

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCILIST REPUBLIC OF SRI LANKA**

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

S.C. (Special Determination)

No. 01/2010

Present : Dr. S.A. Bandaranayake - Judge of the Supreme Court
K. Sripavan - Judge of the Supreme Court
P.A. Ratnayake - Judge of the Supreme Court
S.I. Imam - Judge of the Supreme Court
R.K.S. Suresh Chandra - Judge of the Supreme Court

Counsel : Mohan Peiris, P.C., Attorney-General with Sanjay
Rajaratnam, D.S.G., A.H.M.D. Nawaz, D.S.G., and Nerin
Pulle, S.S.C., appears on notice.

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

J.C. Weliamuna with Maduranga Ratnayake, Pasindu Silva,
Pulasthi Hewamanna and Sanjeewa Ranaweera for Janatha
Vimukthi Peramuna.

Saliya Peiris with Asthika Devendra, Thanuka Nandasiri
for K.W. Janaranjana.

Viran Corea for the Centre for Policy Alternatives.

Chrishmal Warnasuriya with Revan Weerasinghe, Pulasthi
Hewamanna and Dulhantha Kularatne for Sunil
Hadunneththi and Vijitha Herath

Rohan Edrisinha appears in person.

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

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

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

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

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

- A. Clause 2 – Amendment to Article 31(2) and Article 31(3A) (a) (i) of the Constitution, which refers to the election and the term of office of the President of the Republic.
- B. Clause 3 – Amendment to Article 32(3) to make it a requirement for the President to be present in Parliament once in every three (3) months.
- C. Clauses 4 and 5 – Redefining the composition and functions of the Constitutional Council referred to in Chapter VII A of the Constitution which would be hereinafter known as the Parliamentary Council.
- D. Clause 6 – Amendment to Chapter IX of the Constitution with reference to the powers and functions of the Cabinet of Ministers and of the Public Service Commission.
- E. Clauses 7, 8, 9, 10, 11, 22 and 23 – Amendment to Chapters X and XVIII A of the Constitution to classify the Police officers including the Inspector General of Police within the ambit of Public Officers and to redefine the powers of the National Police Commission.
- F. Clauses 13 and 14 – Amendment to Chapter XIV A of the Constitution redefines the composition, powers and functions of the Election Commission.
- G. Transitional provisions which are necessary and consequential in view of the aforementioned amendments.

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

Clause 2

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

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

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

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

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

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

"by election, for a further term:-

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

Article 83 of the Constitution refers to the approval of certain Bills at a Referendum. This Article reads as follows:

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

- a. a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1,2,3,6,7,8,9,10 and 11 or of this Article; and
- b. a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of, paragraph (2) of Article 62 which would extend the term of office of the President, or the duration of Parliament, as the case may be, to over six years,

shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is

approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80".

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

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

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

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

The exercise of the sovereignty referred to in the said Article 3 is clearly stated in Article 4 of the Constitution. In the Supreme Court Determination on the 18th Amendment to the Constitution (SD No. 12/2002), this Court, referring to a series of previous Determinations (SD No. 5/80, 1/82, 2/83, 1/84 and 7/87) had stated that Article 3 is linked up with Article 4 of the Constitution and therefore these two Articles must be read together. Article 4 of the Constitution reads thus:

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

- a. the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;
- b. the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;
- c. the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;
- d. the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and

- e. the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors”.

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

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

Clause 3

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

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

"(3) The President shall by virtue of his office attend Parliament once in every three months. In the discharge of this function the President shall be entitled to all the privileges, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall not be liable for any breach of the privileges of Parliament or of its members; and

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

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

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

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

However in the present Bill the specific provisions that are being introduced under the amendment do not contravene any of the Articles dealing with the Parliament. In fact the provisions related to President being present in Parliament on a periodically stipulated basis read with Article 42 of the Constitution would clearly ensure that the President be answerable to People in a more meaningful manner which would enhance the provisions contemplated in Articles 3 and 4 of the Constitution.

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

Clauses 4 and 5

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

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

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

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Considering the Bill brought in for the establishment of the Constitutional Council under the 17th Amendment, this Court had noted that the establishment and functions of the Constitutional Council was the core of the 17th Amendment.

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

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

As stated earlier, the 17th Amendment was brought into effect only in 2001 and from 1978 up to the 17th Amendment came into effect, for a period of over 13 years, judges were appointed in terms of the provisions laid down under the 1978 Constitution. This position in fact was considered in **Silva v Bandaranayake** ([1997] 1 Sri L.R. 92), by a 7 judge Bench of this Court. In that matter consideration was given to the appointment of judges to the Supreme Court by HE the President of the Republic under Article 107 of the Constitution. At that time, as could be clearly seen, the 17th Amendment had not

come into effect and the Supreme Court had considered the matter under Article 107 of the 1978 Constitution. In that decision, the Supreme Court had clearly held thus:

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

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

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

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

It is therefore quite apparent that even prior to the introduction of the Constitutional Council in terms of the 17th Amendment to the Constitution, there were necessary safeguards which restricted the discretion of appointing authorities since no one possessed any unfettered discretion. The relevant provisions contained in the 1978 Constitution had not violated Article 3 and/or 4 of the Constitution and similarly the

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introduction of the Constitutional Council also had not violated any of the said provisions.

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

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

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

Clauses 6, 7, 8 and 9

Clauses 7, 8 and 9 of the Bill deal with the powers and functions of the Cabinet of Ministers and of the Public Service Commission. By these amendments, Article 55 of the Constitution is to be repealed in order to transfer the powers which were earlier vested with the Public Service Commission to the Cabinet of Ministers. Clause 6 clearly refers to the fact that the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers. Clauses 8 and 9 also refer to the authority

which was exercised by the Public Service Commission, being given to the Cabinet of Ministers.

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

Clauses 13 and 14

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

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

The said clause 14 is in the following term:

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

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

4(a) For the avoidance of doubt it is stated that any guideline issued by the Commission during the period commencing with the making of an Order for the holding of an election or the making of a

Proclamation requiring the conduct of a Referendum, as the case may be, shall—

- a) be limited to matters which are directly connected with the holding of the respective election or the conduct of a respective Referendum as the case may be; and
- b) not be connected directly with any matter relating to the public service or any matter within the ambit of administration of the Public Service Commission or the Judicial Service Commission as the case may be, appointed under the Constitution; and

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

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

As could be seen, the amendments are in addition to the present powers, functions and duties of the Election Commission. A careful perusal of the proposed amendments, indicate that they are for the purpose of ensuring that other organizations of the Government are not stifled in their functions during the pendency of Elections. It is to be borne in mind that Commissions such as the Public Service Commission and the Judicial Service Commission are also independent Commissions established under the

Constitution, whose functions should not be curtailed at any time. As stated by Mark Fernando, J., in **Karunathilake and Another v Dayananda Dissanayake, Commissioner of Elections and Others** ([1999] 1 Sri L.R. 157) in reference to Article 104 of the Constitution,

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

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

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

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

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

Mr. Saliya Peiris submitted that Clause 21 of the Bill has the effect of amending Chapter XVII A of the Constitution. Accordingly learned Counsel contended that it is necessary

to give effect to Article 154G(2) of the Constitution and therefore the Bill has to be first Gazetted and referred to the Provincial Councils. Accordingly at the conclusion of the submissions by all parties, we sought for a clarification on this point from the Hon. The Attorney-General who had appeared on notice.

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

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

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

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

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

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

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

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

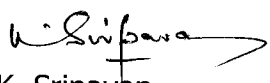
Accordingly this Court determines that the Bill entitled "the Eighteenth Amendment to the Constitution"

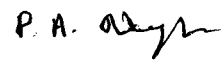
- 1) complies with the provisions of Article 82(1) of the Constitution;
- 2) requires to be passed by a special majority specified in Article 82(5) of the Constitution;
- 3) that there is no provision in the Bill which requires approval of the People at a Referendum in terms of the provision of Article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

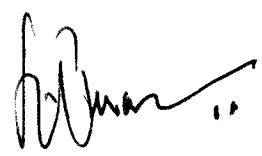
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We shall place on record our deep appreciation of the assistance given by Hon. The Attorney-General, learned Counsel who appeared for the petitioners and the petitioner who appeared in person and made submissions in this matter.


Dr. S.A. Bandaranayake,
Judge of the Supreme Court


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