

President's Executive Powers: Demystifying the 19A Bill Ruling

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Introduction

The Supreme Court ruling of April 2015 with regard to the 19th Amendment Bill¹ has generated much interest and commentary. What exactly are the implications of the ruling and does it or does it not allow the curtailment of the powers of the Executive President? This briefing note seeks to simply and concisely explain the two main principles upon which the ruling was framed and explain the implications for the executive power and office of the president.

This briefing note considers the major findings of the Supreme Court pertaining to the office of the President and the extent of curtailment pronounced as being permissible without a referendum. There are a few other matters ruled on by the Supreme Court in its determination of the 19th Amendment Bill (2015²) which are not dealt with here.

What was the Supreme Court asked to decide?

It is important to understand at the outset, that this Bill (unlike most other Bills) seeks to change the constitution. Therefore, to be passed into law, it requires in any event, a special majority of not less than 2/3rd of all Members of Parliament.³ However, the Constitution provides that if there is any inconsistency with certain specific provisions of the Constitution (commonly called 'entrenched provisions'), in addition to such a special majority, a referendum is also required.⁴ Hence, the question before the Supreme Court was simply this: did some (or all) the provisions of the Bill require a referendum?

For instance, the Constitution lists Article 3⁵ of the Constitution as one of its entrenched provisions. However, Article 4⁶ of the Constitution is not entrenched. This means that any provision in the 19th Amendment Bill that is inconsistent only with Article 4 would not require a referendum, but only passage by a special majority of Parliament. However, if *Article 3 itself* is somehow 'prejudicially affected' by a proposed revision to Article 4, then it could be argued that a referendum is required.

¹ A Bill is a draft law, required normally to be placed on the Order Paper of Parliament enabling reference by any citizen within seven (07) days of such placement by a petition to the Supreme Court for determination within three (03) weeks of the first such petition, of any issues of inconsistency of any/all of its provisions with existing provisions of the Constitution. The procedures for petition and reference of Bills for determination by the Supreme Court as to consistency with the Constitution, is found in Chapter XVI of the Constitution.

² There was an earlier 19th Amendment Bill mooted in 2002, which was held to require a referendum to be passed, which was thereafter not proceeded with. An earlier 18th Amendment Bill which was also mooted at the same time, met with the same fate.

³ Article 82(5), Constitution of Sri Lanka.

⁴ Article 83, Constitution of Sri Lanka.

⁵ Article 3 of the Constitution provides that: '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.'

⁶ Article 4 of the Constitution sets out the manner in which the Sovereignty of the People shall be exercised, and provides that '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' [Article 4(c)].

This was precisely the argument made by those who petitioned the Supreme Court on the 19th Amendment Bill; they argued that limitations placed by the bill on the powers of the President affected the inalienable sovereignty of the people entrenched in Article 3.

The two principles that framed the determination of the court

The determination of the Court effectively relies on two principles that are variously argued throughout its text.

Principle 1: Provisions that limit how the President might exercise his executive powers—which can be expected to improve accountability and the checks and balances on the exercise of that power—do not compromise the sovereignty of the people.

Principle 2: Provisions that go beyond Principle 1 to also alienate the position and functions of the executive from the person of the elected President and repose them in someone else do compromise the sovereignty of the people.

Therefore, to put it simply, the determination is this: limitations to the executive power of the President that increases accountability and improves checks and balances do not need to be approved by a referendum. However, any effective transfer of the position and function of the President to another office—such as that of the Prime Minister—needs to be approved at a referendum.

Arguments and applications of Principle 1:

Principle 1: Provisions that limit how the President might exercise his executive powers—which can be expected to improve accountability and the checks and balances on the exercise of that power—do not compromise the sovereignty of the people.

In its determination, the Supreme Court looked at the nature of the power of the People vested by the Constitution in the President and observed that under the Constitution:

- (a) The President is answerable to Parliament⁷ for the 'due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law.';
- (b) the direction and control of Government is given to the Cabinet⁸ which must be appointed and constituted from amongst Members of Parliament which must be 'collectively responsible and answerable to Parliament';

⁷ Article 42, Constitution of Sri Lanka.

⁸ Articles 43 and 44, Constitution of Sri Lanka.

- (c) the President must appoint a Prime Minister⁹ who must be the Member of Parliament who in his opinion is most likely to command the confidence of Parliament; and
- (d) the President is required to be the Head of the Cabinet.¹⁰

The Court notes that the Constitution underscores conclusively the fact that the President is not the sole repository of Executive Power under the Constitution. It notes that whilst the elected President himself is responsible to Parliament, it is the Cabinet collectively (and not the President alone) that is charged with the direction and control of the government, and that the Cabinet (headed by the President) is responsible and answerable to Parliament.¹¹

The Court also observes that 'certain powers with regard to the public service are vested in the Public Service Commission (PSC) and some in the Cabinet of Ministers'.¹² It also notes that Chapters VII,¹³VIII¹⁴ and IX¹⁵ of the Constitution all reflect the manner in which the executive power of the People is not concentrated in the President by the Constitution.

The ruling notes that the feature of responsibility to Parliament was a feature of the earlier Constitution¹⁶ (where there was no Executive President) and observes that the feature has been retained in the present Constitution¹⁷ as well. The Court recognises that the Constitution must be read as a whole, and emphasises that when thus read,¹⁸ '*clearly, the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance.*'

The Court also recognises that the purpose and object of the Constitutional Council sought to be re-created¹⁹ by the proposed 19th Amendment, is 'to impose safeguards in respect of the exercising of the President's discretion and ensure propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions', and that 'a framework within which the President will exercise his duties pertaining to appointments' is set up, accordingly.

The *ex officio* members²⁰ of the Constitutional Council are all Members of Parliament. The Court observes that all appointments of non-*ex officio* members of the Constitutional Council are made by the President. Non-*ex officio* appointments to the Council involve nominations by various actors and parties within and representative of the legislature, except for one non-*ex officio* member, who can

⁹ Article 43(3), Constitution of Sri Lanka.

¹⁰ Article 43(2), Constitution of Sri Lanka.

¹¹ Article 43, Constitution of Sri Lanka.

¹² Articles 54 and 55, Constitution of Sri Lanka.

¹³ Titled: 'The Executive – The President of the Republic'.

¹⁴ Titled: 'The Executive – The Cabinet of Ministers'.

¹⁵ Titled: 'The Executive – The Public Service'.

¹⁶ First Republican Constitution (1972).

¹⁷ Second Republican Constitution (1978).

¹⁸ The court expressly mentions that Article 4(b) must necessarily be read with Article 42 of the Constitution.

¹⁹ A Constitutional Council was created previously under the 17th Amendment which was abolished by the 18th Amendment to the Constitution.

²⁰ Prime Minister, Speaker (Chairman of the Council), Leader of the Opposition – See Clause 41A of the 19th Amendment Bill.

be appointed by the President without any nomination.²¹ The Court notes that the President is empowered to make appointments to several Independent Commissions²² set up by the Amendment, only on the basis of the recommendation of the Council, which is mandated with recommending fit and proper persons to such offices. At the same time, the President remains empowered to make appointments to certain 'key offices'²³ including judges of the Superior Courts, upon prior approval being obtained from the Constitutional Council. The Constitutional Council is also to be required in terms of the 19th Amendment Bill, to obtain the views of the Chief Justice, Minister of Justice, Attorney General and the President of the Bar Association of Sri Lanka in approving persons nominated by the President for appointment as Justices of the Superior Courts.²⁴ The Court notes that even when the President had the sole-prerogative to make appointments to the superior courts,²⁵ selection was made as a matter of practice, on the basis of nominations by the Chief Justice, Attorney General and Minister of Justice.²⁶

Arguments and applications of Principle 2:

Principle 2: Provisions that go beyond Principle 1 to also alienate the position and functions of the executive from the person of the elected President and repose them in someone else do compromise the sovereignty of the people.

In its determination, the Supreme Court found certain provisions of Clause 11 of the 19th Amendment Bill to prejudicially affect Article 3 of the Constitution,²⁷ and to therefore require approval at a referendum.

The following provisions, in the view of the Supreme Court, substantially relocated powers and functions of the President to the Prime Minister and thereby violate principle 2:

- Making the Prime Minister Head of the Cabinet of Ministers,²⁸
- Giving the Prime Minister the power to determine the number of Cabinet Ministers and Ministries and determine the assignment of subjects and functions to them,²⁹
- Permitting the Prime Minister to at any time change the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet,³⁰

²¹ Clause 10 of the 19th Amendment Bill – proposed Article 41A(1)(d) of the Constitution.

²² Clause 10 of the 19th Amendment Bill – proposed Article 41B of the Constitution.

²³ Clause 10 of the 19th Amendment Bill – proposed Article Clause 41C of the Constitution.

²⁴ Supreme Court and Court of Appeal.

²⁵ Under the present Constitution, prior to the 17th Amendment.

²⁶ Judicially recognised as the established practice in *Silva v. Shirani Bandaranayake* [1997] 1 Sri.L.R. 93.

²⁷ Proposed Articles 42(3), 43(1), 43(3), 44(2), 44(3) and 44(5) in Clause 11 of the 19th Amendment Bill.

²⁸ Proposed Article 42(3).

²⁹ Proposed Articles 43(1).

³⁰ Proposed Article 43(3).

- Permitting the Prime Minister to determine the subjects and functions to be assigned to non-cabinet Ministers and any Ministries to be given to their charge,³¹
- Allowing the Prime Minister to change at any time any such assignment of subjects and functions to non-cabinet Ministers³²
- Allowing any Cabinet Minister *at the request of the Prime Minister* to delegate to any non-cabinet Minister by a gazette notification, any power or duty conferred on the Cabinet Minister by law and rendering its delegated exercise by such non-cabinet Minister legitimate, notwithstanding any conferment or imposition of the relevant power or duty by law on the Cabinet Minister.³³

In making the case for Principle 2, the Court observed that the People of Sri Lanka have through the Constitution reposed certain executive powers on the elected President, which are to be exercised by him, subject of course to permissible restrictions. It observed that if the Prime Minister were permitted to exercise the powers in the manner envisaged by the said provisions of Clause 11,³⁴ the Prime Minister (from below) would then be exercising executive power reposed by the People in the President, which cannot be thus alienated from the President, without violation of Article 3.

Nevertheless the provisions that have been approved do allow a very high degree of latitude for the application of Principle 1. For instance, the proposed Article 43(2) in the 19th Amendment provides that the 'President, **shall**, on the advice of the Prime Minister, appoint from among Members of Parliament, Ministers to be in charge of...Ministries...'. Moreover, proposed Article 33A (2) provides that the 'President shall, except in the case of the appointment of the Prime Minister or as otherwise required by the Constitution, act on the advice of the Prime Minister.' The Supreme Court does not pronounce either of these provisions to be outside the ambit of permissible checks and balances on the exercise of executive power by the President.

Therefore, it is noted that the Supreme Court's ruling does not comment on the **substantive exercise** of executive powers by the Prime Minister through his advice to the President, which the President is constitutionally obligated to follow. For instance, though the Prime Minister may not be permitted to directly determine the assignment of subjects and functions to Cabinet Ministers,³⁵ he could substantively do so by advising the President to appoint certain Members of Parliament as Cabinet Ministers to be in charge of specific Ministries.³⁶

³¹ Proposed Article 44(2).

³² Proposed Article 44(3).

³³ Proposed Article 44(5).

³⁴ Proposed Articles 42(3), 43(1), 43(3), 44(2), 44(3) and 44(5) in Clause 11 of the 19th Amendment Bill.

³⁵ Proposed Article 43(1)

³⁶ Proposed Article 43(2)



In Summary

It may be said on consideration of the 19th Amendment Bill Determination, that the Supreme Court has effectively held that the sovereignty of the people is not compromised by constitutional changes that curtail and build safeguards on the exercise of executive power by the elected President [**Principle 1**].

At the same time, the Court has also held that any changes that remove or alienate executive power reposed in the elected President by the Constitution, and directly repose it in someone else instead, would compromise the sovereignty of the people [**Principle 2**].

On the one hand, the determination holds that significant checks and balances can be imposed on the executive powers of the President without a referendum. Such checks and balances may even extend to the mandatory requirement to follow the advice of the Prime Minister. On the other hand, the determination does not permit those powers to be directly transported or relocated to the office of the Prime Minister.