18th Amendment, introduced shortly after the ending of the civil conflict in 2010, undid the reformist or progressive features of the 17th Amendment. Firstly, it removed the two term limit of a President which permitted him to contest only for two six year terms. Secondly, it repealed the independent appointment of commissions, by replacing it with a much weaker Parliamentary Council that lacked the independence of the Constitutional Council created under the 17th Amendment.

The 18th Amendment was introduced during the immediate aftermath of the civil conflict, when the country was expected to turn its focus on its economic development. The introduction of the 18th Amendment was premised on the argument that it would provide political stability and the particular governance that is required to set the country on a path of economic development. It was contended at the time, that the 17th Amendment was a failure which did not fulfill the requirement of a stable government, and this thinking paved the way for the introduction of a another mechanism through the 18th Amendment.

This paper includes an outline and analysis of the above Amendments and the reforms they sought to implement. The following discussions will refer to the court determination that was instrumental in bringing the 18th Amendment into force, and discuss the impact of its arguments on the overall framework of Sri Lanka's Constitution. While the focus of this article is mainly on the 17th and 18th Amendments to the Constitution, it would not be complete without reference to positive Constitutional developments of the recent past;

* Yoga Gunadasa, Attorney- at -Law, LLB, LLM (Colombo)

much of the unsalutary and undemocratic features of the 18th Amendment have been corrected under the subsequent enactment of the 19th Amendment to the Constitution in May 2015. For instance, the 19th Amendment was instrumental in re-introducing the 'two term limit' that a presidential candidate is subject to that was removed under the 18th Amendment. Other important developments are - the restoration of the Constitutional Council (formerly introduced by the 17th Amendment), but with greater power in the appointment process and oversight of public bodies; and the setting up of 11 Independent Commissions, namely, the Election Commission, The Public Service Commission, The National Police Commission, The Audit Service Commission, The Human Rights Commission, The Bribery or Corruption Commission, The Finance Commission, The Delimitation Commission, The National Procurement Commission, the University Grants Commission and the Official Languages Commission. Subsequent to the 19th Amendment the President cannot dissolve Parliament until the expiration of a period of not less than 4 years and six months unless under the approval of Parliament under certain conditions.

As discussed above, the 19th Amendment removed certain undemocratic features introduced by the 18th Amendment while correcting certain omissions or deficiencies in the 17th Amendment which led to its final collapse and impasse. For instance, under the 17th Amendment, even if the Constitutional Council made recommendations, the Presiden could refuse to appoint the nominees, as has been the case in reality.

The Constitutional Council

It is significant at this stage to discuss the substance and the history of the 17th Amendment to the Constitution, including certain historical precedents for its contents.

Sri Lanka's independence Constitution, the Soulbury Constitution, formed an independent Public Service Commission which was responsible for the transfer, dismissal and disciplinary control of public servants. The Commission was free from political interference and had free advisory capacity without political influence. Nevertheless it appears that both 1972 and 1978 did not accept this mechanism that would ensure an independent public service. The 1978 Constitution paved the way for the Cabinet of Ministers to control the public service, and established unfettered power in the office of the Executive President[1]. It is in this context that the 17th Amendment was devised as a response to the adverse effects that had hitherto resulted by the extensive power vested in the President by the 1978 Constitution.

The 17th Amendment aimed primarily to enhance the rule of law by providing a check over the Executive President's unfettered power, and to introduce an impartial mechanism to appoint key public servants to office. The argument in support of the Amendment was that when executive power is used to make public service appointments, the appointments will be based on political interests and not on the basis of merit. With this in view, the 17th

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1 The Eighteenth Amendment to the Constitution –Rohan Edrisinha and Aruni Jayakody –Centre for Policy Alternatives

Amendment introduced a Constitutional Council[2], to be appointed with the consensus and in consultation of all political parties represented in Parliament. Accordingly the Council will consist 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 Opposition and one person nominated upon agreement by the majority of the members of Parliament 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 Constitutional Council was established accordingly in March 2002 and appointments were made on the recommendations by the Council, to the Human Rights Commission, the Public Service Commission, the National Police Commission and the Election Commission.

The President's subsequent rejection of the nominee for Chairman to the Election Commission paved the way for a Constitutional crisis. The crisis centered on the contention of whether the President had the power to reject a nominee of the Constitutional Council. When then President refused to appoint a chairman to the Election Commission, the Court upheld the President's refusal on the basis that it fell within the blanket immunity under Article 35 of the Constitution.[3] Article 35 bars any legal action, both civil and criminal, being brought against the President while in office either in his official or private capacity. However, this immunity or exception from legal action is not applicable in cases where powers are exercised by the President in relation to any subject or function.

Further in the year 2005, when the first term of office of the Constitutional Council expired, new appointments to the Council were not made. It appeared that the appointment mechanism was not successful as it was complex without clear and express legal provisions being in place to cover situations where potential problems could arise.

The failure to implement the 17th Amendment generated the need to find a new mechanism to justify its disregard. The 18th Amendment to the Constitution therefore repealed provision for a Constitutional Council[4] and replaced it with, what is at best a fragile mechanism, referred to as the Parliamentary Council.

The Parliamentary Council

The 18th Amendment through the repeal and inclusion of Constitutional Articles formed the Parliamentary Council.[5] The Parliamentary Council comprised the Prime Minister, the Speaker, and 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.

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[2] Article 41 A – this is not a complete footnote , of the 17th Amendment

[3] The Eighteenth Amendment to the Constitution –Rohan Edrisinha and Aruni Jayakody – Centre for policy Alternatives

[4] Repeal Article 41 A to 41 H and creates new article 41 A and creates a parliamentary council

[5] The 18th Amendment was established through the repeal of Article 41A to 41H and by inserting a new Article 41A

Further Article 41A (1) of the 18th Amendment empowered the President to appoint the Chairman and members of the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission of Sri Lanka, the Commission to Investigate Allegations of Bribery or Corruption, the Finance Commission, and the persons to be enumerated under schedule B of the Amendment - the Chief Justice and the Judges of the Supreme Court, the President and Judges of the Court of Appeal, the Members of the Judicial Service Commission other than its chairman, and the Attorney General, the Auditor General, the Parliamentary Commissioner for Administration and the Secretary General of Parliament. In making these appointments, the President was to seek the observations of a Parliamentary Council.

The composition of the Parliamentary Council is smaller when compared to the Constitutional Council, with a limited scope for diverse opinions among its members. Notably, the Parliamentary Council had a lesser number of nominees to represent minority interests. As the Constitutional Council did, the Parliamentary Council was to nominate persons to key positions of Public Service, including the chairman and all members of the Election Commission, Public Service Commission, National Police Commission, among other such commissions. It was also vested with the power to nominate persons to the key positions including the Chief Justice, the Attorney General, and judges of the Supreme Court.

In contrast to the Constitutional Council, which stipulated that no person shall be appointed by the President as chairman or member to any of the Commissions except on a recommendation of the Constitutional Council, the Parliamentary Council under the 18th Amendment only had the power to make observations; hence the later Amendment introduced a weaker structure than the Constitutional Council, with the result that the President could easily ignore the observations of the Parliamentary Council. The President was under no duty to consider the observations of the Parliamentary Council. Article 41 A (2) of the 18th Amendment states that when the President seeks the observations of the Parliamentary Council , the observations must be communicated within one week; failing which, the President shall proceed to make the appointments.

Hence, the political implications of the 18th Amendment had far reaching effects, including that it repealed the two term limit of the President, and thereby a fundamental 'check' on executive power as provided for under the 17th Amendment. It conferred extensive power on the President to make appointments to the Public Service Commission with little checks on such appointments, and vested wide discretionary power on the President to appoint persons to key positions, such as Attorney-General, Judges of the Supreme Court and Appeal Court. It allowed in effect, the Executive to make unabashed political appointments to the public service disregarding all norms of good governance such as transparency, accountability and impartiality.

However, the counter-argument in defense of the 18th Amendment is that – it provided the President 'prerogative powers of appointment' that is a pre-requisite for a 'presidential form of government'. Given that there will always be situations where the recommendations of the Constitutional Council, may lead to situations of crisis; such as if the names being

nominated by the Council are not to the liking of the President, there is potential for administrative crisis and much instability. Hence Presidential appointments to the public service can bring stability and certainty, which is arguably conductive to the formation of a strong public service. A strong government with little room for a consultative process ensures that delays in appointments are minimal, leading to an efficient public service and economic development.

However, this argument may not be sufficient to justify the possibility of excessive interference by the Executive President in the appointment of public servants, which will inevitably lead to the loss of independence and politicisation of the public service.

Other effects of the 18th Amendment

The 18th Amendment amended the powers of several key public service bodies formed under 17th amendment. For instance, the 17thAmendment vested in the Public Service Commission, the power to deal with the appointment, promotion, transfer, disciplinary control and dismissal of public officers. Article 55(1) as amended by the 18th Amendment, significantly reduces the power given to the Public Service Commission. Prior to the Amendment, the promotion, transfer, disciplinary control of all heads of Government was vested in the Cabinet of Ministers who was bound to exercise such powers after ascertaining the views of the Public Service Commission. The Amendment removed this consultative process and the Cabinet of Ministers under the 18th Amendment could take decisions without such consultation.

Instead, the Cabinet of Ministers was vested with the powers to appoint, promote, transfer, and provide disciplinary control and dismissal of public servants. In view that the Cabinet is controlled by the President, questions were raised as to whether the decisions of the Cabinet regarding the public service would be controlled by the President indirectly.

The 18th Amendment also repealed the powers vested in the Election Commission, which is a key institution that ensures the integrity of the democratic process. Reducing the powers of the Election Commission was effected by insertions to Article 104(b) of the Constitution. Accordingly the Amendment imposed limitations to the jurisdiction of this Commission, its power to issue guidelines, for instance. Also, the power of the National Police Commission was reduced under the Amendment[6], whereby the powers of the Commission were limited to investigating complaints from the members of the public against the police force.

[6] Article 155 A, 155G

Supreme Court Determination on the 18th Amendment

It is pertinent to discuss the substance of the Supreme Court Determination[7] on the 18th Amendment, with a view to understanding its rationale in Sri Lanka's Constitutional history. According to the determination, the then President made a reference to the 18th Amendment Bill in terms of Article 122(1) (b) of the Constitution; that the draft Bill is urgent in the national interest.

The contention of the petitioners was that the proposed Amendment was inconsistent with Articles 3 and/or 4 of the Constitution. Article 3 is among the "entrenched provisions", as outlined in Article 83, which require a referendum for their amendment. That is, in order for these Articles to be amended a special majority in Parliament is required (2/3 majority) together with a referendum.

Central to this discussion is a full understanding of the provisions of both Articles 3 and 4 of the Constitution. Article 3 of the Constitution refers to the sovereignty of the people which includes powers of government, fundamental rights and the franchise while Article 4 refers to the manner in which sovereignty of the people is exercised. In essence, the legislative or parliamentary power will be exercised by members of Parliament; executive power is exercised by the President, while the fundamental rights recognised by chapter III of the Constitution shall be respected by all three branches of government: the legislature, executive and judiciary and shall not be restricted or denied except under prescribed Constitutional procedures. The franchise or the right to vote is exercised by every citizen when electing the President and Members of Parliament and at every Referendum. Those qualified as an elector (a person who can vote) must be 18 years of age and have his/her name in the register of electors or electoral list.

Clause 5 of the Bill introduces a new heading, "The Parliamentary Council". The petitioners contended that clause 5 and the introduction of the Council has the effect of diluting the independence of the judiciary and therefore has a direct impact on Article 4(c), which relates to the exercise of the judicial power of the people, and the sovereignty of the people reflected in Article 3 of the Constitution. Hence, it was argued that the 18th Amendment requires approval of the people at a referendum in terms of Article 83 of the Constitution, as outlined above.

The Supreme Court contended, that the Bill is only a process of redefining the restrictions placed on the President by the Constitutional Council under17th Amendment in the exercise of the executive power vested in the President; and accordingly, this clause of the Bill is not inconsistent either with Articles 3 and /or 4 of the Constitution.

As outlined by the court determination, Articles 7, 8 and 9 of the Bill dealt with the powers and functions of the Cabinet of Ministers and of the Public Service Commission. Article 55 of the Constitution was to be repealed in order to transfer the powers, which was earlier vested with the Public Service Commission, to the Cabinet of Ministers. It was determined that Articles 55, 56 and 57 of the Constitution do not attract Article 3 and /or 4 of the

[7] SC (special determination) No01/2010

Constitution and therefore there is no inconsistency which would need the approval of the people at a Referendum.

Clause 13 of the Amendment referred to the amendment of Articles 103 and 104B of the Constitution; these Articles deal with the redefinition of the composition, powers and functions of the Election Commission. It was determined by the Court that a careful perusal of the proposed amendments indicate, that they are intended for the purpose of ensuring that other organisations of the Government are not stifled in their functions during the pendency of elections. That the amendments that Article 104B of the Constitution do not in any way curtail the powers of the Election Commission, but brings safeguards in terms of the functions of the other commissions. However it appears that the power to issue guidelines is strictly limited to matters which are directly connected to elections or referendums, and in view of this, the amendment reduces the power of the Election Commission by imposing limitation on its jurisdiction.

Further, the 18th Amendment alters the President's parliamentary privileges by clause 3. In terms of the Article 32 (3) of the Constitution, the President shall by virtue of his office have the right at any time to attend, address and send messages to Parliament and is entitled to all privileges and immunities. The 18th Amendment repeals this Article and substitutes the phrase 'the President shall by virtue of his office attend Parliament once in every three months', thereby vesting in him the privileges, powers and immunities of a Member of Parliament, except the right to vote.

Arguments in favour of the Amendment were based on the fact that this provision will increase the accountability of the Office of President, as he or she can be subject to questioning by members of Parliament. One can argue that this will have the effect of minimising the power vested in the executive presidency. However, it is noteworthy, that his right to address Parliament was made more frequent, increasing his potential to influence the parliamentary process. In such a situation, questions arise as to the independence of the legislature as these periodic visits will increase his powers to interfere with the will of the people through influence on the legislature. There is the danger that by an increased influence of the President over Parliament, the doctrine of the Separation of Powers is undermined.

According to the SC Determination however, the provisions of the Amendment allowing the President to be in Parliament on a periodical basis would clearly ensure that the President is answerable in a more meaningful manner, which in turn would strengthen the position articulated in Articles 3 and 4 of the Constitution. Therefore, according to the court determination, Clause 3 is not inconsistent with either Article 3 and/ or 4 of the Constitution.

With respect to the term of the Executive President, while the 1978 Constitution introduced an all-powerful Executive President, it prescribed certain limitations on his/her term of

office. The two term limit is one such limitation,[8] which was intended to safeguard the people from abuse of power. The 18th Amendment had the effect of removing the above restriction on the Executive President's term of office and enhanced the centralisation of power in this office. Therefore this further concentration of powers in the Executive Presidency by the provisions of the 18th Amendment had the potential to lead to authoritarianism and the loss of democracy.

Among the justifications for this provision of the 18A, is that it would strengthen the executive presidency and will have the capacity of promoting political stability leading to economic development and other positive outcomes. However, the counter-argument is that, an undue concentration of powers in the President will undermine the rule of law and the democratic process. It is contrary to Article 3 of the Constitution which states that sovereignty is in the people and is inalienable and includes the powers of government, fundamental rights and franchise. Further, it is not in keeping with the nature of governance envisaged by Article 4, and hence will change the manner in which executive power and the people's franchise is exercised

The Supreme Court however was insistent that amendment to Article 31 (2) of the Constitution would not restrict the franchise of the people and would enhance the franchise of the people since voters would be given a wide choice of candidates including a President who had been elected twice by them. Hence, the Constitutional requirement that a President can be elected by the people for more than two terms or the removal of the term limit strengthens the franchise given to them under Article 4 of the Constitution. It was therefore stated in the judgment that the Amendment therefore is not inconsistent with Article 3 or 4 of the Constitution.

Accordingly, the Court, in broad stretch of interpretation, contented that the Bill entitled 'the Eighteenth Amendment to the Constitution' complies with the provisions of Article 82 (1) of the Constitution, is requires to be passed by a special majority specified in Article 82 (5) of the Constitution, and 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.

Conclusion

The Constitution in a country is designed, among other things, to protect and empower the people from the abuse of political power. Hence the Constitutional reform necessarily needs the participation of the public. Constitutional reform is a process that entails wide consultation and participation of all stakeholders, including the general public. However, the 18th Amendment was rushed through Parliament as an urgent bill disregarding the democratic process which is at the heart of constitutional making

Some of the regressive provisions that were brought in by the introduction of the 18th Amendment were to some extent removed/mitigated by the 19th Amendment. Namely, the

[8] Article 3(2) states 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.

reintroduction of the presidential term limit and the creation of an empowered Constitutional Council to appoint members to key public bodies. The 18th Amendment paved the way for the executive to make political appointments, thus depriving persons of persons of integrity and competence being appointed to high office.

In a functioning democracy, a Constitution of a country is intended to protect and empower the people who vote in their representatives. As it is the people who vote in a government and according to Article 3 of the present Constitution sovereignty is in the people, consultation and public debate is vital when passing major constitutional Amendments that affect their lives.

The mechanisms under 19th Amendment to the Constitution are far better than the mechanisms introduced under the 17th and 18th Amendments to the Constitution in establishing stability which would strengthen the economic development while ensuring the democracy and rule of law

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

A Bill entitled, "NINETEENTH AMENDMENT TO THE CONSTITUTION" in the matter of applications under Article 121(1) of the Constitution

PRESENT

K. Sripavan	-	Chief Justice
Chandra Ekanayake	-	Judge of the Supreme Court
Priyasath Dep, PC	-	Judge of the Supreme Court

S.D. No 04/2015	**Petitioner**	Gomin Kavinda Dayasiri
	Counsel	Gomin Dayasiri with Manoli Jinadasa, J.P. Gamage, Rakitha Abeygunawardena and Sulakshana Senanayake
	Intervenient Counsel	Suren Fernando M. A. Sumanthiran Dr. Jayampathy Wickremaratne, P.C., With Nizam Kariappar, Ms Pududini Wickremaratne, Nayantha Wijesundera and Ms. Galusha Wriththamulla Chrishmal Warnasuriya instructed by Sunil Watagala
S.D. No. 05/2015	**Petitioner**	Liyana Pathiranage Ivan Perera
	Counsel	Prabath Colombage
	Intervenient Counsel	Chrishmal Warnasuriya instructed by Sunil Watagala

S.D. No. 06/2015	**Petitioner**	Udaua Prabath Gammanpila
	Counsel	Monohara de Silva, P.C. with Rajitha Hettiarachchi, Arinda Wijesundera and Hirosha Munasinghe
	Intervenient Counsel	Faiz Musthapa, P.C. with Faizer Marker and Ashiq Hashin, Suren Fernando, Saliya Pieris with Asthika Devendra, Thanuka Nandariri Viran Corea with Santa de Fonseka and Vdya Nathaniel Mr Alagaratnam, P.C., Chrishmal Warnasuriya instructed by Sunil Watagala, J.C. Weliamuna and Pulasthi Hewamanne, Pasindu Silva, Senura Abeywardena
S.D. No 7/2015	**Petitioner**	Dharshan Arjuna Narendra Weerasekere
	Counsel	Dharshan Weerasekera appears in person
S.D. No 08/2015	**Petitioner**	Ven. Bengamuwa Nalaka Thero
	Counsel	Manohara de Silva, P.C. with Rajitha Hettiarachchi, Arinda Wijesundera and Hirosha Munasinghe
S.D. No. 09/2015	**Petitioner**	Swarnapali Wanigasekera, A-A-L
	Counsel	Kalyanada Tiranagama with Sandamali Ekanayake
S.D. No. 10/2015	**Petitioner**	Ven. Matara Ananda Sagara Thero
	Counsel	Kalyananda Tiranagama with Sandamali Ekanayake

S.D. 14/2015	**Petitioner**	Dampahalage Don Somaweera Chandrasiri, Vice Chairman, Mahajana Eksath Peramuna
	Counsel	Canishka Witharana with Tissa Yapa and Dakshina Coorey
S.D. No. 15/2015	**Petitioner**	Gayan Nishantha Sri Warnasinghe
	Counsel	M.C. Jayaratne and Nadika N. Seneviratne, M.D. J. Bandara and M. Nilanthi Abeyratne instructed by S. M. D. Tuder Perera
S.D. No. 16/2015	**Petitioner**	MTV Channel (Pvt) Limited
	Counsel	Romesh de Silva P.C. with Sanjeewa Jayawardena, P.C. Sugath Caldera, Rajeeve Amarasuriya, Niranjan Arulapragasam and Viswa de Livera Tennakoon instructed by G.G. Arulpragasam
S.D. No 17/2015	**Petitioner**	MBC Networks (Private) Limited
	Counsel	Romesh de Silva P.C. with with Sanjeewa Jayawardena, P.C. Sugath Caldera, Rajeeve Amarasuriya, Niranjan Arulapragasam and Viswa de Livera Tennakoon instructed by G.G. Arulpragasam
S.D No. 19/2015	**Petitioner**	Jayakodi Arachcige Sisira Jayakodi
	Counsel	J.C. Boange

Y.J.W. Wijeyatilleke P.C. Attorney-General with Anusha Navaratne, Addl Solicitor General, Indika Demuni de Silva, Senior Deputy General, Nerin Pulle, Deputy Solicitor

General, Yuresha Ferando, Senior State Counsel and Suren Gnanaraj, State Counsel for the Attorney General.

Court assembled at 10.00 am on 01st, 02 and 6th of April 2015

A Bill bearing the title "An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka" – "19th Amendment to the Constitution" was placed on the Order Paper of Parliament on 24th March 2015. Thirteen petitions, numbered as above have been presented invoking the jurisdiction of this Court in terms of Article 121(1) for a determination, in respect of the Bill. Upon receipt of the petitions the Court issued notice on the Attorney-General as required by Article 134(1) of the Constitution.

The Petitioners and/or Counsel representing them, the Intervenient Petitioners and the Hon. Attorney General were heard before this Bench at the sittings held on 01st April 2015, 02nd April 2015 and 06th April 2015.

The proposed 19th Amendment as contained in the Bill seeks to make the following principal amendments which could be categorized as follows:

1. Inclusion of a right to information
2. Reducing the term of office of the President
3. Introducing a two term limit on the number of terms a person can hold office as President
4. Provision for an acting President in the event of death/absence of the incumbent President
5. Imposition of additional duties on the President
6. Effective renumbering of Article 42 as Article 33A
7. The circumstances in which Presidential immunity will not apply
8. Amendments relating to the time period within which an election shall be held in an election is determined to be void.
9. Reintroduction of the Constitutional Council
10. Changes made to Chapter VII with regards to matters concerning the Executive, the Cabinet of Ministers, the appointment of Ministers and the ceiling on the number of Ministers
11. Reducing the Term of Parliament
12. Amendments relating to the prorogation of Parliament
13. The jurisdiction of the Supreme Court relating to disciplinary actions against Members of Parliament
14. Removal of the provisions relating to urgent Bills.

15. Provisions relating to the independent Commissions (to be appointed based on the recommendations of the Constitutional Council)

16. Special provisions applicable to the incumbent President

While the Supreme Court has sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution, in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, Article 120(a) provides that the only question which the Supreme court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83.

Article 83 states:

Notwithstanding anything to the contrary in the provisions of Article 82 –

(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1,2,3,6,7,8,9,10 and 11 or of this Article and

(b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years. Bills inconsistent with the Constitution.

Shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

The people therefore have chosen and mandated the legislature to make constitutional amendments save and except those affecting the entrenched Articles referred to in Article 83.

In most of the petitions, the Petitioners argued that the Bill alters the basic structure of the Constitution by diminishing the final discretionary authority of the President to make decisions concerning executive governance and thereby violates the basic structure of the Constitution. Mr. Monohara de Silva, P.C. claimed that if the Executive power is alienated from the President, the very act of alienation or transfer or Executive power from the President to another body would violate Article 3 of the Constitution.

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 provides that:

"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 recognised, 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 recognised 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 has to be born in mind that the Sovereign people have chosen not to entrench Article 4. Therefore, it is clear that not all violations of Article 4 will necessarily result in a violation of Article 3.

The first two Articles in Chapter VII of the Constitution are of crucial importance in describing the structure in which executive power was sought to be distributed. Article 42 states: *"The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security."* (emphasis added) Thus, the President's responsibility to Parliament for the exercise of executive power is established. Because the Constitution must be read as a whole, Article 4(b) must also be read in the light of Article 42. **Clearly, the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by other organs of governance.** (emphasis added)

In fact, Mr Sumanthiran contended that Article 42 is identical to the corresponding provisions in the 1st Republican Constitution of 1972, which stated in Article 91 that *"the President shall be responsible to the National State Assembly for the due execution and performance of the powers and functions of his office under the Constitution and under other law, including the law for the time being relating to public security."* Thus, the position of the President vis a vis the legislature, in which the President is responsible to the legislature, was untouched by the 1978 Constitution.

Article 43 of the 1978 Constitution states:

"(I) There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.

(2) The President shall be a member of the Cabinet of Ministers, and shall be the Head of the Cabinet of Ministers

Provided that notwithstanding the dissolution of the Cabinet of Ministers under the provisions of the Constitution, the President shall continue in office.

(3) The President shall appoint as Prime Minster the Members of Parliament who in his opinion is most likely to command the confidence of Parliament."

This important Article underscores that the Cabinet collectively is charged with the exercise of executive power, which is expressed as the direction and control of the Government of the Republic and the collective responsibility of Cabinet, of which the President is the Head. It establishes conclusively that the President is not the sole repository of executive power under the Constitution. It is the Cabinet of Ministers collectively and not the President alone, which is charged with the direction and control of Government. Further, this Cabinet is answerable to Parliament.

Therefore the Constitution itself recognises that executive Power is exercised by the President and by the Cabinet of Ministers, and that the President shall be responsible to Parliament and the Cabinet of Ministers, collectively responsible and answerable to Parliament with regard to the exercise of such powers. Additionally, certain powers with regard to the Public Service are vested in the Public Service Commission and some in the Cabinet of Ministers (Articles 54 and 55), again showing that executive power is not concentrated in the President. Chapter VII and IX of the Constitution are titled "The Executive – The President of the Republic", "The Executive –The Cabinet of Ministers" and "The Executive – The Public Service" respectively.

It may be relevant to note the following observations made by Court in the determination of the Nineteenth Amendment (S.C.S.D. 11/02 – S.C. SD. 40/02) with regard to the Executive powers of the President:

> *"Mr H.L. de Silva, P.C. submitted forcefully that there are "weapons" placed in the hands of each organ of government. Such a description may be proper in the context of a general study of Constitutional law, but would be totally inappropriate to our Constitution setting, where sovereignty as pointed out above, continues to be reposed in the People and organs of government are only custodians for the time being, that exercise the power for the People. Sovereignty is thus a continuing reality reposed in the People.*

Therefore, executive power should not be identified with the President and personalised and should be identified at all times as the power of the People. *Similarly, legislative power*

should not be identified with the Prime Minister or of any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of People. Viewed from this perspective it *would be a misnomer or describe such powers in the Constitution as "weapons" in the hands of the particular organ of government.* (emphasis added)

The role of the Cabinet in the Executive in Re the Thirteenth Amendment Determination [(1987) 2SLR 312 at 341} as observed by Wanasundera, J. in his dissenting judgment is stated thus:

"It is quite clear from the above provisions that the Cabinet of Ministers of which the President is a component is an integral part of the mechanism of government and the distribution of the Executive power and any attempt to by-pass it and exercise Executive powers without the valve and conduit of the Cabinet would be contrary to the fundamental mechanism and design of the Constitution. It could even be said that the exercise executive power by the President is subject to this condition. **The People have also decreed in the Constitution that executive power can be distributed to the other public officers only via the medium and mechanism of the Cabinet system.** This follows from the pattern of our Constitution modeled on the previous Constitution, which is a Parliamentary democracy with a Cabinet system. The provisions of the Constitution amply indicate that there cannot be a government without a Cabinet. The Cabinet continues to function even during the interregnum after Parliament is dissolved, until a new Parliament is summoned. To take any other view is to sanction the possibility of establishing a dictatorship in our country, with a one man rule." (emphasis added)

The people in whom sovereignty is reposed having made the President as the Head of the Executive in terms of Article 30 of the Constitution entrusted in the President, the exercise of the executive power being the custodian of such power. It the people have conferred such power on the President; it must be either exercised by the President directly or someone who derives authority from the President. There is no doubt that executive powers can be distributed to others via President. However, if there is no link between the President and the person exercising the executive power, it may amount to a violation of mandate given by the people to the President. If the inalienable sovereignty of the people which they reposed on the President in trust is exercised by any other agency or instrument who do not have any authority from the President then such exercise would necessarily affect the sovereignty of the People. It is in this backdrop the Court in the Nineteenth Amendment Determination came to a conclusion that the transfer, relinquishing or removal of power attributed to one organ of government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution. Though Article 4 provides the form and manner of exercise of the sovereignty of the people, the ultimate act or decision of his executive functions must be retained by the President. So long as the President remains the Head of the Executive, the exercise of his powers remain supreme or sovereign in the executive field and others to whom to such power is given must derive the authority from the President or exercise the Executive power vested in the President as a delegate of the President. The President must be in a position to monitor or to give directions to others who derive authority from the President in relation to the exercise of his executive power.

Failure to do so would lead to a prejudicial impact on the sovereignty of the People. The constitutionality of the following Clauses are examined, keeping in mind the observations referred to above.

Clause 11

(I) **42(3) The Prime Minister shall be the head of the Cabinet of Ministers**

(II) **43(1) The Prime Minister shall determine the number of Ministers of the Cabinet of Ministers, and the Ministries and the assignment of subjects and functions to such Ministers.**

(III) **43(3) The Prime Minister may at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers. Such change shall not affect the continuity of the Cabinet of Ministers and the continuity of its responsibility to Parliament.**

(IV) **44(2) The Prime Minister shall determine the subjects and functions which are to be assigned to Ministers appointed under paragraph (1) of this Article, and the Ministries, if any, which are to be in charge of, such Ministers.**

(V) **44(3) The Prime Minister may at any time change any assignment made under paragraph (2)**

(VI) **44(5) At the request of the Prime Minister, any Minister of the Cabinet of Ministers may by Notification published in the Gazette, delegate to any Minister who is not a member of the Cabinet of Ministers any power or duty pertaining to any subject or function assigned to such Cabinet Minister, or any power or duty conferred or imposed on him or her by any written law, and it shall be lawful for such other Minister to exercise and perform any power or duty delegated notwithstanding anything to the contrary in the written law by which that power or duty is conferred or imposed on such Minister of the Cabinet of Ministers.**

Clause 11 deals with "The Executive – The Cabinet of Ministers". In the absence of any delegated authority from the President, if the Prime Minister seeks to exercise the powers referred to in the aforesaid Clause, then the Prime Minister would be exercising such powers which are reposed by the People to be exercised by the Executive, namely, the President and not by the Prime Minister. In reality, the Executive power would be exercised by the Prime Minister from below and does not in fact constitute a power coming from the above, from the President. In the words of Wanasundera, J. as stated in Re the Thirteenth Amendment to the Constitution at page 359 *" if the Executive power of the People can be renounced in this manner, serious questions regarding the proper administration of the country could arise. At the bare minimum, legislation permitting such a renunciation must have the approval of the People at a Referendum."*

By virtue of the Executive power vested in the President, as guaranteed in Article 4(b) of the Constitution, certain rights flow to the citizens enabling them to enjoy those rights in its fullest measure, subject of course to permissible restrictions. The President cannot relinquish his Executive power and permit it to be exercised by another body or person without his express permission or delegated authority. As laid down by Sarath N. Silva, CJ. In *Patrick Lowe and Sons vs. Commercial Bank of Ceylon Ltd.* (2001) 1SLR 280, "*What is not permitted by the provisions of the enabling statute should be taken* as *forbidden and struck down by Court as being in excess of authority.*" (emphasis added). Thus, permitting the Prime Minister to exercise Executive power in relation to the six paragraphs referred to above had to be stuck down as being in excess of authority and violative of Article 3.

Clause 2

14A(1) – Every citizen shall have the right of access to any information held by:-

(a) The State, a Minister or any Government Department or any statutory body established or created by or under any law;

(b) Any Ministry of a Province or any Government Department or any statutory body established or created by a statute of the Provincial Council;

(c) Any local authority; and

(d) Any other person,

being information that is required for the exercise or protection of the citizens' rights.

(2) No restriction shall be placed on the right declared and recognised by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

The thrust of the submission of Mr. Gomin Dayasiri was that paragraph 14A(1) enables even foreigners to receive benefits as they become beneficiaries of the rights by virtue of the synthetic definition of a citizen given in the Bill as per the proposed paragraph 14A(3). It was also stressed on the fact that the proposed amendment enables a foreigner with the help of four other citizens of Sri Lanka living abroad or living in Sri Lanka to access this information via setting up a hoaxed unincorporated body, Further, it was the contention of

the Counsel that when a fundamental right of this nature is conferred it amounts to a right as provided for by law and therefore it amounts to granting of a right conferred by paragraph 14A (1) against an individual and secondly, the said paragraph 14A(1) becomes a source of law by which that 'right of access' is granted to the accessory. Counsel heavily laid stress on the following aspect also with regard to the proposed paragraph 14A(2), that is, the defenses under 14A(2) are restricted by the inclusion of the phrase "prescribed by law", as there are no specific laws which have been enacted in relation to the right of privacy of an individual or reputation of others which are vague principles for which no defenses would be available for a Court to consider. The Court notes that the definition given to a "citizen" is identical to the definition given in Article 121(1) of the Constitution.

Having considered the submissions of the Counsel the Hon. Attorney-General Informs Court that he wishes to bring in the following amendments at the Committee stage:

(a) To delete the words "held by" in above 14A (1) and following to be added thereof-

"Being information that is required for the exercise or protection of the citizens' rights held by any person of."

(b) In paragraph 14A(2) after the word privacy following words to be interpolated –

'Contempt of Court, Parliamentary privilege

(c) In paragraph 14A(2) to delete the words 'Information received' and to and t replace with 'information communicated.'

It was the submission of the Counsel that the sub-paragraph 14A (1) (d) violates the rights of the people. However, the Hon. Attorney General has agreed to delete the above 14A(1)(d), and to replace it with the following provision:

14A(1)(d) Any other person, being information that is required for the exercise or protection of the citizen's right of access to information in relation to a person or an institution referred to in sub paragraph (a), (b), or (c) of this paragraph.

We are of the view that, Clause 2 does not become inconsistent with any of the entrenched provisions of the Constitution.

Submission was made with regard to Clause 5 of the Bill which reads as follows:

Clause 5 33(1) The President shall be the symbol of National unity.

Mr Canishka Witharana brought to the notice of Court that the origin of our National Flag is based on a Report of the National Flag Committee. Counsel submitted that in 1979, a Cabinet Memorandum has been submitted by the Minister of State on the use of National Flag and was approved by the Cabinet of Ministers in 1981. The Code for the use of the National Flag prepared by the Cabinet Sub Committee provides that each of us have to think more deeply of the National Flag and when we see our National Flag automatically

our shoulders will strengthen; our hearts lift and our thoughts go out to our motherland. Thus, the message and the significance of the National Flag is stated as follows:-

> *"Respect the National Flag and it will inspire you. This is the basic message of the National Flag. It is a message which should reach every Sri Lankan because the National Flag is a symbol of our motherland, our independence and the unity of our People. It is a symbol of our hopes and aspirations in the Nation's future."*

Thus, it has been categorically stated that the National Flag is the symbol of the unity of our People. Considering the above, we are of the view that Paragraph 33 (1) in Clause 5 is incorrect and be deleted.

It was argued by the Counsel for the Petitioners that the establishment of the Constitutional Council and its composition will impinge on the sovereignty of the People, in as much as it will impose a fetter on the executive power of the people. It was contended that the Constitutional Council will not be a representative of the people. Clause 10 provides that the Constitutional Council shall consist of the Prime Minister, the Speaker, the Leader of the Opposition, one person appointed by the President, five persons appointed by the President on the nomination of both by the Prime Minister and the Leader of the Opposition and one person nominated by agreement of the majority of the Members of Parliament belonging to political parties other than to which the Prime Minister and the Leader of the Opposition belong.

All appointments of non ex-officio members of the Constitutional Council are made by the President, Sub paragraph (5) requires all non ex-officio members to be persons of eminence and integrity who have distinguished themselves in public or professional life and who are not members of any political party. Considering the composition of the Constitutional Council one could see that it would be a representative body, reflecting the views of the diverse groups in Parliament, and also be apolitical in so far as the non-ex-officio members are concerned. The establishment of the Constitutional Council was considered by this Court in *Re Seventeenth Amendment to the Constitution* (S.D. Determination 6/2001), which held that the establishment of the Constitutional Council would not impinge on Article 3 or 4 of the Constitution, even though the Court noted that there is a restriction in the exercise of the discretion hitherto vested in the President, the said restriction per se would not be an erosion of the Executive power by the President, so as to be inconsistent with Article 3 read with Article 4(b) of the Constitution.

The purpose and object of the Constitutional Council is to impose safeguards in respect of the exercising of the President's discretion, and to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions. It sets out a framework within which the President will exercise his duties pertaining to appointments. When Sub Clause 41B, is considered the President continues to be empowered to make the appointments of Chairman and members of the Independent Commissions. However, such appointments are to be made on a recommendation of the Constitutional Council on which a duty is cast to recommend fit and proper persons to such offices. Similarly in terms of Sub Clause 41C the President makes the appointments to key

offices including the Judges of Superior Courts. However, prior to the appointments his recommendations would have to be approved by the Constitutional Council.

Sub Clause 41C(4) of the Bill sets out that the Constitutional Council shall obtain the views of the Chief Justice, the Minister of Justice, the Hon. Attorney General and the President of the Bar Association of Sri Lanka, in the discharge of its functions relating to the appointment of Judges of the Supreme Court and the President and the Judges of the Court of Appeal. Seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointment. In fact a consultative process will only enhance the quality of the appointments concerned. In the *Silva v. Shirani Bandaranayake* (1997) 1SLR 93 Mark Fernando J observed that a practice had been developed where relevant stakeholders were consulted. At page 95, His Lordship quoted from an article written by the then President of the Court of Appeal which had stated as follows:- *"Under the Constitution, the President of the Republic has the sole prerogative to appoint Judges..... In practice Judges are selected through a process of nomination by the Chief Justice, the Attorney General and the Minister of Justice."* Therefore, we are of the opinion that Clause 10 and the provisions contained therein (Chapter VII A) do not violate any of the entrenched provisions of Article 83 of the Constitution.

Clause 26

104 B (5) (c) –

Where the Sri Lanka Broadcasting Corporation, the Sri Lanka Rupavahini Corporation or the Independent Television Network or any other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of every private broadcasting or telecasting operator, as the case may be, contravenes any guidelines issued 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, Rupavihini Corporation or Independent Television Network, or other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of such private broadcasting or telecasting operator, as the case may be, insofar as such management relates to 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, the Sri Lanka Rupavahini Corporation and the Independent Television Network or other broadcasting or telecasting enterprise owned or controlled by the State or the enterprise of such private broadcasting or telecasting operator, shall not, during such period, discharge any function connected with, or relating to, such management which is taken over by the Competent Authority.

While making submissions on the aforesaid provisions, Mr. Faiz Musthapa P.C. and Mr. Sanjeewa Jaywardene, P.C. submitted that as to what is a "political broadcast", or what is the factor which impinges on an election are not matters which should be left to the

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