19th Amendment

The Wins, the Losses and the In-betweens

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Gehan Gunatilleke & Nishan de Mel

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Gehan Gunatilleke & Nishan de Mel

Gehan Gunatilleke, *LL.B. (Colombo); LL.M. (Harvard); Attorney-at-Law*, specialises in the fields of constitutional law and human rights. He is the present coordinator of the Masters of Human Rights and Democratisation (Asia Pacific) Programme jointly offered by the University of Sydney and the University of Colombo. Gehan is currently a Research Director at Verité Research.

Nishan de Mel, *B.A. (Harvard); M.Phil (Oxon); D.Phil (Oxon)*, has held several governing, teaching and research positions, including as a Lecturer in Economics at Oxford University. In Sri Lanka, he has served on the Presidential Committee on Tobacco and Alcohol, the National Steering Committee on Social Security and the Presidential Task Force on Health Sector Reform. Nishan is currently the Executive Director of Verité Research.

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Email comments to: publications@veriteresearch.org

INTRODUCTION

The final version of the 19th Amendment (19A) was gazetted on 15 May – more than two weeks after the Bill was passed in Parliament. The myriad changes (around 60) that were mooted and accommodated during the committee stage in Parliament meant that not even the lawmakers were certain about the details of the Act they eventually passed. The gazette on 15 May provides an opportunity to assess its final contents.

The key expectations that underpinned 19A were with regard to democratising and depoliticising governance by:

- The substantial reduction of the President's executive powers, and the restoration of term limits on the presidency in order to democratise governance
- The reversal of the 18th amendment to bring back the independent Constitutional Council and Commissions in order to depoliticise governance

This research brief analyses some of the changes made to the original bill and assesses the final version of 19A that emerged in terms of its delivery on the key expectations.

Photo by Quintus Colombage

THE WINS: PRESIDENTIAL OFFICE & POWERS OF APPOINTMENT

19A introduced at least five major changes that can be classified as successfully meeting expectations on democratising governance. These changes broadly relate to the Presidential Office and the powers of appointment.

With regard to the Presidential Office, there are two important changes:

- A term limit has been re-imposed
- The functional impact of presidential immunity has been reduced

With regard to the powers of appointments, 19A introduced three important changes:

- It makes the Constitutional Council's recommendation a necessary precondition to all appointments to scheduled commissions
- It makes the Constitutional Council's approval a precondition for the appointments of persons to scheduled offices
- It prevents the President from denying—by delay—the appointments recommended by the Constitutional Council

PRESIDENTIAL OFFICE

The committee stage changes, numerous as they were, left certain key provisions of the original Bill untouched. First, the two-term limit for any person seeking to be elected to the office of President was restored. Article 31(2) now provides:

> No person who has been twice elected to the office of President by the People, shall be qualified thereafter to be elected to such office by the People.

Second, the immunity granted to the President under the Constitution is subject to an important limitation. Article 35(1) now provides:

> While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity:
>
> Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity.

Therefore, for the first time, the Supreme Court can exercise its fundamental rights jurisdiction to scrutinise the acts and omissions of the President – except when he exercises powers to declare war or peace under Article 32(2)(g). The acts of the President, if impugned as infringing fundamental rights, would now need to be defended by the Attorney General.

POWERS OF APPOINTMENT

The most significant change introduced by 19A is the restoration of the Constitutional Council to replace the Parliamentary Council, which was set up under the 18th Amendment and exclusively comprised Members of Parliament. The 18th Amendment only required the President to seek the observations of the Parliamentary Council. Under the previous Article 41D (as per the 18th Amendment), the President had the power to appoint the chairpersons and members of the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission, the Bribery Commission, the Finance Commission and the Delimitation Commission. He also had the power to make appointments to certain key offices, including the Chief Justice and the Judges of the Supreme Court, the President and Judges of the Court of Appeal, the Attorney General, the Auditor-General, the Ombudsman and the Secretary-General of Parliament.

However, 19A removes the president's direct and sole discretion in these respects. The new Article 41B(1) provides:

> No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendation of the Council.

The schedule includes all the above mentioned Commissions as well as the Audit Service Commission and the National Procurement Commission. However, the original schedule in the original 19A Bill was revised at the committee stage to exclude the University Grants Commission and the Official Languages Commission.

19TH AMENDMENT

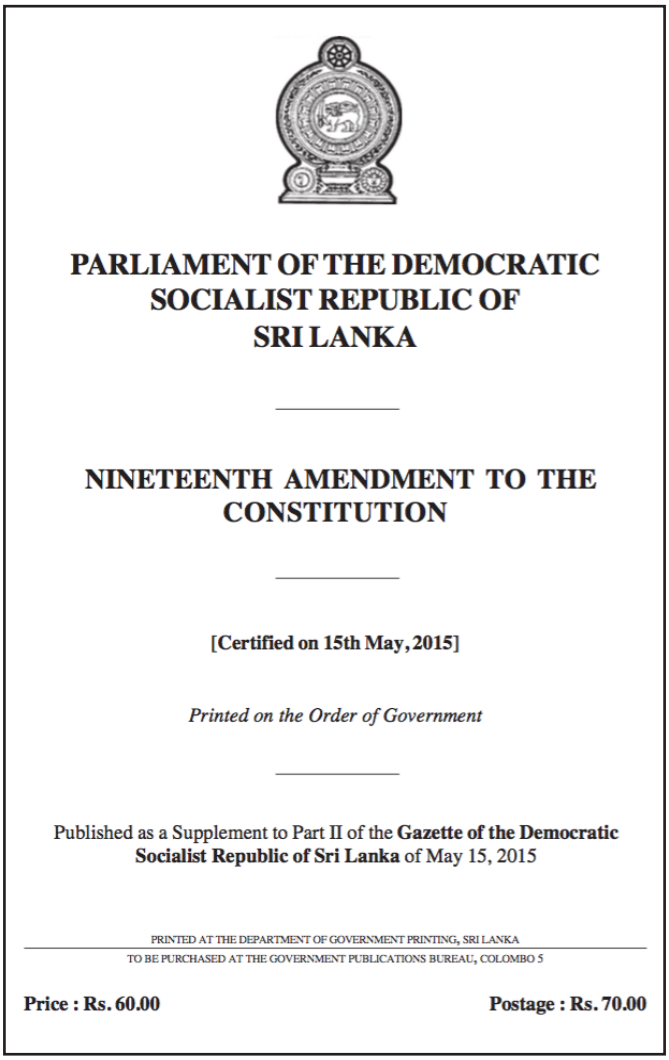
In addition to restoring the Constitutional Council and directing appointments to the various commissions on its recommendations, 19A also requires the approval of the Constitutional Council for other key appointments to high positions.

Article 41C(1) provides:

> No person shall be appointed by the President to any of the Offices specified in the Schedule to this Article, unless such appointment has been approved by the Council upon a recommendation made to the Council by the President.

The schedule includes the key offices mentioned above as well as the Inspector-General of Police.

Past presidents were able to undermine the 17th Amendment (which first introduced the Constitutional Council before it was abolished by the 18th Amendment) by simply failing to make the appointments when the Constitutional Council's recommendations were not to their liking. This problem has been now foreseen and forestalled by 19A. In the case of scheduled commissions, the President is bound to make appointments within fourteen days of receiving the Council's recommendations. According to Article 41B(4)(a), if the President fails to act within fourteen days, the persons recommended by the Council 'shall be deemed to have been appointed'. The President's ability to disregard the Council's recommendations and delay appointments is therefore circumvented.



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THE LOSSES: COMPOSITION OF THE CONSTITUTIONAL COUNCIL

There is one area in particular where the revisions to 19A reversed the undergirding principle of depoliticisation, and in that sense, fell short of expectations.

The problematic revisions to 19A were with respect to the composition of the Constitutional Council. The original Article 41A in 19A provided that seven out of the ten members of the Council should not belong to any political party ('independent-members'). However, this clause was amended at the committee stage to stipulate that seven out of the ten members were Members of Parliament (MPs).

Yet the consequence of this change should be evaluated alongside a realistic understanding of political incentives and the difficulty of achieving a completely depoliticised, purely professional and independent mechanism of appointments.

If this new powerful Council was set up to be dominated by 'independent-members', there would have been strong political incentives to select members that would be malleable to being guided by their respective appointing authorities i.e. the President, Prime Minister and the political party leaders. In such an event, the political hand would have been active, but hidden in the decisions of the Council. Under the revised 19A, the political hand is patently active but also clearly exposed, and the MPs on the Constitutional Council are additionally vulnerable at elections.

However, it may be over-optimistic to argue that the Council's MPs might be restrained by perceived vulnerability at future elections. Alternatively, MPs on the Council could perceive more vulnerability to the President and Prime Minister (in securing future cabinet appointments), as well as to their political party leaders (in securing future party nominations for elections). This then could adversely politicise their decisions on the Council.

The functioning of 'independent members' could be compared to 'independent directors' on a board of a listed private company. These members have a reputation to protect and, therefore, are likely to take their responsibility seriously, despite accommodating some strong pressures. A similar phenomenon was, to an extent, evident in the outcome of Sri Lanka's Lessons Learnt and Reconciliation Commission appointed by former President Rajapaksa.

The Constitutional Council's 'independent members' may be expected to adopt a similar sense of responsibility while MPs may be moved more directly and significantly by their vulnerability to the President, Prime Minister and party leaders. In light of such expectations, the fact that 'independent members' are now a minority in the Council may be treated as a loss.

Image courtesy *The Sunday Times*

THE IN-BETWEENS: CABINET APPOINTMENTS

One of the much-anticipated provisions of 19A related to the President's powers to appoint the Cabinet of Ministers. However, the impact of these changes will depend on the practices that emerge, and the changes may nurture both negative and positive outcomes.

The original Bill envisaged a scheme that vested powers in the Prime Minister to control the appointment of Cabinet Ministers and determine their subjects and functions.

However, following the Supreme Court's determination on the matter, the Bill was revised to vest these powers in the President subject to certain checks. The scheme approved by Supreme Court was further revised during the committee stage in Parliament. Article 43(1) now provides:

> The President shall, in consultation with the Prime Minister, **where he considers such consultation to be necessary**, determine the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers (emphasis added).

Therefore, the President is not strictly required to consult the Prime Minister when determining the number of Cabinet Ministers or the assignment of subjects and functions to such Ministers. The President's powers are, however, subsequently checked by an 'advice clause', which requires the President to seek the advice of the Prime Minister when appointing MPs as Cabinet Ministers. Article 43(2) provides:

> The President shall, on the advice of the Prime Minister, appoint from among Members of Parliament, Ministers, to be in charge of the Ministries so determined.

It would appear that the President cannot appoint Cabinet Ministers unless on the advice of the Prime Minister – it is the Prime Minister who determines which MPs are appointed to the Cabinet. Yet Article 43(3), which was revised during the committee stage, provides:

> The President may **at any time** change the assignment of subjects and functions and **the composition** of the Cabinet of Ministers. Such changes shall not affect the continuity of the Cabinet of Ministers and the continuity of its responsibility to Parliament (emphasis added).

While the President is constitutionally bound to obtain the advice of the Prime Minister when appointing Cabinet Ministers, he may change the composition of Cabinet portfolios without any advice or consultation. Under Article 43(3), the President is free to make changes to the composition of Cabinet portfolios as he sees fit. For instance, it is possible for the President to remove a Cabinet Minister's portfolio and reassign that particular portfolio to another Minister without consulting the Prime Minister. The President is, however, bound under Article 46(3)(a) to obtain the advice of the Prime Minister when removing any particular Minister from office.

Where the President and Prime Minister are strongly aligned—and especially when they are from the same political party—this distribution of powers may not lead to any serious tension. It does, however, safeguard against unilateral decision-making and prevents any one individual from dominating the decision making process or exercising sole discretion.

Where the President and Prime Minister are from different political parties, and are not strongly aligned, the overall scheme under 19A compels a high degree of negotiation and compromise between the two. While this scheme can potentially lead to deadlocks and dysfunction, it can also motivate a much stronger commitment to mutual accommodation with a strong incentive to check and balance each other's decisions against abuse.

The final scheme of 19A then falls significantly short of the strong expectations created with regard to abolishing the executive presidency and reverting to a mostly parliamentary system. What has emerged instead is more of a hybrid system that significantly checks the powers of the presidency while also allowing a significant role that can, in turn, check the powers of the Prime Minister.

It is not clear whether this hybrid outcome is a win or a loss with regard to the expectation of democratising governance in Sri Lanka. The practices and traditions that emerge and shape the functioning of this hybrid system will ultimately determine its benefits.

CONCLUSION

This research brief has not attempted to discuss in detail 19A or the many revisions that were subsequently made to the original proposal at the committee stage. Instead, it seeks to provide an insight into how the final outcome of 19A fulfils the key expectations of democratising and depoliticising governance.

The enactment of 19A is certainly a watershed event in Sri Lanka's constitutional history. It delivered on some of the key promises on democratisation made under the 100-Day Plan by limiting the authoritarian scope of the President's powers. It restored the term limits of the presidency, reduced the scope of presidential immunity, and circumscribed presidential powers in making appointments to the Cabinet. These amendments may be regarded as 'Wins'.

However, 19A falls short of meeting the key expectation on depoliticising appointments to important public institutions and to high offices. It fails to ensure a composition of the Constitutional Council that is for the most part independent of strong political influence. This shortfall may be treated as a 'Loss'.

The revised 19A also provides for a hybrid scheme of power sharing between the President and Prime Minister in selecting appointments and subject-assignments to the Cabinet. On the one hand, this scheme could give substance to past jurisprudence on the President's accountability to Parliament and could democratise governance through checks and balances. Yet on the other hand, the new scheme could give rise to dysfunctional deadlocks that deteriorate governance. This scheme may treated as an 'In-between'.

19A is therefore a mixed bag of wins, losses and in-betweens. It is a promising yet imperfect constitutional enactment, perhaps befitting an imperfect yet promising democracy.

Photo by Ishara S. Kodikara

VERITÉ RESEARCH
Strategic Analysis for Asia

A | No. 5A, Police Park Place, Colombo 5
T | +94 11-2055544
E | reception@veriteresearch.org
W | www.veriteresearch.org