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ANALYSIS: THE CHALLENGE TO THE 22ND AMENDMENT

A FORMIDABLE CONSTITUTIONAL CHALLENGE



CAN TWO MORE YEARS BE GIVEN WITHOUT THE PEOPLE?

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ANALYSIS: THE CHALLENGE TO THE 22ND AMENDMENT

The short conclusion:

This is a formidable constitutional challenge-particularly against applying the proposed retirement-age extension to judges already in office.

Its strongest argument is not merely theoretical. The petition identifies an unusually direct statement from an earlier Supreme Court determination:

"Any Constitutional amendment to the retirement age or the period of office impacting on incumbent judges, whether directly or indirectly, will impinge on the independence of the judiciary and [be] violative of Article 3 which requires a Referendum."

If that passage from the 2022 Inland Revenue Amendment Bill determination is accepted as controlling, Clause 2 cannot safely be applied to incumbent Supreme Court and Court of Appeal judges without approval at a referendum.

The challenge to increasing the size of the Court of Appeal is appreciably weaker.

What the petition asks the Court to decide

The petition has been filed by:
• T.M.S. Pasindu Silva, Treasurer of the Bar Association of Sri Lanka; and
• Lakitha Isiwara Wakishta Arachchi, Assistant Secretary of the BASL.

They ask the Supreme Court to determine that:

1. the entire Bill requires a referendum;
2. alternatively, Clause 2 requires a referendum;
3. alternatively, Clause 3 requires a referendum; and
4. the matter should be heard by the full Supreme Court.

This is not an ordinary fundamental-rights action. It is a pre-enactment constitutional review under Articles 120 and 121.

The Court is not deciding whether extending judges' retirement ages is wise. It is deciding what constitutional procedure must be followed before Parliament can enact it.

The constitutional bridge

Articles 107(5) and 137 are not expressly entrenched provisions. On the face of Article 83, changing either provision would ordinarily require a two-thirds majority in Parliament, but not necessarily a referendum.

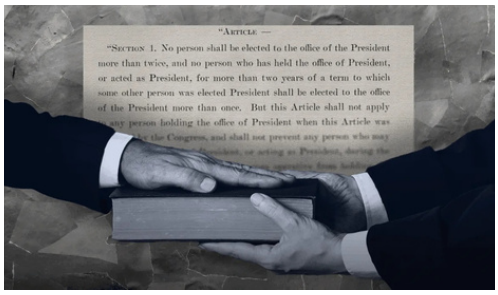
The petition relies on the Supreme Court's earlier position that sovereignty under Article 3 includes the right to an independent judiciary.
Parliament exercises legislative power, while courts exercise the judicial power of the people under Article 4(c). If judicial independence is undermined, the petition argues, the sovereign judicial power of the people is correspondingly impaired.

This is a legally recognised route to Article 83. The Bill need not expressly amend the words of Article 3. It is sufficient if its substance or effect is inconsistent with Article 3.

Clause 2: the strongest part of the challenge

Clause 2 proposes:
• Supreme Court retirement age: 65 to 67;
• Court of Appeal retirement age: 63 to 65; and
• a six-year maximum term for the Chief Justice, subject to retirement at 67, whichever comes first.

The petition's central objection is not to higher retirement ages as a general policy. It is to changing the tenure of judges who accepted appointment under the existing constitutional arrangement.


"ARTICLE —

"SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply [illegible] person holding the office of President when this Article was [illegible] the Congress, and shall not prevent any person who may [illegible] President, or acting as President, during the

The earlier Supreme Court determination

Paragraph 72 is the petition's most important paragraph. The quoted 2022 determination appears to address the precise question now before the Court: a constitutional change to retirement age affecting incumbent judges.

It does not limit its reasoning to reducing judicial tenure. It refers to "any" amendment affecting incumbent judges, "whether directly or indirectly."

That makes the Government's position difficult.

The Government may argue that the passage arose in a materially different context-reportedly involving tax measures that could indirectly affect judges' retirement-and should not be treated as a binding rule governing a deliberate constitutional amendment.

But the language quoted is broad, categorical and directly concerned with incumbent judges.

The Court would have to distinguish, qualify or depart from its own earlier reasoning to permit an automatic extension for sitting judges without a referendum.

Security and certainty of tenure
The deeper constitutional proposition is that judicial tenure should remain fixed and certain.

Most discussions of judicial independence concern governments shortening judges' terms or forcing them into premature retirement. The petition argues that an extension can also create dependence because it confers:

• two additional years of salary;

• two additional years of allowances and official benefits;
• continued status and institutional authority; and
• the possibility-or appearance-of reward by the political branches.

The point is not that any sitting judge has acted improperly. The contention is that changing the rules for existing judges creates a constitutionally damaging relationship between the Government and the judicial beneficiaries of the change.

That argument is particularly powerful where the amendment comes shortly before several expected retirements.

Actual independence versus perceived independence
The petition correctly distinguishes between:

• actual inducement or influence; and
• the public perception of influence.
Even if every judge remains entirely impartial, judgments favourable to the Government could subsequently attract suspicion: did the Government retain the present Court because it considered its composition favourable?

Public confidence is not a cosmetic concern. Courts lack their own electoral mandate or enforcement machinery. Their constitutional authority depends substantially on confidence that decisions are reached independently.

The petition is strongest when it remains with that institutional point. It becomes more contentious when it characterises the additional service as a "legislative bribe." That expression is forceful, but possibly unnecessarily accusatory. A court could accept the constitutional danger without accepting an allegation of bribery or improper motivation.

The Constitutional Council argument

The petition says extending the tenure of sitting judges amounts, in substance, to a fresh appointment or reappointment.

Ordinarily:

1. the President nominates a person for appointment to a superior court; and
2. the Constitutional Council approves or rejects the nomination.

An automatic legislative extension would allow incumbent judges to occupy their offices for another two years without either a fresh presidential nomination or Constitutional Council approval.

This is an imaginative supporting argument, but it is less secure than the Article 3 argument.

The Government will likely answer that Parliament is not reappointing anyone. It is altering the constitutional retirement age applicable to the office. Existing judges remain in office under their original appointments.

The question will therefore be whether an additional two years is merely the continuing consequence of an existing appointment, or is constitutionally equivalent to a renewed term.

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The Court need not decide that question in the petitioners' favour if it concludes, on the simpler ground, that changing incumbent tenure itself impairs judicial independence.

The likely constitutional escape route
There is an evident way for the Court-or the Government-to separate the policy from the constitutional problem:

Permit the higher retirement ages to apply only to judges appointed after the amendment becomes operative.

That would preserve the Government's long-term policy while leaving the tenure of incumbent judges untouched.

The Court could determine that Clause 2 may be passed without a referendum only if amended to exclude all sitting judges. Otherwise, it requires:

• a two-thirds majority of the whole membership of Parliament; and
• approval by the people at a referendum.

This would be the most legally conservative outcome because it would follow the 2022 determination without permanently preventing Parliament from prescribing higher retirement ages prospectively.

Clause 3: increasing the Court of Appeal

Clause 3 proposes increasing the Court of Appeal's maximum complement from the President plus 19 other judges to the President plus 24-five additional judges.

The petition characterises this as "court packing."
This portion of the case is materially weaker for several reasons.

Expansion is not automatically court packing

A court may legitimately be expanded because of:

• an increasing caseload;
• accumulated arrears;
• the creation of additional benches;
• regional or specialised sittings;
• delays in delivering appellate justice; or
• broader justice-sector reforms.

Increasing the authorised number of judges does not, by itself, prove an attempt to capture the Court.

The petition would be stronger if it supplied detailed evidence concerning:

• the Court of Appeal's caseload;
• the existing number of judges;
• the number of pending cases;
• the Government's stated administrative justification;
• whether the additional five judges are operationally necessary; and
• why the proposed increase is disproportionate or institutionally suspicious.

Without that evidentiary foundation, the "court packing" argument risks appearing inferential.

The Constitutional Council remains involved

The petition acknowledges that appointments to the expanded Court would still pass through the existing constitutional process.

The President cannot simply install five judges unilaterally. The Constitutional Council remains the prescribed filtering institution. That significantly weakens the claim that the new positions necessarily amount to political capture.

"Dilution of influence" is not enough

The contention that additional judges would "dilute the influence" of individual Court of Appeal judges is not, on its own, constitutionally compelling.

Judicial authority belongs to the Court and ultimately derives from the people. It is not an individual shareholding whose value is diminished whenever another judge is appointed.

The better argument would have been that the expansion, considered together with the extension of existing tenure and the timing of anticipated vacancies, produces a deliberately engineered alteration of the Court's composition. But even that would require facts capable of showing something more than legitimate institutional enlargement.



The assessment could well be that Clause 3 could survive independently, even if Clause 2 is found to require a referendum.

"Abusive constitutionalism" and "court capture"

The petition employs two comparative-law concepts:

• abusive constitutionalism; and
• court capture or court packing.

These concepts provide a useful warning framework, but labels cannot replace the constitutional test.

The Court will ask:

• What does each clause legally do?
• Does it impair judicial independence?
• Is the impairment sufficiently substantial to violate Article 3?
• Can the defect be removed by an amendment?
• Is the impugned provision severable from the remainder of the Bill?

The allegation that the Bill is an authoritarian constitutional project is therefore unlikely to decide the case. The petition's domestic constitutional authorities-especially the 2022 determination-are much more important than comparative academic terminology.

Lack of consultation and electoral mandate

The petition records an extensive sequence of letters, requests, meetings and objections involving the BASL, the Judicial Service Association, religious leaders and international legal organisations.

This history is politically and institutionally significant. It supports the claim that the Government proceeded despite repeated warnings.

But lack of consultation does not automatically produce constitutional invalidity. Nor must every constitutional amendment have been specifically promised in an election manifesto.

A Government with the necessary parliamentary majority may introduce a constitutional amendment not mentioned in its manifesto. The legal question remains whether it follows the procedure demanded by the Constitution.

These points may influence the intensity with which the Court examines the measure, but they are unlikely to create a referendum requirement independently of Article 3.

The conflict-of-interest problem

The petition openly recognises the extraordinary position in which the Supreme Court has been placed.

The judges must determine whether legislation conferring two additional years in office upon them may be passed without consulting the people. Every sitting Supreme Court judge therefore has at least an apparent personal and financial interest in the outcome.

Ordinarily, the principle that no person should adjudicate their own cause would favour recusal. Here, however, universal recusal would make constitutional review impossible. The doctrine of necessity therefore allows the Court to hear the case because no alternative tribunal can exercise jurisdiction under Articles 120 and 121.

The petition calls a referendum an "elegant solution" because it places the ultimate decision before the sovereign people.

That is rhetorically effective, although the Court must reach its determination by constitutional interpretation, not by choosing the politically most convenient means of escaping embarrassment.

The request for the full Court

The petition asks for all Supreme Court judges to sit.
There is logic to that request because:

• every sitting judge is affected;
• the question is constitutionally exceptional;
• a small bench deciding an issue benefiting the entire Court could intensify public criticism; and
• a full Court would carry greater institutional authority.

There is also tension in the argument. If participation creates a conflict, having every interested judge participate does not eliminate it. The answer is the doctrine of necessity, coupled with maximum transparency and a fully reasoned determination.

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Whether to constitute a full Court remains a matter for the Chief Justice under the applicable constitutional arrangements. The petitioners can request it but cannot demand it as of right.

An important underdeveloped issue: the Chief Justice's six-year limit

The petition reproduces the proposed special limitation governing the Chief Justice but does not analyse it in comparable depth.

That is a noticeable omission.

The Court may have to ask:

• Why is a six-year limitation imposed only on the Chief Justice?
• Does it affect the present Chief Justice?
• Could it shorten an incumbent Chief Justice's expected period in that office?
• Does the provision alter only the office of Chief Justice, or also tenure as a Supreme Court judge?
• Is the provision prospective or immediately operative?

If it can shorten the tenure of an incumbent Chief Justice, the same 2022 authority concerning changes affecting incumbent judges becomes even more directly relevant.

Likely outcomes

Possible determination	Assessment
Entire Bill requires a referendum	Possible, but broader than necessary
Clause 2 requires a referendum because it applies to incumbents	Strongest and most likely petitioner victory
Clause 2 can proceed if amended to apply prospectively	Constitutionally plausible compromise
Clause 3 independently requires a referendum	Considerably less likely
Entire Bill may pass with only a two-thirds majority	Possible only if the Court distinguishes or limits its 2022 statement
Full Supreme Court hears the matter	Institutionally defensible, but not automatic

Overall assessment

The petition contains one exceptionally strong legal weapon surrounded by several more ambitious arguments.

That weapon is the Supreme Court's own reported 2022 pronouncement that any retirement-age amendment affecting incumbent judges impinges upon judicial independence, violates Article 3 and requires a referendum.

The Government's best defence is therefore unlikely to be that changing incumbent tenure has no constitutional implications. Its safer route would be to make the extension prospective.

The attack on the expansion of the Court of Appeal is much less convincing. Without proof that the five additional positions are unnecessary, manipulative or designed to defeat the Constitutional Council process, an increase in judicial capacity can readily be presented as legitimate court administration.

Accordingly, a robust assessment may well be:

• Clause 2, insofar as it benefits or otherwise affects serving judges, faces a serious and potentially decisive referendum objection.
• A prospective extension for future appointees would be considerably easier to defend.
• Clause 3 is likely severable and has a substantially better chance of surviving with a two-thirds parliamentary majority alone.
• The petition's strongest voice is the Supreme Court's earlier jurisprudence-not its accusations of bribery, secrecy or authoritarian court capture.

Be that as it may, this challenge has transformed the issue. The question before the Court is no longer whether judges should retire two years later.

It is whether a Government and Parliament may change the tenure of the very judges who must sit in judgment over the State-and do so without first asking the sovereign people.

NEW TERROR LAW GETS CABINET CLEARANCE

PTA replacement heads towards Parliament - but the real test will be found in the small print

Cabinet has approved the publication and presentation to Parliament of the proposed Protection of the State from Terrorism Bill, setting the stage for another national argument over where security ends and individual liberty begins.

The legislation is intended to replace the Prevention of Terrorism (Temporary Provisions) Act of 1979 - a law that has remained "temporary" for nearly half a century and has attracted sustained criticism over prolonged detention, alleged abuse and inadequate judicial safeguards.



The new Bill was prepared following recommendations from a technical committee, drafted by the Legal Draftsman and cleared by the Attorney General. Justice Minister Harshana Nanayakkara submitted the proposal under which it will now be gazetted before reaching Parliament.

That procedural history, however, tells the public little about the powers the new law will confer upon the State. Previous versions of the proposed framework attracted criticism over broadly framed terrorism offences, detention powers, restrictions on movement and the authority granted to the Executive.

The decisive question is therefore not whether the PTA is being repealed, but whether its most troubling powers are being removed-or simply repackaged beneath a different title.

Once gazetted, the Bill will become open to constitutional challenge following its placement on Parliament's Order Paper. Lawyers, civil-liberties organisations and communities that have experienced the PTA's application will be watching every clause.

Sri Lanka unquestionably requires an effective law against terrorism. It also requires protection against the terrorism label being used to silence dissent, journalism, political opposition or peaceful protest.

Replacing the name of a law is easy. Replacing its culture of abuse is rather harder.

FOURTH DAY AT SEA - NAVY OFFICER STILL MISSING

Salvaged Fast Attack Craft may have struck submerged wreck off Angulana

A search for a missing Sri Lanka Navy officer continued for a fourth day on Tuesday after Fast Attack Craft P 4447 encountered an emergency while returning from a routine patrol off Angulana.



The incident occurred at approximately 11.40 a.m. on August 15. Eleven personnel aboard the craft were rescued with assistance from the Angulana Police and members of the local fishing community. They remain under medical care and are reported to be in stable condition.

The missing officer, however, has still not been located.

Navy divers succeeded in salvaging the distressed vessel following an operation that began early on August 16, although rough seas impeded attempts to tow it. Naval and Air Force resources have been deployed in the continuing search.

Preliminary accounts from rescued personnel suggest the craft may have struck a submerged wreck in the area. The Navy has stressed that this remains only one possibility under examination, and a panel of experts has been appointed to establish what occurred.

That investigation must determine whether the submerged object was previously charted, whether navigational warnings had been issued, what equipment was operational aboard P 4447 and whether sea conditions or mechanical failure contributed to the incident.

The immediate priority remains finding the missing officer. Thereafter must come a transparent accounting of how a frontline naval vessel was placed in distress so close to Sri Lanka's coastline.

At sea, speculation assists nobody. Facts-and accountability-must follow the search.

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MEDICINE FOR THE SYSTEM

Cabinet accelerates pharmaceutical policy - affordability and quality placed at centre of five-year plan

Cabinet has approved the expedited implementation of Sri Lanka's National Pharmaceutical Policy for 2026–2030, promising safer, better-quality and more affordable essential medicines.

The updated policy has been developed against a difficult background: disruptions in international supply chains, dependence on imported pharmaceuticals, pressure on public-health expenditure and repeated concerns over the quality and procurement of medicines.

Work to update the national policy introduced in 2005 had been undertaken between 2020 and 2025 but was not completed. Cabinet has now approved a proposal by the Health and Mass Media Minister to prioritise implementation of the new framework.



Its objectives include equitable access to medicines meeting internationally recognised standards, scientifically sound prescribing, reduction of waste and increased local manufacture of essential medical products. All of that is welcome. But Sri Lanka's difficulty has rarely been a shortage of elegantly written policies. The failure usually occurs somewhere between approval and execution.

The new framework must therefore be accompanied by measurable deadlines, transparent procurement, independent quality testing, disclosure of supply contracts and an accountable system for dealing with shortages. Local production should be encouraged, but not protected at the expense of safety, quality or competitive pricing.

Patients do not experience pharmaceutical policy as a Cabinet document. They experience it at the hospital counter when a medicine is unavailable, at the pharmacy when its price is unaffordable-or in the worst circumstances, when its quality is uncertain.

The policy's success will be judged there, not at its launch.

THE WATER IS RUNNING LOW

More than 70,000 affected as dry weather tightens its grip on several districts

The Government has launched a special drinking-water distribution programme for areas affected by prolonged dry weather, with Batticaloa, Monaragala and Ampara among the districts requiring intervention.

The programme will be implemented through district secretaries following discussions by the special ministerial and officials' committees appointed to address the effects of the developing El Niño conditions.

Official figures indicate that 70,828 people belonging to 22,759 families have been affected across several districts. Monaragala is the worst affected, with 33,023 people from 10,264 families facing the consequences of the dry spell. Bowser supplies have already been arranged for 12,801 people experiencing shortages of safe drinking water.

Meanwhile, the country's 74 major reservoirs reportedly held only 1.106 million acre-feet of effective storage by August 16-approximately 37.2 per cent of capacity. Small tanks in several farming districts have already dried up.

The immediate distribution of drinking water is essential. But bowsers are an emergency response, not a water-security policy.

The implications extend beyond household supplies. Prolonged dry conditions threaten cultivation, livestock, wildlife, rural livelihoods and food prices.

If reservoir levels continue to decline, authorities will have to balance drinking-water requirements against irrigation and power-generation demands.

Sri Lanka moves repeatedly from flood to drought and back again, paying for emergency relief at both extremes. Better storage, repaired village tanks, protected catchments and disciplined water management are no longer optional environmental ambitions.

Be that as it may, people cannot drink promises-and fields cannot be cultivated with committee minutes.



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