Sri Lanka's Constitutional Council Comes Into Its Own

The Supreme Court Vindicates the Council's Role in Vetting Appointments to High Judicial Office

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2024 was full of landmark decisions, and the Supreme Court of Sri Lanka ended the year with another one for the history books. In *Pathirathne v Abeywardena and others*[1], the court dealt with the controversial issue of the constitutional council's refusal to approve the president's nomination of a judge to the Supreme Court. This was the first case seeking review of a decision of the constitutional council. I argue that the decision is significant because the court affirms the council's role in securing judicial independence, overrules (by implication) previous remarks on the council's purpose, and strengthens the culture of inter-branch accountability.

Facts

The constitutional council ("the council") is a 'meta' guarantor institution established by the constitution.[2] Its two main constitutional functions are (i) to make recommendations to the president for appointments to the independent commissions (guarantor institutions such as the election commission and human rights commission), and (ii) to vet the president's nominations for high public office, including judicial appointments to the superior courts. It comprises seven members of parliament from both government and opposition (including the speaker, prime minister, and leader of the opposition) and three 'civil society' members with no partisan affiliations. It is designed to promote consensus-based decision-making in appointing members to high public office. The aim is to reduce the influence of purely partisan considerations in the appointment process and thereby strengthen the independence of these institutions. This mechanism has been modified and / or repealed in a process of constitutional ping-pong but was most recently reintroduced by the twenty-first amendment to the constitution (2022).

In October 2023, the president nominated the president of the Court of Appeal to fill an impending vacancy on the Supreme Court. Concerns about the nominee's conduct emerged in the public sphere over the course of the council's deliberations. After a prolonged discussion spanning several meetings, three members of the council voted for the nomination and five against, and the council wrote to the president informing him of the reasons for their decision to refuse approval.

This decision was challenged by a fundamental rights petition (ostensibly in the public interest) by a lawyer who alleged that the conduct of the council's majority undermined the independence of the judiciary and was a breach of fundamental rights.[3] Thus, in a nutshell, the Supreme Court was asked to decide whether the council's decision to disapprove this judicial nomination breached the petitioner's fundamental rights.

Role of the Constitutional Council

The court determined that it did not. It held that the council's majority acted correctly when it (i) considered the concerns raised about the judge's conduct (the primary concern was that the judge had failed to

[1] SC/FR No. 35/2024, Supreme Court Minutes of 12 December 2024.

[2] Per Tarunabh Khaitan, "*in a given political context, a guarantor institution is a tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof).*" *In related scholarship, these are also referred to as 'fourth branch institutions' or 'institutions protecting constitutional democracy.'*

[3] Specifically, the right to equality guaranteed by article 12 of the constitution.

prevent 'bench-hunting' tactics in the Court of Appeal), and (ii) refused to approve the nomination. On a previous occasion (2015), the court had said of the council, "*The purpose and object of the Constitutional Council is to impose safeguards in respect of the exercising of the President's discretion, and to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions. It sets out a framework within which the President will exercise his duties pertaining to appointments*". In this case, the court quoted this passage with approval.

After examining several constitutional provisions securing the independence of the judiciary, the court stated "[…]*one may not need any more reasons to understand that it is primarily to safeguard and protect the Independence of the Judiciary that the Constitution itself has put in place a filtering process in terms of Article 41C of the Constitution* [the constitutional council mechanism] *before any person could be appointed as a Judge of the Superior Courts."* The court then went on to emphasise that not only was the council *entitled* to write to the Chief Justice to obtain more information about the nominee (as it had attempted to do), and to consider the allegations against the nominee, but that it was in fact their "solemn duty" to weigh this material in their deliberations.

By this finding, the court implicitly overruled its remarks in its determination on the 22nd amendment to the constitution bill (the most recent amendment, by which the present council was reintroduced to the constitution).[4]There, the court said the council existed to "assist" the president in discharging his executive functions, and opined that the president could not be beholden to a body empowered to assist him. These remarks, framing the council as a mere appendage of the executive, and as serving to "assist" the president, do not accurately reflect how previous councils functioned, nor how the present council discharged its role. The constitutional council is an independent guarantor institution established by the constitution. Through its role in vetting judicial nominations, it acts as a check on the president's powers of appointment, to secure the independence of the judiciary. The court now recognises this, and its previous remarks are thereby implicitly overruled.[5]

This also illustrates the vast difference between abstract and concrete review. On two previous occasions, the court was confronted with the repeal of the constitutional council (in the 18th and 20th amendments to the constitution).[6] On both occasions, the court's attention was drawn specifically to the threat that repealing this mechanism may pose to the independence of the judiciary (i.e. without the council, the president would be at liberty to appoint judges to the superior courts at his sole discretion). However, on both occasions, the court downplayed the impact of repealing the council and permitted its abolition without the stringent procedural requirement of a referendum.[7] In those cases, the possibility of an unsuitable appointment to the court was mere conjecture; in this case, it formed the crux of the dispute. The court's ruling in this case enshrines the council's role in securing the independence of the judiciary – a core component of the people's sovereignty. Therefore, those portions of the court's remarks in the 18th and 20th amendment determinations that are inconsistent with this decision have also been implicitly overruled.

Transparency

Transparency was another theme that ran throughout this case. During its deliberations, the council was dissuaded from seeking additional information from the Chief Justice about the impugned nominee; in fact, the same petitioner had filed a different case alleging that the council's attempt to obtain that information undermined the independence of the judiciary. The court stated emphatically, however, that blocking such

[4] Twenty Second Amendment to the Constitution Bill (S.C. (S.D.) No. 40/2022 – 49/2022).
[5] The court's decision in the case under review made no reference to this determination.
[6] Eighteenth Amendment to the Constitution Bill (S.C. (S.D.) No. 01/2010); Twentieth Amendment to the Constitution Bill, S.C. (S.D.) No. 01/2020 – 39/2020).
[7] The Supreme Court exercises a limited 'pre-enactment' jurisdiction to review bills for constitutional compliance prior to enactment, including constitutional amendment bills.

information and / or attempting to do so was contrary to the public interest and to the rule of law. It emphasised the council's duty to obtain information "by whatever means" and make a considered decision on the suitability of judicial nominees. In light of these remarks, the council perhaps now has the duty to adopt clearer guidelines on this process – what kind of information it will seek, from whom, and by what criteria nominees will be evaluated. The council has the power to adopt such rules, but the rules currently published do not address this. Faith in the judiciary is tied to public confidence in the judges themselves – as acknowledged elsewhere in this decision. The council has the opportunity to secure public confidence in judicial appointments by enshrining transparency and accountability in its vetting process through rules it may adopt in the future.

Conclusion

Zooming out, this episode serves to reinforce the importance of guarantor institutions such as the constitutional council, and their potential to mediate political power and strengthen constitutional governance. It involved two constitutional actors: the powerful executive president on the one hand, and the constitutional council on the other. They disagreed not only on the suitability of the nominee, but also on the nature of their respective powers. Opinion was divided even within the council. Ultimately, as with many constitutional questions – it was resolved by the Supreme Court. In this case, the court agreed with the council's (majority) decision; in future disputes, it may not.[8] But the court now affirms the council as having *real power*: it is not window-dressing in the constitutional scheme but plays a crucial constitutional role. The elevation of the council's status within Sri Lankan jurisprudence – and the fact that the entire process followed the law – bodes well for constitutional governance going forward.

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[8] There are several other challenges to decisions of the council that are pending before the Supreme Court.