

## Down-Sizing Sri Lanka's Executive Presidency

*The campaign for curbing executive powers and strengthening democratic governance was a decisive factor in Maithripala Sirisena's victory in Sri Lanka's presidential election in January 2015. In keeping with his '100-day programme', President Sirisena succeeded in getting the 19th Amendment to the Constitution duly enacted. The Amendment does not ensure a total abolition of the executive presidency, yet it dismantled, or at the minimum, diluted, the excessive powers of the executive presidency. It can, therefore, be regarded as a milestone along Sri Lanka's path towards greater representative democracy.*

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Since the inception of his presidency, President Sirisena had two significant battles to fight. On one hand, he had to keep up with his promise to the masses on democratisation through constitutional reforms. On the other hand, he was battling to keep up a stable government in parliament. By forming the National Unity Government, the Sirisena administration by now had

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the required two-thirds majority in Parliament. As a result, the Sirisena government is now working towards drafting a new constitution with the primary focus on abolishing the executive presidency and devolution of powers. The whole House of Parliament will be sitting as a Constituent Assembly and will be working towards introducing Sri Lanka's Third Republican Constitution, which is then required to be passed by a two-thirds majority in Parliament and by the people at a referendum to be enforced as the supreme law of the country.

Ending the executive presidency in Sri Lanka was one of the most common slogans used by many presidential candidates during their election campaigns, which was soon conveniently forgotten once they ascended to power. Yet, President Sirisena, on the day of the assumption of his duties as President, made a memorable declaration - that he will only serve as President for one term and utilise his executive powers to reinforce the rule of law and democratic governance in Sri Lanka.

In keeping up with his 100-day programme, the Sirisena government passed the 19th Amendment to the Constitution (19A) in May 2015. Even though the 19th Amendment did not completely do away with the executive presidency, it pruned its excessive executive powers.

The initial 19A draft Bill proposed to significantly reduce the powers of the executive president and transform the current presidential form of government to a parliamentary system instead. The 19A Bill, thereby, proposed to *inter alia*:

- I. Reduce the term of office of the President from 6 years to 5 years
- II. Re-introduce the two-term limit of the President
- III. Re-introduce the Constitutional Council and the Independent Commissions
- IV. Introduce new Articles<sup>2</sup> that would make the prime minister the Head of the Cabinet and permit him to perform functions such as determining the subjects of ministers and the ceiling of cabinet ministers, without involving the president.

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<sup>2</sup> The proposed Articles 42(3), 43(1), 43(3), 44(2), 44(3) and 44(5) of the draft 19A Bill

## **The Supreme Court's Determination**

Thirteen petitions were filed invoking the Supreme Court's jurisdiction in reviewing the constitutionality of the proposed 19A Bill. Most of the petitioners argued that the Bill altered the basic structure of the Constitution by diminishing the final discretionary authority of the president in the executive governance. It was argued that the executive power of the president is alienated, that is transferred, and such alienation or transfer of executive power to another body violates Article 3 of the Constitution - the sovereignty of the people.<sup>3</sup> Article 3 is an entrenched clause - amendment, repeal or replacement of such clause not only requires two-thirds majority in parliament but also approval by the people at a referendum.

The Supreme Court disagreed with the petitioners and held that the executive power is part of people's sovereign powers and that it is not exclusively vested in the office of the president. Nevertheless, the Supreme Court determined that "there is no doubt that the executive power can be distributed to the others via the president. However, if there is no link between the president and the person exercising the executive power, it may amount to a violation of the mandate given by the people to the President. If the inalienable sovereignty of the people, which they reposed on the president in trust, is exercised by any other agency or instrument that does not have any authority from the president, then such an exercise would necessarily affect the sovereignty of the people".<sup>4</sup>

Such was the backdrop that enabled the Supreme Court to determine that transferring the executive function or relinquishing the same from one organ to another - from the president to the prime minister - with no authority deriving from the president shall violate Article 3 of the Constitution (i.e. the sovereignty is vested with people) read with Article 4 (the executive power of the people shall be exercised by the president). The Supreme Court ruled that as per the proposed 19A Bill if the prime minister is to be appointed as the Head of the Cabinet, if the prime minister has the

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<sup>3</sup> Article 3: In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of the government (legislative, executive and judicial power), fundamental rights and franchise.

<sup>4</sup> Supreme Court determination - (S.D. Nos.4,5,6,7,8,9, 10, 14, 15, 16, 17, 19 of 2015), p.9

power to determine the number of cabinet ministers and their subjects and functions, this would be acting in excess of authority and violates Article 3, - an amendment of which requires not only a two-thirds majority in Parliament but also approval of the people at a referendum. It was only this proposal (and one other relating to the Election Commission's power) that the Supreme Court held, that a referendum is required.

The prime minister then announced that those clauses that required a referendum would be removed and that existing provisions of the 1978 Constitution shall remain in force, that is that the president would be the Head of the Cabinet and will decide on the number, subjects and functions of the ministers and if he wishes, he could consult the prime minister in exercising these functions.

## **Parliamentary Debate and uproar within the United People's Freedom Alliance**

The Parliamentary debate on the 19A Bill that was scheduled to be held on the 21 and 22 April 2015 was postponed to 27 and 28 April 2015, amidst the protests by the UPFA<sup>5</sup> based on the summoning of the former president Mahindra Rajapaksa to the Bribery Commission investigations.

By 27 April 2015, the UPFA members of parliament came forward with new proposals, which delayed and thus hindered the passage of 19A. Their proposals were primarily<sup>6</sup>:-

- I. The Constitutional Council should only include members of parliament.
- II. Since the president is able to decide the number, subjects and functions of the cabinet, he should also have the power to appoint/ remove ministers without consulting the prime minister for advice.

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<sup>5</sup> The leader of the UPFA is President Maithripala Sirisena as of March 2015. UPFA was the majority in the last Parliament of Sri Lanka.

<sup>6</sup> 'Defeating the Saboteurs; the 19<sup>th</sup> Amendment', Groundviews, 03.05.2015. Available at <http://groundviews.org/2015/05/03/defeating-the-saboteurs-the-19th-amendment/>

These proposals went contrary to the Supreme Court's determination, which upheld the composition of the Constitutional Council introduced by the 17<sup>th</sup> Amendment. Similarly, "acting on the advice of the prime minister" did not require a referendum as per the Supreme Court determination. Therefore, the UPFA proposals were viewed as an indication of the UPFA opposing the de-politicization of the public administration and judiciary (that is by appointing MPs to the Constitutional Council) and the curtailment of the executive powers of the president. In other words, they were contrary to making significant changes to the present system and attempted to uphold the status quo.

The UPFA members of parliament also sought a pledge from President Sirisena in passing of the 20<sup>th</sup> Amendment to the Constitution prior to the dissolution of parliament in the hope of winning the forthcoming parliamentary elections under the new electoral system. The proposed 20<sup>th</sup> Amendment introduces a hybrid of the PR system and the First-Past-the-Post system along with the National List. This was brought forth as a necessary condition in order to receive the UPFA support to pass the 19A.

Obtaining the UPFA support for the 9A was perhaps one of the most arduous challenges that President Sirisena had to face during his tenure as president. The discussions with the UPFA continued from 27 April to 28 April 2015. A faction of the UPFA were determined in blocking the safe passage of 19A whereas the prime minister, Democratic National Alliance (DNA) and Janatha Vimukthi Peramuna (JVP) were steadfast in passing it.

However, after much discussions, the pro-19A group agreed to come to a compromise in respect of the composition of the Constitutional Council, agreeing to include seven members of parliament as opposed to having only non-political members as proposed originally.

## **Democracy Triumphs**

On the night of 28 of April, the 19A was passed with 212 voting in favour and 10 absentees. One

voted against the Bill and one abstained from voting.<sup>7</sup> This overwhelming majority ensured safe passage of the 19A in Parliament.

Some salient features of 19A can be summarised as follows:

**1. Two-term limit for the office of the president has been re-introduced<sup>8</sup>**

The 1978 Constitution permitted two six-year terms for the president. President Rajapaksa removed term limits in 2010 by way of the 18<sup>th</sup> Amendment. Term limits are an important check on the executive in a democracy. The 19A abrogates the 18<sup>th</sup> Amendment and re-introduces the two-term limit.

**2. Term of the president's office has been reduced from six years to five years<sup>9</sup>.**

**3. The president can only dissolve parliament after four and half years of parliament's term unless the parliament requests so by resolution<sup>10</sup>.**

Prior to the 19A, the president was able to dissolve parliament at any time after one year of its election if the General Election was held due to a premature dissolution.

The president has to now wait for four and half years to dissolve parliament after its election and the parliament term is also reduced from six to five years after the 19A.

**4. The president is *required* to act on the prime minister's advice when appointing Ministers<sup>11</sup>.**

Under the 19A, the president can no longer make ministerial appointments at his discretion but that he is required to obtain the prime minister's advice when identifying members of

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<sup>7</sup> T. Ramakrishnan, Sri Lanka adopts 19<sup>th</sup> Amendment, The Hindu. Available at <http://www.thehindu.com/news/international/south-asia/sri-lanka-adopts-19th-amendment/article7151450.ece>

<sup>8</sup> Clause 4 of the 19A, Article 31(2) of the Constitution

<sup>9</sup> Clause 3 of the 19A, Article 30(2) of the Constitution

<sup>10</sup> Clause 17 of the 19A, Article 70(1) of the Constitution

<sup>11</sup> Clause 9 of the 19A, Articles 43(2), 44(1), 45(1) and 46(3)(a) of the Constitution

parliament to appoint as ministers and when removing them from office. However, when deciding the number of cabinet and non-cabinet ministers, subjects assigned to them, the president is required to consult the prime minister *only* if he/she considers such consultation is necessary<sup>12</sup>, thereby, preserving the conventional executive system to a certain extent.

**5. Presidential immunity is changed from ‘no proceedings’ to ‘no civil and criminal proceedings’ to be initiated or continued against the president.<sup>13</sup>**

This widens the scope of the Supreme Court to exercise its fundamental rights jurisdiction against official acts of the president.

**6. The president is precluded from assigning ministerial portfolios to himself.**

Assigning ministerial portfolios to the president himself/ herself, was a scope that was abused during the past as the president does not sit in parliament, and thereby provided no opportunity to scrutinize issues pertaining to such ministry. However, this provision is not applicable to President Sirisena because special provisions in the 19A permit the person holding office as president of the commencement of the 19A, to hold ministerial positions<sup>14</sup>.

**7. The president is precluded from submitting to the people at a referendum, any Bill (which is not a constitutional amendment) which has been rejected by parliament<sup>15</sup>.**

**8. The Constitutional Council**

The Constitutional Council and the independent commissions were introduced by the 17<sup>th</sup> Amendment to the Constitution with the aim of de-politicizing appointments made to the public service and the judiciary. Accordingly, the president is required to act on the recommendation/consultation of the Constitutional Council when making key appointments to the judiciary and the public service<sup>16</sup>. The Constitutional Council under

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<sup>12</sup> Clause 9 of the 19A, Article 43(1).44(2) of the Constitution

<sup>13</sup> Clause 7 of the 19A, Article 35 of the Constitution

<sup>14</sup> Clause 50(a) and Clause 51 of the 19A

<sup>15</sup> Clause 19 of the 19th Amendment, by repealing the previous Article 85(2) of the Constitution

<sup>16</sup> Clause 8 of the 19A, Article 41B(1) of the Constitution and Article 41B(3) of the Constitution

the 17<sup>th</sup> Amendment comprised largely of non-political members with the exception of the Speaker, the prime minister and the leader of the opposition acting as ex-officio members. The 18<sup>th</sup> Amendment abrogated the provisions of the 17<sup>th</sup> Amendment. The 19A then proposed to re-introduce the 17th Amendment. However, with the UPFA demands at the discussion rounds during the passing of 19A, now the Constitutional Council comprises of seven members of parliament which is counter-intuitive to the aim of de-politicization.

## **Conclusion**

Despite former President Rajapaksa's popularity amongst the rural Sinhalese conservative Buddhist masses, the 19A now acts as a clear barrier for Mr Rajapaksa to regain full executive power. As now 19A re-imposes the two-term limit, Mr Rajapaksa will be disqualified from contesting a subsequent presidential election. As political critics most rightly say, former President Rajapaksa met his Waterloo with the passing of the 19A.

On the other hand, the passing of 19A is a clear victory for President Sirisena who managed to secure a resounding majority within the parliament, given the fact that he was heading a minority government in parliament at the time. His willingness to cut down on executive powers as President, like no other president before, was remarkable and received wider acceptance from people at large.

During the discussions on the UNHRC resolution on the government of Sri Lanka, the 19A was also instrumental in winning a domestic mechanism to investigate the alleged human rights violations.

Though the 19A did not ensure the promised parliamentary democracy, it is definitely a victory towards the long journey of democratisation. The passing of the 19A is the edifice upon which the initiative to institutionalise democracy was built on as it undoubtedly, reassured the trust and mandate given by the people to President Sirisena. It is the continuation of this democratic victory that conceptualized the new constitution making. The coming months for Sri Lanka will be a



challenging period with debates on the executive presidency and devolution, thereby, paving the path to much-needed transparency and public consultation in nation-building.

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