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Overview

The last three amendments to the Second Republican Constitution of Sri Lanka all concerned the restriction or expansion of presidential power. More specifically, they concerned reforms to the power of the executive president to make appointments to several high public offices and independent commissions. The Seventeenth and Nineteenth Amendments were relatively progressive in that they established a Constitutional Council (CC), which was expected to de-politicise the process of making appointments, and thereby improve the legitimacy and independence of high offices and independent commissions. The Eighteenth Amendment, which was applicable for a short time, had replaced the CC with a Parliamentary Council which had no teeth, no independence, nor expert representation. This amendment weakened the rule of law while it was in force in a drastic way.

This chapter examines these amendments with a view to understanding their impact on governance. At least two assertions are relevant here. Firstly, that the independence of public institutions in Sri Lanka has been eroded due to excessive politicisation and patronage politics. Secondly, that in order to preserve a constitutional democracy, in certain instances, processes and institutions must be separated out of the representative democratic process. These arguments are employed to justify the call to ‘depoliticise’ governance. However, I argue in this chapter that while constitutional reform can, in the short term, address mal-governance and ensure good governance, the sustainability of such reform requires interventions that address the root causes of mal-governance. Reform that address ‘de-politicisation’ is a skin-deep solution to a more fundamental

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*I am grateful to Ms Azra Jiffry, undergraduate of the Faculty of Law, University of Colombo, for her research assistance.

1 This chapter will consider three constitutional amendments and two proposed constitutional amendments. The enacted constitutional amendments are: the Seventeenth Amendment (2001), the Eighteenth Amendment (2010), and the Nineteenth Amendment (2015). The proposed amendments, which were never enacted, are the Eighteenth Amendment Bill of 2002 and the Nineteenth Amendment Bill of 2002. These constitutional amendment bills will be distinguished by indicating the year in which they were proposed.
problem in Sri Lankan society. The more deep-seated problems that plague representative democracy requires further critical inquiry which will hopefully lead to the development of more targeted solutions for such problems.

The first section in this chapter considers politicisation and political patronage as they affect public institutions in Sri Lanka and the arguments for their ‘de-politicisation.’ The second section reviews the political context and specific constitutional issues related to the three amendments. The third section investigates the concept of democracy more broadly in justifying the ‘de-politicisation’ of public institutions and appointments to those institutions. Following these discussions, I conclude this chapter by arguing that more nuanced and long-term interventions are required if the CC and independent commissions are to be a core component of the new framework for governance in Sri Lanka.

Politicisation, Patronage Politics, and Public Institutions

A turning point in the politicisation of public institutions and the institutionalisation of political patronage in Sri Lanka is the First Republican Constitution. The concentration of state power in the National State Assembly and bringing the public service under the purview of the Cabinet set the stage for the negation of democratic principles and norms that had previously been observed. The subsequent introduction of the Executive Presidency and a new constitution that reproduced the illiberal processes and substance of the previous constitution cemented this


The concentration of power in the presidency gradually sucked the life blood out of numerous public institutions including the judiciary, leading to a political culture in which the meaning and logic of independence, merit, and even efficiency were replaced by partiality, corruption, and nepotism. The manner in which appointments were made to the higher judiciary in the 1990s is a case in point. A President of the Court of Appeal was appointed as the Attorney General in what was viewed as direct interference in the independence of both the judiciary and the office of the Attorney General. This state of affairs was aggravated when this Attorney General was thereafter appointed as the Chief Justice. During this same period, the appointment of an academic to the Supreme Court was perceived to be a partial appointment made based on personal and political preferences as opposed to being based on merit. Both these appointments were challenged before the Supreme Court. However, the cases were dismissed on the basis that appointments to judicial office were within the discretion of the President; and that its exercise cannot be subject

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8 Ibid.

to judicial review due to the immunity vested in the office of the President.\textsuperscript{10}

The fate of the Permanent Commission to Investigate Allegations of Bribery or Corruption (CIABOC) is another example of the impact of politicisation on public institutions. Established in 1994 under an Act of Parliament that was adopted unanimously, this institution was considered to be a symbol of a new chapter in the history of governance in the country.\textsuperscript{11} However, by 1999, due to several factors including lack of commitment on the part of the government, the Commission ‘stood ineffective and defunct’.\textsuperscript{12} Even though attempts were made to revive the CIABOC subsequently, it has remained a weak institution that has been unable to effectively address bribery and corruption.

Responses to similar problems regarding governance in other jurisdictions have included the delegation of powers ‘to bodies beyond the direct control or oversight of democratically elected politicians.’\textsuperscript{13} Arguments of ‘technical competence and specialist expertise’ coupled with the desire to establish ‘credible commitment to policy objectives’ have been relied on to support such interventions (particularly in relation to the regulation of markets).\textsuperscript{14} Conceptually, these responses carry with them the promise of ‘good governance.’ Good governance is a concept that recognises that ‘the character of a society’s political institutions to a large extent determined its economic and social development.’ Good governance focuses on describing the qualities of political

\textsuperscript{10} Constitution of Sri Lanka (1978): Article 35 (1). It must be noted that the Nineteenth Amendment has restricted the immunity of the President. Any act of the President that violates fundamental rights can now be challenged under Article 126. The petition has to be filed against the Attorney General.


\textsuperscript{14} Ibid: p.231.
institutions that best serve economic and social development. Literature in this field often refers to the indicators developed by the World Bank to measure good governance; those indicators include voice and accountability, and the rule of law.\textsuperscript{15}

However, there is a conceptual problem in promoting good governance for the more long-term objective of strengthening and/or preserving democracy. It has been pointed out that ‘there is no straightforward relationship between establishing electoral representative democracy and many features of good governance.’\textsuperscript{16} It has also been argued that they are distinctive concepts which require equal attention if human wellbeing is to be advanced.\textsuperscript{17} Interventions or reforms for good governance have been critiqued as undermining the democratic mandate of governments; as allowing for privileged access to political power for the elite; and also as allowing for the manipulation of public institutions for ‘elite interests.’

Good governance re-emerged in significant ways recently in Sri Lankan political discourse when the joint opposition candidate for the presidential election of January 2015 launched his campaign with the promise of restoring good governance in the country. The Sinhala term \textit{Yahapalanaya} has since then become an all encompassing expression which seems to have captured the public imagination: the term is associated by many with the revival of democracy, the restoration of the rule of law, and the preservation of the rights of the governed.\textsuperscript{18} The introduction of the Nineteenth Amendment was seen by many as the translation of the promise of Good Governance / \textit{Yahapalanaya} into actual practice.

\textsuperscript{15} The other indicators are, political stability and absence of violence; government effectiveness; regulatory quality; and control of corruption. See World Bank Good Governance Indicators, \url{http://info.worldbank.org/governance/wgi/index.aspx#home} (accessed 9\textsuperscript{th} August 2015).


\textsuperscript{17} Ibid: p.151.

\textsuperscript{18} This was apparent in the parliamentary elections of August 2015 that followed the presidential elections. Many political parties defined their election manifestoes in relation to the concept of good governance.
The Constitutional Council and the Independent Commissions

Three Successive Amendments

It has been said that Sri Lanka borrowed the idea of a CC from the Constitution of Nepal. The concept of an independent commission for appointments to certain offices was proposed initially by the Presidential Commission on Youth in 1990. That Commission recommended a ‘Nominations Commission’ that would recommend names to the President for appointment to Commissions of the Public Service. The Nominations

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(1) There shall be a Constitutional Council, for making recommendations in accordance with this Constitution for appointment of officials to Constitutional Bodies, which shall consist of the following as Chairman and members:
(a) the Prime Minister Chairman;
(b) the Chief Justice Member;
(c) the Speaker of the House of Representatives Member;
(d) the Chairman of the National Assembly Member; and
(e) the Leader of the Opposition in the House of Representatives Member.
(2) For the purpose of recommendation of an appointment of the Chief Justice, the Constitutional Council shall include among its members the Minister of Justice and a Judge of the Supreme Court. The author is grateful to Radhika Coomaraswamy for drawing the author’s attention to this recommendation. Sessional Paper I (1990): pp.5-6.
20 The author’s attention to this recommendation. Sessional Paper I (1990): pp.5-6.
21 The Commissions that were proposed to be brought under the Nominations Commission were: the Public Service Commission; the Educational Services Commission; the Human Rights Commission; the Board of the National Youth Service Council; the Public Corporations Services Council; the Official Languages Commission; the University Grants Commission; A Commission responsible for appointments to the Security Forces; the Salaries Standardisation Commission. Four new commissions were proposed by the Youth Commission and they too were proposed to be brought under the Nominations Commission for appointments: a Commission on National Educational Policy; a
Commission itself was to comprise of ten Members of Parliament (MPs) representing political parties in Parliament and one non-voting member each to represent the Chief Justice and the Auditor General respectively. The institution was first proposed during the debates on state reforms in the 1994-2000 period. The Constitution Bill of 2000 was the first instance where the establishment of a CC was included.

The idea was mooted again as a condition in the Memorandum of Understanding (MoU) between the Peoples’ Alliance and the Janatha Vimukthi Peramuna (JVP) in 2001 and was incorporated into the constitution as the Seventeenth Amendment.\textsuperscript{22} The CC comprised of the Prime Minister, the Speaker, the Leader of the Opposition, a nominee of the President, five nominated jointly by the Prime Minister and the Leader of the Opposition, and one nominee by parties represented in Parliament other than those already represented in the CC.\textsuperscript{23} This nominee was required to ‘represent minority interests.’\textsuperscript{24} Only three members of the CC were Members of Parliament. The others were required to be ‘persons of eminence and integrity who have distinguished themselves in public life and who are not members of a political party.’\textsuperscript{25} The Eighteenth Amendment of 2010 replaced the Council with a ‘Parliamentary Council’ (PC) whose recommendations were not binding on the President.\textsuperscript{26} The PC consisted entirely of MPs: the Prime Minister, the Speaker, Leader of the Opposition, and one nominee each by the Prime Minister and the Leader of the Opposition from Parliament. The amendment stipulated that the nominees of the Prime Minister and the Leader of the Opposition should ‘belong to communities which are communities other than’ those represented by the \textit{ex officio} members of the PC.\textsuperscript{27}

\textsuperscript{22} See in this regard, de Silva (2011).
\textsuperscript{23} Constitution of Sri Lanka (1978): Article 41(A) [Seventeenth Amendment].
\textsuperscript{24} Ibid: Article 41(A) (3).
\textsuperscript{25} Ibid: Article 41(A) (4).
\textsuperscript{26} See e.g., Constitution of Sri Lanka (1978): Article 41(A) [Eighteenth Amendment].
\textsuperscript{27} Ibid.
The Seventeenth Amendment has been described as a moment in Sri Lanka’s political history where political parties in Parliament reached a consensus on constitutional reform for good governance. The perusal of the parliamentary debates that preceded the adoption of the amendment evidences the limits of that consensus. Political parties that were nationalist in their outlook such as the Jathika Hela Urumaya (JHU) and the Tamil United Liberation Front (TULF) opposed the amendment for reasons that were quite similar. Representatives of these parties claimed that unless a viable solution for the ethnic conflict was reached, constitutional reform was merely window dressing. These parties disagreed only in terms of how they characterised the ethnic conflict: the JHU defined it in terms of terrorism while TULF defined it in terms of historic discrimination against Tamils. The TULF walked out of the debate while the JHU declined to vote for the amendment.

During the debates the United National Party (UNP) raised the question as to whether an alternative process will be laid down to be followed in the event there is a deadlock in making nominations to the CC. Wimal Weerawansa MP (JVP) speaking on behalf of the government, argued that by design this process required political consensus. He took the view that leaders of political parties in Parliament could reasonably be expected to work towards reaching such an agreement.\(^{28}\) Interestingly, a deadlock on nominations arose sooner than later: no CC was appointed after the first CC’s term expired since no consensus could be arrived at regarding the nominations. The absence of clauses that addresses a deadlock in nominating the CC therefore possibly led to the failure of the amendment.\(^{29}\) The Nineteenth Amendment seeks to address this gap by providing that where the President does not make the required appointments ‘the persons nominated shall be deemed to have been appointed…’\(^{30}\)

\(^{30}\) Constitution of Sri Lanka (1978): Article 41(A)(6) [Nineteenth Amendment].
The adoption of the Eighteenth Amendment was problematic in terms of its substance as well as the process. Apart from adopting the bill as urgent in the national interest for no apparent reason, it was also the first significant law reform by the then government after the conclusion of the armed conflict. The amendment primarily served to further strengthen an already powerful Executive President. The government obtained the required two-thirds support for the amendment in Parliament by facilitating crossovers from the opposition. There was no consultation regarding the proposed reform even among the political leadership. The manner in which the Eighteenth Amendment was adopted therefore was unacceptable from the point of view of democratic norms. The UNP did not attend the second and third reading of the amendment bill presumably in protest, while the TNA and the JVP voted against it.

The incumbent President’s election manifesto prioritised the repeal of the Eighteenth Amendment and the re-establishment of ‘Independent Commissions to secure the impartiality of judicial, police, elections, auditing institutions and the office of the Attorney-General.’ The Nineteenth Amendment was adopted accordingly in May 2015. The CC at present comprises of the Prime Minister, the Speaker, Leader of the Opposition, an MP appointed by the President, five appointed jointly by the PM and the Leader of the Opposition (of which two are MPs), and one MP nominated by parties and independent groups in Parliament other than those represented by the other categories.

The 2000 Constitution Bill, the Seventeenth Amendment, and the Nineteenth Amendment, envisaged two main functions for the

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34 Constitution of Sri Lanka (1978): Article 41(A) [Nineteenth Amendment].
CC: the recommendation of appointments to independent commissions, and the approval of recommendations made by the President to several high offices. The 2000 Constitution Bill included both the Official Languages Commission and the University Grants Commission but neither of the other two amendments included those bodies under the purview of the CC. The Nineteenth Amendment includes two other bodies: the Audit Service Commission and the National Procurement Commission under the CC.\(^{35}\) The Judicial Service Commission is the only Commission for which the CC had the power to approve the recommendations of the President under all three amendments.\(^{36}\) The 2000 Constitution Bill additionally envisaged the CC as appointing members to the Regional Public Service Commissions and the Regional Police Commission.

**Independent Commissions**

The governance architecture in Sri Lanka has included statutory bodies with the authority to act independently. These institutions were designed to be independent on the assumption that the technocratisation of certain public functions leads to improvement in governance. The University Grants Commission and the Legal Aid Commission are two examples.\(^{37}\) Funded by the state, these bodies are financially accountable to Parliament but are independent in terms of their mandate. Placing certain public functions beyond the reach of the political interests of governments and political parties in power, providing opportunities for experts to engage in governance without involving themselves with party politics, and adopting diverse approaches to governance are some of the arguments that justify independent commissions. In the new wave of democratisation that was claimed to be ushered in after the presidential elections of 1994, the model of independent commissions was revisited.\(^{38}\)

\(^{35}\) Ibid: Schedule to Article 41(B).

\(^{36}\) See e.g., ibid, Article 111(D) [Seventeenth Amendment].

\(^{37}\) UGC established under the Universities Act No. 16 of 1978 and the LAC established under the Legal Aid Commission Act No. 27 of 1978.

New commissions such as the Human Rights Commission (HRC) and the Commission to Inquire into Allegations of Bribery or Corruption (CIABOC) were established during this time.

The Constitution Bill of 2000 proposed to bring these Commissions under the CC. Even though this draft constitution was not adopted, the Constitutional Council was introduced to the Constitution in 2001. During this time, the National Police Commission and the HRC in particular, functioned in a dynamic way. Only a few of the independent commissions came under the CC then, and even under the Nineteenth Amendment this remains the case. The rationale for the selection of Commissions that would come under the CC is not officially stated, but it seems to be based on an understanding of the significance attributed to the mandate of the respective commissions. For instance, even though the University Grants Commission (UGC) was included under the 2000 Constitution Bill, it was not included in the Seventeenth or the Nineteenth Amendments. State universities have suffered significantly due to politicisation and patronage politics, and the politicisation of the UGC has been a contributory factor in this institutional decline. A wider debate should have preceded the adoption of the Nineteenth Amendment through which commissions that ought to be under the CC could have been identified through defined criteria. The Nineteenth Amendment includes certain provisions that seek to improve the process of appointments to the commissions. Where the CC


makes recommendations but the President fails to make the
appointments within fourteen days, the appointments are
‘deemed’ to have been made.\footnote{Constitution of Sri Lanka (1978): Article 41(B)(4) [Nineteenth
Amendment].}

The state of the HRC since 2005 epitomises the problem with
independent commissions that are located in a deeply politicised
society that does not appreciate the logic of independence and
expertise. The HRC has been downgraded by the International
Coordinating Committee of National Institutions for the
Promotion and Protection of Human Rights (ICC) due to its lack
of independence.\footnote{As of 28th January 2014, the Sri Lanka HRC is accredited at ‘B’ grade
– ‘not fully in compliance’. The HRC has been downgraded since 2007.}
The HRC has in some instances even been an
apologist of the government and defended the government’s
rejection of international monitoring through the UN Human
Rights Council. At the peak of the armed conflict, the HRC
played, at most, a peripheral role, in addressing human rights
issues on the ground. The experimentation with independent
commissions in Sri Lanka has not been positive. Barring a few
exceptions such as the HRC during certain periods, in retrospect,
it is evident that independence in the appointment of the
commissioners is a prerequisite for the success of these
commissions. Sri Lanka is yet to develop an understanding of the
notion of ‘independence’ of these commissions and an
appreciation of the leadership given by dynamic experts to these
institutions.\footnote{For a critical analysis of this point in relation to the public service, see
W. McCourt ‘Impartiality through Bureaucracy? A Sri Lankan Approach to
Managing Values’ (2007) \textit{Journal of International Development} 19:
p.429.}

\textbf{Reforms introduced by the Nineteenth Amendment}

Two new commissions were created under the Nineteenth
Amendment and several other progressive revisions were made to
the mandate of other commissions. The Audit Service
Commission and the National Procurement Commission are the
two new commissions with mandates to regulate the audit service
and procurement respectively.\textsuperscript{44} The amendment provides that the mandate of CIABOC be broadened by law to provide for the implementation of the UN Convention Against Corruption and any other related international Convention.\textsuperscript{45} Failure by public authorities to comply with the directives of the Election Commission has been declared a punishable offence.\textsuperscript{46} The amendment stipulates that the Chief Justice and the two most senior judges of the Supreme Court be appointed to the Judicial Service Commission.\textsuperscript{47} These reforms seek to strengthen the institutional architecture of the independent commissions as well as broaden their scope.

However, in making judicial appointments to the appellate courts, the Nineteenth Amendment only requires the CC to consult the Chief Justice, whereas the Seventeenth Amendment required that the Attorney General’s view be considered as well.\textsuperscript{48} The gazetted Nineteenth Amendment Bill in fact required that the CC obtain views of the Minister of Justice, the Attorney General, and the President of the Bar Association. In reviewing this clause, the Supreme Court held that ‘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.’\textsuperscript{49} In spite of these observations of the Court, at committee stage, the CC was only required to consult the Chief Justice.

\textit{Composition of the Constitutional Council}

The membership of the CC changes radically from the 2000 Constitution Bill to the Seventeenth, Eighteenth, and Nineteenth Amendments. The Seventeenth Amendment included seven non-MPs, while the Eighteenth Amendment provided an all MP composition.

\textsuperscript{44} Constitution of Sri Lanka (1978): Articles 153A and 156(B) [Nineteenth Amendment].
\textsuperscript{45} Ibid: Article 156(A)(1)(c).
\textsuperscript{46} Ibid: Article 104GG.
\textsuperscript{47} Ibid: Article 111(D)(1).
\textsuperscript{48} Ibid: Article 41(C)(4).
\textsuperscript{49} \textit{In Re the Nineteenth Amendment to the Constitution} SC (SD) 4/2015, SC Minutes, 6th April 2015: p. 15.
membership for the Parliamentary Council. The Nineteenth Amendment, as proposed, included seven non-MPs which was however brought down to three at the committee stage. The Nineteenth Amendment in that sense dilutes the CC, having increased its ‘political’ representation and it effectively renders negligible the ‘expert’ representation.

The requirement that joint nominations by the Prime Minister and the Leader of the Opposition should reflect ‘minority interests’ has been generally viewed positively.\(^{50}\) It has been justified on the basis that it would ensure that minority interests are also considered in making appointments to independent commissions and to high offices. It has also been defended on the basis that it would ensure the legitimacy of the CC. Elsewhere, it has been argued that in the Sri Lankan context, ‘the politics of recognition, as symbolic recognition of the distinct identity of ethnic groups may be more important than the specifics of power sharing for an enduring resolution of the conflict.’\(^{51}\) The failures in the numerous attempts at state reform and the explicit constitutional provisions that are majoritarian have given rise to the view that specific representation of minority interests by the minorities themselves is a pre-requisite for any reform that seeks to meaningfully address the ethnic conflict. This position is premised on the idea that only a member of a minority community can effectively understand and/or represent its interests. This idea of exclusivity has often fed into the competing narratives of nationalisms in Sri Lankan society. The Seventeenth and Nineteenth Amendments, however, require only the representation of minority interests which in theory suggests that even a member of a ‘majority’ community could represent those interests. Interestingly, the JHU argued against this provision on the basis that even members of the ‘majority’ community give priority to minority community interests and therefore that the


interests of the majority will be under-represented or marginalised in the process.\textsuperscript{52}

Theoretically, on the other hand, it has been argued that in multi-ethnic societies, solutions that address the ‘identitarian problem’ may in fact stand at odds with ‘the essential precepts of constitutionalism.’\textsuperscript{53} Identity politics have over-determined the fate of state formation in Sri Lanka at every stage. The primary objective of introducing the CC is to ensure the impartiality and the credibility of the process of making appointments, and to ensure accountability in the exercise of that power. Such appointments ought to be based on merit. It could be effectively argued that candidates that demonstrate the required degrees of merit and suitability would consider minority interests in their decision-making. The constitutional requirement that persons who represent minority interests be appointed to the CC therefore seems redundant and reactionist. It constitutionalises identity politics and indirectly affirms notions of exclusivity.

Representation based on ethnicity had already been included in the constitution in the establishment of the Finance Commission under the Thirteenth Amendment.\textsuperscript{54} Three members that represent ‘the three major communities’ have to be appointed to this Commission and between the three of them the fields of finance, law, administration, business or learning have to be represented as well.\textsuperscript{55} The Seventeenth and Nineteenth Amendment extended this approach to the CC, thereby arguably incorporating characteristics of consociationalism into the constitution.\textsuperscript{56} However, constitutionalising ethnic identities is problematic for at least two reasons.\textsuperscript{57} Firstly, it is difficult to define the membership of these ethnic communities, and often, political parties resort to the reinforcement of ethnonationalism in

\begin{footnotesize}
\textsuperscript{52} Parliamentary Debates, 138 (1), 24\textsuperscript{th} September 2001: p.65. \\
\textsuperscript{54} Constitution of Sri Lanka (1978): Article 154R as amended. \\
\textsuperscript{55} Ibid: Article 154(R)(c). \\
\textsuperscript{57} Ibid: p.311 et seq.
\end{footnotesize}
such situations. Similarities within such ethnic groups are often foregrounded at the cost of ignoring the common grounds across different ethnic groups. Secondly, such provisions result in the eclipsing of other interests such as gender and social justice.

The nominating authorities have not been required to ensure the representation of diverse interests in making appointments to the CC. The mention of minority interests in the absence of a reference to other categories such as gender indicates a lack of sensitivity to other systemic discriminatory practices in Sri Lankan society. These concerns have been addressed in the Nineteenth Amendment to a significant degree. The joint nominations to the CC by the Prime Minister and the Leader of the Opposition are expected to reflect ‘the pluralistic character of Sri Lankan society, including professional and social diversity.’ Furthermore, the CC is required to ‘endeavour to ensure’ that their recommendations for appointments to Commissions ‘reflect the pluralistic character of Sri Lankan society, including gender.’ However, whether the spirit of these provisions will be respected in practice remains to be seen.

Furthermore, for the purpose of guaranteeing political impartiality, the nominees to the CC cannot be members of a political party. They ought to be ‘persons of eminence and integrity who have distinguished themselves in public life.’ This requirement is problematic at two levels at least. On the one hand, participation in political activities is a freedom guaranteed under the constitution and would include the freedom to obtain membership in a political party. Its restriction therefore flies in the face of existing fundamental rights guarantees. This requirement envisages that ‘persons of eminence and integrity who have distinguished themselves in public life’ would not desire to be political to the extent of obtaining party membership. Moreover, whether an individual is a member of a political party in and of itself cannot be a measurement of the political loyalties.

59 Ibid: Article 41(B)(3) [Nineteenth Amendment].
60 Ibid.
61 Ibid.
or disloyalties of such a person. Furthermore, curiously, being apolitical, is indirectly considered to be desirable and as a characteristic that informs ‘eminence and integrity.’

**Judicial Review**

The constitution recognises only pre-enactment review of proposed bills including bills to amend the constitution.\(^{63}\) Any citizen can challenge such bills before the Supreme Court.\(^ {64}\) In relation to bills to amend the constitution, the question to be determined by the Supreme Court is whether such bill requires approval by the people at a referendum.\(^ {65}\) Only proposed amendments that affect the entrenched clauses of the constitution require approval at a referendum. Therefore the question to be determined by the Court is whether the proposed amendments affect the entrenched clauses of the constitution.\(^ {66}\) It is expressly provided that the ‘determination of the Supreme Court shall be accompanied by the reasons therefor.’\(^ {67}\) However, it is evident from an examination of the Special Determinations on the various Seventeenth, Eighteenth, and Nineteenth Amendment Bills that judicial reasoning is threadbare, and often at odds with the basic norms and principles of constitutionalism.

The Seventeenth and Eighteenth Amendments were both proposed as urgent bills. The constitution permits the Cabinet to approve bills as being ‘urgent in the national interest’ which endorsement then requires the Supreme Court to determine the constitutionality of the bill within a shorter time: usually 24 hours or up to 3 days, as decided by the President.\(^ {68}\) To date the Supreme Court has not reviewed a decision of the Cabinet to identify a bill as being urgent even though there is no clause that expressly precludes the Court from doing so. As pointed out by N. Selvakkumaran, it was evident that neither of those two bills were

\(^{63}\) Ibid: Articles 121 – 124.
\(^{64}\) Ibid: Article 121(1).
\(^{65}\) Ibid: Article 120.
\(^{66}\) Ibid: see Article 83.
\(^{67}\) Ibid: Article 123(1).
\(^{68}\) Ibid: Article 122.
‘urgent’ in any reasonable sense of the term. By cutting short the already very short time period for pre-enactment review, the possibilities of challenging the proposed bill are minimised and the possibilities of public debate and discussion of the proposed reform are effectively eliminated. At most, only legal experts and social activists who closely monitor the government are able to make interventions in such situations. It is commendable that the Nineteenth Amendment has repealed these provisions and Cabinet can no longer approve bills as being urgent in the national interest.

Regrettably, in both instances mentioned above, the Court did not apply its mind to these implications of endorsing proposed bills as being urgent in the national interest. At least in the case of the Seventeenth Amendment, the contradiction in introducing a constitutional amendment that promotes governance and a broader understanding of democracy in an obviously undemocratic manner also points to the motives of the then government. It seems that the government was more concerned with fulfilling its obligations under the MoU and ensuring its stability rather than with increasing accountability and transparency in the reform process.

In reviewing the constitutionality of the proposed Seventeenth and Nineteenth Amendments, the Court held that the limitations imposed on the exercise of discretion by the President did not amount to ‘an effective removal of the President’s executive power in this respect’. This conclusion was justified in the review of the Seventeenth Amendment on four grounds: that the President had the power to nominate one person to the CC; that the Council itself was appointed by the President; that all powers with regard to Heads of Departments remained with the President and the Cabinet; and that Heads of the Armed Forces were appointed by


70 Nineteenth Amendment to the Constitution Act: Section 30.

the President. The Court did not consider the fact that it was compulsory for the President to be guided by the CC in the exercise of discretion in making appointments.

It is problematic that the Court did not apply its mind to the inroads made by the Seventeenth Amendment into the powers of the President. The rubberstamping by the judiciary of the proposal by the government is regrettable. The same Court, in the review of the Nineteenth Amendment (2002), which proposed to alter the powers of the President with regard to the dissolution of Parliament, among other things, held that any such transfer, relinquishment or removal would be an ‘alienation of sovereignty’ and that ‘the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.’\(^72\) By implication the Court held that any substantive reform to the Executive Presidency can only be made by introducing a new constitution. This view contrasts with the judicial opinions expressed in reviewing the Seventeenth Amendment in 2001, and the Nineteenth Amendment in 2015.

In all three amendments, the perception of the governments of the time seems to have been that it should avoid seeking approval for the amendment at a referendum. The unpredictability of the outcome, delay, and also perhaps the perception that the people may reject the amendment are possible reasons for this negative attitude towards a referendum. While the pros and cons of reforming constitutions through referenda is beyond the scope of this chapter, it is noteworthy that popular will is relegated to the margins by governments even when intending to introduce progressive constitutional reform.\(^73\)

The failure by the President to act on the recommendations made by the CC (and later the deliberate violation of the Seventeenth Amendment) led to decisions made by the President \textit{vis-à-vis} the CC being challenged in court. In all these instances, the courts

\(^72\) \textit{In Re the Nineteenth Amendment to the Constitution (2002) 3 SLR 85:} pp.97-98.

\(^73\) In fact, the election manifesto of Maithripala Sirisena promised to introduce progressive constitutional reform, that will not affect any of the entrenched clauses of the constitution and therefore will not require a referendum. Sirisena (2014): p.14.
declined to review the decisions on the basis that the President enjoyed immunity from suit. The first case was *Public Interest Law Foundation v AG*.\(^{74}\) The CC had nominated a chairman and members to the Election Commission but the President had not made the appointments. The petitioner sought a writ of *mandamus* to compel the President to appoint the nominees to the Commission. The Court of Appeal was of the view that the ‘blanket immunity’ vested in the President prevented it from even issuing notice on the respondent.\(^{75}\) At a later point, the direct appointment of members to the Public Service Commission and the National Police Commission by the President was challenged by a civil society organisation, which sought a writ of *certiorari* to quash the appointments.\(^{76}\) In this instance too the Court of Appeal held that the immunity from suit of the President precluded it from reviewing the impugned decisions. The court was of the view that ‘… injustice, if any caused to the people as alleged … cannot be cured by this court as it is for the legislature to make necessary amendments to the Constitution.’\(^{77}\)

Two fundamental rights petitions were filed in Supreme Court on the basis that the non-appointment of the CC and the appointment of an Attorney General in violation of the Seventeenth Amendment amounted to a violation of the right to equality under Article 12 (1) of the petitioner.\(^{78}\) Even though the petitions were filed in 2008, the determination was made by the Court only in 2011, well after the Eighteenth Amendment had been passed. In any event, the Court upheld the preliminary objections of the respondent and dismissed the petitions on the basis of immunity from suit of the president.

The Nineteenth Amendment has restricted the scope of presidential immunity. A violation of fundamental rights by the President can be challenged before the Supreme Court by filing a

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\(^{74}\) *Public Interest Law Foundation v AG*, CA 1396/2003, CA Minutes 17\(^{th}\) December 2003.

\(^{75}\) Ibid: p.21.


\(^{77}\) Ibid.

petition against the Attorney General.\textsuperscript{79} This provision allows for some accountability of an office which had hitherto been placed above the law, and is therefore a subjection of the office to the rule of law. It is also relevant to note here that in Sri Lanka the right to equality has been interpreted to include a prohibition of any arbitrary use of public power and also as an expression of the rule of law.\textsuperscript{80} Therefore arguably, the violation of the Nineteenth Amendment for instance, can be challenged by way of a fundamental rights petition.

**Reforming the Constitutional Council**

In 2002, a constitutional amendment was proposed to make some modifications to the CC. These modifications included the granting of power to the CC to make rules related to its conduct; the grant of immunity from judicial review; immunity from suit; and punishment for interference with the work of the CC. In reviewing these proposed changes, the Supreme Court was of the view that these provisions undermined the sovereignty of the people and was therefore unconstitutional.\textsuperscript{81} For instance, the rules adopted by the CC did not require approval by Parliament. It is interesting to note that the very body that was expected to usher in a new political culture of transparency, accountability, and improve deliberative and participatory democracy itself, subsequently sought to clothe itself with protections that violate those norms. In the pre-enactment proceedings, it was argued that in the context where provision has not been made for ensuring representation of majority interests, the provision for prosecution for interference with the CC would be discriminatory. It would preclude anyone from making representations to the CC regarding majority interests. The Court accepted this argument. With regard to the immunity from suit and from judicial review, the Court held that the proposed amendment will vest ‘unlimited and unfettered immunity’ on the CC and that ‘it would in effect

\textsuperscript{79} Constitution of Sri Lanka (1978): Article 35(1) as amended by the Nineteenth Amendment.

\textsuperscript{80} See for instance, Visuwalingam v Liyanage (1983) 1 SLR 203; Premachandra v Jayawickrama (1994) 2 SLR 90; Nangayakkara v Choksy, SC(FR) 158//2007, SC Minutes 4\textsuperscript{th} June 2009.

\textsuperscript{81} In Re the Eighteenth Amendment to the Constitution (2002) 3 SLR 71.
be elevated to a body that is not subject to law, which is inconsistent with the Rule of Law.\textsuperscript{82}

In reviewing the reforms proposed to the Eighteenth Amendment of 2010, including the replacement of the CC, the Court held that none of those proposed amendments affected the sovereignty of the people and therefore did not require approval at a referendum but only approval by a special majority in Parliament. With regard to the repeal of the CC whose recommendations the President was required to follow in making certain appointments – and the replacement of it with a Parliamentary Council whose recommendations the President \textit{may} follow – the Court held that it was ‘only a process of redefining the restrictions that was placed on the President by the CC …’\textsuperscript{83} The determination on the Eighteenth Amendment was issued by the then Chief Justice Bandaranayake who was subsequently impeached in early 2013. At the time of the determination, she was perceived by many to be biased given that her spouse had recently been appointed as the chairman of a state-owned bank.\textsuperscript{84} The process and the substance of the Eighteenth Amendment therefore reflects a dark moment in Sri Lankan constitutional history where the legislature and the judiciary supported and justified the removal of the few remaining checks on an already extremely powerful Executive President.

\textbf{Representative Democracy and ‘Independence’ of Public Institutions}

The call for independence of public institutions and the de-politicisation of the selection and appointment of individuals to these institutions are premised on the idea that representative democracy, in the Sri Lankan context, has failed in this regard. There are at least two factors that contribute to and justify this

\textsuperscript{82} Ibid: p.78.
\textsuperscript{83} \textit{In re the Eighteenth Amendment to the Constitution}, SC SD 1/2010, SC Minutes 31\textsuperscript{st} August 2010.
\textsuperscript{84} See e.g., ‘\textit{Chief Justice or Her Husband Must Resign to Avoid Conflict of Interest Situation’}, \textbf{Transcurrents}, 4\textsuperscript{th} June 2011, http://transcurrents.com/news-views/archives/1062 (accessed 11\textsuperscript{th} February 2014); N. Anketell & A. Welikala (2013) \textit{A Systemic Crisis in Context: The Impeachment of the Chief Justice and the Rule of Law in Sri Lanka} (Colombo: Centre for Policy Alternatives).
perception. Firstly, the election of the Executive President and its centrality in the institutional architecture of the state (including immunity from suit), leads to a situation in which the office-bearer enjoys untrammeled power. Having contested in an island-wide campaign, the winning candidate also brings into his office, obligations to different individuals and groups. Experience suggests that these factors encourage the President to abuse his discretion in making appointments to high offices. Experience further suggests that MPs in Sri Lanka have generally been partisan towards the executive in their approach to governance and have therefore failed to act as an appropriate check on the exercise of discretion by the Executive President. In such a political culture, representative democracy is incapable of guaranteeing the independence of public institutions.

The technocratisation of the appointment process is intended to curb these excesses. It must be recognised, however, that it limits and temporarily even undermines representative democracy. The CC envisaged under the Seventeenth Amendment included seven experts which meant that the CC could not arrive at a decision without the support of the independent experts. A similar arrangement was proposed in the Nineteenth Amendment Bill but was revised at committee stage, bringing down the number of experts to three. The two CCs in that sense are fundamentally different: the CC under the Seventeenth Amendment was weighted in favour of independent experts while the CC under the Nineteenth Amendment is weighted in favour of political representatives. Under the Nineteenth Amendment, decisions are to be unanimous, or supported by at least five members of the Council. Therefore, in effect the opinions of the ‘experts’ can be disregarded in the decisions made by the CC.

However, it can be argued that democracy today has to be understood in the broader sense in relation to governance. Representative democracy is the core of the tradition of liberal democracy. In this tradition, the exercise of the ballot for representative governance is the core idea. Another tradition of democracy is the ‘civic republican’ tradition which foregrounds

\[85\] Constitution of Sri Lanka (1978): Article 41(E)(4) [Nineteenth Amendment].
direct participation of the governed. Deliberative democracy and participatory democracy are ideas that emerge from the notion of civic republicanism, which seek to ensure democratisation of governance. The democratisation of governance has been described as a global phenomenon: within states as being downwards to include participation by different levels of society, and internationally to increase participation by non-state actors such as victims and community-based organisations. The thrust of these movements is the ‘more equitable distribution of political power’, which would complement the progressive features of representative democracy.

The CC too can be described as an example of this broader global movement, although a very modest one. The combining of expert opinion with that of elected representatives in making nominations and in approving selections made by the Executive President achieves several objectives. Firstly, it is a welcome check on the absolute discretion that was previously enjoyed by the Executive President in making certain appointments. Secondly, it allows for participatory and deliberative democracy. The experts are unelected individuals drawn directly from society, who can be expected to bringing non-partisan views that will improve the quality of the decisions arrived at. Thirdly, it broadens the means by which the evolving aspirations and needs of the governed can be brought to bear on the decisions of the Executive President. Accordingly, ‘both governance and governments will not only be more in tune with what people want but more dynamic and responsive to their ever changing needs.’

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87 Ibid: p.9 et seq.
88 Ibid: p.11 et seq.
89 Ibid.
A New Framework for Governance?

Sri Lanka’s experience with the CC and independent commissions can possibly be best expressed through the ‘glass half full or half empty?’ dilemma. As was argued in this chapter, the restrictions imposed on the discretionary powers of the Executive President in appointing persons to high offices and independent commissions is commendable and progressive. However, the experience under the CC and the subsequent reforms to the CC clearly suggests that the sustainability of the intervention is a serious challenge. Several factors need to be considered: the protracted armed conflict and its impact on the rule of law; a political culture that places a higher value on illiberal notions such as patronage and nepotism; a powerful Executive Presidency; and a top-down approach to constitutional reform which is neither participatory nor deliberative.

The Seventeenth Amendment failed and was eventually repealed. Only certain civil society organisations, some civil society leaders, and certain smaller political parties kept alive the call to ‘bring back the Seventeenth Amendment.’ The wider Sri Lankan society was not mobilised around this issue. This suggests that independence is perhaps not valued adequately as a core principle of governance in the political imagination of society. The sense of a national crisis generated by the escalated armed conflict implicitly justified the deliberate violation of the Seventeenth Amendment. In this context, the reforms introduced by the Eighteenth Amendment were the logical next step and it gave an appearance of legitimacy to the concentration of power in the Executive Presidency.

This then leads to the question as to what factors led to the adoption of the Nineteenth Amendment. It is possible to argue that political expediency remained the guiding motivation. The political consensus to adopt the Nineteenth Amendment came about only due to the need to establish a coalition that could defeat the incumbent. A former stalwart of the Sri Lanka Freedom Party, who had not been known to have opposed the approach of the former President to governance, competed against him and was elected as President. The coalition that supported him foregrounded ‘good governance’ as the election
pledge. The wider resonance of the phrase was evident in the manner in which ‘good governance’ became a prominent reference point for most candidates and their political parties during the August 2015 parliamentary elections. However, the dilution of the CC under the Nineteenth Amendment indicates that its re-introduction was less about ensuring independence in the appointment process and more about ensuring the distribution of political power among political parties in Parliament.

Since then it has been claimed that the Sri Lankan electors have rejected extremism, racism, and corruption and caused a disruption in a process of illiberalisation of society. While this optimism is justified to some degree by the quiet and unpredictable manner in which change of government took place, not too much can be read into the changes brought about by the ballot. The dilution of the CC under the Nineteenth Amendment is strong evidence of the modest progress Sri Lanka has made in its improvement of governance.

In order to allow the CC and the independent commissions to take root in Sri Lankan political society, radical reform is required. A greater appreciation must be cultivated for distribution of political power among political representatives as well as among experts in a manner that respects diversity. The sharing of power must be both vertical as well as horizontal. Even an attempt to cultivate such values is possible only if the current Executive Presidency is further reformed. Systemic discrimination based on ethnicity and other communal insecurities must be addressed through public law in a manner which leads to a new logic of citizenship. That is possible only in the context where the negative impact of nationalisms, whether of minorities or of the majority, on democratisation and on the law is acknowledged. In Sri Lanka democracy must be revamped and rebuilt. Resolution of disputes and the allocation of resources based on political patronage and nepotism must be eliminated from the public realm. Understandings of democracy in the everyday imagination of society must be broad and go beyond representational democracy: it must also include ideas of deliberation and participation. It is only in such a political culture that the new frame of governance considered in this chapter can be effective.
Conclusion

The CC and independent commissions have occupied a central place in constitutional discourse over the last two decades. Attempts at constitutional reform to introduce a CC has had mixed outcomes with Sri Lanka having re-established this body in 2015. It is evident that the proposed new framework of governance addresses several problems related to the politicisation of public institutions and the abuse of the discretionary power of the President. However, the reform process, the judicial review of the reforms for their constitutionality, and certain substantive aspects of the reforms themselves, have been contrary to norms of constitutionalism and the rule of law. On the other hand, the Seventeenth and Nineteenth Amendments have probably been the two most progressive constitutional reforms under the 1978 Constitution. Nevertheless, as the experience under the Seventeenth Amendment and the adoption of the Nineteenth Amendment amply demonstrate, these progressive developments can be sustained only if the political culture within which these institutions operate are also transformed and if the process of democratisation is strengthened.
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