

The forgotten Constitutional Council Position Paper

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Previous Position Paper on
17th Amendment - 16th May
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The Forgotten Constitutional Council

An analysis of consequences of the non implementation of the 17th Amendment

1. INTRODUCTION

The 1972 Constitution vested the power on the political authority to make appointments to the public service, the 1978 Constitution followed suit. This became a threat to the independence of the public service. The need to depoliticize the public service was a concern that needed urgent attention. On 3rd October 2001, Parliament passed the 17th Amendment to the Constitution which created a procedure that was more objective than the existing system. This Amendment was influenced by civil society at a time when the Chandrika Bandaranaike government had the support of the Janatha Vimukthi Peramuna (JVP), a period which was popularly known as "government under probation".¹

The Amendment mandated the President to appoint the Constitutional Council (CC) consisting of the Speaker (Chairperson), Prime Minister, Leader of the Opposition, Appointee of the President, five persons nominated jointly by the Prime Minister and the Leader of the Opposition and appointed by the President, one person nominated upon agreement by majority of members belonging to political parties other than the parties to which the PM or Opposition Leader belong.² Except the ex-officio members, the term of office of other members is 3 years. Once they are nominated, the President is required to make the appointments forthwith.³

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On 25th March 2002, the first CC was appointed by the then President. The Council became functional with several independent Commissions being established under the 17th Amendment.⁴

Further, with a view to making several statutory authorities more independent and credible, many laws were changed to provide for mechanisms whereby the CC could scrutinize appointees of governing bodies. The following 3 examples are worth considering.

- The three appointees of the President to the Monetary Board to be made with recommendation of the Minister of Finance and with the concurrence of the CC [section 3(c) of the Monetary Law (Amendment) Act no 32 of 2002]
- The appointment of the members of the Public Utilities Commission to be made by the Minister in concurrence with the CC [section 3(1) of No. 35 of 2002]
- The appointment of members of the Welfare Benefits Board to be made by the Minister in consultation with the CC [section 4(2) of Act No 24 of 2002]⁵

2. Approach of the Executive

In March 2005, six positions of the Constitutional Council fell vacant due to the expiry of their terms.⁶ The President cited the "deliberate delay" of the minority parties as the reason for the non-appointment of the Constitutional Council.⁷ On 1st February, 2006, the Prime Minister and the Leader of the opposition wrote to the President nominating five members.⁸ However, this seems to have fallen on deaf ears. While the National Police Commission (NPC) and the Public Service Commission (PSC) were inoperative, in the interim the Cabinet of Ministers decided, without any lawful authority, to transfer the functions and powers of the NPC to the Inspector General of Police, and those of the PSC to the Secretaries of Ministries and the Heads of Departments.

In another questionable and obviously unconstitutional move, the President proceeded to unilaterally appoint members to the NPC and PSC and thereafter to make specific appointments such as Members of Independent Commissions without any scrutiny. Due to obvious narrow short term political gains, the leadership of the coalition parties defended these unconstitutional moves by the Executive.⁹

In the meantime, on 18th July 2006 the government moved to form a Parliamentary Ad Hoc Committee headed by Constitutional Affairs Minister D.E.W. Gunasekera to review the 17th Amendment and suggest reforms. When the post of Secretary-General of Parliament (SG) fell vacant with the retirement of Priyani Wijesekera in March 2008, the President moved to appoint the Secretary of the CC, Dhammika Kitulgodra temporarily, once every two weeks¹⁰, to act for SG, displaying a possible conflict of interest.¹¹

By February 2008, the political parties submitted their nominations to the CC to the Speaker, who is said to have sent them to the President. The names of the nominated members were:¹²

1. Nihal Seneviratne
2. Ranjit Abeysooriya P.C.
3. Justice C. Vigneswaran
4. Sivakumar Nadeson
5. Prof A.H. Sherifdeen
6. S.C. Mayadunne

In another surprising and strategic move, on 19th March 2008, the Prime Minister stated the President will not appoint the CC until he receives the report of the Select Committee.¹³ After nine meetings, the Committee submitted an interim report recommending elaborate amendments to the 17th Amendment.¹⁴ However, on 6th May 2008 the President prorogued Parliament, whereby the Select Committee stood dissolved.¹⁵

Meanwhile, the President has made a number of appointments directly into the constitutional positions including four Supreme Court Judges¹⁶, four Presidents of the Court of Appeal, five Court of Appeal Judges, Inspector- General of Police (2), Auditor-General (2) Attorney General (1), Chairman and Members of the NPC ,PSC & the National Human Rights Commission (NHRC).¹⁷ (List of Appointments is in the Annexure)

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However, when Dr. Deepika Udagama and S.G. Punchihewa, two highly respected persons were appointed to the NHRC, both refused to accept the appointments, protesting against such unconstitutional appointments.

3. CONTROVERSY RE THE NOMINATION OF THE MINORITY MEMBER

In 2005, the government consisted of two major parties: Peoples Alliance (PA) and Janatha Vimukthi Peramuna (JVP). The nomination of members to the CC by Parliament was delayed due to different interpretations, particularly about the member to be nominated from minority parties. JVP took up the position that they should be considered as a minority party. Attorney General, Mr. Kamalabayson opined that JVP being part of the ruling coalition cannot get involved in the said appointment.¹⁸ This opinion was ignored by the government.

4. JUDICIAL CHALLENGES

In June 2006, Dr. A.C.Visvalingam and Jeri Silva of Citizens' Movement for Good Governance (CIMOG) petitioned the Supreme Court questioning the appointment of judges to the Supreme Court by the President by-passing the Constitutional Council. The Supreme Court is reported to have rejected the petition directing the Attorney General to report whether the petitioners had attempted to abuse the judicial process.¹⁹ Prior to that the appointments to the NPC and the PSC were challenged in the Court of Appeal in March 2006. The court dismissed the writ petition holding that the decision of the President cannot be challenged in courts.²⁰

On 25th July 2008, Sumanasisri Liyanage submitted another Fundamental Rights application challenging the non- appointment of the CC by the President. This application is now pending before Court.

5. ROLE OF CIVIL SOCIETY ORGANIZATIONS

In December 2007 on the intervention of the Organization of Professionals Association (OPA), the JVP (which had by then left the ruling coalition) and the Tamil parties agreed to accept Mr. S.C. Mayadunne, former Auditor General as their nominee.²¹

The Media, Civil Society leaders, religious leaders including the Congress of Religions, Chambers of Commerce mounted their protest against the President's decision not to appoint the CC. There was also a move by the OPA to request the MPs to move an Impeachment Motion against the President on this issue.

6. SOCIO-ECONOMIC AND POLITICAL IMPACT

TISL conducted a series of interviews and discussions with a cross section of intellectuals²² and found that the non-implementation of the 17th Amendment can have dire political and economic consequences. A senior professor of sociology was, however, of the opinion that the sociological impact may be less because majority of the people do not have an informed knowledge on the 17th amendment to react to such a situation. Most intellectuals pointed out that many vernacular media stations/institutions have not given sufficient space to either educate or debate on the 17th Amendment issue due to the polarization of those media institutions. Lack of civil society initiatives and the existing weak opposition in Parliament are largely responsible for this situation.²³

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Economists commented that the non-implementation of the 17th Amendment can have an adverse effect on the economy. They stated that unhealthy practices signify political instability in the country, which portrays economic instability. In such a situation the government and the country tend to lose its integrity, which in turn affect the confidence of the local and foreign investor adversely. This slows growth forcing the Government to raise revenue by direct or indirect means, such as increasing taxes. The main business lobby of the country, the Ceylon Chamber of Commerce has pointed out the need to make appointments to key public institutions under the 17th Amendment, to bring about political stability in the country.²⁴

The divisions in political parties, media and civil society organizations have created a weak voice and destroyed the checks that have been in place to counter the power of the State. Various weaknesses that were identified in the system which have not been addressed by previous governments have been one of the main reasons for such a situation to arise.²⁵ The reason for aggravating the dismal state of affairs is the non-implementation of the existing constitutional provisions.

7. SRI LANKA'S INTERNATIONAL IMAGE

The 17th Amendment has figured in many international forums challenging the credibility of the State. In deciding the awarding of the GSP+ status²⁶ to Sri Lanka, compliance with various international conventions would be considered.²⁷ According to many observers, the constant violation of the constitutional process, such as making unconstitutional appointments to key posts contrary to the 17th amendment, is perceived internationally as the inability on the part of the State to uphold Rule of Law.

The United Nations special rapporteurs Philip Alston, the United Nations High Commissioner for Human Rights and the International Coordinating Committee of the National Institutions for Promotion and Protection of Human Rights²⁸ have reported the questionable state of the independent commissions due to the non-implementation of the 17th Amendment.²⁹ In several reports, Human Rights Watch³⁰, the Commonwealth Human Rights Initiative³¹ and the Asian Human Rights Commission³² have alerted the international community of the unconstitutional practices that have been taking place in Sri Lanka. They have also urged the international community to take note of such practices and respond accordingly. Having realized the international shame, the government of Sri Lanka made a voluntary commitment at the United Nations when the Universal Period Review was considered on Sri Lanka to "enable the reconstitution of the Constitutional Council".³³ Despite these pledges, the government has failed to give any serious attention to the revival of the CC. It is reasonable to assume that the failure to appoint the CC is definitely a contributory factor for the failure of the country to secure the seat of the United Nations Human Rights Council in May 2008.³⁴

8. OTHER ADVERSE CONSEQUENCES

The conduct of the Government and the President has raised critically important questions with respect to the electoral process, deterioration of the integrity of the Police and the continuous politicization of the public service, among others.

8.1 Losing Credibility of the Electoral Process

After the 17th Amendment was enacted, when appointments to the Elections commission were to be made for the first time, President Chandrika Bandaranaike Kumaratunga refused to accept the recommendations of the CC. The present Elections Commissioner, on the other hand, cannot retire although he has reached the retirement age of 60 years. When this was challenged in the Supreme Court of Sri Lanka, it was held by court that the Commissioner could not retire due to a 'constitutional aberration' and that the Supreme Court has no power to intervene in the matter in 2003.³⁵ This has had a chilling effect on the efficiency and capacity of the Election Commission. There is also a possibility of the President arbitrarily and unilaterally appointing another set of his selectees as Members of Election Commission.

8.2 Deterioration of the Integrity of Police

The credibility of the police has been deteriorating in the eyes of the public after the unconstitutional appointments were made to the Police Commission in April 2006 directly by the President. None of the members of the Commission were vetted by a constitutional mechanism for their suitability, integrity or possible conflicts of interest.³⁶

To make things worse, two Inspectors General of Police were also appointed directly by the President without involving the CC. This has been a contributory reason for the police to lose its integrity. The present spate of allegations against police inaction on disappearances reaffirms the need to have an independent police commission, as contemplated by the 17th Amendment.³⁷

8.3 Perpetuation of Politicization of Public Service

The refusal to abide by the 17th Amendment portrays a clear intention of the government to further politicize the public service of the country. The President unilaterally appointed members of the PSC, which is responsible for the integrity of the entire public service.

Probably the worst consequence of this unconstitutional appointment is the "legality of entire public service". It could be argued that since the PSC is unconstitutional, all decisions made by them naturally become unconstitutional. The moral authority of the PSC to question public officials and their illegal actions or wrong doings remains yet another issue.

9. CONCLUSION

The non-implementation of the 17th Amendment has created not only unprecedented constitutional and socio-economic issues but has also impacted the image of the country. Since it is a direct issue of Rule of Law, the public is losing trust in the constitutional governance of the country.

While recognizing the need to further improve the 17th Amendment, TISL firmly believes that the President has an uncompromising constitutional duty to make appointments to the Constitutional Council forthwith, making way for the return of the constitutional governance of the country.

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End Notes

¹ Official Hansard dated 3rd October 2001.

² See Article 41 of the 17th Amendment.

³ Article 41A sub clause 4 of the Constitution.

⁴http://www.priu.gov.lk/news_update/Current_Affairs/ca200203/20020325constitutional_council.htm

⁵http://www.cbsl.gov.lk/info/03_about/a_5.htm#.

⁶ Kishali Pinto Jayawardena, "An unfulfilled Promise; Critical Scrutiny of the National Police Commission of Sri Lanka, *LST Review*, Vol .18, issue 238, page 14, August 2007.

⁷*Id.* Also see <http://www.nation.lk/2008/02/24/edit.htm> Senior Lecturer, Rohan Edirisinghe opined that if the President was actually keen to appoint the Constitutional Council, he could have appointed the nine members who have been nominated as the required quorum for the functioning of the Constitutional Council is six members. *Cf. Ravaya*, 23.4.2006.

⁸ Hansard, Vol 174 issue No. 7, page 880.

⁹ <http://www.themorningleader.lk/20080319/news.html>

¹⁰ As per Article 41C (2) of the 17th Amendment

¹¹ http://www.parliament.lk/secretariat/secretary_general.jsp and

http://www.parliament.lk/handbook_of_parliament/secretaries_general.jsp

¹² Refer <http://www.thesundayleader.lk> Also see Hansard, Vol 174 issue No. 7, page 880, 881.

¹³ <http://www.dailynews.lk/2008/03/19/pol01.asp>

¹⁴ "Interim Report of the Select Committee of Parliament on the 17th Amendment to the Constitution", *LST Review*, Vol .18, issue 238, page 1. August 2007.

¹⁵http://www.priu.gov.lk/news_update/Current_Affairs/ca200805/20080507parliament_prorogued.htm

¹⁶ See also http://www.bbc.co.uk/sinhala/news/story/2006/06/060630_court_appointments.shtml

¹⁷See Annexure for all the appointments.

¹⁸http://www.bbc.co.uk/sinhala/news/story/2006/06/060630_court_appointments.shtml.

¹⁹http://www.bbc.co.uk/sinhala/news/story/2006/06/060630_court_appointments.shtml

²⁰<http://www.dailymirror.lk/2006/06/03/news/12.asp>

²¹ See <http://www.thesundayleader.lk/20080203/Issues.htm> This nomination was criticized by the Government citing conflict of interest as S.C. Mayadunne was a consultant to the COPE Committee in Parliament who is appointed by the Secretary General of Parliament. This appointment was up for consideration by the CC.

²² The interviews with few professionals, academics, economists and business leaders were conducted on the basis of anonymity.

²³ The loss of credibility of the media due to the biased nature in presenting facts to the people. It is alleged that civil society organizations have been intimidated and silenced by extremist political elements that have persecuted those who have dissented to acts such as the non-implementation of the 17th Amendment.

²⁴ <http://www.lankanewspapers.com/news/2005/8/2915.html>

²⁵ Reforms in the electoral system, constitutional reforms, and educational reforms have not been addressed and as a result are affecting the forces that were necessary to act as a check on State power.

²⁶ This is a concession that is provided to only 12 countries in the world by the European Union exempting a selected country from various tariffs on export garments

²⁷ There are more than 500,000 people employed in the export garments trade. This concession was given to the export garments industry, which has benefited from the concession and has affected their growth at large. With the imminent threat of revocation, the process of laying off has taken place in order to absorb the impact of a possible revocation. A pre-condition for such concessions is the commitment to the protection of human rights and compliance to conventions.

²⁸This organization accredits the local Human Rights Commission. In their 2007 report, the Committee had downgraded Sri Lanka's Human Rights Commission to the status of observer due to the lack of independence and the appointments that have been made flouting the Constitution.

²⁹ See report of the Special Rapporteurs, Philip Alston, Extrajudicial, summary or arbitrary execution, Economic and Social Council, United Nations, E/CN.4/2006/53/Add.5. <http://www.unhcr.ch/hurricane/hurricane.nsf/view>

³⁰<http://www.hrw.org/effectiveHRC/SriLanka/factandfiction.html> & the letter to the Human Rights Council by various international organizations and NGOs at <http://www.hrw.org/effectiveHRC/SriLanka/INGOletter.html>

³¹See http://www.humanrightsinitiative.org/publications/nl/newsletter_summer_2006/article4.htm

³² See <http://www.ahrchk.net/statements/mainfile.php/2006statements/432/>

³³ UN General Assembly (A/62/778 - 1st April 2008) Annex to the letter dated 31st March 2008 from Permanent Representative of Sri Lanka to President of UN General Assembly.

³⁴ <http://www.hrw.org/effectiveHRC/SriLanka/factandfiction.html>

³⁵ http://news.bbc.co.uk/2/hi/south_asia/4278216.stm

³⁶ Arbitrary appointments made without appointing and seeking the approval of the Constitutional Council to the NPC in April 2006 by the President.

³⁷ See reports of the United Nations Special Rapporteurs and other Human Rights agencies cited above from footnotes.

ANNEXURE - Table of appointments made outside the 17th Amendment

APPOINTMENTS MADE WITHOUT BEING SCRUTINIZED BY THE CONSTITUTIONAL COUNCIL

PUBLIC OFFICIALS (IGPs, ATTORNEY GENERAL AND AUDITOR GENERALS)		
Name	Date of Appointment	Appointed
S. Sarnajothi	3 rd January 2008	Auditor General
Jayantha Wickremeratne	Assumed duties on 1 st June 2008	Inspector General of Police
C.R. De Silva	7 th April 2007	Attorney General
P.A. Prematilleke	23 rd October 2006	Auditor General
Victor Perera	4th October 2006	Inspector General of Police

APPOINTMENTS TO INDEPENDENT COMMISSIONS		
Name	Date of Appointment	Appointed
Nevil Piyadigama	April 2006	Chairman, National Police Commission
Ven. Elle Gunawansa	April 2006	Member, National Police Commission
Justice Chandradasa Nanayakkara	April 2006	Member, National Police Commission
Nimal Punchihewa	April 2006	Member, National Police Commission
R. Shivaraman	April 2006	Member, National Police Commission
Javed Yusuf	April 2006	Member, National Police Commission
Sharmaine Madurusinghe	April 2006	Member, National Police Commission
Justice Priyantha Perera	April 2006	Member, Public Services Commission
Gunapala Wickramaratne	April 2006	Member, Public Services Commission
Mr. H.H Mukiya	April 2006	Member, Public Services Commission
Dr. W.P.S Jayasundera	April 2006	Member, Public Services Commission
Dr. Bernard Zoysa	April 2006	Member, Public Services Commission
Dr. Palitha Kumarasinghe	April 2006	Member, Public Services Commission
Prof. Dayasiri Fernando	April 2006	Member, Public Services Commission
Srima Wijeratne	April 2006	Member, Public Services Commission
Mendis Roharadeera	April 2006	Member, Public Services Commission
Justice Ananda Coomaraswamy	December 2006	Chairman Human Rights Commission
Justice D. Jayewickreme	May 2006	Member, Human Rights Commission
Nalini Abeywardena	May 2006	Member, Human Rights Commission
M.T.M Bafiq	May 2006	Member, Human Rights Commission
Mahanama Tillekeratne	May 2006	Member, Human Rights Commission

MONETARY BOARD, CENTRAL BANK OF SRI LANKA		
Name	Date of Appointment	Appointed
Manohari Ramanathan	6 th November 2007	Member, Monetary Board, Central Bank of Sri Lanka
Nimal Welgama	3 rd July 2006	Member, Monetary Board, Central Bank of Sri Lanka

JUDGES, SUPREME COURT/ COURT OF APPEAL		
Name	Date of Appointment	Appointed
Justice P.A. Ratanayake	May 2008	Supreme Court Judge
Justice K. Sripavan	28 th March 2008	Supreme Court Judge
Justice Jagath Balapatabendi	13 th December 2007	Supreme Court Judge
Justice Andrew Somawansa	29 th May 2006	Supreme Court
Justice Chandra Ekanayake	27 th March 2008	President, Court of Appeal
Justice Upali Abeyratne	27 th March 2008	Court of Appeal Judge
Justice K. Sripavan	6 th March 2007	President, Court of Appeal
Justice Puvalasiri Wijayaratne	13 th December 2007	President, Court of Appeal
Justice A.W.A Salam	6 th March 2007	Court of Appeal Judge
Justice Anil Gooneratne	5th January 2007	Court of Appeal Judge
Justice Jagath Balapatabendi	29 th May 2006	Court of Appeal Judge
Justice Rohini Perera	29 th May 2006	Court of Appeal Judge
Justice Sarath de Abrew	29 th May 2006	Court of Appeal Judge