

Constitutional Council: Can its recommendations be acted upon?

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There is a widespread view among the community that the decision of the Care-Taker Government in setting up the Constitutional Council is a commendable one with a view to advising the President with suggestion of names to make appointments to all constitutional posts. They include among others, the Supreme Court judges, the Chief Election Commissioner and Election Commissioners and the Chairman and members of the Public Service Commission.

The idea behind the move is that in the past, it is alleged successive elected governments have not adhered to the spirit of the Constitution when the appointments to these positions were made and as a result, there is a widespread perception in the community that these vital institutions of the state have been weakened.

Constitutional jobs are those that have been specified in the Constitution and therefore have certain characteristics. The persons once appointed to the positions hold for a certain period of term and they cannot be easily removed from their offices unless they resign or they are removed through a certain method, as specified in the Constitution.

This is because individuals who are appointed to such positions must do their jobs without fear or favour. Their independence and impartiality in performance of their functions emanate from the knowledge that they cannot be easily removed from their positions. Constitutional jobs in every country have these characteristics so that they can perform their duties without interference or influence from any quarter.

Public are assured that certain important constitutional responsibilities are invested with persons who are competent to discharge their responsibilities without fear or favour. And as a result, public have respect and confidence in decisions of these institutions.

Issues:

It appears that there are predominantly two issues, namely:

- (a) Whether the Constitutional Council can be set up without amending the Constitution?
- (b) Whether recommendations made to the President by the Council can be acted upon by the President? In other words, do the recommendations conflict with the advice of the Prime Minister under the existing provision of Article 48(3) of the Constitution?

The simple answers to issue above (a) is yes. It is argued the setting up of the Council is consistent with the current provisions of the Constitution.

With regard to the above issue (b), the recommendations of the Council might conflict with the advice of the Prime Minister on such appointments under the existing provision of the Constitution.

Let us briefly discuss the position in the following paragraphs:

The powers and functions of the President are described in Chapter IV of the Constitution (Articles 48 to 54).

Article 48(2) is relevant and is quoted below for ready reference:

“The President, shall, as Head of State, take precedence over all other persons in the State and shall exercise the powers and performs the duties conferred and imposed on him by the Constitution and by any other law.”

The two significant phrases are noticeable in the above Article 48 (2) such as “by the Constitution and by any other law.”

That means the President, in terms of the Constitution, is obliged to perform his duties not only in accordance with the Constitution but also by any other law.

The Constitutional Council is to be set up initially by ordinance that will later become law when the next parliament (9th Parliament) approves it.

Therefore it is argued the setting up of the Council is perfectly consistent with the provision of the Constitution Article 48(2).

Accordingly, it is argued the President is obliged to take cognisance of the recommendations made to the President by the Constitution Council under the law in the exercise of his functions to appoint to the constitutional posts.

Anomaly:

An anomaly may arise when the Prime Minister advises the President on the appointments as per existing Article 48(3) that may not tally with the recommendations of the Constitutional Council.

Article 48(3) is quoted below:

“In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (3) of article 95, the President shall act in accordance with the advice of the Prime Minister.” (it was inserted in 1991 by the Constitution Twelfth Amendment Act).

The interpretation of the Article is argued to be that the President has no option but to accept the advice of the Prime Minister in the exercise of his functions and that includes all appointments to the constitutional posts.

In both Articles 48(2) and 48 (3), the word “shall” has been used in regard to the exercise of the functions of the President.

Thus, an anomalous situation is likely to arise when the recommendations of the Constitutional Council are at variance with the advice tendered by the Prime Minister to such appointments.

In that scenario, it is argued that the functions of the President as per advice of the Prime Minister under Article (48 (3) of the Constitution tend to override those under the law enacted by the Parliament pursuant to Article 48(2) of the Constitution. That means functions under Article 48(3) will supersede those under Article 48(2)

Removal of anomaly:

It is argued that to implement the recommendations of the Constitutional Council, Article 48(3) and Article 142(1A) need to be amended by the elected members of the next parliament. As a result, anomaly arising out of Article 48(2) and 48 (3) will be removed.

Furthermore the amendment of these two Articles may balance the distribution of powers between the President and the Prime Minister. Since 1991, it is totally lopsided in favour of the Prime Minister.

Conclusion:

It is argued that given the public sentiment overwhelmingly in favour of the setting up of the Constitutional Council for the constitutional posts, it is expected that the elected members of MPs amend the provisions of Articles 48(3) and 142(1A) of the Constitution. This will ensure the ability of the President to appoint persons to the constitutional posts through a process prescribed by the law.

Finally, it is argued that the setting up of the Constitutional Council is legally tenable under the Constitution, and it is a right step in the right direction. Only Articles 48(3) and 142(1A) are required to be amended so that the recommendations of the Council are acted upon..