

Court rejects amendments

The United National Front (UNF) government suffered a major setback when the Sri Lankan Supreme Court effectively struck down parts of the proposed 19th Amendment to the Constitution in October. Legal experts say that the highest court in the island has set a precedence for the courts to provide protection to all declared and undeclared rights granted to citizens in the Constitution or found as the basic features of the Constitution.

The seven-member bench, presided by Chief Justice Sarath N Silva considered 29 petitions before delivering an unanimous decision. The Court sent its determination to President Chandrika Kumaratunge and Speaker of Parliament Joseph Michael Perera on 15 October. It became public only after the Speaker made the announcement in Parliament on 22 October.

The Amendment would have curtailed the power of the President to dissolve Parliament. Under the 1978 Republican Constitution, the President has powers to dissolve Parliament after one year from the date of a general election [Article 70 (1) (a)]. President Chandrika Kumaratunge exercised this power and dissolved Parliament on 10 October 2001. As general elections were held on 5 December 2001, the President would acquire the power to dissolve Parliament again on 5 December 2002.

The UNF, which controls Parliament, fears that the President, who is leader of the main opposition People's Alliance (PA), will dissolve Parliament at the first opportunity. Dissolution of Parliament would be disastrous for the peace process. Unprecedented and unexpected progress has been made in the talks between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE). There is no guarantee that a new government will take the process forward.

Doubts over dissolution have led the government to consider various options. One of them was impeachment of the President. The Constitution provides that an impeachment motion against the President may be introduced in Parliament for intentional violation of the Constitution, treason, bribery, corruption or abuse of power. But the impeachment procedure is complicated and requires a two-thirds majority in the 225 member legislature and an enquiry and declaration by the Supreme Court that the President is guilty of the charges levelled against her [Article 38 (2)].

The UNF has 114 seats in Parliament including the five SLMC MPs. The 15 members of the Tamil National Alliance (TNA) would support constitutional changes that ensure continuance of the peace process and satisfy the aspirations of the Tamil people. The TNA comprises the Tamil United Liberation Front (TULF), Eelam People's Revolutionary Liberation Front (EPRLF), All Ceylon Tamil Congress (ACTC) and Tamil Eelam Liberation Organisation (TELO). Even the support of the TNA would be insufficient to muster the 150 seats necessary for a two-thirds majority. Therefore the government needed the votes of at least 19 members of the opposition.

The UNF, which has legal experts such as GL Peiris and KN Choksy, came up with the 19th Amendment to overcome the difficulties. The Amendment dealt with a 'conscience vote' and would have given immunity to MPs from being sacked by their party. Under current laws, an MP who fails to toe the party line can be replaced without a by-election. The UNF government argued that 'conscience voting' is needed to muster the required support in Parliament to ensure that it remains in power long enough to conclude the peace process and improve the economy. The Amendment also sought to curb the President's powers to dissolve Parliament.

In September, the Cabinet approved the proposed Amendment despite objections from President Chandrika. It was tabled in Parliament and referred to the Supreme Court to check its constitutional validity (under Article 120). But on 17 October, even before the Supreme Court decision became public, Constitutional Affairs minister GL Peiris announced the Cabinet decision that the government may consider requesting the President to dissolve Parliament in order to hold fresh elections. Observers point out that this stance of the government is contrary to the earlier position that the peace process would be affected if President Chandrika dissolved Parliament.

The Supreme Court declared that the Amendment needed a two-thirds majority in Parliament, and in addition, approval by the people in a national referendum. It totally rejected Clause 6 of the Amendment which provided for 'conscience voting'. Since the 'conscience' provision applied only to this Clause and not to all provisions of the Amendment, the Court took the view that this amounted to suspension of Article 99 of the Constitution. The Court said that it could not be rectified even by a referendum.

Article 99 (13) (a) says where an MP ceases by resignation or expulsion to be a member of a political party from which he/she contested, then his/her seat would become vacant. This Article also provides a legal remedy to such an MP. The MP could petition the Supreme Court within one month of expulsion from the party.

The Supreme Court's position is that Parliament has no power under the present Constitution to change fundamental features of the Constitution so as to destroy its identity. The Court has noted that Article 99 (13) (a), which is a fundamental feature of the Constitution, has implications on the exercise of franchise and the exercise of judicial power. Clause 6 of the 19th Amendment has the effect of distorting the exercise of franchise and removing the exercise of judicial power.

The Court suggested an alternative way of bringing the Amendment into force. If the period of one year for dissolution of Parliament by President after a general election is extended to three years [which is half the

total life of a Parliament under Article 62 (2)], the Amendment could be passed with a two-thirds majority without the need for a referendum. Similarly, if the conscience voting provision is extended to all clauses, the Amendment could be passed with a two-thirds majority in Parliament, without the need for a referendum.

President Kumaratunge and the PA were strengthened by the Supreme Court decision. The President retains the power to dissolve Parliament after 5 December 2002. However, a change of strategy was apparent. In a national TV address, the President, who had hitherto been opposing every move of the UNF, praised the peace efforts of Prime Minister Ranil Wickremasinghe and called on him to join hands, 'leaving aside all political and other differences and work out a clear programme for peace, acceptable to all the people, including the LTTE'.

Reports say that President Chandrika has decided to abide by the assurances given by her to the Speaker of Parliament in August that she would not dissolve Parliament unless the government loses its majority or in case of imminent danger to the unity of the nation. The President may wait until prospects for a PA victory at a general elections have improved.

Observers have expressed concern that a solution to the conflict presented by the UNF government granting substantial autonomy to the north-east region may be regarded by the PA and its allies as 'imminent danger to the unity of the nation'. Colombo newspaper *Sunday Leader* columnist DBS Jeyaraj says that the strategy of the PA may be to consistently provoke the LTTE through agents within the armed forces and political parties operating in the north-east to such an extent that they retaliate.

The President's unexpressed message to the government was clear. The government must listen to her and incorporate her demands if any progress was to be made in the peace talks. While showing a friendly face to the government, she continued to attack the LTTE, accusing them of extortion, kidnapping, enforcing an unlawful judicial system and recruitment to illegal armed forces and a police force.

The President's advisor and PA stalwart Lakshman Kadirgamar launched a scathing attack on the facilitators of the peace negotiations - Norway. He alleged that the actions of Norway were favourable to the LTTE and called for changes in the ceasefire agreement. He denounced the aid conference in Oslo on 25 November, as an attempt to have the ban on the Tigers removed in other countries by granting status to the LTTE equal to that of the delegates from Britain and the US. President Chandrika refused to meet Norwegian Deputy Foreign minister Vidar Helgesen who visited Sri Lanka on 20 October.

But Lord Nesby from Britain visiting Sri Lanka in November declared that Norway was not aligned to any side in the conflict and had continued to act as a dedicated and honest broker. He further said that Norway had vast experience in peace diplomacy and progress had been made in the peace talks as a result of Norwegian involvement.

It appears that political cohabitation which is crucial for progress in the peace negotiations, is far from the political minds of the two major parties in Sri Lanka. Even if the talks between the UNF government and the LTTE are successful, the support of the PA is essential for the two-thirds majority needed in Parliament for constitutional changes to give effect to any agreement that is reached.

Some observers have criticized the Supreme Court of acting inconsistently in the application of the constitutional provisions. They say that the Supreme Court had failed to act in a similar manner to protect the rights of the people in the case of the Prevention of Terrorism Act (PTA), which has been used for the repression of a section of the population. They say the principles enunciated by the Supreme Court when considering the 19th Amendment had been completely ignored when it considered the PTA, which contains several provisions which are in violation of the International Covenant on Civil and Political Rights (ICCPR).

Observers also say that the government would not be affected by the Supreme Court decision and be able to continue its business as before, unless the President intervenes. The attempt of the PA to recruit MPs of the SLMC during the voting on the budget in

November seems to have failed. The defeat of the budget in Parliament would have forced the government to call for fresh elections. But the government received 129 votes for the Budget with 93 against. PA ally Eelam Peoples' Democratic Party (EPDP) also voted with the government. EPDP members say that they do not wish to destabilise the peace process.

The 18th Amendment

The Supreme Court also rejected the 18th Amendment initiated by the government and ruled that it needed to be approved by a national referendum in addition to a two-thirds majority in Parliament. The proposed 18th Amendment sought to exempt members of the Constitutional Council from the application of the fundamental rights provisions of the Constitution. Under fundamental rights provisions, the Supreme Court has power to grant relief to victims of violations.

The Constitutional Council was established under the 17th Amendment to the Constitution (effective from 3 October 2001) for the promotion of good governance, transparency and accountability. The main duty of the Council is appointing members to the following independent commissions:

- 1) The Election Commission
- 2) The Public Service Commission
- 3) The National Police Commission
- 4) The Human Rights Commission
- 5) The Bribery and Corruption Commission
- 6) The Finance Commission
- 7) The Delimitation Commission.

The Constitutional Council is composed of the following members:

- a) The Prime Minister
- b) The Speaker of Parliament
- c) The Leader of the Opposition in Parliament
- d) One person appointed by the President
- e) Five persons appointed by the President on the nomination of the Prime Minister and the Leader of the Opposition, three of whom should represent minority communities
- f) One person to represent minority parties.

The Council also approves the appointment the judges of the Supreme Court and the

Court of Appeal, members of the Judicial Service Commission, the Attorney-General, the Inspector-General of Police, The Parliamentary Commissioner for Administration and the Secretary-General of Parliament.

The Prime Minister says that the government initiated the 18th Amendment on the request of the Constitutional Council members. The Council members have been quoted as saying that they would not be able to carry out their duties, if there are fundamental rights applications by citizens against them.

The Constitution requires that those appointed to the Council 'shall be persons of eminence and integrity who have distinguished themselves in public life and who are not members on any political party'. Observers say that the integrity of the members has come into question. The attempt of the Council to gain blanket immunity from the fundamental rights jurisdiction of the Supreme Court is totally contrary to good governance, transparency and accountability, the very purposes for which the Council was established.

The Constitution clearly states that Council members should not belong to any political party [Article 41A (4)]. But some of the present Council members appear to hold the view that political affiliation is no bar for appointment to the commissions. Reports say that at least one member of the Human Rights Commission contested on behalf of a political party in a recent election. The Presidential nominee to the Council, HL de Silva, resigned in mid-October, after it was revealed that he appeared for the PA, to support a petition to the Supreme Court against the 19th Amendment.

The Constitution also states that recommendations of the Council for appointment to the commissions shall reflect the different ethnic groups [Article 41B (3)]. In a letter to the Prime Minister in early November, Estate Infrastructure minister and leader of the Ceylon Workers Congress (CWC), Arumugam Thondaman, points out that no member to represent the interests of the Hill Country Tamils has been appointed to the Police Commission,

the Public Service Commission or the Election Commission. He alleges that the Constitutional Council has acted unfairly against the spirit and intent of the 17th Amendment.

Observers say that a Hill Country Tamil lawyer RC Karunakaran was appointed to the Constitutional Council on the recommendation of Hill Country political parties to ensure fair representation to a million-strong Plantation Tamils in the independent commissions. Article 41A (3) of the Constitution says that three members of the Council 'shall, in consultation with the members of Parliament who belong to the respective minority communities, be nominated to represent minority interests'.

According to Ceylon Workers United Front General Secretary S Sathasivam, CWC's nominee RC Karunakaran was appointed to the Council in preference to his union's nominee Jaya Peri Sundaram, another Hill Country lawyer. Mr Sathasivam, blames Mr Thondaman and Mr Karunakaran for the current situation. He alleges that the Hill Country people have been discriminated in the inclusion of names in voters lists, while in some areas, names have been unreasonably removed from the lists in pursuance of deliberate policy of denying representation to the Hill Country Tamils.

Hill Country analysts allege that the Constitutional Council has used contradictory criteria for appointment to the different commissions to deliberately deny representation to the Hill Country Tamils and are failing in their duty to ensure impartiality, objectivity and make certain that the commissions are truly independent without political influence.

The demand for independent commissions arose because of political pressure and interference with public bodies leading to bribery and corruption. Because this issue was considered extremely important, UNF and PA cooperated to ensure a two-thirds majority in Parliament for the passage of the 17th Amendment. But observers say the actions of the Constitutional Council, which is one of the most powerful bodies in the island, have created doubt whether the objectives of the 17th Amendment would be achieved.