



The Limits of the Presidential Portfolio and its Implications for the Office on Missing Persons

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1. Introduction

The Nineteenth Amendment (19A) to the Constitution placed limitations on the powers of the Executive President. This briefing note will examine these limitations in the context of the President's powers to assign subjects and functions to ministers. The briefing note will also discuss the implications of these limitations on the operationalisation of the Office on Missing Persons (Establishment, Administration and Discharge of Functions) (OMP) Act, No. 14 of 2016. The briefing note argues that the Constitution and the 19A Act prohibit the President from assigning the subject of the OMP Act to himself, and consequently from appointing the date on which the provisions of the OMP Act comes into operation.

2. The Limits of the Powers of the Executive President

The 19A places two key constitutional limitations on the President's powers to assign subjects and functions:

- (i) First, the subjects and functions that are not assigned to a particular ministry do not automatically vest in the President; and
- (ii) Second, the President can only assign to himself subjects and functions of Defence, Mahaweli Development and Environment during his tenure as President.

2.1 No Residual Powers Conferred on the President

Pre-19th Amendment

Article 4(b) of the Constitution provides: 'the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People'. Accordingly, prior to 19A, the President had the power to (a) assign to himself any subject or function, and (b) remain in charge of any subject or function not assigned to any minister. These powers were provided for in article 44 of the Constitution.¹ According to article 44(2):

The President may assign to himself any subject or function and shall remain in charge of any subject or function not assigned to any Minister under the provisions of paragraph (1) of this Article or the provisions of paragraph (1) of Article 45 and may for that purpose determine the number of Ministries to be in his charge, and accordingly, any reference in the Constitution or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President.

19A repealed the above provision in the Constitution.

Post-19th Amendment

Post-19A, article 43(1) of the Constitution only vests in the President the power to determine:

- (a) The number of ministers in the Cabinet of Ministers; and
- (b) The assignment of subjects, functions, departments, public corporations and statutory institutions to particular ministries.

¹ Article 44(2) of the Constitution, as amended by the Eighteenth Amendment to the Constitution.

Additionally, under article 43(2), the President is required to appoint (on the advice of the Prime Minister) ministers *from among the Members of Parliament* to be in the Cabinet of Ministers. Further, at his discretion, the President is able to decide which specific ministries are to be headed by each cabinet minister.

As such, the post-19A Constitution no longer affords the President the power to control subjects, functions, departments, public corporations, and statutory institutions that are not specifically assigned to other ministries.

In September 2015, President Maithripala Sirisena, purportedly exercising his powers under article 43(1), issued *Extraordinary Gazette* No. 1933/13² ('the 2015 Gazette'). The Gazette states:

All subjects and functions and Departments, Public Corporations and Statutory Institutions that are not specifically assigned to any Minister will continue to *remain* in my charge as the President [emphasis added].

By using the word 'remain' in the 2015 Gazette, the President purports to explicitly assign to himself, subjects, functions, departments, and institutions that he has not allocated to particular ministries. However, as discussed above, the President no longer has the residual power to exercise control over subjects, functions, departments and institutions that are not assigned to particular ministries.

2.2 Limits on the Extent of the Presidential Portfolio

The 19A Act (i.e. the Act of Parliament that amended the Constitution) contains certain 'special provisions relating to the period commencing on the date on which certain Articles (of the Constitution) come into force'. These provisions place certain restrictions on the extent of the presidential portfolio. Section 50(a) of the 19A Act provides:

The President may, with the concurrence of the Prime Minister, assign to himself any subject or function and may, with like concurrence, determine the Ministries to be in his charge.

According to section 50 of the 19A Act, the above power of self-assignment commences on the 'date on which the Act comes into operation' (i.e. 15 May 2015), and ends on 'the date on which the next General Election of the Members of Parliament is concluded' (i.e. 17 August 2015). As such, the President's general

² Extraordinary Gazette No. 1933/13 (21 September 2015).

power to assign any subject or function to himself has ceased since the conclusion of the August General Election.

Additionally, section 51 explicitly provides:

Notwithstanding anything to the contrary in the Constitution, the person holding office as President on the date of commencement of this Act, so long as he holds the Office of the President may assign to himself the *subjects and functions* of Defence, Mahaweli Development and Environment and determine the Ministries to be in his charge for that purpose (emphasis added).

This section applies exclusively to President Maithripala Sirisena, as he held office as President on the date of commencement of the 19A Act. When section 50 is read together with section 51, it appears that there is a prevailing constitutional restriction on the ability of the current President to assign to himself subjects and functions other than Defence, Mahaweli Development and Environment. In other words, the particular subject or function must fall within the categories of Defence, Mahaweli Development or Environment in order for the President's self-assignment to be valid. Moreover, it is reiterated that article 43(2) of the Constitution states that all ministerial portfolios should be allocated to members of parliament. Thus, in any event, the current President is precluded from holding any portfolio with subjects or functions other than Defence, Mahaweli Development or Environment, as he is not a member of parliament.

3. Implications for Operationalising the OMP

On 27 May 2016, the Sri Lankan government gazetted the OMP Bill. The Bill was debated and enacted in Parliament on 11 August 2016, and certified into law by the Speaker on 23 August 2016. However, despite the lapse of over six months since its passage in Parliament, the OMP Act is yet to be operationalised.

Section 1(2) of the OMP Act stipulates that the provisions of the Act 'shall come into operation on such date as the Minister may appoint, by Order published in the *Gazette*'. Therefore, unlike the recently enacted Right to Information Act, No. 12 of 2016,³ the OMP Act does not stipulate a date by which its provisions automatically come into effect. It can be brought into effect only by a *Gazette* notification issued by the 'relevant Minister'.

However, prior to the *Gazette* being issued by the relevant Minister, the President will be required to assign the OMP Act to a specific ministry. This is attributed to the fact that post-19A, the President does not have residual powers to assume subjects or functions that are not specifically assigned to a ministerial portfolio.

In September 2015 (i.e. after the date on which the General Election was concluded), by way of the 2015 Gazette, the President assigned to himself three ministerial portfolios. They are: (a) Minister of Defence; (b) Minister of Mahaweli Development and Environment; and (c) Minister of National Integration and Reconciliation.⁴ In terms of the 2015 Gazette, the duties and functions under the Minister of National Integration and Reconciliation include:⁵

- (a) Identifying of impediments in regard to national integration and reconciliation;
- (b) Collaborating with Ministries, Departments and Institutions dealing with matters relating to national integration and reconciliation;
- (c) Reviewing strategies that are being implemented with regard to national integration and reconciliation; and
- (d) Intervening in matters relating to the implementation of the recommendations of the Commission of Inquiry on Lessons Learnt and Reconciliation.

³ Section 1(3), Right to Information Act, No. 12 of 2016.

⁴ The Office of the Cabinet of Ministers, *accessible at*: http://www.cabinetoffice.gov.lk/cab/index.php?option=com_content&view=article&id=25&Itemid=23&lang=en.

⁵ Extraordinary Gazette No. 1933/13 (21 September 2015), at p.4A.

Moreover, the 2015 Gazette places legislation pertaining to the above duties and functions under the purview of the Minister of National Integration and Reconciliation (provided that it is not assigned to any other minister).

The President's 'self-assignment' of the Ministry of National Integration and Reconciliation appears to be contrary to the provisions of the Constitution and the 19A Act. The President is not a member of parliament, and the duties and functions of the Minister of National Integration and Reconciliation do not fall within the categories of Defence, Mahaweli Development or Environment.

It is noted that article 33(1) of the Constitution places a duty on the President to 'promote national integration and reconciliation'. However, this article only imposes a general obligation on the President to foster national integration and reconciliation. When it is read together with the remaining provisions of the Constitution and the 19A Act, it is clear that this provision does not grant the President a specific entitlement outside the ambit of article 43 to assign to himself a ministerial portfolio on national integration and reconciliation.

The preamble of the OMP Act states:

It is an Act to provide for the establishment of the Office on Missing Persons; to provide for the searching and tracing of missing persons; to provide assistance to relatives of missing persons; for the setting up of a database of missing persons; for setting out the procedures and guidelines applicable to the powers and functions assigned to the said office; and to provide for all matters which are connected with or incidental to the implementation of the provisions of this Act.⁶

The subject of the OMP Act cannot be construed as falling within the scope of Defence, Mahaweli Development or Environment. Moreover, even when the Act may be construed as falling within the scope of National Integration and Reconciliation, the President appears to be legally barred from assigning the ministerial portfolio of National Integration and Reconciliation to himself.

Consequently, the operationalisation of the OMP Act will require the President to assign the subject of the OMP Act to a minister other than himself. This Minister may then appoint the date on which the OMP Act comes into operation, in accordance with section 1(2) of the Act.

⁶ Preamble, Office on Missing Persons (Establishment, Administration and Discharge of Functions) No. 14 of 2016.