

## IN RE THE EIGHTEENTH AMENDMENT TO THE CONSTITUTION

SUPREME COURT

S. N. SILVA, C.J.,

WADUGODAPITIYA, J.,

BANDARANAYAKE, J.,

ISMAIL, J.,

EDUSSURIYA, J.,

YAPA, J. AND

J. A. N. DE SILVA, J.

SD NOS. 12, 14, 22-24, 29 AND 36 OF 2002

OCTOBER 03, 2002.

*Constitution – 18th Amendment to the Constitution – Amendments to Articles relating to the Constitutional Council – Inconsistency with Article 3 read with Article 4 of the Constitution – Alienation of legislative and judicial power of the People – Infringement of fundamental rights – Article 12 (1) – Articles 84 (2) and 83 (a) of the Constitution – Special majority and approval of the People at a Referendum.*

A Bill titled the "Eighteenth Amendment to the Constitution" was placed on the Order Paper of Parliament for 18th September, 2002. Seven petitions were presented invoking the jurisdiction of the Supreme Court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution, in respect of the Bill.

The Bill provides, *inter alia*, for the following :

- (1) A provision conferring power on the Council to make rules – Clause 2.
- (2) A provision enabling the payment of emoluments to the members of the Council – Clause 3.
- (3) A provision conferring total immunity from judicial review of the decisions of the Council – Clause 4.

- (4) A provision providing immunity from suit against the Council, its members and officers – Clause 5.
- (5) A provision for punishment for interference with the Council – Clause 5.

**Held :**

- (1) Article 3 of the Constitution mandates that in Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes powers of government, fundamental rights and franchise.
- (2) The manner in which the sovereignty of the People is exercised is set out in Article 4. The legislative power of the People is exercised by Parliament (Article 4 (a)), Articles 4 (d) and (e) refer to fundamental rights and franchise which are also components of sovereignty).
- (3) Articles 3 and 4 must be read together and hence no organ of government shall alienate the sovereignty of the People in the exercise of its power entrusted to it. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. That would be inconsistent with the Rule of Law.
- (4) Under Clause 2 (proposed Article 41 FF) of the Bill which empowers the Council to make rules of procedure and guidelines to be followed by it, the Council is required before gazetting the rules (whereupon they would come into effect) to communicate such rules to Parliament. No approval of Parliament is required as in the case of rules made by the Supreme Court under Article 136 of the Constitution. Hence, Clause 2 alienates the legislative power of the People in violation of Article 4 (a); in the circumstances Clause 2 requires to be passed by the special majority and approved by the People at a Referendum in terms of Article 84 (2) by virtue of Article 83. The above inconsistency with the Constitution will cease if Clause 2 is amended requiring the rules to be placed before Parliament for approval or the power of the Council is restricted to the formulation of guidelines only.
- (5) By Clause 4 it is sought to amend Article 41 H of the Constitution removing the only form of judicial control which that Article reserved against decisions of the Council namely, fundamental rights jurisdiction under Article 126.

This is an alienation of judicial power of the People in respect of an executive body such as the Constitutional Council. Such provision is violative of Article 3. It is also violative of Article 3 in that the creating of a different class of persons who are immuned from judicial review is violative of Article 12 (1). Consequently, it is an alienation of the sovereignty of the People. Therefore, Clause 4 requires to be passed by the special majority under Article 84 (2) and approved by the People at a Referendum by virtue of Article 83 of the Constitution.

- (6) Clause 5 provides for two new Article namely, 41j and 41k. The immunity from suit sought to be conferred by the proposed Article 41j on the Council, its members and officers is an alienation of the judicial power of the People. It also constitutes such alienation as it violates Article 12 (1) which guarantees a fundamental right which is a component of sovereignty.
- (7) The provisions of the proposed Article 41k for penalizing interference with the Council will preclude any representations being made by the majority community for whom there is no special representation in the Council such as is available to the minority communities. Hence, it is violative of Article 12 (1) which guarantees a fundamental right which is a component of sovereignty of the People. In the circumstances, the proposed Article 41 k requires to be passed by the special majority under Article 84 (2) and approved by the People at a Referendum by virtue of Article 83 of the Constitution.

**PETITIONS** challenging the "Eighteenth Amendment to the Constitution" in terms of Article 121 (1) for a determination under Article 123 of the Constitution.

Counsel for petitioners :

SD 12/2000 – *Dr. Jayampathy Wickramaratne, PC with Gaston Jayakody.*

SD 14/2000 – *Manohara de Silva.*

SD 22/2000 – *J. C. Weliamuna with Lianthi de Silva, Chrismal Warnasooriya and Sanath Jayawardane.*

SD 23/2000 – *M. A. Sumanthiran with Viran Corea and Renuka Senanayake.*

SD 24/2000 – *Manohara de Silva* with *W. D. Weeraratne*.

SD 29/2000 – *Wijayadasa Rajapakse, PC* with *Kapila Liyanagamage* and *Ranjith Meegaswatte*.

SD 36/2000 – *Dr. Jayampathy Wickramaratne, PC* with *Gaston Jayakody* and *Pubudini Wickramaratne*.

Counsel for the State :

*K. C. Kamalabayson, PC*, Attorney-General with *S. Marsoof, PC*, Additional Solicitor-General, *Uditha Egalahewa*, State Counsel and *Harsha Fernando*, State Counsel.

*Cur. adv. vult.*

October 03, 2002

A Bill bearing the title “18th Amendment to the Constitution” was placed <sup>01</sup> on the Order Paper of Parliament for 18th September, 2002. Seven petitions, numbered as above have been presented invoking the jurisdiction of this Court in terms of Article 121 (1) for a determination in terms of Article 123 of the Constitution 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 Counsel representing the petitioners and the Attorney-General were heard before this Bench at the sittings held on 03. 10. 2002.

The petitioners contended that Clauses 2, 4 and 5 of the Bill are <sup>10</sup> inconsistent with Article 3 read with Article 4 of the Constitution and that if they require to become law, they must be passed by a

two-thirds (2/3) majority in Parliament and thereafter be approved by the People at a Referendum, in terms of Article 83 of the Constitution.

Since extensive references were made to Clause 4 of the Bill, we would consider this first.

#### CLAUSE 4

Clause 4 of the Bill seeks to amend Article 41 (H) of the Constitution and is in the following terms :

Article 41 (H) of the Constitution is hereby amended by the substitution for the words and figures "subject to the provisions of paragraphs (1), (2), (4) and (5) of Article 126, no Court shall" of the words "No Court, including the Supreme Court acting under Article 136 shall".<sup>20</sup>

Counsel for the petitioners argued that by the amendment of Article 41 (H) of the Constitution, the power of the Supreme Court to exercise its jurisdiction over any "decision, recommendation and approval of the Constitutional Council", set up by Article 41 (A) of the Constitution, is taken away.

The Constitution, *inter alia*, provides for the amendment or repeal<sup>30</sup> of the provisions of the Constitution. Provision is made in regard to such amendments or repeals in Articles 82 and 83 of the Constitution.

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

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(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 6 years,

shall become law if the number of votes cast in favour thereof amount 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.”

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It is not disputed that Article 83 makes no reference to proposed Articles 41 (F), 41 (H), 41 (J) and 41 (K), which respectively are mentioned in Clauses 2, 4 and 5 of the Bill. However, the arguments put forward by the petitioners were to the effect that although the aforementioned Articles are not referred to in Article 83, the provisions in the proposed Articles are inconsistent with Article 3 read with Article 4, which is specifically mentioned in Article 83 of the Constitution.

Article 3 of the Constitution, which is an entrenched provision, 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.”

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It was the unanimous contention of all the petitioners that Article 4 is complementary to Article 3 of the Constitution. In fact, this Court has ruled in a series of cases that Article 3 is linked up with Article

4 and that these two Articles must be read together (*vide* SD 5/80, 1/82, 2/83, 1/84 and 7/87).

Article 4 of the Constitution deals with the exercise of sovereignty and provides that –

“The Sovereignty of the People shall be exercised and enjoyed  
in the following manner : 70

- (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; 80
- (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 90

an elector as hereinafter provided, has his name entered in the register of electors.”.

Thus, in terms of Articles 3 and 4 of the Constitution, fundamental rights and franchise constitute the sovereignty of the People, and is inalienable. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35 (3).<sup>100</sup> Moreover, the Supreme Court has entertained and decided the questions in relation to Emergency Regulations made by the President [*Joseph Perera v. Attorney-General* – (1992 – 1 Sri L.R. pg 199)] and Presidential Appointments (*Silva v. Bandaranayake* – (1997)1 Sri L.R. pg 92).

By the envisaged 18th amendment, the Constitutional Council is clothed with unlimited and unfettered immunity on their decisions, recommendations and approvals. If such immunity is given to the Constitutional Council, it would in effect be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law.<sup>110</sup> The Rule of Law, means briefly the exclusion of the existence of arbitrariness and maintaining equality before the Law (A. V. Dicey – *Law of the Constitution*, pg. 120).

Hitherto, without exception, executive and administrative action have been subjected to the jurisdiction enshrined in Article 126 of the Constitution. The total immunity expected in terms of the proposed amendment to the Constitution would effectively shut out the justiciability of actions of the Constitutional Council in the exercise of the fundamental rights jurisdiction by the Supreme Court.<sup>120</sup>

The Constitutional Council established under the 17th Amendment, is part of the Executive and is attributed executive power. Thus, the Council would come within the executive organ of Government in regard to Article 4 (d) of the Constitution, referred to above. It is,



therefore, the duty of the Constitutional Council to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution. The functions of the Constitutional Council would come within the framework of executive action as provided for in terms of Article 17 of the Constitution. Article 17 enables every person to apply to the Supreme Court in respect of the infringement or imminent infringement of a fundamental right. 130

The effect of the amendment in Clause 4 is to introduce a different class of people whose actions are not subject to judicial review. There is no justification for such immunity to be granted, which is contrary to Article 12 (1) of the Constitution and the basic principles of Rule of Law.

The concept of judicial review of administrative action, being a predominant feature of Constitutional jurisprudence, prevents total immunity being given to anybody, created under the Constitution as such restriction of judicial scrutiny, would impair the very foundation of the Constitution and the Rule of Law. The total immunity contemplated by the amendment, taking away the judicial review of the actions of the Constitutional Council out of the fundamental rights jurisdiction, in effect would alienate the judicial power from the people in contravention of Articles 3 and 4 of the Constitution. It is to be noted that Article 3 of the Constitution specifically refers to the following : 140

- (A) the sovereignty is in the people and that it is inalienable, and
- (B) the sovereignty includes the powers of Government, fundamental rights and the franchise. 150

For the aforementioned reasons we determine that Clause 4 of the Bill is inconsistent with Articles 3 and 4 of the Constitution. We also state that the Bill in its present form is therefore required to be passed by the special majority in terms of the provision of paragraph (2) of Article 84 and approved by the people at a Referendum by virtue of the provisions of Article 83.

## CLAUSE 2

Clause 2 of the Bill is to amend Article 41 (F) of the Constitution and to insert a new Article, namely, Article 41 (FF) which would deal with the rule making powers of the Constitutional Council. This new Article is in the following terms :

- (1) The Council may, from time to time, make rules setting out the procedure and guidelines to be followed by it, in the performance and discharge of the duties and functions assigned to it under the Constitution, or by any other Law.
- (2) Every rule made under paragraph (1) of this Article, shall be published in the *Gazette* and shall come into operation on the date of such publication.
- (3) The Council shall, before the publication of any rule formulated in terms of this Article in the *Gazette*, communicate such rule to Parliament.”

The petitioners submitted that that these Rules would be for the purpose of setting out the procedure and guidelines to be followed by the Constitutional Council itself. It was also pointed out that no provision has been made in the amendment that these Rules must be approved by Parliament. The amendment merely requires the Constitutional Council to communicate such Rules to Parliament.

The Constitutional Council, as pointed out earlier is established by the 17th amendment. The proposed amendment enables the Council to exercise legislative power which according to Article 4 (a) of the Constitution, is reposed in the People and is exercised by Parliament. In terms of Article 76 (1) of the Constitution, Parliament cannot abdicate or alienate its legislative power.

The Rule making power of the Constitutional Council is derived from the Constitution. The amendment shows that this power is not subjected to any kind of control. However, the other organs, which

are created by the Constitution, and thus have the power to make Rules, are quite correctly subjected to the accepted norms of Parliamentary control. For instance, the Rules of the Supreme Court made under Article 136 of the Constitution, should as soon as convenient after their publication in the *Gazette*, be brought before Parliament for approval. The proposed amendment thus undermines the Parliamentary control over the Rule making powers of an institution established by the Constitution, which in turn is an abdication as well as an alienation that affects the sovereignty of the People, which is inconsistent with Articles 3 and 4 of the Constitution. Hence, this Clause requires approval by the People at a Referendum in addition to a two-thirds majority votes (including those not present) in terms of Article 83 of the Constitution. <sup>190</sup>

We are of the opinion that if Clause 2 is amended by incorporating the requirement for the Rules prepared by Constitutional Council to be placed before the Parliament in order to obtain approval or the power of the Council is restricted to the formulation of guidelines only, the inconsistency with Articles 3 and 4 of the Constitution would cease and the approval by the People at a Referendum in terms of Article 83 of the Constitution would not be necessary. <sup>200</sup>

## CLAUSE 5

Clause 5 of the Bill consists of 2 Articles, namely 41 J and 41 K (1) and (2), which are proposed to be inserted immediately after Article 41 H of the Constitution. While 41 J refers to immunity from suit, 41 K (1) and (2) deal with the interference with the Council. These two Articles are in the following terms : <sup>210</sup>

"41 J No suit or proceeding shall lie against the Council, the Chairman, a Member, the Secretary or an officer of the Council in respect of anything done or omitted to be done by the Council, the Chairman, a Member, the Secretary or any officer of the Council in the performance or discharge of any duty or function conferred or assigned in terms of the Constitution or by any other Law.

41 (K)(1) Every person who, otherwise than in the course of such persons lawful duty, directly or indirectly by himself or by or with any other person, in any manner whatsoever <sup>220</sup>

influences or attempts to influence or interferes with any decision or recommendation of the Council, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand rupees or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

- (2) A High Court established under Article 154 P of the Constitution shall have jurisdiction to hear and determine any matter referred to in paragraph (1).”<sup>230</sup>

Learned counsel in petitions No. 14/2002 and 24/2002 contended that the proposed Article 41 (K) (1) would have implications, violative of Article 12 (1) of the Constitution. His submission was that Article 41 (3) of the Constitution provides for the mandatory appointment of 3 persons from the minority communities to represent their interest, whereas the majority community as such is not represented in the Constitutional Council to safeguard their interest. Accordingly, any representation made in respect of the majority community, would entail the consequences of prosecution. Whilst the minority communities<sup>240</sup> could communicate with their representatives in the Constitutional Council, the majority community would be denied such opportunity in the absence of any specific representation, which in turn would be violative of Article 12 (1).

Article 3, referred to above, specifically mentions that sovereignty includes fundamental rights and which is “in the people and is inalienable”. Article 4 (d) which refers to the exercise of sovereignty specifies that the fundamental rights which are declared and recognized by the Constitution must be “respected, secured and advanced” by all the organs of the Government. This Article further contemplates<sup>250</sup> that the fundamental rights cannot be abridged, restricted or denied.

In such circumstances the proposed Article 41 (K) is inconsistent with Article 3 read with Article 4 of the Constitution.

The Attorney-General conceded that there is much merit in these submissions and suggested in his submissions tendered after the hearing was concluded, the following to be considered :

- (a) an appropriate definition to be included in the proposed Article to exclude any representation that may be made to the Council by any person or,

*in the alternative :*

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- (b) The words "otherwise than in the course of such person's lawful duties directly or indirectly by himself or by or with any other persons in any manner whatsoever influence or attempt to influence or" be deleted from the proposed Article to ensure protection to persons making representation to the Council.

Since the suggestions were not made at the time of the hearing of these applications, which would have given an opportunity for the petitioners also to consider the views expressed by the Attorney-General, it would not be possible for this Court to consider them.

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We, therefore, determine that the proposed Article 41 (K) is inconsistent with Articles 3 and 4 of the Constitution. The proposed Article therefore is required to be passed by the special majority in terms of paragraph 2 of Article 84 and approved by the people at a Referendum by virtue of the provisions of Article 83.

The proposed Article 41J referred to above, which grants an immunity to the Constitutional Council, the Chairman, a Member, the Secretary or an officer, from judicial proceedings in respect of anything done or omitted to be done, attracts both objections dealt with, in the preceding paragraphs of this determination. They are :

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- (1) that it would alienate the judicial power from the people;
- (2) that it creates a special class of people in violation of Article 12 (1) of the Constitution, who would not be subjected to judicial review.

For the reasons stated above we determine that there is merit on both grounds of objections and the proposed Article 41J is therefore inconsistent with Article 3 read with Article 4 of the Constitution.

For the reasons stated above, the Bill, in its present form, requires approval by People at a Referendum in addition to a two-thirds majority vote (including those not present) in terms of Article 83 of the Constitution.

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We shall place on record our deep appreciation of the assistance given by the Attorney-General and all the other learned Counsel who made submissions in this matter.

**SARATH N. SILVA, CJ.**

**S. W. B. WADUGODAPITIYA, J.**

**DR. SHIRANI A. BANDARANAYAKE, J.**

**A. ISMAIL, J.**

**P. EDUSSURIYA, J.**

**H. S. YAPA, J.**

**J. A. N. DE SILVA, J.**

*Clauses 2, 4 and 5 of the Eighteenth Amendment to the Constitution unconstitutional and require to be passed by the special majority and approved by the People at a Referendum – subject to the suggestion of Court in respect of Clause 2.*