The Hon. M.A. Sumanthiran (Tamil National Alliance – National List)
Debate on the 18th Amendment to the Constitution,
Parliament of Sri Lanka, 8 September 2010.

Mr. Speaker, I rise to speak today with a very heavy heart. Not even half a year has passed since I stepped into this assembly for the first time. I did not realize then that I will be participating in a debate such as this; on a Bill that threatens to put the final nail in the coffin, in which democracy of this country has been laid for some time.

Mr. Speaker, first and foremost, I wish to place on record our very strong objection to the manner in which this Bill is being rushed through. That in itself is an indictment, and an indication of the anxiety of the government to have it passed with little or no public discussion on the matter. Leave a alone discussion, there wasn't even any notice given to the public; and only 24 hours notice given to the supreme court, that seems to comprise of such exceptionally talented judges, that they seem to have been able to dissect these proposed constitutional amendments with consummate ease and deliver their determination in such short time. In the process though, the Supreme Court bench seems to have overlooked at least two of their own determinations of the past – those on which they had a little more time to deliberate. I will refer to those in a little while.

(Responding to interruptions) Mr. Speaker, these interruptions I am facing from the floor of the parliament are yet another indication of the attempt to stifle any debate, any debate on this bill. Bad enough that there was no time for public discussion; bad enough that there was such short time given for the deliberation of this bill; now even with the absence of the main opposition party, when there are only two or three members available to speak in opposition to this bill, why is the government so worried that it should try to stifle the voice of these few speakers.

This House too had very little time to deliberate on this bill. It's a fact that this house also did not have a copy of this bill, until after I had raised a point order yesterday. Mr. Speaker you will recall, that when I referred to clause 20 and clause 22, that none of the members of this house had a copy of this bill and it was distributed to them at this stage. Even the copy that was taken up in the cabinet was different to the one that was referred to the Supreme Court. If I did not make that point of order reference yesterday, perhaps we would not have these copies even today!

Although there was general talk of impending constitutional amendments, and that removal of the term limits of the President was one of those, no proper intimation was given to anyone of the contents of this Bill. In fact what was given publicity was the fact of an agreement reached between His Excellency the President and the Leader of the Opposition that the Executive Presidency would be abolished and the post of Executive Prime Minister would be introduced in its place.

So therefore, when and where then did this Bill originate? Was it in the Cabinet? No! The Cabinet of Ministers has certified this as urgent in the national interest. Can anything be more laughable than that? Did the Cabinet have a copy of this bill? I think not. What the Cabinet certified and what was sent to the Supreme Court were two different versions and this came to light at the hearing in the Supreme Court. The council that is now referred to in the Bill as the **Parliamentary Council**, is referred to as the **Constitutional Council** in the version certified by the cabinet.

The issue with regard to the removal of the term limit of the President will not be, and cannot be, faced by this country at least for another **Four years and Two months**. My problem is how then did the cabinet certify this Bill as **"urgent in the national interest"**? How does that become urgent, when the issue, when the issue cannot even

come before the country for **four years and two months at least**? So what warranted this indecent haste?

Sir, I ask you in all humility: is this House also expected to capitulate and take leave of its senses like the Cabinet and permit the passage of this Bill post-haste? The rush is so intense, that even the special resolution provided in **Standing Order 46A** – which is designed to by-pass Constitutional requirements in times of haste – is itself being bypassed, in this ***intense*** rush to have this Bill passed. I do not think that these maneuvers by the government are becoming of any responsible government. All right-thinking people of this country have condemned this Bill.

The Civil Rights Movement, The Organization of Professional Associations, The Bar Association of Sri Lanka have all warned the government not to resort to the "urgent bill" procedure. Some leading academics of the country have said in a statement yesterday, and I quote:

> "Constitutional reforms, like elections, go to the heart of what it means to be a democracy in the modern-day world. Any changes that are introduced to a country's constitution should be undertaken after due deliberation and consultation while having at its centre, the will of the People. In a pluralistic society such as Sri Lanka, ascertaining the will of the People can be a time-consuming and complex exercise. While the will of the People must be given due consideration, the essential features of a democracy, such as the rule of law, accountability of the government and transparency must be preserved and promoted through any constitutional reform.

> By choosing to amend the constitution through an urgent bill the entire process of reform has been expedited, if not short-circuited, and no room has been left for any kind of public debate let alone public consultation. Under a Constitution that explicitly recognizes the "Sovereignty of the People" that process is not acceptable, especially when no convincing reasons have been given as to the need to expedite this process. Indeed, the most distressing aspect to this whole process is the lack of interest in government ranks on the need to raise awareness, let alone build consensus, among the general public on the need for such urgent reform."

The Bar Association of Sri Lanka, having warned in due time, has again issued a statement this morning, and I quote:

> "The Bar Association of Sri Lanka is perturbed by the move of the Government to introduce the 18th Amendment to the constitution as an "urgent bill".
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> As early as June this year, the bar Council resolved that constitutional Amendments should not be presented as "Urgent Bills" and urged the Government to desist from proposing Constitutional Amendments in the form of "Urgent Bills".
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> This position of the Bar Association was communicated to the Government and given wide publicity as well. We regret to note that despite this, the Government is planning to proceed with the proposed 18th Amendment to the Constitution as an "Urgent Bill" to be debated and voted on 08.09.2010.

> As the professional body representing all lawyers of this country, we strongly urge the Government not to move this proposed Bill without a fuller public discussion and debate on such an important matter"

Needless to say, no right thinking person can condone this, and we unreservedly condemn the government for making a mockery of the hallowed process of constitution-making.

I wish to ask the Hon. Prime Minister: why did you choose to dismiss this wealth of advice from the intelligentsia of this country? There can be only one answer, and that is **Fear!**

There can be many fears. Some may be personal fears. But there is also the fear that if this is permitted to be discussed in public, it will be roundly rejected. There is room for such fear because the people of this country have repeatedly voted to abolish Executive Presidency; not to bolster it with more powers. In 1994 people gave President Chandrika Bandaranaike Kumaratunga a mandate to abolish Executive Presidency within 6 months. She herself introduced a new draft Constitution to this House in August 2000, seeking to abolish Executive Presidency, but retaining it for her term of office. In 2005, President Mahinda Rajapakse himself sought a mandate to abolish Executive Presidency in Mahinda Chinthanaya. I have not attended one session of this Parliament in which at least one government member had not referred to the Mahinda Chinthanaya as their Bible. Will they refer to Mahinda Chinthanaya today? In Mahinda Chinthanaya 2, also, President Mahinda Rajapakse sought and obtained a mandate to reduce, to **reduce** the powers of the Executive Presidency. President Mahinda Rajapakse was at the fore-front of the agitation against all anti-democratic moves of the UNP governments. We all know that President Rajapakse was a champion of human rights, a champion of democracy, when UNP was in power. I am absolutely certain that if

President Jayawardena had actually tried to abolish this term limit of the President – as he contemplated towards the end of his term – President Mahinda Rajapakse would have been the first to agitate against that move. And so I ask the Hon. Prime Minister, again, why are you moving against the wishes of your leader and your people?

All progressive forces in this country are against the abolition of the term limit of the President. All civilized jurisdictions that have an Executive Presidency have a two-term limit. It is a universal principle that "Power corrupts, and absolute power corrupts absolutely". Leading academics and jurists have all opined that concentration of power in one individual for too long is detrimental to democracy. Why is it even necessary for me state these first principles? Is it because even such first-principles take a flight out of the window when political office and power ensnares and entraps you?

There is a book that all first year law students of this country study. It is titled: Essays on Administrative Law in Sri Lanka, by G L Peiris, first published in 1980.

> "Parliament always enacts legislation on the presumption that the repository of power will act in good faith and reasonably...yet the courts remain responsible for checking the abuse of powers..." (p.309).

Then citing the Indian case of Mohambaram v. Jayavelu it says:

> "There is no such thing as absolute or untrammeled discretion, that is the nursery of despotic power in a democracy based on the rule of law." (p.310).

Then on the same page the Hon. External Affairs Minister Prof. G.L. Peiris says, citing Wade and Schwartz:

"Every legal power must have legal limits, otherwise there is dictatorship." (p.310).

The Civil Rights Movement has reminded us in its statement that in 1978 when immunity was being conferred on the Executive President, – by the way that is unparalleled in any civilized country with Executive Presidency – the consolation against this was that there was a two term limit on anyone holding the office of President. This amendment that seeks to permit a person to hold the office of President for life also confers immunity for life on that person. This amendment will create this super-human being not only out of the present incumbent. If the next President ascends the throne at a tender age of 30, this will enable him to remain President for life, periodic elections notwithstanding. I wish to ask the honourable members on the government side: would you have supported such powers to be concentrated on President Jayawardena or President Premadasa? Or are you under the impression that this amendment will give this power only to President Rajapakse, and to no one after him?

And what about my good friend the Hon. Vasudeva Nanayakkara? For a brief moment we deluded ourselves into thinking that perhaps the leftists had some conscience left in them. But, alas, they too have gone the way of their departed leader Dr Colvin R de Silva, who having prophesied in 1956 that a single language policy will lead to separatism in this country, was the very person who drafted the 1972 Constitution that gave to Sinhala the status as the only official language for the first time in the Constitution, and as if that was not enough, gave to Buddhism the foremost place to the exception of all other religions. It is perverse to say that we are opposed to this in principle but will vote for it! Principles don't matter to many people in this country any more. If not, will we see this sad spectacle of so many back-stabbings and defections

from the UNP? Surely the consideration for this mass movement of MPs cannot be principles?

And I was saddened very much when the Hon. Prime Minister made a list of persons who had crossed over, and spoke of it in glowing positive terms. This is one thing that this country is sickened by: political cross-overs. And I am very sad that today the Hon. Prime Minister stood up in this house and in very light vein talked about the persons who had crossed over. It is a sad day, not only for the passing of this amendment, that takes away the democratic rights of this country, but even for the reason that the foremost person in this house seeks to justify political cross-overs.

(Responding to interruptions) And as I speak of political cross-overs, appropriately, I am being interrupted by one such.

The concern of the TNA is also to do with regard to the other provisions of this Bill. The removal of the term limit of the President is but one line in this 16 page Bill. The other provisions of this Bill are equally, if not more, dangerous. The 17th Amendment to the Constitution is the only part of our Constitution which did not have even one vote cast against its passage in Parliament, and has very salutary provisions for good governance and checks and balances against concentration of power. That very part of the Constitution is being sought to be nullified by this Bill.

The Constitutional Council is abolished and in its place a totally ineffective Parliamentary Council is introduced. This Parliamentary Council does not even meet; does not even have a Chairman. Powers of the Election Commission and the National Police Commission are seriously eroded. Even the very limited powers granted by the 13th amendment to the Constitution – and this is where I wish to address the Hon. Douglas Devananda and the other two honourable members of his party -- are being

removed by this Bill. This affects the Chapter on devolution, but the Bill has not been referred to the Provincial Councils as mandated by Article 154 G (2) and (3).

Clauses 20 and 22 of the Bill have provisions in respect of matters set out in the Provincial Council List, and seeks to amend and/or repeal the provisions with regard to Provincial Public Service Commission and Provincial Police Commission, both of which are referred to in the Ninth Schedule to the Constitution.

Article 154 G (2) and (3) of the constitution is very clear and specific, that if a bill is not first published in the gazette, thereafter (and/or) referred to every provincial council, **it will not become law**, if it is in respect of any matter in the chapter on devolution.

The Supreme Court has at least on two previous occasions ruled that such Bills cannot be placed on the Order Paper of Parliament without first complying with the procedural requirements of Articles 154 G (3). I wish to table the two previous determinations of the Supreme Court in this regard, which were recorded in the Hansard of 20 November 2003, Volume 151, No. 02 and the Hansard of 6 January 2009 Volume 180, No 01.

1. Supreme Court determination on "Water Services Reform Bill" made on 13.11.2003 clearly holds that a Bill in respect of a matter set out in the Provincial Council List cannot be placed on the Order Paper of Parliament without first complying with the provisions of Article 154 G (3) of the Constitution. (Hansard 20 November 2003, Volume 151, No.02)

2. Supreme Court determination on "Local Authorities (Special Provisions) Bill made on 19.12.2010 also holds that since the said Bill relates to certain matters set out in the Provincial Council List it ought to be referred by HE

the President to every Provincial Council as required by Article 154 (G) (3) of the Constitution before it is placed on the Order Paper of Parliament. (Hansard 6 January 2009, Volume 180, No.01).

It seems now that the Supreme Court in this urgent and hurried determination has held that such reference to the provincial councils is not necessary, forgetting that it has previously determined otherwise. The previous determinations were not on urgent Bills and the Supreme Court had a little more time to consider the law on those occasions.

I am referring to a principle in law known as *per incuriam* law. The *per incuriam* rule says that if any court makes a ruling in forgetfulness of a relevant provision of law or of a **precedent**, that such a ruling can be summarily set aside by that very court itself. That is the reason why I have now referred to two previous determinations of the Supreme Court that have been recorded in the Hansard. This Bill therefore is in danger of being later ruled as not having become law. I am only referring to a well established rule of law called the *per incuriam* rule. I am not being disrespectful of the judges of the Supreme Court.

This is the holy month of Ramadan and it disturbs to a great extent that it is in this month that the members of the Sri Lanka Muslim Congress have decided to act against their own conscience. I am saddened that two members elected to this house, one by the Plantation Tamil community on the UNP ticket and another by the Colombo Tamil community on the UNP ticket decided to cross-over within 4 months of an election in which they were elected by the anti-government vote. That is their right, I understand. But I am saddened by that spectacle. The question has been posed to us: other minority communities in this country know how to survive, never mind, principles. Why is it that only this community that I represent is so foolish as to always hit our heads against the stone all the time? I don't think I need to answer that question.

(Responding to prolonged interruptions) Mr. Speaker, I am repeatedly asking you this question: Are you able to control this house?

I am proud to stand up straight today with my head held high because none in our party has bowed to any pressure. It is only the Democratic National Alliance and the Tamil National Alliance today that can proudly say this in this house. Between 1978 and 1994, the period the members of this government describe as the 17 year mis-rule, several constitutional amendments were rushed in as urgent bills. Several members of this house were the ones then vociferously objecting to that procedure. Those very persons have forgotten their history. Even the history written today, we know, judges President Jayawardena in a particular way for what was done during those years. When today's history is written, at least, there will a record of the fact that the TNA did not betray the country, even for the parochial short-term considerations of our own community.

Thank you very much.