

Sri Lanka: From lofty 'vistas of prosperity and splendour' to 'elected autocracy'?

Sunday 27 September 2020, by [The Sunday Times \(Sri Lanka\)](#) (Date first published: 6 September 2020).

When Justice AP Shah remarked recently that, 'India is moving towards some form of elected autocracy', he may have been speaking for the entire region and perhaps, swathes of the world in turmoil as it were.

Returning Sri Lanka 'forward to the past'

But the fact that we are not the only comfortless creatures facing perversions of democratic governance is cold wisdom as Sri Lanka confronts another constitutional amendment drafted to suit political ambitions of men in power and their doubtlessly eager-to-please legal minds. Inflicted with some of those very same ills, the '*yahapalanaya*' pioneered 19th Amendment spontaneously imploded as a President and a Prime Minister bickered. We should have learnt from that experiment which cost the country dearly and corrected those internal contradictions while preserving its admirable features.

Instead, the draft 20th Amendment to the Constitution proposes a travesty of concentration of power in the Executive Presidency. This Bill is virtually an inept 'cut and paste' job of the 18th Amendment, complete to the shade of making the same typographical errors in that amendment. It differs on three specific points. Retention of the two term limit of the Presidency is in line with the original formulation of Article 31(2) of the 1978 Constitution which was done away with by the 18th Amendment. That concession along with keeping the 19th Amendment's five year duration of the Presidency and the Parliament and the constitutional right to information is certainly positive.

Even so, that pales into insignificance compared with the enormity of what is otherwise proposed. This goes beyond the chaos of governance thrust upon us by a bickering President and a Prime Minister during 2015-2019. What this amendment Bill points to is a fundamental shift in the nature of the Sri Lankan State, returning the country to 1978 in a bizarre form of 'forward to the past' despite the constitutional water that has flowed under Sri Lanka's bridges since then. All the history of the past tumultuous decades is discarded. A particularly virulent form of Presidentialism is underscored, arguably worse than the ancient transgressions of the 1978 Constitution.

A common or garden path approach to Constitution-making

For the 20th Amendment Bill does not merely reduce the Prime Minister to a peon and the Parliament to a cipher. Rather, it makes the entire edifice of Parliament irrelevant. In fact, banana republics do just this; dump all powers in the seat of a single individual. This is a far cry from a constitutional embodiment of a presidential promise of "Vistas of Prosperity and Splendour." If the 17th Amendment's Constitutional Council (CC), brought back in a truncated form in the 19th Amendment to recommend appointments to constitutional commissions and vital offices such as the judiciary and the public service posts, had procedural deficiencies, the answer is not to replace it with a cringingly subservient Parliamentary Council.

This Council can only make 'its observations' in respect of proposed appointments once the President in all magnanimity, calls for such observations. Presidential power to remove nominees of the Prime Minister and the Leader of the Opposition on this Council reflects the 18th Amendment to the word. The constitutional commissions are rendered such shadows of themselves that this cavalier treatment is par with the course. But where the 20th Amendment departs from the precedent 18th Amendment is the astounding effrontery with which it chops off two constitutional commissions with nary a bow.

Thus, the Audit Service Commission and the Procurement Commission is discarded much like one would throw garbage. Meanwhile, the National Police Commission (NPC) is deprived of power regarding the transfer, dismissal and disciplinary control of police officers, excluding the Inspector General of Police (IGP). In fact, the IGP is dropped from the Schedule of officers to be appointed. That omission is perfectly ironic given the hue and cry by the Government that the President must appoint and dispose of the IGP as he pleases.

Peculiarities and problematic features

This was in the wake of a manifestly unsuitable 'yahapalanaya' IGP being continued until the final atrocity of the Easter Sunday jihadist attacks. Removing him was said not to be possible as the 19th Amendment prevented it. Yet this was a magnificent farce and a discernible one at that, if the media employed critical scrutiny without parroting what politicians say. Under the Removal of Officers (Procedure) Act (No. 5 of 2002) which was left unaffected by the 18th Amendment, removal of the IGP was through a simple majority.

This was easily achievable in the previous Parliament if there was political will to do so. Now the IGP has no constitutional recognition whatsoever. And the removal of this officer remains the same, at least until Parliament, bowing to the Presidency, does away with the 2002 law. The proposed 20th Amendment does not impact on that process whatsoever. That constitutional delegitimation of the IGP applies equally to the Commission to Investigate Bribery and Corruption and the pruning of its suo motu (of its own accord) powers. Non compliance with the Election Commission's directives to specified persons in respect of holding free and fair elections is no longer an offence.

Its other features are no less problematic, even if we brush aside such peculiarities as dual citizens entering Parliament, the limitless Cabinet or the presidential power to dissolve Parliament in one year. Empowering the President to hold portfolios at his pleasure is now enhanced and sweeping immunities of the office is restored. So too are urgent Bills, excepting an amendment to the Constitution. Finding at least one nugget of gold among the familiar dross, restrictions of committee-stage amendments is to the good.

Constitutions are not footballs in political mud

Objecting to this constitutional amendment must not be thought a redundancy due to the abundance of political power vested in ruling party politicians by the electorate in the presidential (2019) and parliamentary (2020) elections. A Constitution is not a football to be tossed around in the rough and tumble of the political mud. If this is what the 'clean' (far from it) and purportedly bright legal minds of 'team Gotabhaya' can dream of, one shudders to think what monstrosities a drafting team tasked with drawing up an entirely new constitutional text for Sri Lanka will come up with. Critical foresight is needed to temper the nakedly autocratic thrust of this constitutional amendment.

As with the 19th Amendment gone awry at the hands of its lamentably short sighted 'yahapalanaya' drafters, bad constitutional amendments have a way of coming back and biting one in the proverbial rear. The phrase, 'elected autocracy' was explained by Justice Shah, a rare judge of integrity and

principle, as referring to that country's 'central executive' becoming 'all powerful and given free rein to do whatever is proposed.' That remark was made in the context of India's covid-induced paralysis with Parliament becoming ' a ghost town' and the judiciary having 'abdicated its role.' As he observed, the damage done thereby destroys entire nations, entire peoples and entire cultures.

These are salutary warnings that (temporary) holders of the reins of State power in Sri Lanka may surely be advised to take heed of.

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