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The Answers"**

THE DEFENCE MUST NOW SPEAK



Easter Sunday
Trial-at-Bar
reaches
critical stage

547**WITNESSES****2,076****EXHIBITS****24****ACCUSED**

Prosecution closes after 547 witnesses and 2,076 exhibits;
24 accused move into defence phase

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THE DEFENCE MUST NOW SPEAK

Easter Sunday Trial-at-Bar reaches critical stage as prosecution closes after 547 witnesses and 2,076 exhibits; 24 accused move into defence phase

By Faraz Shauketaly

COLOMBO, Sunday. One of the most consequential criminal trials arising from the 2019 Easter Sunday terror attacks enters a critical new phase tomorrow when the defence case is due to begin before the Colombo Permanent High Court Trial-at-Bar, following the conclusion of a prosecution that called **547 witnesses and produced 2,076 exhibits.**

The case involves 24 accused facing thousands of charges arising from the coordinated Easter Sunday attacks which struck churches and luxury hotels on April 21, 2019, killing hundreds and injuring many more.

The Attorney General originally filed **23,270 charges**, including allegations of conspiracy connected with the attacks. Twenty-five accused were originally indicted, but the proceedings are now continuing against 24 following the death of one accused.

The prosecution formally closed its case on Thursday, August 13, bringing to an end the evidentiary phase that began before the Trial-at-Bar in October 2023.

The three-member bench comprises Presiding Judge Navaratne Marasinghe and Judges Sujewa Nissanka and Ramanathan Kannan.

With the prosecution case concluded, the proceedings now move into the defence phase, marking an important legal threshold in a trial that has taken years to reach this point.

The distinction is important.

Being called upon to present a defence **does not amount to a finding that any accused is guilty.** At the close of a prosecution case, the legal question is whether sufficient evidence has been presented to require an accused to answer the case.

The ultimate question of guilt beyond reasonable doubt is determined only after the trial has run its full course.

That principle assumes particular importance given the scale, complexity and enormous public interest surrounding the Easter Sunday proceedings.

The attacks remain among the darkest events in Sri Lanka's recent history.

Churches celebrating Easter Mass and major Colombo hotels were struck in a coordinated series of suicide bombings, leaving families across Sri Lanka - and overseas - searching not merely for accountability but for a complete explanation of how such an operation was conceived, organised and allowed to proceed.

The criminal proceedings against the 24 accused are also distinct from other Easter Sunday cases and continuing investigations. Earlier this month, former Defence Secretary Hemasiri Fernando and former Inspector General of Police Pujith Jayasundara were convicted and sentenced to death in separate proceedings concerning their failure to act upon intelligence warnings ahead of the attacks.

Other investigations concerning the circumstances surrounding the bombings have continued separately. Tomorrow's proceedings therefore represent another important milestone rather than the conclusion of Sri Lanka's long search for answers over Easter Sunday.

For nearly three years, the Trial-at-Bar has heard the prosecution's evidence. Hundreds of witnesses have testified and thousands of documents and other exhibits have been placed before court.

Now the prosecution has finished speaking.

The defence must answer.

And only when it has done so will the Court ultimately be called upon to decide whether the prosecution has proved its case against each accused beyond reasonable doubt.

JUDGES' AGE SPECIAL WHAT HAPPENS NOW?

From Parliament to the Supreme Court - and perhaps ultimately to the People: NewsLine explains the constitutional road ahead for the Government's controversial judicial retirement-age proposals

By Faraz Shauketaly

COLOMBO, Sunday - Amid the increasingly heated argument over the Government's proposal to extend the retirement ages of Sri Lanka's judges, one important fact risks being obscured: the controversy is taking place within a constitutional process which itself provides the mechanism by which the disagreement must ultimately be resolved.

The Government proposes increasing the retirement age of Supreme Court judges from 65 to 67 and Court of Appeal judges from 63 to 65 through the proposed 22nd Amendment to the Constitution.

A companion amendment to the Judicature Act proposes increasing the retirement age of High Court judges from 61 to 63, fixing the retirement age of other judges and magistrates at 62, and increasing the maximum number of High Court judges from 110 to 120.

The two Bills are scheduled to be presented to Parliament on Tuesday, August 18.

That is where the next constitutional stage begins.

FIRST: THE BILL ENTERS PARLIAMENT

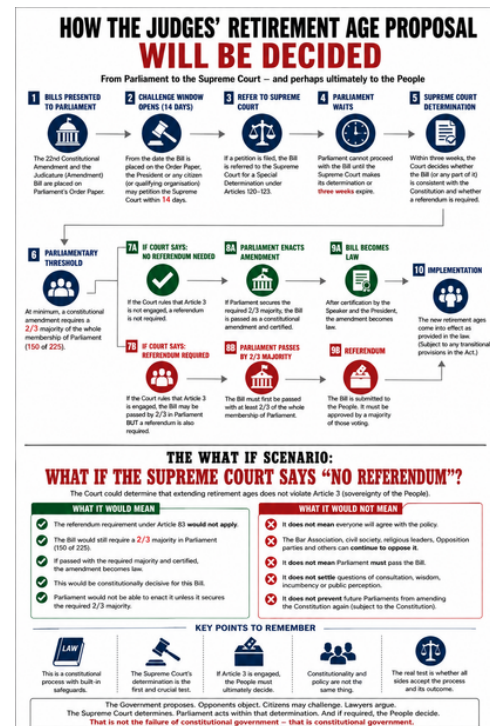
Once the proposed constitutional amendment is placed on Parliament's Order Paper, citizens have the constitutionally prescribed opportunity to challenge it before the Supreme Court.

That is not an extraordinary intervention in the legislative process.

It is the process.

The Constitution deliberately gives the Supreme Court jurisdiction to examine Bills before enactment and determine whether their provisions are consistent with the Constitution and, where they are not, what special procedure is required for them to become law.

Given the controversy surrounding the judges' retirement-age proposal, a Supreme Court challenge appears highly likely.



THEN COMES THE SUPREME COURT

The Court's job would not be to decide whether 67 is a better retirement age than 65.

Nor would it decide whether retaining experienced judges is administratively desirable. Those are essentially policy questions. The constitutional question is different.

The Court would examine whether the proposed amendment can validly be enacted through the constitutional-amendment procedure requiring a two-thirds majority in Parliament, or whether its provisions also affect one of the entrenched constitutional protections that can be changed only with the approval of the People at a referendum.

That distinction lies at the heart of the entire controversy.



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WHY TWO-THIRDS IS ALREADY NECESSARY

The retirement ages of Supreme Court and Court of Appeal judges are presently contained in Article 107 of the Constitution.

Changing those ages therefore requires changing the Constitution itself.

A constitutional amendment requires the support of at least two-thirds of the whole membership of Parliament. In the present 225-member Parliament, that means at least 150 votes.

But the opponents of 22A argue that 150 votes may not be enough.

WHY IS EVERYONE TALKING ABOUT A REFERENDUM?

Article 3 declares that sovereignty is in the People and is inalienable.

Article 4 explains how that sovereignty is exercised, including through the judicial power of the People exercised through the courts.

Article 3 enjoys special constitutional protection. If an amendment is inconsistent with it, Article 83 requires not merely a two-thirds parliamentary majority but approval by the People at a referendum.

This is the foundation of the opposition argument.

It is important, however, to understand precisely what that argument is. Article 107 - which contains judicial retirement ages - is not itself among the provisions expressly protected by the referendum requirement.

Opponents instead argue that altering the tenure of serving superior-court judges affects judicial independence; judicial independence is essential to the exercise of the People's judicial power; and interference with that independence therefore engages Article 3.

If that reasoning is accepted, a referendum becomes necessary.

If it is rejected, the referendum requirement could fall away.

THE 2022 DETERMINATION

Those opposing the present proposal rely heavily upon an earlier Supreme Court Special Determination delivered in 2022.

The significance of that determination lies in the Court's treatment of changes affecting the retirement age or tenure of incumbent superior-court judges.

The argument now being advanced is that altering the tenure of judges already holding office affects judicial independence and consequently the sovereignty protected by Article 3.

The Bar Association of Sri Lanka has placed considerable reliance upon that reasoning in opposing the present amendment.

But the present 22nd Amendment has not yet been determined by the Supreme Court. That distinction matters.

Previous constitutional reasoning will undoubtedly be placed before whichever judges hear a challenge to 22A. The Court will nevertheless have to determine the constitutionality of the actual Bill now before Parliament.

WHY SITTING JUDGES MATTER

Perhaps the most difficult issue concerns incumbency. There is a considerable difference between Parliament saying:

“Future Supreme Court judges shall retire at 67,” and Parliament saying that judges presently serving until 65 may now remain until 67. The first changes the conditions applicable to future appointments.

The second alters the tenure of identifiable judges already holding constitutional office.

Opponents argue that this creates both an independence issue and a problem of public perception.

There is an additional complication. If the present amendment is challenged, Supreme Court judges may be required to determine the constitutionality of legislation from which members of their own Court could potentially benefit through longer tenure.

No allegation of actual bias necessarily follows.

The concern is about appearance and public confidence.

That is why some critics argue that prospective application would substantially reduce the controversy.

BUT IS EXTENDING TENURE REALLY INTERFERENCE?

That question deserves to be asked as well.

Judicial independence traditionally protects judges against improper removal, pressure and interference with their ability to decide cases impartially.

The Government can therefore argue that uniformly extending retirement ages does not remove anybody, reduce anybody's tenure or subject continued service to executive discretion.

Quite the opposite: every judge in the affected category receives the same additional period.

People live longer. Professional careers have lengthened. Experienced judges represent an enormous investment of knowledge and institutional memory.

There is consequently a perfectly respectable policy argument for reconsidering retirement ages fixed many years ago.

The constitutional argument is whether doing so for judges already serving crosses a different line.

That is the question the Supreme Court may ultimately have to answer.

WHAT IF THE COURT SAYS A REFERENDUM IS REQUIRED?

The Government would then face choices.

It could proceed with the constitutional amendment, obtain the necessary two-thirds majority in Parliament and submit the proposal to the People.

Alternatively, Parliament could consider amendments capable of removing the constitutional problem identified by the Court.

Depending upon the Court's reasoning, that could conceivably include transitional arrangements concerning sitting judges.

What Parliament could not legitimately do would be simply to ignore a Supreme Court determination that a referendum was constitutionally necessary.

There is presently nothing to suggest that the Government intends to do so.

AND IF THE COURT SAYS TWO-THIRDS IS ENOUGH?

Then the constitutional position changes dramatically.

If the Supreme Court determines that extending the retirement ages does not violate Article 3 and therefore does not require approval at a referendum, the Government could proceed with 22A provided it obtains the required two-thirds parliamentary majority.

The political controversy would not disappear. The BASL could continue opposing it. Civil society could continue criticising it.

Religious leaders and Opposition parties could continue demanding its withdrawal.

But the particular legal argument that the Constitution requires a referendum would have been determined by the institution to which the Constitution entrusts that question.

That distinction is fundamental. Something may be constitutional without being wise. Something may be politically unpopular without being unconstitutional.

HAS THE GOVERNMENT BYPASSED THE CONSTITUTION?

On the presently available facts, that would be difficult to sustain.

The Government obtained Cabinet approval, published the proposed legislation in the Gazette and is taking the Bills to Parliament.

The constitutional machinery thereafter permits challenges before the Supreme Court.

There has so far been no Government announcement suggesting that it intends to prevent such challenges, disregard a Supreme Court determination or circumvent a referendum should the Court determine that one is necessary.



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That does not answer the objections to the substance of 22A.

Nor does it answer criticism concerning consultation, incumbency, judicial independence or public confidence.

It simply means those criticisms should be distinguished from an allegation that the constitutional process itself is already being circumvented.

SO WHAT EXACTLY ARE WE ARGUING ABOUT?

Strip away the political noise and there are really four questions.

Should Sri Lankan judges work for another two years?
That is principally a policy question.
Should the change apply to judges already sitting?

That raises much more serious questions concerning tenure, independence and perception.
Does applying it to incumbent superior-court judges engage Article 3?

That is a constitutional question which the Supreme Court may soon have to answer.

And finally:
If Article 3 is engaged, should the People decide?
The Constitution itself supplies the answer.
If the Supreme Court determines that Article 83 applies, they must.

That is why the coming weeks could prove more important than the argument which preceded them.
Sri Lanka is not merely debating how old a judge should be.

It may shortly be testing how constitutional disagreement itself is supposed to be resolved.

Be that as it may.

WHY ARE SO MANY PEOPLE OPPOSED?

The argument is not simply whether a judge should retire at 65 or 67 - concerns centre on incumbent judges, judicial independence, consultation and whether the People must ultimately decide

By Faraz Shauketaly

COLOMBO, Sunday - On the surface, the Government's proposal appears almost deceptively simple. People live longer, professional careers last longer and judges accumulate enormous experience. Why, then, should a Supreme Court judge necessarily leave the Bench at 65 rather than 67?

Put that way, extending judicial retirement ages by two years hardly appears capable of producing the constitutional storm now gathering around the proposed 22nd Amendment.

Yet the intensity of the opposition becomes easier to understand once an important distinction is made: for many critics, the argument is not principally about age.

It is about judicial independence, security of tenure, the position of sitting judges and whether changing the rules governing identifiable judges already holding office crosses a constitutional line.

The position of the Bar Association of Sri Lanka is particularly important because it can easily be misunderstood. The Bar's opposition should not simply be characterised as an insistence that Supreme Court judges must retire at 65 and Court of Appeal judges at 63 forever. Indeed, there is a perfectly rational argument for reviewing retirement ages as life expectancy increases and professional careers become longer.



The difficulty arises from applying the new ages to judges presently occupying the Bench. There is a considerable difference between Parliament declaring that judges appointed in future will retire at 67 and changing the retirement date of a judge who already holds office under constitutional provisions specifying retirement at 65.

Critics argue that the latter alters the tenure of identifiable incumbents. The Government responds that the proposed amendment does not select particular judges for preferential treatment. It establishes a uniform retirement age applicable to an entire constitutional class of judicial officers.

That distinction lies at the heart of the controversy.

Judicial independence is frequently discussed in terms of protecting judges against dismissal or political pressure, but the principle extends further. Security of tenure exists partly to ensure that judges can decide cases without depending upon the Executive or Legislature for their continuation in office.

Opponents therefore argue that if Parliament can alter the tenure of judges already serving, even by extending it, an important constitutional principle is engaged. The Government can counter that nobody is being removed, nobody's tenure is being shortened and no individual judge is receiving a discretionary extension from the President or Cabinet. Parliament is instead being asked to alter the Constitution itself for all judges falling within the relevant category.

The referendum argument rests substantially upon Article 3 of the Constitution, which declares that sovereignty is in the People and is inalienable, read together with the provisions concerning the exercise of the People's judicial power. Those opposing the amendment argue that judicial independence is an essential component of that sovereignty and that altering the tenure of incumbent superior-court judges consequently engages an entrenched constitutional protection.

An earlier Supreme Court Special Determination delivered in 2022 has assumed particular importance because its reasoning concerning changes affecting the retirement age or tenure of incumbent judges is now being relied upon by opponents of 22A.

If that reasoning governs the present Bill, the implications could be considerable. The amendment could require not merely the two-thirds parliamentary majority necessary to amend the Constitution but approval by the People at a referendum.

There is nevertheless an important qualification. The present 22nd Amendment has not yet received its own Supreme Court determination. The earlier reasoning will plainly be highly relevant if the Bill is challenged, but the Court will have to determine the constitutionality of the legislation actually placed before it.

There is also the unusually sensitive question of who determines that issue. Supreme Court judges could be required to decide whether legislation potentially extending the tenure of members of their own Court is constitutional.

That does not mean those judges are biased, and such an allegation should not casually be made. The concern raised by the Bar and the UN Special Rapporteur on the independence of judges and lawyers relates instead to actual or perceived conflict and the importance of maintaining public confidence in judicial impartiality.

The UN intervention has consequently added an international dimension to what was already an intense domestic debate. Importantly, the argument is not that judicial retirement ages can never legitimately be increased.

Longer tenure can preserve expertise, experience and institutional continuity. The concern is whether extending the tenure of sitting judges without adequate transitional safeguards could create a perception of Executive or Legislative interference with the judiciary.

Religious leaders, civil-society organisations and Opposition politicians have raised additional concerns over consultation and the manner in which the constitutional change is being pursued. They argue that altering the rules governing one of the principal institutions of the State warrants a broader discussion involving the judiciary, legal profession, constitutional specialists and society.

That is an important criticism, but it should be distinguished from the question of constitutional legality.

A Government can follow the formal constitutional procedure and still face legitimate criticism that consultation was inadequate. Equally, extensive consultation cannot cure a Bill which fails a constitutional requirement.

The Government has also linked the proposal to the wider problem of delays in the administration of justice. Retaining experienced judges while expanding the number of judges and increasing institutional capacity forms part of its stated reform programme.

Critics respond that Sri Lanka's enormous case backlog cannot realistically be attributed principally to Supreme Court and Court of Appeal judges retiring two years too

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early. Delays occur throughout the system and involve court capacity, investigations, prosecutorial resources, adjournments, Government Analyst reports and congestion in the lower courts.

There is merit in examining both arguments. Experienced judges are valuable. Equally, keeping judges longer at the top can delay vacancies and consequently slow the progression of judges further down the judicial hierarchy. What should not be lost amid the increasingly heated rhetoric is that considerable opposition to the Government's proposal does not itself establish that the Government is acting outside the Constitution.

The Government has approved the proposal, gazetted the Bills and is taking them to Parliament. The Constitution then provides the opportunity for citizens to challenge the amendment before the Supreme Court.

If challenged, the Court determines what the Constitution requires. If it says a two-thirds parliamentary majority is sufficient, Parliament may proceed on that basis. If it determines that Article 3 is engaged and a referendum is necessary, the Government must either satisfy that requirement or alter its legislative course.

There is presently no indication from the Government that it intends to disregard that process.

That leaves Sri Lanka with an important distinction which should perhaps guide the entire debate. Opposition to a constitutional amendment does not, by itself, make the amendment unconstitutional.

Equally, a determination that an amendment is constitutionally permissible does not necessarily make it wise.

One is ultimately a question of law.

The other remains a question of judgment.

WHAT IF THE SUPREME COURT SAYS: NO REFERENDUM?

The opposition case rests heavily on Article 3 and an earlier Supreme Court determination - but the present 22nd Amendment must still face its own constitutional test

By Faraz Shauketaly

COLOMBO, Sunday - It is perhaps the most intriguing question in the entire controversy over extending the retirement ages of Sri Lanka's superior-court judges: what happens if the Supreme Court itself determines that the People do not have to vote on it?

Much of the constitutional opposition to the proposed 22nd Amendment rests upon the argument that altering the tenure of incumbent judges affects judicial independence,

thereby engaging Article 3 of the Constitution and triggering the requirement for approval at a referendum. There is substantial constitutional reasoning behind that position, reinforced by an earlier Supreme Court Special Determination concerning judicial tenure. But until the Supreme Court determines the constitutionality of the present Bill, the precise requirements governing 22A remain to be decided.

It is therefore entirely legitimate to examine the opposite possibility.

Suppose the present amendment is challenged and the Supreme Court concludes that increasing the retirement age of Supreme Court judges from 65 to 67 and Court of Appeal judges from 63 to 65 does not diminish judicial independence and consequently does not violate Article 3.



The constitutional consequences would be significant.

The Bill would still require a two-thirds majority of the whole membership of Parliament because Article 107 of the Constitution itself is being amended. In the 225-member Parliament, at least 150 votes would therefore remain necessary.

But there would be no referendum.

A possible Government argument is relatively straightforward. Article 107 establishes retirement ages, but Article 107 is not itself one of the provisions expressly protected by the referendum requirement under Article 83.

The critical question therefore becomes whether changing those ages also infringes the sovereignty of the People protected by Article 3.

A Supreme Court could conceivably determine that uniformly extending the retirement age of an entire category of judges is fundamentally different from political interference with individual judges.

Nobody is being dismissed. Nobody's existing tenure is being shortened. No individual judge has to seek an extension from the President, Cabinet or Parliament. If enacted, the Constitution itself would provide the additional two years to everyone falling within the relevant category.

Under that reasoning, the amendment might be characterised as an institutional reform rather than an interference with judicial independence.

Indeed, the Government could make the provocative counterargument that security of tenure is not being weakened at all. It is being lengthened.

The opposition answer is equally substantial. Judicial independence does not merely protect judges against dismissal. It also protects the stability of the constitutional conditions under which they hold office.

If Parliament can alter the tenure of incumbent judges after their appointment, critics ask whether that creates a precedent capable of being used differently by another Government in another set of circumstances.

An extension may be beneficial to a judge, but critics argue that this does not eliminate the institutional concern. Judges decide cases involving the Government and State. If the political branches subsequently legislate to give serving judges additional tenure, questions of appearance and public confidence may arise even where everybody involved acts with complete integrity.

That is why the apparently simple alternative of prospective application has assumed such importance.

If the Government's long-term policy is that Supreme Court judges should retire at 67, Parliament could theoretically establish that age for future appointments without changing the tenure of anyone presently sitting. The Government can respond that this would defeat part of the immediate purpose of the reform - retaining the experience of existing judges while the judicial system is expanded.

That is a legitimate policy disagreement. Whether it also becomes a constitutional problem is the question the Supreme Court may have to answer.

The composition of the Court hearing a challenge could itself attract considerable attention. Given the exceptional importance of the issue, there has been discussion about whether a larger bench might ultimately consider it.

A larger bench does not possess some greater power to dispense with constitutional requirements. Five or seven judges cannot avoid a referendum if the Constitution requires one, just as a three-member bench cannot require one merely because it considers a referendum politically desirable.

The importance of a larger bench would lie in the institutional authority of its determination on an issue affecting the judiciary itself.

Nor should the matter be simplistically described as a larger bench "overruling" an earlier three-member bench.

A Supreme Court considering 22A would be exercising its constitutional jurisdiction over the Bill presently before it. Earlier Supreme Court reasoning would undoubtedly carry considerable weight and would almost certainly be relied upon by those challenging the amendment.

The Court could accept that reasoning and apply it to 22A. It could distinguish the earlier circumstances from the present legislation. Or its constitutional analysis of the Bill before it could lead to a different conclusion.

If the Court ultimately determines that Article 3 is not infringed and no referendum is necessary, that would settle the referendum requirement for the present Bill.

It would not settle the political argument.

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The Bar Association could continue opposing 22A. Civil society could continue criticising it. Religious leaders could continue asking the Government to withdraw it. Opposition MPs could vote against it and citizens could campaign against the policy.

That is because there is an essential distinction between something being constitutionally permissible and something being politically desirable.

Nor would a Supreme Court determination that no referendum is necessary compel Parliament to enact 22A. It would merely establish the constitutional conditions under which Parliament may do so.

MPs would still have to vote.

Conversely, if the Supreme Court determines that Article 3 is engaged and a referendum is necessary, even an overwhelming parliamentary majority could not substitute for the approval of the People.

That is perhaps the most important point in the entire debate.

Sri Lanka has not yet necessarily reached a constitutional crisis. It has reached a profound constitutional disagreement for which the Constitution itself provides a mechanism.

The Government proposes.
Its opponents object.
Citizens may challenge.
Lawyers argue.
The Supreme Court determines.
Parliament acts within that determination.

And if the Constitution requires it, the People decide.

The real test of the rule of law therefore comes afterwards. If the Court requires a referendum, will the Government accept that determination? And if the Court says no referendum is required, will those opposing the amendment accept that constitutional conclusion while continuing, entirely legitimately, to oppose the policy?

The answer to both should be yes.

Because the controversy is ultimately about considerably more than whether a judge retires at 65 or 67.

It is about whether all sides are prepared to accept the constitutional process when the answer it produces may not be the answer they wanted.

Be that as it may.

WHY NOT JUST START WITH THE NEXT JUDGE?

Making higher retirement ages prospective could remove much of the controversy - but it would also deny the Government the immediate benefit it says the reform is intended to achieve

By Faraz Shauketaly

COLOMBO, Sunday - Amid thousands of words of constitutional argument over the proposed extension of judicial retirement ages, one deceptively simple question keeps returning: if the Government believes Supreme Court judges should retire at 67 rather than 65, why not apply the new rule only to judges appointed in future?

It is an important question because prospective application could potentially remove, or at least substantially reduce, several of the objections now surrounding the proposed 22nd Amendment.

The Government's underlying policy would remain intact. The retirement age of Supreme Court judges would become 67 and that of Court of Appeal judges 65. Sri Lanka would have made the policy decision that judges should serve longer, while nobody presently occupying those courts would receive additional tenure.

The distinction goes directly to the heart of the constitutional controversy. A judge appointed under existing constitutional arrangements knows the retirement age applicable to that office. Changing that age while the judge remains in office alters the period for which that individual can continue serving.

Opponents argue that it is precisely this feature - rather than the numbers 65 or 67 themselves - that engages the constitutional principle of judicial independence.

Prospective application produces a different situation. Parliament would still be changing the Constitution, but the new rule could be designed to govern appointments made after a specified date rather than extending the tenure of identifiable incumbents.

It would also substantially address the awkward question of judges potentially being called upon to determine the constitutionality of an amendment from which serving members of the Supreme Court might themselves benefit. If nobody presently serving receives additional tenure, that particular perception of personal benefit is considerably diminished.

It is nevertheless important not to leap from that proposition to the conclusion that prospective application is constitutionally required. That is precisely one of the matters which could arise if the proposed amendment is challenged before the Supreme Court.

The Government has a legitimate counterargument. Its proposal forms part of a wider attempt to strengthen judicial capacity now, rather than several years into the future. If experienced judges are required to deal with pressures confronting the courts, applying the higher retirement ages only to future appointments would postpone much of the intended immediate benefit.

There is nothing inherently extraordinary about a country reconsidering retirement ages. Governments routinely change retirement policies as life expectancy, professional working lives and institutional requirements evolve.

The difference is that judges are not ordinary public servants. Judicial tenure is constitutionally protected precisely because judges must remain independent of the political branches of government. Any alteration to the conditions governing how long serving judges remain in office consequently attracts a degree of constitutional scrutiny that would not ordinarily accompany a change in the retirement age of another profession.

There is another consequence which has received less attention. Keeping existing judges for an additional two years inevitably means that vacancies which would otherwise arise at particular dates arise later.

That can affect movement throughout the judicial hierarchy. A Court of Appeal judge who might otherwise become eligible for elevation to the Supreme Court could wait longer. A High Court judge awaiting possible elevation to the Court of Appeal could similarly find the timetable altered.



The Government's proposed expansion in judicial numbers could counter some of those consequences, but retirement ages and judicial promotions cannot be viewed entirely separately.

This is why prospective application presents an attractive compromise to many critics. The Government obtains its long-term reform. Future judges serve longer. The retirement-age policy changes permanently. Yet the tenure of judges presently occupying office remains untouched.

But compromise remains a political choice unless the Constitution makes it a legal necessity.

If the Supreme Court determines that applying the extension to incumbent judges engages Article 3 and therefore requires approval at a referendum, the Government will face a very different calculation. Depending upon the precise reasoning of the Court, transitional or prospective arrangements could then assume considerable importance.

If, however, the Court determines that uniformly extending the retirement ages of incumbent judges does not infringe Article 3, the Government could proceed with the proposal subject to satisfying the constitutional requirement for a two-thirds parliamentary majority.

The question would then cease to be principally one of constitutional necessity and become one of political judgment.

That leaves perhaps the simplest question in this complicated controversy unanswered.

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If prospective application can preserve the reform while removing much of the suspicion surrounding it, why not do it?

The Government's answer is essentially that Sri Lanka needs to retain judicial experience now. Its opponents argue that judicial independence is too important to permit even the perception that the political branches are extending the tenure of judges presently occupying the Bench.

Somewhere between those positions may lie the least controversial route to reform.

Whether the Government is constitutionally obliged to take it is another matter altogether.

WILL TWO MORE YEARS ACTUALLY CLEAR THE COURTS?

Government links longer judicial service to wider justice reform, but Sri Lanka's case delays extend far beyond the retirement ages of its most senior judges

By Faraz Shauketaly

COLOMBO, Sunday - If Sri Lanka's judges work for another two years, will cases actually move through the courts appreciably faster?

It is perhaps the most practical question surrounding the Government's controversial retirement-age proposals - and one that risks becoming lost beneath the constitutional argument over referendums, judicial independence and Article 3.

The Government has not presented the retirement-age changes entirely in isolation. Its wider programme envisages expanding judicial capacity and strengthening institutions involved in the administration of justice, while the companion Judicature amendment proposes increasing the maximum number of High Court judges from 110 to 120.

Seen in that context, retaining experienced judges for longer has an understandable rationale.

A senior judge represents decades of accumulated legal and judicial experience. Replacing that expertise is not instantaneous. Additional years on the Bench preserve institutional knowledge and, in theory, provide additional judicial capacity without waiting for another generation of judges to acquire comparable experience.

But Sri Lanka's notorious case delays are considerably more complicated than that.

Cases become delayed long before they reach the Supreme Court. Investigations take time. Reports from specialist State institutions take time. Prosecutorial decisions can take time. Cases are postponed.

Witnesses become unavailable. Lawyers seek dates. Courtrooms and staff are limited.

Lower courts carry substantial workloads.

An additional two years for a Supreme Court judge cannot by itself solve those problems. Nor does the existence of a large national case backlog necessarily establish that the superior courts lack sufficient judges because experienced members retire too early.

This is where the debate requires evidence rather than assertion.

If longer tenure is being advanced partly as an answer to judicial delay, Parliament is entitled to know how much of the backlog exists at each level of the system, how long cases remain pending, what principally causes those delays and what measurable improvement another two years of judicial service is expected to produce.



There is also the question of replacement. Keeping an experienced judge for two additional years preserves that judge's productivity and expertise, but the system does not ordinarily lose a judicial position when somebody retires. A vacancy arises and another qualified judicial officer can be elevated.

The Government can reasonably respond that replacement is not the same as experience.

A newly elevated judge may be exceptionally capable but does not necessarily possess the institutional knowledge accumulated by somebody who has already spent years in a superior court.

That is a legitimate consideration.

It still leaves the larger question unanswered: where exactly is the bottleneck?

If the principal delays exist in Magistrates' Courts, District Courts, High Courts, police investigations, prosecutions or forensic reporting, increasing retirement ages at the very top addresses only one component of a much larger machine.

Indeed, the Government's proposal to expand High Court numbers may ultimately have greater practical significance for reducing delays than the retirement-age provisions which have generated most of the political attention.

Justice, of course, cannot be measured merely by how many cases a court disposes of. Judicial quality matters. Consistency matters. Experience matters.

A system producing judgments more rapidly is not necessarily delivering better justice.

Retaining highly experienced judges may therefore possess value that cannot be captured simply by counting disposed cases.

But if that is the principal argument, it should be made clearly.

The controversy would benefit from separating two propositions which have increasingly become intertwined.

The first is that experienced judges are valuable and might reasonably serve for another two years.

The second is that extending their retirement ages will materially solve Sri Lanka's enormous case backlog. The first proposition has an obvious logic.

The second requires evidence.

Perhaps the retirement-age controversy therefore presents Sri Lanka with an opportunity to ask a considerably larger question.

How many cases are pending at each level of the judicial system? How old are they? Why have they been delayed? How many judges are actually required? How many courtrooms are needed? How much delay originates outside the judiciary? And which reforms would produce the greatest improvement in the time taken to deliver justice?

Answer those questions and the country can begin designing a justice system around evidence rather than assumption.

Extending retirement ages may form part of that answer. It should not be mistaken for the whole of it.

Be that as it may.

FOUR VACANCIES - SO WHY WAIT FOR ONE JUDGE?

President says Easter Trial-at-Bar complicates Court of Appeal appointments, but legal circles argue other vacancies need not necessarily remain unfilled until the trial concludes

By Faraz Shauketaly

COLOMBO, Sunday - The existence of four vacancies in the Court of Appeal has opened another front in the debate over judicial appointments, with legal circles questioning whether the Government needs to await the conclusion of the Easter Sunday attacks Trial-at-Bar before proceeding to strengthen the appellate Bench.

President Anura Kumara Disnayake has explained that the most senior serving High Court judge is presently engaged in the three-member Trial-at-Bar hearing the Easter Sunday prosecution and that elevating him to the Court of Appeal at this stage could disrupt one of the largest and most important criminal trials conducted in Sri Lanka.

The concern is understandable. The Easter prosecution has involved 24 accused, 547 prosecution witnesses and

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2,076 exhibits. With the prosecution having closed its case and the proceedings now moving into the defence phase, maintaining continuity of the bench carries obvious practical importance.

The question being raised in legal circles, however, is a narrower one. If four vacancies presently exist in the Court of Appeal, why should filling them all depend upon the availability of one High Court judge?

Seniority has traditionally been an important consideration in judicial appointments, particularly where career judges are concerned. A departure from seniority can itself become sensitive and may require proper justification.

But seniority does not necessarily amount to an automatic constitutional right to be the next person elevated to the Court of Appeal.

Appointments to the Court of Appeal are made by the President subject to the constitutional process, including approval by the Constitutional Council.

The President therefore does not possess an unfettered discretion simply to appoint anyone he wishes.

Equally, however, the Constitution does not appear to require all Court of Appeal vacancies to remain unfilled because the most senior prospective candidate is occupied with an unfinished Trial-at-Bar.

That leaves an apparently straightforward possibility.

The judge hearing the Easter Sunday case could remain where he is, preserving continuity in that exceptionally important trial, while other appropriately qualified candidates are considered for some of the remaining Court of Appeal vacancies.

His own position could then be addressed when the trial reaches a stage at which an elevation would no longer risk disrupting proceedings.

The issue assumes additional importance because it intersects directly with the Government's wider argument for extending judicial retirement ages.

The Government says Sri Lanka needs to retain experienced judges for longer, increase judicial capacity and tackle delays in the administration of justice. The companion reforms also envisage increasing the number of judges available within parts of the court system.

Those objectives are difficult to quarrel with.

But if existing positions in one of the country's superior courts remain vacant, critics are entitled to ask whether the immediate shortage of judicial capacity arises because judges are retiring too early - or because available vacancies are not being filled.

The two problems are quite different.

Extending retirement ages keeps experienced judges in office for another two years.

Filling existing vacancies increases the number of judges actually sitting and available to hear cases now.

A serious attempt to address judicial delays may ultimately require both.

There is also the separate question of whether elevating a judge presently sitting on a Trial-at-Bar would necessarily bring the proceedings to a halt. Legal practitioners point out that Sri Lankan criminal procedure contains mechanisms capable of dealing with changes in the composition of a court in appropriate circumstances.

That does not mean changing the Easter Trial-at-Bar bench would be desirable.

Far from it.

After hundreds of witnesses, thousands of exhibits and years of proceedings, preserving the existing bench wherever possible has considerable practical merit. The trial has now reached the defence stage and continuity may be particularly valuable.

The President's reluctance to disturb that bench can therefore be understood without accepting that every Court of Appeal appointment must consequently wait.



That is the distinction at the centre of the present question.

Nobody need suggest that the President should remove the senior High Court judge from the Easter trial tomorrow and elevate him immediately.

The alternative is considerably simpler: leave him where he is and consider other constitutionally eligible candidates for the other vacancies.

If there are institutional or constitutional reasons why that cannot sensibly be done, they should be explained.

Vacancies themselves have consequences. Every empty Court of Appeal position potentially means less judicial capacity at precisely the moment the Government says the country needs more of it.

That makes the issue particularly relevant to the proposed 22nd Amendment.

If Sri Lanka's shortage of judicial capacity is sufficiently serious to justify changing the Constitution so that superior-court judges can remain in office for another two years, it is reasonable to ask why existing seats cannot first be filled.

That question does not undermine the case for extending retirement ages.

But it does require the Government to reconcile two apparently competing realities.

Sri Lanka says it needs more judges.

Sri Lanka already has vacancies for judges.

The Easter Sunday Trial-at-Bar deserves continuity and should not casually be disrupted.

But the Court of Appeal also deserves a full complement of judges.

The two need not necessarily wait for each other.

Be that as it may.

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