20A, Sovereignty of The People and The Need for Approval at A Referendum

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The Twentieth Amendment to the Constitution Bill (20A) has been published. If I were to describe it in one sentence—20A seeks to take the country backwards to the 2010-2015 period. The only features introduced by the Nineteenth Amendment (19A) that would survive if 20A is passed in its present form would be the five-year terms of the President and Parliament, the Presidential term-limit and the fundamental right to access of information (RTI).

Now, after the Cabinet of Ministers approved the Bill, concerns are raised by Ministers themselves; also by Government MPs and those who support the Government. The Prime Minister has appointed a committee to go into the Bill.

Now, no one claims paternity to 20A—hopefully, everything will not be blamed on the very conscientious officers of the Legal Draftsman's Department, who only do what the relevant Cabinet memorandum tells them to. If 20A was an urgent Bill (abolished by 19A and sought to be permitted again by 20A) there would not have been even the opportunity for such discussion and dissent. The Bill would have been passed in a matter of days, as was the case in the Eighteenth Amendment. 20A Bill is a very good argument against urgent Bills. Nevertheless, the discussion that has ensued is welcome.

Dr. Colvin R. De Silva[1] described the system of government under the 1978 Constitution as a constitutional presidential dictatorship dressed in the raiment of a parliamentary democracy. With 18A, the executive presidency in Sri Lanka became one of the strongest and vilest, if not *the* strongest and vilest, presidential systems in the 'democratic' world. Now, 20A seeks to reverse the gains of 19A and take the country backwards.

19A, its drafting and shortcomings

19A has its shortcomings, mainly due to the decision taken by the Yahapalanaya (good governance) government not to completely abolish the presidential system of government, the dilution of the draft that went to Cabinet due to pressure from parties within the Government and concessions made to the Opposition in return for its support to obtain the required two-thirds majority.

[1] Former Minister of Constitutional Affairs; leftist politician.

The drafts were initially prepared by a team that consisted of three retired senior officials of the Legal Draftsman's Department, myself and another legal practitioner. Contrary to reports, M.A. Sumanthiran and J.C. Weliamuna were not involved but were certainly consulted. The several drafts that were prepared were vetted by a Cabinet-appointed committee headed by the Prime Minister. Dr. Colvin R. De Silva's famous statement—"When a Constitution is made, it is not made by the Minister of Constitutional Affairs"—applied equally well to the drafting committee. This is not to say that we did not have any space. We did, but each and every provision that we proposed was cleared by the high-powered committee. The recognition of the right to information as a fundamental right, the elevation of the Commission on Bribery or Corruption to constitutional status and the National Procurement Commission were among the drafting committee's proposals that were so approved. As the initial drafting process neared its end, the drafts were shared with the Legal Draftsman who put the final touches and even made changes, as he was the final authority on the draft.

In the morning of 15 March 2015— I remember well that it was a Sunday—the finalized draft which had been sent to the Office of the Cabinet of Ministers a few days earlier was discussed at a meeting held at the Presidential Secretariat, presided over by President Sirisena. At the meeting, representatives of the political parties of the Opposition, the Sri Lanka Freedom Party—whose MPs sat in the Opposition while its leader now was President Sirisena—and the Jathika Hela Urumaya,[2] which was in Government, were strongly opposed to the extent of the proposed erosion of powers of the President. The Prime Minister and the leaders of the United National Party and the other parties of the Government offered little resistance. The absence of the Tamil Nationalist Alliance and the Janatha Vimukthi Peramuna,[3] which were not invited, was also a contributory factor. The writer's perception was that the opposition to the draft was pre-planned, with the tacit approval of President Sirisena. The Opposition's big advantage was that the Government did not even have a simple majority in Parliament and needed Opposition support for any constitutional amendment.

The Cabinet met the same afternoon. The Legal Draftsman, whom I assisted, had just two hours to make the changes that were agreed upon in the morning. He did so under the watchful eyes of Prof. G.L. Peris[4] and Minister Champika Ranawaka[5] who had been tasked to oversee the changes. The revised draft was approved by the Cabinet and the Bill was published in the Gazette the following day.

[2] A Sinhala-nationalist party.

[3] Leftist party which supported the change in 2015.

[4] Former Professor of Law, President of the Sri Lanka Podujana Peramuna, present ruling party.

[5] Leader of the JHU.

More changes were made during the Committee Stage in Parliament. While some of them were made to fall in line with the determination of the Supreme Court, others such as dropping the anti-cross-over provision were made due to pressure from the Opposition.

Readers may pardon me for quoting Colvin again and again. (What else can I do? It is Colvin and Dr. N.M. Perera[6] who have been most prophetic about such issues.) Responding to J.R. Jayewardene's proposal in the Constituent Assembly for a Presidential form of government, Dr. De Silva warned against the danger of counterposing the Prime Minister (PM), chosen by the people who are sovereign, against a President who is directly elected. That would result in two powers at the apex of the State counterposed to each other, each drawing its power from the same source, the sovereign people, but each drawing the power independent of the other. 'No Constitution will be able to define adequately and satisfactorily the relationship between the two and the United States of America is precisely the best example of that', he said. The experiences under 19A clearly underscore the need to completely abolish the Presidential form of government and move towards a Parliamentary form, not to go backwards. I said so several times in the last Parliament but opponents of 19A misinterpreted my words as a confession that 19A was a mistake. Far from it, 19A was a major step in the correct direction.

Sword of Damocles over Parliament

Under 20A, Parliament will again be at the mercy of the President, who may dissolve Parliament at any time, even if the PM commands a comfortable majority in Parliament— that is what President Kumaratunga did in 2004. The only fetter on the power of dissolution is that if the previous Parliament had been dissolved before completing its five-year term, the President can dissolve the new Parliament only after one year. If the previous Parliament had completed its full term, the President can, under proposed Article 70(1), dissolve the new Parliament even one day after it holds its first meeting. At the last Presidential elections, Gotabhaya Rajapaksa obtained 52.25% of the total valid votes. At the last Parliamentary elections, the 225 MPs elected together polled 96.57% of the valid votes. If the President would have the power to dissolve Parliament at any time, would not that be an erosion of the sovereignty of the People who had elected the Parliament to exercise legislative power on their behalf?

The power of the Head of State to summon and dismiss Parliament at will has monarchical origins. One is reminded of how Charles I kept the Parliament of England dissolved for eleven years. During the short-lived English Republic, Cromwell dissolved Parliament when it would not agree with him on dissolution and also failed to agree on a new constitution. Cromwell attended

[6] Late leader of the leftist Lanka Sama Samaja Party.

Parliament on 20 April 1653, listened to a few speeches and shouted 'In the name of God, go!' at members and declared 'You are no Parliament'.

In many of the early written parliamentary constitutions, the power of the Sovereign to dissolve Parliament was retained. The French Constitutional Charter of 1814, the Belgian Constitution of 1831, the Romanian Constitution of 1866 and the Japanese Constitution of 1889 all permitted the monarch to dissolve Parliament at will. Eventually, however, monarchies became more and more ceremonial and monarchs became nominal heads of the executive. The power of dissolution was thereafter exercised by the monarch only on the advice of the Prime Minister.

In the United Kingdom, the Queen dissolves Parliament on the advice of the Prime Minister. Before the Fixed-term Parliament Act of 2011, a Prime Minister could advise dissolution any time before the end of the five-year term. There have been instances of dissolution quite early in the term. This was considered to be an unfair advantage to the ruling party. Under the Fixed-term Parliament Act, an early dissolution can be advised in two circumstances. If the House of Commons passes a vote of no-confidence on the Government and a new Government formed does not win a vote of confidence within fourteen days, Parliament would be dissolved. Dissolution would also follow a resolution passed in the House of Commons, supported by a two-thirds majority of members including vacant seats, proposing an early general election.

In countries in the democratic world that have a Presidential form of government, safeguards against the arbitrary dissolution are found. In the United States of America, the President cannot dissolve the House of Representatives and the Senate is a continuing body, with one-third of the Senators being elected every two years. In France, the President can dissolve the National Assembly only after consulting the Prime Minister and the Presidents of the two Assemblies. However, another dissolution is not possible for twelve months.

PM or KKS?

Mr. R. Premadasa, before he became President of course, likened the PM under the 1978 Constitution to a 'peon' (office aide), a '*karyala karya sahayaka*' (KKS). Today, the PM, who is the MP who commands a majority in Parliament, has much more power, thanks to 19A. If 20A is passed, the PM will again be relegated to the status of a peon. The President can remove the PM at will. Ministers and Deputy Ministers will not be appointed on the recommendation of the PM. The President may consult the PM but is not obliged to. Ministers and Deputy Ministers may be removed without reference to the PM. It is the President who decides the subjects and functions of Ministers and changes them; the PM has no role whatsoever.

The proposed provisions relating to the dissolution of Parliament and the weakening of the PM result in a consequential weakening of Parliament, which is the institution that exercises the legislative power of the People, and thus adversely impacts on the sovereignty of the People.

President unfettered in making appointments

The Constitutional Council (CC), re-introduced by 19A, provides for a national consensus on appointments to important positions, including the judiciary and the independent commissions. The CC has representatives from both the Government and the Opposition, including a representative of the smaller parties. The President also has a representative. The Council also has three eminent persons who are not in politics and who are nominated jointly by the PM and Leader of the Opposition after consulting leaders of political parties represented in Parliament. In appointing these three persons and another two MPs, the PM and Leader of the Opposition must ensure that the CC reflects the pluralistic character of Sri Lankan society, including professional and social diversity.

Under 20A, the President would only 'seek the observations' of a Parliamentary Council, which consists of the Speaker, PM, Leader of the Opposition and two MPs. The leverage that the CC had with important appointments would be completely gone. The President will be unfettered in making appointments to the judiciary, certain high posts and the independent commissions, compromising the independence of these institutions and positions and resulting in the loss of the people's confidence in them.

Before 19A, the Attorney-General and the IGP were required to obtain extensions from the President upon reaching 58 years, thus compromising their independence. K.C. Kamalasabayson, one the best and respected AGs Sri Lanka had, died a disappointed man after he was given only a 3-month extension. 19A provided that the AG and IGP would retire at 60, so that they would not be at the mercy of the President. This provision would be negated by 20A. The belief in some quarters that the AG and IGP cannot not be removed under 19A is patently wrong. The Removal of Officers Act No. 5 of 2002 provides for their removal upon an address for removal being passed by Parliament after due inquiry.

Although the right to information will survive 20A, the Right to Information Commission would be appointed by the President at will, thus compromising the in dependence of this new Commission which serves useful purposes under Right to Information Act. Our RTI Act has been recognized as one of the strongest such laws in the world; one major reason for this being the independence of the RTI Commission.

The National Police Commission was re-established by the Nineteenth Amendment, giving Police officers the much-needed independence. One is reminded of how the number of fundamental rights applications against promotions, transfers and disciplinary orders relating to police officers declined during the period the late Ranjith Abeysuriya, PC chaired the Police Commission because he would not tolerate any political interference. The Commission was also empowered by 19A to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress as provided by law.

With the National Police Commission abolished, political interference would compromise the independence of the Police and a useful mechanism to address public grievances against the Police would be no more. Police officers would be cautious in even entertaining complaints against politicians and their cohorts.

The same goes for the independence of the public service with the independence of the National Public Service Commission compromised. Would not a Forest Officer like Devani Jayathilaka think twice before speaking out against environmental degradation by lackeys of politicians if the Commission is no more independent?

The writer submits that the removal of the salutary provisions relating to the appointments referred to and the consequent adverse impact on the independence of the institutions and high positions impinges negatively on the sovereignty of the People and would therefore necessitate a referendum.

Urgent Bills

19A also abolished provisions relating to urgent Bills, which were sent to the Supreme Court for review within 24 to 72 hours without being published in advance in the Gazette so as to enable citizens to challenge them before enactment. 20A seeks to permit urgent Bills again.

The big problem with urgent Bills arises out of the fact that there is no post-enactment judicial review in Sri Lanka; a law cannot be challenged for unconstitutionality after it is certified by the Speaker. Both the 1972 and 1978 Constitutions permit only pre-enactment judicial review. The effect of a law is best seen when the law is in operation. Not every likely effect can be foreseen at the Bill stage. Also, citizens would have the benefit of the development of the law when post-enactment review is permitted.

The Supreme Court cannot be expected to peruse Bills, some running into more than one hundred sections, within a short period. Our laws, especially those passed after 1972, are replete

with unconstitutional provisions, either not challenged by citizens or gone unnoticed by the Supreme Court.

Fundamental right to challenge acts of President to be withdrawn

An obvious erosion of the sovereignty of the People is the proposal to take away the right of a person under Article 17 to invoke the fundamental rights jurisdiction of the Supreme Court when a fundamental right to which s/he is entitled is infringed by the President. Article 17 being a provision in the chapter on fundamental rights, the right to complain to the Supreme Court is itself a fundamental right. The original 1978 Constitution made an exception to this right by giving the President total immunity from suit. 19A made the President's official acts subject to the fundamental rights jurisdiction and thus removed the anomaly, thereby strengthening fundamental rights and thus the sovereignty of the People. It was that change that made it possible for citizens to successfully challenge the unconstitutional dissolution of Parliament by President Sirisena. Now, a restriction of the fundamental right under Article 17 would offend Article 4(e) ('the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided') and consequently Article 3, which states that sovereignty includes the powers of government, fundamental rights and the franchise.

20A need a Referendum

Article 3 is one of the Articles listed in Article 83. A Bill for the amendment or for the repeal and replacement of the provisions so listed, or which is inconsistent with any of them, requires approval at a referendum.

In regard to the argument that since 19A was not approved at a referendum, its provisions could also be deleted or amended without a referendum, it is submitted that a referendum is not needed to enhance sovereignty. For example, if the right to life is to be included in the chapter on fundamental rights, that would not necessitate a referendum. But to take away the right to life later would certainly need approval at a referendum. The gains achieved through 19A contributed to the strengthening of the sovereignty of the people. Therefore, the removal of the gains so achieved prejudicially impacts on sovereignty and necessitates approval at a referendum.

To ascertain whether sovereignty is adversely affected by 20A, it must be compared with the existing Constitution, not with the pre-19A Constitution or the original Constitution of 1978 which do not exist anymore. There is only one Constitution and that is the present Constitution.