

[ADRN Issue Briefing]

Strengthening the presidency, weakening democracy: A brief analysis of the Twentieth Amendment to the Constitution of Sri Lanka

Verité Research

On 22 October 2020, the Twentieth Amendment (20A) to the Constitution of Sri Lanka was enacted.¹ The 20A reversed much of the reforms introduced by the preceding Nineteenth Amendment (19A) to the Constitution, with the primary effect of the 20A being the consolidation of power in the office of the executive president.

This article explores the 20A and is divided into two main sections. Firstly, it will briefly set out the background to the passage of the 20A. Second, the features of the 20A will be discussed in respect of their implications on governance and the constitution.

I. Background to the passage of the 20A

The passage of the 19A: Yahapalanaya on the rise

The 19A was passed in April 2015 by the then Sri Lanka Freedom Party (SLFP) - United National Party (UNP) coalition government (*Yahapalanaya* government).² The 19A sought to repeal the Eighteenth Amendment (18A), which was notable for hyper-strengthening the office of the executive president and removing key checks and balances.³

The 19A introduced several reforms to the constitution, with the expectations of democratising and depoliticising governance.⁴ Some of these reforms included:

- re-introducing the Constitutional Council (CC) to approve the president's appointments and removals of high-ranking officials and members of independent commissions;
- restricting the immunity of the president by allowing Fundamental Rights applications to be filed against decisions of the president; and
- limiting the number of cabinet ministers that can be appointed and the number of ministerial portfolios that can be held by the president.⁵

¹ Twentieth Amendment to the Constitution, certified on 29 October 2020, [hereinafter '20A Act'].

² Nineteenth Amendment to the Constitution, certified on 15 May 2015, [hereinafter '19A Act'].

³ Eighteenth Amendment to the Constitution, certified on 09 September 2010.

⁴ See, Gehan Gunatilleke and Nishan de Mel, *The Wins, the Losses and the In-betweens* (Verité Research June 2015), at https://www.veriteresearch.org/wp-content/uploads/2018/05/Verit%C3%A9-Research_19th-Amendment-The-Wins-the-Losses-and-the-In-betweens-1.pdf [last accessed 11 January 2021].

⁵ Other reforms introduced by the 19A included restricting the discretion of the president to dissolve parliament, abolishing the passage of 'urgent' Bills without the opportunity for public scrutiny, and establishing independent institutions to regulate and

The undoing of the 19A: Yahapalanaya in disarray

The *Yahapalanaya* coalition soon began to disintegrate, as reports of disagreements between the former President Maithripala Sirisena led-SLFP faction and the former Prime Minister Ranil Wickramasinghe led-UNP faction began to regularly surface.⁶ These disagreements culminated in the 2018 ‘constitutional coup’, where President Sirisena sought to remove Prime Minister Wickramasinghe from the post of prime minister and prematurely dissolve parliament.⁷ This plunged Sri Lanka into a two-month long constitutional impasse, where the 19A was sharply criticised as having created an unworkable governance structure.⁸

In April 2019, a serious lapse in national security resulted in the Easter Sunday Attacks. Many opponents of the 19A attributed this set back to inherent issues in the 19A.⁹ In particular, the reduced powers of the president under the 19A were pointed out as having compromised national security, bringing security concerns to the forefront of political discourse.¹⁰

The mandate to repeal the 19A: 2019 presidential election and 2020 general election

In this background, Sri Lanka held its presidential election on 16 November 2020. The main contender was the Sri Lanka Podujana Peramuna (SLPP) candidate Gotabaya Rajapaksa, who served as defence secretary during his brother, Mahinda Rajapaksa’s tenure as president. Gotabaya Rajapaksa ran on the ticket of strengthening national security and stabilising the economy, which he intended on achieving by repealing the 19A.¹¹ At the election, Rajapaksa secured a clear mandate, having obtained 52.25% of the popular vote and approximately 1.3 million more votes than the next contender; Sajith Premadasa of the Samagi Jana Balawegaya.¹² Immediately after Rajapaksa’s victory, politicians called for fresh parliamentary elections to enable the SLPP to secure a two-thirds majority in parliament to enable the repeal of the 19A.¹³ As the COVID-19 pandemic further

promote transparency in government procurement and public auditing.

⁶ Hilmy Ahamed, ‘The Farce that is Yahapalanaya: Two years on and failing’, *Daily FT*, 13 January 2017, at <http://www.ft.lk/article/591099/The-farce-that-is-Yahapalanaya--Two-years-on-and-failing> [last accessed 11 January 2021]; ‘Sri Lanka’s Transition to Nowhere’, *International Crisis Group*, Asia Report N 286, 16 May 2017, at <https://www.crisisgroup.org/asia/south-asia/sri-lanka/286-sri-lanka-s-transition-nowhere> [last accessed 11 January 2021].

⁷ ‘Sri Lankan president suspends parliament after firing prime minister’, *Reuters*, 27 October 2018, at <https://www.reuters.com/article/us-sri-lanka-politics/sri-lankan-president-suspends-parliament-after-firing-prime-minister-idUSKCN1N107E> [last accessed 11 January 2021]; Website of Manthri.lk, ‘Extracts from the Parliamentary Hansard concerning the No-confidence motion presented in Parliament on the 14th of November 2018’, at <http://www.manthri.lk/en/blog/posts/extracts-from-the-parliamentary-hansard-concerning-the-no-confidence-motion-presented-in-parliament-on-the-14th-of-november-2018> [last accessed 11 January 2021].

⁸ A seven-judge bench of the Supreme Court unanimously declared that these actions by President Sirisena were unconstitutional. See *Rajavarothiam Sampanthan v. The Attorney General*, S.C. (F.R.) No. 351/2018, (Supreme Court of Sri Lanka), Judgement delivered on 13 December 2018, at http://www.supremecourt.lk/images/documents/sc_fr_351_2018.pdf [last accessed 11 January 2021].

⁹ ‘Sirisena demands repealing of 19th Amendment, blames it for political instability’, *The Times of India*, 23 June 2019, at <https://timesofindia.indiatimes.com/world/south-asia/sirisena-demands-repealing-of-19th-amendment-blames-it-for-political-instability/articleshow/69914507.cms> [last accessed 11 January 2021].

¹⁰ ‘19A jeopardized national security – PM Rajapaksa’, *Ceylon Today*, 22 October 2020, at <https://ceylontoday.lk/news/19a-jeopardised-national-security-pm-rajapaksa> [last accessed 11 January 2021].

¹¹ Website of the Office of the President, ‘Vistas of Prosperity and Splendor’ (Official Presidential Manifesto of Gotabaya Rajapaksa), at https://www.presidentsoffice.gov.lk/wp-content/uploads/2019/16/Gotabaya_Manifesto_English.pdf [last accessed 11 January 2021] p. 09.

¹² Website of the Election Commission of Sri Lanka, Presidential Election – 2019 Results, at https://elections.gov.lk/web/wp-content/uploads/election-results/presidential-elections/pre2019/PRE_2019_All_Island_Result.pdf [last accessed 11 January 2021].

¹³ ‘We are studying 19th Amendment to plan immediate plan of action: Mahinda Rajapaksa’, *Lanka Business Online*, 17 November 2019, at <https://www.lankabusinessonline.com/we-are-studying-19th-amendment-to-plan-immediate-programme-of-action-mahinda-rajapaksa/> [last accessed 11 January 2021]; ‘We need a strong parliament to discard the 19th amendment: President Gotabaya

crippled the economy, the calls to repeal the 19A and create a strong executive who can stabilize the economic and security interests were amplified. These political trends and shifts dominated the media and significantly shaped public discourse on governance.¹⁴

At the parliamentary elections held on 05 August 2020, the Rajapaksa led political alliance secured more than 150 of the 225 seats, thereby obtaining a two-thirds majority.¹⁵ Soon thereafter, repeal of the 19A was called for, and the newly appointed cabinet of ministers appointed a committee to draft a Bill to repeal the 19A.¹⁶

The replacing of the 19A and passage of the 20A

The 20A Bill was published in the Gazette on 28 August 2020 and was subsequently challenged in the Supreme Court.¹⁷ On 20 October 2020, the Speaker formally conveyed to parliament that the Supreme Court had determined that the 20A Bill could be passed by a two-third majority, except for four clauses that required further approval at a referendum.¹⁸

The 20A Bill was debated in parliament on 21 and 22 October 2020. Notably, the final Bill presented to parliament did not contain the four clauses that required approval by a referendum, as determined by the Supreme Court. Despite the opposition vehemently opposing the 20A Bill, a total of 156 parliamentarians voted in favour of the 20A Bill, thereby passing the 20A and effectively replacing the 19A.¹⁹

II. Features of the 20A and their implications

The 20A has far reaching implications on the constitution and governance of Sri Lanka. The implications of the 20A will be explored in light of six aspects of the constitution: 1) the executive president; 2) the Parliamentary Council; 3) the cabinet of ministers; 4) the parliament; 5) the judiciary; and 6) independent commissions.

1) The Executive President

It is evident that bolstering the office of the executive president was the predominant feature of the 20A. Four key features are analysed in respect of their implications on the executive presidency.

a. The power to appoint and remove high-ranking officials and independent commissions

Rajapaksa', *Newsfirst.lk*, 29 December 2019, at <https://www.newsfirst.lk/2019/12/29/we-need-a-strong-parliament-to-discard-the-19th-amendment-president-gotabaya-rajapaksa/> [last accessed 11 January 2021].

¹⁴ Verité Research, '19A in reverse gear', (23 August 2020), 10 (34) *The Media Analysis* [last accessed 11 January 2021]; Verité Research, '20A: Legitimacy in the balance', (4 October 2020) 10 (39) *The Media Analysis* [last accessed 11 January 2021].

¹⁵ Website of the Elections Commission of Sri Lanka, Parliamentary Elections Results 2020, at http://elections.gov.lk/en/elections/PE_RESULTS_2020_E.html [last accessed 11 January 2021].

¹⁶ 'Government to table 20th amendment by mid-September', *NewsWire*, 14 August 2020, at <http://www.newswire.lk/2020/08/14/government-to-table-20th-amendment-by-mid-september/> [last accessed 11 January 2021]; 'Education Minister levels criticism over 19th Amendment, says Easter Genocide was its outcome', *LankaNewsWeb*, 23 August 2020, <https://www.lankanewsweb.net/67-general-news/67142-Education-Minister-levels-criticism-over-19th-Amendment-says-Easter-Genocide-was-its-outcome> [last accessed 11 January 2021].

¹⁷ In re *The Twentieth Amendment to the Constitution of Sri Lanka*, S.C (S.D.) 01/2020, (Supreme Court of Sri Lanka) at http://www.supremecourt.lk/images/documents/sc_sd_01_39_2020.pdf [last accessed 11 January 2021].

¹⁸ *ibid.*

¹⁹ Website of Manthri.lk, 'How did MPs vote for the 20th amendment?', at <http://www.manthri.lk/en/blog/posts/how-did-mps-vote-for-the-20th-amendment> [last accessed 11 January 2021].

Under the 20A, the president is required to seek the observations of the Parliamentary Council (PC) before appointing high-ranking officials²⁰ and the members of independent commissions.²¹ However, the president is not bound by the observations of the PC. Thus, the president is effectively vested with complete discretion when making appointments. This is in contrast to the 19A, where the CC's approval was necessary before the president could make such appointments.

The 20A also vests the president with the power to remove high-ranking officials and members of independent commissions where the constitution or other law does not set a procedure for removal.²²

These offices and commissions embody key institutions, whose independence is vital for democratic governance. Under the 20A, the president has full control in determining the holders and composition of these offices, effectively granting the president the ability to influence several key aspects of governance. Consequently, the independence of these institutions is undermined, and can result in public confidence in these institutions being eroded.

b. The power to assign ministerial portfolios to himself

The 20A also allows the president to 'assign to himself any subject or function and shall remain in charge of any subject or function not assigned to any Minister'.²³ Thus, the president can assign any ministerial subjects or functions to himself and be vested with extraordinary control over state affairs. Such disproportionate strengthening of a single institution undermines the system of checks and balances in government. This ability of the president to control key ministerial subjects and functions and drive policy decisions at his discretion also undermines the collective independence of the cabinet of ministers.

Under the 19A, by contrast, the president did not possess the power to assign ministerial functions and subjects to himself.²⁴

c. The power to dissolve parliament after two and a half years

The 20A grants the president the power to dissolve parliament after the lapse of two and half years after its first sitting.²⁵ By doing so, the president can prematurely call for fresh elections in a bid to secure a more favourable parliamentary composition, which will support his agenda. Such circumstances can significantly undermine the independence and integrity of parliament.

Under the 19A, the president had the discretion to dissolve parliament only upon the lapse of four and a half years since its first sitting.²⁶

²⁰ This includes the offices of Chief Justice, President of the Court of Appeal, the judges of the Supreme Court and Court of Appeal, the Attorney-General, the Auditor-General, the Parliamentary Commissioner for Administration (Ombudsman), the Secretary-General of Parliament, the Inspector General of Police, as well as the members of the Election Commission, the Human Rights Commission, the Public Service Commission, the Bribery Commission, the National Police Commission, the Finance Commission and the Delimitation Commission.

²¹ Section 6 [Article 41A(1)], 20A Act.

²² Section 6 [Article 41A(10)], 20A Act. The following offices do not have a prescribed procedure for removal from office: the Auditor-General, the Ombudsman, and the Secretary-General of Parliament, and members of the Public Service Commission, the National Police Commission, and the Finance Commission.

²³ Section 7 [Article 44(2)], 20A Act.

²⁴ See, Section 9 [Article 44], 19A Act, which does not provide for the president assigning cabinet functions to himself.

²⁵ Section 12 [Article 70(1)(a)], 20A Act.

²⁶ Section 17 [Article 70(1)], 19A Act.

d. The power to remove the prime minister

Sri Lanka's parliament follows the traditions of the Westminster model, which recognises the prime minister as a key official in conducting parliamentary business on behalf of the government. Under the 20A, the president has the power to unilaterally remove the prime minister from office.²⁷ This unrestricted power of the president to remove the prime minister severely weakens the independence of the prime minister and, by extension, the integrity of parliament. Consequently, the role of parliament in serving as a check against the president and the executive arm of government is seriously undermined.

Under the 19A, the prime minister was removed from office by his resignation or if he ceases to be a member of parliament (MP).²⁸

2) The Parliamentary Council (PC)

The PC was introduced to replace the CC. The CC functioned as a check on the discretion of the president by approving appointments/removals made by the president in order to safeguard the independence of government and democratic institutions.²⁹ The CC was composed of ten members, three of whom were 'independent members'.³⁰

The PC, on the other hand, could only make "observations" in respect of the decisions of the president, and the president is not duty bound to comply with the observations of the PC.³¹ Accordingly, the president's discretion in appointing and removing high ranking officers and members of commissions is virtually unrestricted under the 20A. Further, the PC comprises of five MPs.³²

3) The Cabinet of Ministers

In addition to the president's ability to assign any subject or function to himself without any limitation, the following change introduced by the 20A has the effect of making the cabinet of ministers further subservient to the president:

a. The president determines the composition of Cabinet at his discretion

The 20A empowers the president to appoint MPs to be cabinet ministers in consultation with the prime minister only where the president 'considers such consultation to be necessary'.³³ In effect, the president has full discretion in determining the cabinet of ministers. Thus, cabinet ministers would appear to hold their portfolios at the pleasure of the president, thereby undermining its ability to function independently.

The position under the 19A was that the president was obliged to seek the advice of the prime minister when determining and making changes to the composition of the cabinet of

²⁷ Section 7 [Article 47(2)(a)], 20A Act.

²⁸ Section 9 [Article 46(2)], 19A Act.

²⁹ Section 8 [Article 41B (1) and (5)], 19A Act.

³⁰ Section 8 [Article 41A (1)], 19A Act. See also Articles 41A (4) and (5), for criteria for independent members of the Constitution Council.

³¹ Section 6 [Article 41A (1)], 20A Act.

³² *ibid.* See also Proviso, for criteria for members of the Parliamentary Council.

³³ Section 7 [Article 44(1)], 20A Act.

ministers.³⁴

4) The Parliament

Apart from the power of dissolution of parliament, two further amendments introduced by the 20A have implications on the accountability of parliament:

a. The passing of 'urgent' Bills without public scrutiny

The passing of 'urgent' Bills without the opportunity for the public to challenge it in the Supreme Court was abolished by the 19A. However, the 20A re-introduced the process to pass such 'urgent' Bills. 'Urgent' Bills on matters relating to i) national security and ii) disaster management can be directly referred to the Supreme Court for determination within 24 hours (which may be extended by the president for a period not exceeding 72 hours).³⁵ Thus, laws on the above matters can be passed by parliament, without the public getting an opportunity to voice their concerns regarding the constitutional implications of such laws.

b. Reduction of minimum period of prior publication of Bills

When a Bill is placed on the Order Paper of parliament, the public is given a period of seven days to petition the Supreme Court to challenge its constitutionality.³⁶ Under the 19A, a Bill was required to be published in the Gazette at least 14 days before it is placed on the Order Paper.³⁷ The effect of this is that the public would have at least 21 days to petition the Supreme Court.³⁸

However, the 20A requires that a Bill be published in the Gazette only seven (07) days prior to it being placed on the Order Paper.³⁹ This amendment effectively reduced the time granted to the public to scrutinize the Bill and petition the Supreme Court from 21 days to 14 days, restricting the already limited time frame available to the public to meaningfully challenge a Bill.

5) The Judiciary

In addition to the unfettered presidential power over judicial appointments to superior courts, two other aspects of the 20A have further implications on the independence of the judiciary:

a. Changes to the composition of the Judicial Service Commission (JSC)

The JSC has the constitutional mandate of determining policy in respect of the administration, transfers, promotion and disciplinary action of judicial officers of the lower courts and courts of first instance.⁴⁰ Under the 19A, the Chief Justice and the two most senior judges of the Supreme Court constituted the JSC.⁴¹ Thus, the composition of the JSC was pre-determined and could not be

³⁴ Section 9 [Article 43(2)], 19A Act.

³⁵ Section 26 [Article 122], 20A Act.

³⁶ Article 121, The Constitution 1978.

³⁷ Section 18 [Article 78(1)], 19A Act.

³⁸ The 21 days is computed on the basis of the 14 days between publication in the Gazette and the Bill being placed on the Order Paper, and the 07 days after the Bill is placed on the Order Paper.

³⁹ Section 13 [Article 78(1)], 20A Act.

⁴⁰ Article 111H, The Constitution 1978.

⁴¹ Section 28 [Article 111D (1)], 19A Act.

directly influenced by the president.

Under the 20A, the president directly appoints the other two judges of the JSC at his sole discretion.⁴² Therefore, the president can directly affect the composition of the JSC, and thereby influence judicial policy in respect of judicial officers. This has the potential to seriously undermine the independence of the judiciary.

b. Increasing the Supreme Court and Court of Appeal benches

The 20A Bill that was published in the Gazette and reviewed by the Supreme Court did not propose amendments to the composition of apex courts of Sri Lanka. However, as a last-minute committee stage amendment, it was proposed that the bench of the Supreme Court be increased from 10 to 16 judges and the bench of the Court of Appeal be increased from 11 to 19 judges.⁴³ This amendment was passed along with the 20A.

During parliamentary debates, the government claimed it was ‘strengthening’ the capacity of the Supreme Court and the Court of Appeal through this amendment.⁴⁴ However, the appointment of the new judges will now be carried out unilaterally by the president under the 20A. Appointing such a high number of new judges to the apex courts at the discretion of the president can have far-reaching implication in terms of the independence of the judiciary.

6) Independent Commissions

The 20A vests the president with the authority to appoint members of the independent commissions at his sole discretion. Thus, the independence of these commissions is undoubtedly compromised. However, the 20A sought to undermine several of the independent commissions even further.

a. Abolishing the National Procurement Commission (NProC) and the Audit Service Commission (ASC)

The NProC and the ASC were established by the 19A. The NProC had a mandate to formulate procedures and guidelines for all government procurement and to monitor and report on the public procurements.⁴⁵ The ASC was empowered to make independent rules and policies in respect of the administration, transfer, promotions, and disciplinary matters of the audit service of Sri Lanka.⁴⁶ Both these commissions were established to enhance public accountability and transparency. Nevertheless, both the NProC and the ASC were abolished by the 20A.⁴⁷

b. Reducing the mandate of the National Police Commission (NPC)

Under the 19A, the NPC was to function as an independent body in charge of the administration of the police service. Thus, the NPC was vested with the authority to determine the appointment, transfer, promotion, dismissal, and disciplinary control of police officers. However, under the 20A,

⁴² Section 23 [Article 111D (1)], 20A Act.

⁴³ Section 25 [Article 119] and Section 31 [Article 137], 20A Act.

⁴⁴ ‘Official Report of Parliamentary Debates (Hansard) of 22 October 2020’,

<https://www.parliament.lk/uploads/documents/hansard/1604463391079193.pdf> [last accessed 11 January 2021], pp. 1834-1838.

⁴⁵ Section 46 [Article 156C], 19A Act.

⁴⁶ Section 35 [Article 153C], 19A Act

⁴⁷ Sections 35 and 56, 20A Act.

the NPC's mandate was reduced to merely hearing complaints from the public against police officers. Thus, the police service no longer functions under the oversight of an independent commission.

Conclusion

The above analysis demonstrates how the principal outcome of the 20A was to elevate the office of the executive president to a position of immense power. The 20A achieved this outcome by undermining the independence of other institutions and weakening the system of checks and balances. Consequently, the separation of powers in the Constitution of Sri Lanka and, by extension, the accountability and transparency of government has been significantly diminished by the 20A. These consequences of the 20A can potentially whittle down democratic values and pave the way for espousal of authoritarian practices in Sri Lanka. ■

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