

Eighteenth Amendment and the Empowering of the President in Sri Lanka

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ABSTRACT : The constitution of the Democratic Socialist Republic of Sri Lanka, which was introduced by the late former President J.R.Jeyawardena in 1978, which has been in existence henceforth, has been amended eighteen times. The rudimentary objective of the eighteenth amendment is to accord supreme power and authority on key posts to the president. This has made the president, an executive president with absolute power. The eighteenth amendment would bolster the ones, who wish to defeat democracy and dismantle good governance in order to create an authoritarian government. The present government believes that to liberate the country completely from civil war and to make good socio economic development during the post-war era, there is a desperate need for executive presidency, which is the only mean by which political stability and order can be achieved. The government also believes that the sovereignty of people would be enhanced, since the right to choose the president lies with the people, and allowing a person to hold the office any number of times can be considered as prime democracy. In actuality, the aforementioned arguments are valid only in societies with sound knowledge, ability to think laterally and traits of good governance. This article is written at a time when fear and questions are being raised regarding their influence on the political culture, democracy and good governance in Sri Lanka.

Key Words: the constitution of the democratic socialist republic of sri Lanka of 1978, executive president, eighteenth amendment

1. Introduction

The constitution of the Democratic Socialist Republic of Sri Lanka, which was introduced by the late former President in 1978, which has been in existence henceforth, has been amended eighteen times. The eighteenth amendment which was brought to effect with the two third majority in the parliament has abolished the restriction on the number of terms a president can hold while exterminating the constitutional assembly which has been replaced by a new council termed as a parliamentary assembly. There will no longer be a limit on the number of times an individual can be elected to the office of the President. The constitutional council will be replaced with a new *Parliamentary Council*. The President will seek the 'observations' of the Parliamentary council in making appointments to key government posts. However where the parliamentary council fails to communicate its observations to the President within the specified time, the President can proceed to make appointments solely at his

discretion. The Election Commission will no longer have the power to issue directions to prevent political parties from using state resources to advance their campaigns during elections. Further, the private media will be under a duty to comply with the the guidelines issued by the Election Commission. This article is written at a time while the will of the People must be given due consideration, the essential features of a democracy, such as the rule of law, accountability of the government and transparency must be preserved and promoted through any constitutional reform of Sri Lanka.

2. President

The Constitution of the Democratic Socialist Republic of Sri Lanka is hereby amended in Article 31 thereof, by the repeal of paragraph (2) of that Article, and in paragraph (3A) (a) (i) of that Article 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” (S.L.Constitution. Amend.XVIII,Art.2)

The constitution of the Democratic Socialist Republic of Sri Lanka says that anyone who has been elected as the President twice cannot be elected again thereafter (S.L Constitution, Art. 32, Sec. 2). The eighteenth amendment has abolished this article allowing one to become the president any number of times through universal franchise (S.L. Constitution. Amend. XVIII, Art.2). This new phenomenon of allowing one to hold the office any number of times has jeopardized good governance and democracy while paving the way for the possibility of a tyrannical rule.

Article 32 of the Constitution is hereby amended as by the repeal of section (3) of thereof, and the substitution there for 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” (S.L. Constitution. Amend.XVIII,Art.3). Article 32 (3) has been abolished with the eighteenth amendment and has been amended as follows. The president by virtue of his

office is liable to attend the Parliament once in every three months. During this, the president is entitled to all the privileges, immunities and powers of a Member of Parliament, excluding the right to vote. The president shall not be responsible for any infringement of the privileges of the parliament or its members. The article appended to the amended third paragraph says that, the President by virtue of his office has the right to address and send messages to the parliament (S.L. Constitution. Amend. XVIII, Art.3, Sec.2).

Periodical attendance of the President to the parliament could enhance the power of the president while providing opportunities to the powerful executive president to hinder the freedom of the representatives who have been elected by the people to represent themselves in the parliament. This has clearly abandoned the doctrine of the separation of power. The parliament might lose its sovereignty and autonomy due to the control that can be exercised on it by the executive powers of the president. This amendment might be questioned, since the parliament houses some finest intellects. On the other hand, the executive president has been vested with the legal recognition and opportunity to rein in the activities of the parliament in an astute manner. Speaking in Parliament during the debate on the eighteenth amendment, Tamil National Alliance Member of Parliament M.A. Sumanthiran described

It as a Bill that threatens to finally nail the coffin in which democracy of this country had been laid for some time now.... All progressive forces in this country are against the abolition of the term limit of the President. In all civilized jurisdictions that have Executive Presidency have a two-term limit. They are all not less intelligent than us. It is a universal principle that "Power corrupts, and absolute power corrupts absolutely". Leading academics and jurists have all opined that concentration of power in one individual for too long is detrimental to democracy(Parliament Speech on Sep.8th2010).

Removal of the two term limit violates the mandate of President Rajapaksa. The proposal to remove the two term limit violates the mandate given by the people at two successive presidential elections. In 2005, *Mahinda Chinthanaya* promised to abolish the Executive Presidency before the end of the first presidential term. *Mahinda Chinthanaya* promised to reduce the powers of the executive presidency, and make it more accountable to Parliament. The proposed changes are totally contrary to these promises contained in the *Mahinda Chinthanaya*.

3. The Parliamentary Council

According to the seventeenth amendment to the constitution, a constitutional council can consist of the following members (S.L. Constitution. Amend. XVII, Art.41A.Sec.1).

1. The Prime Minister
2. The Speaker
3. The leader of the opposition in the parliament
4. One person appointed by the president
5. Five persons appointed by the president, on the nominations of both the prime minister and the leader of the opposition
6. One person nominated upon agreement by the majority of the members of the parliament belonging to political parties or independent groups other than respective political parties or independent groups to which the prime minister and the leader of the opposition belongs and appointed by the president, which adds up to ten members in total.

The eighteenth amendment has completely eradicated the articles from 41 A to 41 H. In place of these articles, chapter VII A has been amended as Parliamentary Council, so has been article 41 A (S.L. Constitution. Amend.XVIII, Art.4A.Sec.1). This council consists of

- a. The Prime Minister
- b. The Speaker
- c. The leader of the opposition in parliament
- d. a nominee of the Prime Minister, who shall be a Member of Parliament; and
- e. a nominee of the Leader of the Opposition, who shall be a Member of Parliament:

According to the eighteenth amendment, persons mentioned in paragraph (d) and (e) would be appointed by the President. Persons appointed accordingly, should be from a community that is different from that of the nominees appointed according to paragraphs (a), (b), (c).

In pursuant to the seventeenth amendment, the Prime Minister and the Leader of the opposition in parliament may hold discussions with the leaders of the political parties and independent groups in parliament, to nominate the person mentioned in paragraph (e). Three out of them may be selected from the minorities on the advice of the Members of Parliament.

But the eighteenth amendment says that, all members of the Parliamentary Council should be Members of Parliament. This has attenuated the statement that says, the persons mentioned in paragraphs (d), (e) and (f) of the seventeenth amendment, may be nominated and appointed by the President, from those who have procured social esteem and higher status in the society due to their nobility, and they do not necessarily need to be a member of a political party. Hence, the Parliamentary council created by the eighteenth amendment has annihilated the flexibility and transparency of being able to induct nobles who are non-members of the parliament, created by the seventeenth amendment.

In instances where the President belongs to the party that has the majority of the seats in Parliament, the president will be able to exercise control and influence over three of the five members (Prime Minister, the Speaker, a member of Parliament belonging to the party of the prime Minister) appointed to the council by himself. Therefore, Parliamentary council lacks a diversity of opinions. The proposed alternative to the Constitutional Council would result in the politicization of key government posts. The proposed alternatives would curtail the freedom of thought and conscience of key public officers and Commissions. The power to appoint persons to key public offices has been absolutely vested in the President and the Parliamentary Council has been relegated to a mere spectator who can comment only if the President seeks such observation (Transparency international Sri Lanka)

4. Recommended Appointments

According to the seventeenth amendment of the constitution no person shall be appointed by the president as the chairman or a member of any of the commissions, specified in the schedule to this article, except on recommendation of the council (S.L. Constitution. Amend. XVII, Art.41 B Sec.1). The commissions are,

- a. The election commission
- b. The public service commission
- c. The national police commission
- d. The human rights commission of Sri Lanka
- e. The permanent commission to investigate allegations of bribery or corruption.
- f. The finance commission
- g. The delimitation commission

According to the seventeenth amendments no person shall be appointed by the president to any of the office specified in the schedule to this article, unless such appointment has been approved by the council upon recommendation made to the council by the president (S.L. Constitution. Amend. XVII, Art.41 C. Sec.1). They are,

Schedule

Part I

- a. The Chief justice and the judges of the Supreme Court
- b. The President and the judges of the court of appeal
- c. The members of the judicial service commission other than the chairman

Part II

- a. The attorney-General
- b. The Auditor-General
- c. The Inspector-General of Police
- d. The Parliamentary commissioner for administration (ombudsman)
- e. The Secretary General of Parliament

According to the eighteenth amendment, the Chairman of the Parliamentary council and its members must be appointed by the president (S.L. Constitution. Amend. XVIII, Art.4A.Sec.1). These appointments made by the president require the observation of the parliamentary council. When the president calls for the observation of the parliamentary council as per article 41 A (1), article 41 A (8) says that these observations need to reach the President through the Speaker within a week. Should the parliamentary council fail to convey its observations, the President should come forward to make the aforementioned appointments.

The Constitutional Council had the power to make recommendations. But now, the Parliamentary Council has the power only to make observations. According to the seventeenth amendment, the President made appointments on the recommendation of the constitutional council, whereas, now the parliamentary council has become mere observers of the appointments being made by the President. This has exposed the strong disparity between the constitutional and parliamentary councils. This has made the parliamentary council weaker than the constitutional council, while paving the way for parliamentary council to be toothless in its activities. This article describes the President's supreme power to appoint prime government appointments. The

eighteenth amendment doesn't make the president legally obliged to listen to the observations of the Parliamentary Council.

5. Public Service Commission

According to the seventeenth amendment, on the recommendation of the constitutional council, the president shall appoint a public service commission. Moreover, a member of this commission shall be appointed as the chairman of this commission by the President (S.L Constitution. Amend. XVII, Art.54.Sec.1). According to the eighteenth amendment article 54 (1) has been abolished and has been amended as follows. The public service commission shall be appointed by the President. One of its members shall be appointed as the chairman by the President (S.L Constitution. Amend. XVIII, Art.7.Sec.1).

According to the seventeenth amendment, the public service commission was appointed on by the President on the recommendation of the constitutional council. But as per the eighteenth amendment, the president has been permitted to appoint a public service commission at his discretion. With the eighteenth amendment, the parliamentary council has no power to make observations on the appointment of public service commission, which has negated the barricade, the president had hither to, on appointing the public service commission. This has repealed the free and independent function of the public service commission.

According to the seventeenth amendment, the public service commission was entrusted with the appointment, promotion, transfers, disciplinary control and dismissal of public officers. Irrespective of the provisions of the Article 55 section (1), the appointment, promotion, disciplinary control, dismissal of all Heads of the Department shall vest in the Cabinet Ministers who shall exercise powers after considering the views of the commission (S.L. Constitution. Amend. XVII, Art.55).

The eighteenth amendment has revoked article 55 of seventeenth amendment and has amended it as follows. The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal. The appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Department shall, vest in the Cabinet of Ministers. Subject to the provisions of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be

vested in the Public Service Commission (S.L. Constitution. Amend. XVIII, Art.8).

The policies regarding Public service officers are vested in the Cabinet of Ministers. To handle matters pertaining to the Heads of the Departments, the cabinet of ministers does not need the views of the Public Service Commission. This has disabled the free and transparent functions of the Public Service Commission. The eighteenth amendment to Sri Lanka Constitution weakens checks and balances and undermines the principles of constitutional democracy. Philip J. Crowley, the U.S. State Department Assistant Secretary for Bureau of Public Affairs said

The U.S. has closely followed the progress and the passage of the 18th Amendment in Sri Lanka. The amendment eliminates term limits for the president and expands the power of the president over independent institutions, including the elections, police, and human rights commissions, as well as the judiciary. The Government of Sri Lanka to promote the principles of good governance, democracy, and independent State institutions (Colombopage, Sep, 11th2010).

6. Possible Effects During Elections

The seventeenth amendment made to the constitution of Sri Lanka discusses the powers of the election commission or the commissioner of election. The seventeenth amendment has vested the power to prohibit the use of movable or immovable properties belonging to the state or any other public corporation, in promoting, electing or impeding a political party or independent groups, in the election commission or the commissioner of election. Officers in charge of the properties belonging to the government are entrusted with the responsibility of implementing the rules and regulations appraised by the Election commission (S.L. Constitution. Amend. XVII, Art.104B, Sec.4A&B)

As per the powers vested with him by article 104, the Commissioner of Election issued guidelines/directions/notices in 2009 and 2010 with the objective of ensuring a free and fair Presidential election and General elections. Directions were issued on 08.12.2009 to all Secretaries of the Ministries, State Departments, Corporations and Statutory Bodies to prevent the abuse of public resources during election time. Among others these directions include nullification prohibition of any appointments, transfers and promotions of employees done or intended to be done on or after the 23.11.2009. These directions were publicly

announced by publishing in national newspapers on 14.12.2009. A set of guidelines was issued by the Commissioner on 17.12.2009 to the electronic and print media to be observed in broadcasting, telecasting and publishing of matters relating to the Presidential Election. A guideline dated 07.12.2009 was issued to the Police Department regarding their duties in relation to the election. Although the objectives of these guidelines/directions/notices aimed at a free and fair election it is unfortunate to note these were observed in breach than conformity. The specific abuses highlighted in this report identify such non-conformities. This circular had identified all vehicles belonging to the government including helicopters, circuit bungalows belonging to the government, holiday inns, rest houses, government maintained buildings, buildings belonging to the government, facilities provided to ministers and government institutions, public fund which has been reserved for the needs of the public, public institutions, corporations, staffs who work in institutions funded by the government, military forces, police officers, government media, and other public properties as public properties (Lionel Bopage, 2009). Moreover the commissioner of election had regulated the government requesting them not to perform government appointments, promotions, transfers during the time of elections.

The paragraph that supersedes the seventeenth amendment of the constitution article 104 (B) (4) (A) has been amended by introducing the following: For the avoidance of doubt it is stated that any guideline issued by the Commission during the period commencing on the date of the making of an order for the holding of an election or the date of the making of a Proclamation requiring the conduct of the Referendum, as the case may be, shall

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

The seventeenth amendment had vested in election commission the power to forbid the abuse of state property by government officials and political parties. But article 104 (B) (4) (A) of the eighteenth amendment has shrunk the boundaries of the powers of the election commission, thereby making it a powerless commission.

Especially, the power of the election commission to proscribe the use of state properties in election propagandas by the ruling party has been curtailed. In other words, the ruling political party has only been barred from the use of movable or immovable state properties that lie within the boundaries of an electorate concerned, which would mean that the ruling party is free to use the movable and immovable properties of the state that belong to a different electoral region which is outside the concern of the particular election. The power of the commissioner of election to rein in the activities of the government that are not directly related to the election has been truncated. The authority of the commissioner of election to regulate the public services and police has been abolished. This has eradicated the constitutional limits that were placed on the government regarding public services during elections. This has opened the way for the government to misuse state properties and to make prejudiced appointments, promotions and transfers during the times of elections.

Sub paragraphs (B) (C) (D) of the fifth paragraph of article 104 (B) of the seventeenth amendment discusses the guidelines on the media by the commissioner of election. But the eighteenth amendment has deleted the sub paragraphs (B) (C) (D) of the fifth paragraph of article 104 (B), and in place of them has added the following new 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).

In the past, the state media abided by the rules and regulations of the commissioner of election. The commissioner of election had the power to appoint a competent authority, in place of the existent authority, should the state media act impartially with regard to the elections. But these powers and authorities of the commissioner of election have been abolished, which means that the election commission cannot take actions against the state media during the times of election, even if they fail to publish or broadcast the message sent in by the commissioner of election. This severely hinders the reception of valuable information from the commissioner of election before and after elections, while exterminating good governance.

7. The way forward

Many intellectuals and critics have expressed their fear over the prospective inability to conduct free and fair elections in the future, citing the limitation of powers of the election commission and commissioner of election, with the

eighteenth amendment brought to the constitution of the Democratic Socialist Republic of Sri Lanka. It will be very difficult to impede appointments, promotions and transfers that are not directly related to a particular election under the eighteenth amendment. In the same way the ability to control the use of movable and immovable state properties that are not directly related to the election concerned, has been rendered difficult. There is a slim chance for a free and fair election in the island with the curtailment of the authority of the election commission by the eighteenth amendment, which was in existence under the seventeenth amendment. The rudimentary objective of the eighteenth amendment is to accord supreme power and authority on key posts to the president. This has made the president, an executive president with dominant power. The eighteenth amendment would bolster the ones, who wish to defeat democracy and dismantle good governance in order to create a totalitarian government.

The eighteenth amendments of constitution of Democratic Socialist Republic are sought to be made to violate the prime principles of constitutionalism. These changes are sought to be made to demonstrate a shocking disregard for basic internationally accepted norms of constitution making. These changes affect the independence and integrity of democratic institutions of this country. Yet these proposed changes were hatched in secrecy with no public consultation. The constitution is meant to protect and empower the people from those who wield political power. If the constitution can be changed by the wielders of power without participation of those whom a constitution is designed to protect the basic rationale for having a constitution is undermined.

The previous government believed that to liberate the country completely from civil war and to make good socio economic development during the post-war era, there is a desperate need for executive governance, which is the only mean by which political stability and strength can be achieved. The previous government also believed that the sovereignty of people would be enhanced, since the right to choose the president lies with the people, and allowing a person to hold the office any number of times can be considered as prime democracy. In actuality, the aforementioned arguments are valid only in societies with sound knowledge, ability to think laterally and traits of good governance. On the other hand, one cannot disregard the argument that, this may pave the way for the demise of democracy and good governance in Sri Lanka, leading to a totalitarian government in Sri Lanka.

But the beginning of a new political culture in the political history of Sri Lanka, the parliament adopted the nineteenth constitutional amendment on 28th April 2015 with an overwhelming majority. The Presidential elections on January 8th 2015 provided President Maithripala Sirisena a clear mandate to introduce constitutional reforms that would dismantle or, at a minimum, dilute the powers of the executive Presidency created by the current constitution. The dismantling of the executive Presidency had become an unfulfilled promise to the people given from 1994 by successive Presidents. The nineteenth amendment is a crucial step towards a system of governance that is democratic and respects the rights of the people. It has incorporated key provisions that have eliminated the worst aspects of the eighteenth amendment. The nineteenth amendment has set limitations on the Presidential term of office, reintroduced the concept of independent commissions such as the Human Rights, Public Service, Police and Elections Commissions and seeks to eliminate provisions that encourage the erosion of democracy and the rights of the people.

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