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Any president can contest a third term – if 18A is valid

This INSIGHT discusses the eligibility of twice-elected Sri Lankan presidents to contest a third term. It demonstrates that the textual arguments claiming to disqualify such presidents are mistaken: first, because an incumbent president has an alternative route to the presidency, and second, because the question of ‘retrospective validity’ does not arise if the constitutional provisions are read in their proper context.

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This insight addresses the current context where there is raging legal and political debate about whether or not the current President of Sri Lanka can legally contest a third term as President. The issue was first mooted by a former Chief Justice of Sri Lanka, who argued that the 18th Amendment (18A) to the Constitution did not have retrospective effect and therefore, that the President is disqualified from contesting a third term. Since then there have been many arguments made for and against this interpretation.

An article by Asanga Welikala (published on www.groundviews.org) provides an excellent analysis of the main

arguments and their standing. In Welikala’s terms, there are two competing approaches to interpretation: (1) textual (2) intentional. Referring to the former Chief Justice Sarath N. Silva as well as the scholarly contributions of Professor Suri Ratnapala and Dr. Reza Hameed, Welikala concludes that the **textual** interpretation weighs against the current President being eligible to contest a third term, whereas the **intentional** interpretation weighs in favour.

The present analysis demonstrates that the set of textual arguments claiming to disqualify the current President from running for a third term are mistaken for two reasons: (1) first, because the specific provisions of the Constitution being analysed can be by-

passed by a sitting president, through a subsequent clause that has not been analysed; (II) second, because the question of retrospective validity does not arise for the analysed clauses, when they are read in the proper context. The first reason implies that the current President can run for a third term under 18A. The second reason implies that past presidents can also run for a third term.

The analytical conclusion is that both President Mahinda Rajapaksa and former President Chandrika Bandaranaike Kumaratunga are eligible for a third term, but only due to 18A. Asanga Welikala, as well as others, have argued that the passing of 18A was dubious and obnoxious in terms of process. Therefore, if 18A is not accepted as being properly formulated into law, then neither individual is eligible for a third term.

PART I: TWO TRACKS TO PRESIDENCY – THE INCUMBENT IS NOT BOUND BY NOMINATIONS

The Constitution provides two unique and mutually exclusive tracks to the presidency. The Silva argument only (if at all) affects the first. These two tracks existed even prior to 18A, as the 3rd Amendment to the Constitution introduced the second track. However, 18A modified both tracks to do away with term limits.

TRACK 1: NOMINATION FOR PRESIDENT

The first track is the one that has received all the attention. It is the track to the presidency through the process of nomination. The relevant constitutional clauses are cited in box 1.

BOX 1

Before 18A

Article 31(1) Any citizen who is qualified to be elected to the office of President may be nominated as a candidate for such office -

- (a) by a recognized political party, or
- (b) if he is or has been an elected member of the legislature, by any other political party or by an elector whose name has been entered in any register of electors.

Article 31(2) No person who has been twice elected to the office of President by the People shall be qualified thereafter to be elected to such office by the People.

After 18A

Article 31(1) Any citizen who is qualified to be elected to the office of President may be nominated as a candidate for such office -

- (a) by a recognized political party, or
- (b) if he is or has been an elected member of the legislature, by any other political party or by an elector whose name has been entered in any register of electors.

Article 31(2) -- repealed ---

TRACK 2: DIRECT APPEAL BY INCUMBENT TO CONTINUE AS PRESIDENT

This track is only available to an incumbent (i.e. current) President. It is a continuation of the same Article that applies to track 1, and dismisses the need for track 1 for an incumbent President. The relevant constitutional provisions are cited in box 2.

BOX 2

Before 18A

Article 31(3A)(i) *Notwithstanding anything to the contrary in the preceding provisions of this Chapter*, the President may, at any time after the expiration of four years from the commencement of his *first term of office*, by Proclamation, declare his intention of appealing to the People for a mandate to hold office, by election, for a further term (emphasis added).

Article 31(3A)(ii) Upon the making of a Proclamation under sub-paragraph (i) the Commissioner of Elections shall be required to take a poll for the election of the President.

After 18A:

31(3A)(i) *Notwithstanding anything to the contrary in the preceding provisions of this Chapter*, the President may, at any time after the expiration of four years from the commencement of his *current term of office*, by Proclamation, declare his intention of appealing to the People for a mandate to hold office, by election, for a further term (emphasis added).

Provided that, where the President is elected in terms of this Article for a further term of office, the provisions of this Article shall *mutatis mutandis* apply in respect of any subsequent term of office to which he may be so elected.

Article 31(3A)(ii) Upon the making of a Proclamation under sub-paragraph (i) the Commissioner of Elections shall be required to take a poll for the election of the President.

The incumbent President is not bound by track 1

The assertion in Article 31(3A)(i) of 'notwithstanding anything to the contrary in the preceding provisions of this Chapter', (and the chapter begins with Article 30), not only makes track 2 (the direct appeal track) independent of track 1 (the nomination track), but also makes track 1 quite unnecessary for and irrelevant to the incumbent President (see Box 2).¹

However, prior to 18A, track 2 had two limitations imposed by the words 'at any time after the expiration of four years from the commencement of his **first term** of office'. Therefore, the limitations were: (a) track 2 could only be invoked during the first term in office; (b) it could only be invoked four years after the commencement of that term.

18A amended the words '**first term**' to read '**current term**' and thereby took away the first term limitation. Moreover, the proviso introduced by 18A specifically ensures that track 2 is made available during any subsequent term of office. Therefore, under 18A, track 2 can be invoked during any 'current term' of a president, provided it is after four years of the commencement of that 'current term'.

Only the incumbent President can run for a third plus term under track 2

The present debate surrounding the eligibility of the President to contest a third term has focused exclusively on the application of Articles 31(1) and 31(2), and Article 92 by virtue of its link to Article 31(1); that is Track 1. However, the present analysis shows that track 1 is unnecessary for and irrelevant to the incumbent President.²

Track 2 allows the incumbent President that has been elected by the People to run for a third term and for any number of terms thereafter. Therefore, after 18A, the interpretation of qualifications for track 1 does not affect the ability of an incumbent President to make use of track 2 for any number of terms.

However, the interpretation of track 1 does affect the standing of past presidents, who are not currently in office, and who have already been elected for two terms prior to the passing of 18A. Such past presidents can only seek nomination under track 1 to return to office once again under 18A. If Silva's textual interpretation is accepted and taken to its logical end, only a former president will be disqualified – not the incumbent President.

PART II: THE NOMINATION TRACK – THE PROBLEM OF RETROSPECTIVE VALIDITY DOES NOT ARISE

The change made by 18A on track 1 (the nomination track) was to delete Article 31(2). Questioning the retrospective validity of the deletion of 31(2) has been the basis on which the application of track 1 has been brought into controversy.

As demonstrated above, how this question is resolved does not affect the incumbent President, but it does affect past presidents (who have already served two elected terms) if they were to seek nomination for a further term under 18A. At present, it affects only former President Chandrika Bandaranaike Kumaratunga.

This part provides a textual resolution on the question of retrospective validity by pointing out that on a careful reading of the text, the problem in fact does not arise – it is a proverbial red herring.

This part will first explain how the problem of retrospective validity has been framed by others. The textual explanation that follows, of why the problem does not arise, asserts that the same referent in connected sub-clauses should be interpreted as having the same meaning and context.

After 18A, the interpretation of qualifications for track 1 does not affect the ability of an incumbent President to make use of track 2 for any number of terms. However, the interpretation of track 1 does affect the standing of past presidents, who are not currently in office, and who have already been elected for two terms.

(A) The retrospective validity problem explained

This is a succinct logical rendition of the retrospective validity problem. Article 31(2) states that 'no person who has been twice elected to the office of President...shall be qualified thereafter to be elected...' The logical structure of the sentence can be expressed as follows:

X: 'has been twice elected to the office of President'

Y: 'qualified to be elected'

The logical structure of this restriction in Article 31(2) is therefore: **If X then Not Y.**

Those raising the problem of retrospective validity assert that the current President, and all presidents before him met the criteria of '**if X**' before 18A was passed. Therefore they moved in to the status of being '**not Y**', for a further term, under the operative law (prior to 18A). If 18A has no retrospective effect, then this status of being 'not Y' cannot be retrospectively changed, even though the restriction (of 'if X then not Y') has been removed at a later date.

As explained in Part I of this piece, Article 31(3A) asserts itself over Articles 31(1) and 31(2) by saying 'notwithstanding anything to the

contrary in the preceding provisions of this Chapter... the president may... [ask] for a mandate... to hold office, by election, for a further term'. To assert that this disqualification problem affects the incumbent President therefore is a mistake. But the disqualification problem, when set up this way, does affect past presidents who have been already twice elected.

(B) Why retrospective validity does not arise – a textual explanation

As noted through reference to Welikala's article, there are certain counters to the textual interpretation

put forward by Sarath N. Silva and others. The main counter is based on an alternative deductive framework based on legislative 'intentions' to interpret the 'text', rather than interpreting only the precise formulation of the text.

The difference in the textual conclusion by Silva and the present analysis hinges on whether Articles 31(1) and 31(2) are read as being independent or as being related.

Article 31(1) and 31(2): are they interrelated or independent?

The textual meaning derived will hinge on whether 31(1) and 31(2) are read as completely independent provisions having no implication on the meaning of the other, or whether the meaning of these provisions is best derived by reading them together as different but related provisions.

Since they are positioned as two sub-clauses within Article 31 of Chapter XII, the assertion here is that the proper meaning is derived from reading them as related sub-clauses, as opposed to reading them as entirely independent and isolated sub-clauses. If this position is accepted, the question of retrospective validity does not arise as explained below.

What is the relationship between 31(1) and 31(2)?

A close reading reveals at least two ways in which these two provisions are related.

- First, 31(1) and 31(2) are both essentially referring to criteria that are applicable for being nominated as a candidate for the office of President. But they are each dealing with two different types of criteria:
 - a) Criteria for who can nominate – this is in 31(1)
 - b) Criteria for who can be nominated – this is in 31(2)
- Second, the two provisions are linked by the referent phrase 'qualified to be elected'. 31(1) mentions this as an undefined eligibility condition for nomination: only those who are 'qualified to be elected' can be nominated. 31(2) defines at least one test that must necessarily be passed for this eligibility condition to be fulfilled

The phrase 'qualified to be elected' should have the same meaning in 31(1) and 31(2). It follows that both provisions are setting up the single eligibility condition for being nominated, and not two separate eligibility conditions: one for being nominated, and another for being elected.

filled ('not being previously twice elected as president').³

The eligibility test is for being 'nominated', and not for satisfying the condition 'qualified to be elected'

If the phrasing 'qualified to be elected' is thus understood to have the same meaning in 31(1) and 31(2) then it naturally follows that these provisions are both setting up the single eligibility condition for being nominated, and not two separate eligibility conditions: one for being nominated, and another for being elected.

This position is already very clear in 31(1), but can be misunderstood in 31(2) when it is read independently as referring to a new condition – one that makes a person eligible for being elected, as opposed to simply giving content to the same condition mentioned in 31(1) for being eligible to be nominated.

The semantic confusion has arisen partly because of the special name given to this condition of being eligible to be nominated. The condition is called 'qualified to be elected'. If a logical term such as **condition Y** was used in both cases instead of the phrase 'qualified to be elected', it would be easier to avoid the semantic confusion.

- Then 31(1) would read: 'Any citizen who satisfies **condition Y** may be nominated as a candidate for the office of President.'
- And 31(2) would read: 'No person who has been twice elected to the

office of President...shall be able to satisfy **condition Y**...'

Once this semantic confusion is avoided it is clear that the consequence of being twice elected is not to be disqualified from being elected in the future, but to be disqualified from being nominated for such an election. The difference matters for the question of retrospective validity.

What happens after being twice elected to the office of President?

Ineligible, if nomination for a third term was attempted prior to 18A

Prior to 18A, at the point of being twice elected, a person would then consequently fall short of the constitutionally defined eligibility condition for being nominated. Therefore, if a re-nomination was attempted prior to 18A, the person would have been deemed ineligible.

However, falling short of this condition for nomination is not the same thing as being *permanently disqualified from being elected for another term*. That is because, failing to satisfy a condition that makes one eligible for nomination, makes one ineligible for nomination only so long as that condition stands. It does not impose a permanent ineligibility.

Assume only those above eighteen years of age can apply for a driving license. Imagine a rule that disqualifies applicants under five feet in height. As long as the rule is in place, applicants under five feet cannot apply. But if the rule is later discarded, **all** those above eighteen can apply. Those who were under five feet (and above eighteen years) when the rule existed and remain under 5 feet are not permanently disqualified. This is because the eligibility criterion with regard to being nominated (or applying for the driving license) can sensibly be applied only at the point in which a person is nominated (or making the application) – not at any other time. This is the only sensible interpretation that emerges when Article 31(1) and 31(2) are read together as related sub-clauses, rather than reading and interpreting 31(2) outside of its context. Reading these provisions out of context is the crucial mistake that has pervaded the discussion thus far.

Eligible if nominated for a third term after 18A

As in the driving license example, 18A discarded an eligibility condition by repealing 31(2). It did away with that particular criteria needed to satisfy what we have called condition Y in 31(1). What is substantively modified then is condition Y in 31(1) for who can be nominated.

We have already explained that any eligibility condition for nomination is evaluated only at the time a person is nominated. Therefore, all nominations made after 18A must be evaluated against the current eligibility criteria that are in effect. Applying the current eligibility criteria to current nominations is a current application of the law – the question of retrospective application does not arise.

The question of retrospective validity of 18A's deletion of 31(2)

can therefore arise under only one circumstance: a case where a person who was nominated and deemed not eligible prior to 18A (due to being already twice elected) now seeks to have that *same* old nomination deemed eligible and accepted instead of being freshly nominated. Since such a case does not exist, the question of retrospective validity of 18A does not arise.

Therefore, the question of whether 18A is retrospectively valid is in fact a red herring. It is deployed on the basis of misreading Article 31(2) as a general stand-alone clause outside of the context of the rest of Article 31, and especially 31(1) to which clause 31(2) is connected.

As long as 18A is taken to be the current law, the nomination criteria that existed before being amended by 18A cannot reach out from its grave and apply its criteria to nominations that occur after 18A.

IF 18A IS NOT VALID, THEN A THIRD TERM IS NOT VALID FOR ANYONE

There is a significant school of thought in Sri Lanka that the manner in which 18A was passed into law was improper, and that it does not have legitimacy despite its *de facto* application. There are multiple legal arguments in this regard which will not be recapped here.

The point to note is that within the line of reasoning which defines 18A as not properly passed into law, a third term presidency would certainly be unlawful – not by claiming that 18A does not apply retrospectively, but by claiming that the pre-18A law is the law that still applies prospectively.

If 18A is not valid, then no one – Incumbent or past president – can validly run for a third term. But if 18A is valid, they all can. ■

¹ We note that 18A also repealed Article 92(c), which disqualifies a person from being elected to the office of President, if he has been twice elected to the office of President by the People. Track 2 operates independently of and notwithstanding this disqualification as well, since after 18A the phrase 'qualified to be elected' in Article 31(1) is only substantiated by Article 92.

² These incumbent rights of track 2 are only available to an incumbent that has been elected by the People, and not one who has come in to the position as a result of death or incapacitation of the elected President. This is made clear in Article 31(3E).

³ A more comprehensive description of eligibility is provided in Chapter XIV of the Constitution, in Article 92.