

H.E. the President

Dear Madam,

MEMO

I set out below for your kind attention, a **Brief Note** in relation to the provisions in Articles 220, 221, 222 and 223 of the proposed Draft Constitution of August 2000. I believe that the detail construction of the provisions of this proposed Draft Constitution were handled by the then Minister of Justice & Constitutional Affairs, Mr. G.L. Peiris, *erstwhile* Professor of Law, with the participation, advice and assistance of Mr. K.N. Choksy, President's Counsel, representing the United National Party.

It stands to reason, that neither you, nor the then Leader of the Opposition, Mr. Ranil Wickramesinghe, would have studied the details and implications of the provisions in this proposed Draft Constitution. As the President, you were entitled to and you would have naturally relied on Mr. G.L. Peiris, who was responsible for crafting and drafting the details of the proposed Constitution, as the then Minister of Constitutional Affairs.

Together with the provisions in the relevant Articles 220, 221, 222 and 223, I have set out in **bold type** my observations and comments in that regard, and the grave and serious implications of which, I am sure you would note with much concern.

I have had the occasion to discuss the implications of the provisions of the above Articles of the proposed Draft Constitution, on the lines set out in my notes below, with the Hon. Attorney General and the Solicitor General at two different social occasions. Both of them acknowledged the grave and serious issues identified, as set out below, and conceded that there is a necessity for amendment.

**In the given circumstances, how could it be left to the same Mr. G.L. Peiris, to negotiate with responsibility, with the LTTE protecting and safeguarding the sovereignty of the country; discussions in regard to which are being conducted in a clandestine manner, devoid of any transparency?**

I had prepared this analytical Note sometime back and meant to send it to you previously. In the given current circumstances, I thought I should bring this matter to your attention, *without any further delay*.

BRIEF NOTE

RE- PROVISIONS OF ARTICLES 220, 221, 222 AND 223 OF THE PROPOSED DRAFT CONSTITUTION OF AUGUST 2000

1. **To ensure public security and public order Articles 220 and 221 of the proposed Constitution provide thus:**

"220.(1) Where the President, upon being advised by the Prime Minister, is of opinion that the security or public order in a Region is threaten by armed insurrection, grave internal disturbances or by any act or omission of the Regional Administration which presents a clear and present danger to the unity and sovereignty of the republic, the President may make a Proclamation bring the provisions of the law relating to public security into force in the Region.

- (2) Upon the making of the Proclamation pursuant to paragraph (1) of this Article, the President may –

- (a) by order deploy aid of the civil power, the armed forces or any unit of the National Police Service for the purpose of restoring public order; and
- (b) make regulations having the legal effect over-riding, amending or suspending the operation of any written law, except the provisions of the Constitution, relating to any matter in List 1 of the Second Schedule or any matter provided for in Chapter XXII.
- (3) Every Proclamation made pursuant to paragraph (1) of this Article shall be revoked, as soon as the President is satisfied that public order has been restored in the Region.

"221. (1) (a) Where the Governor of a Region, upon being advised by the Chief Minister of the Region is of opinion that a situation has arisen in the Region or part thereof wherein the preservation of public order or the maintenance of supplies and services essential to the life of the community is threatened, the Governor may request the President to make a Proclamation bring the provisions of the law for the time being in force relating to public security into force in the Region or part thereof.

(b) Where the President makes a Proclamation pursuant to sub-paragraph (a) of this paragraph, it shall be lawful -

- (i) for the Central Government, its representatives or agencies, to exercise authority in respect of any subject or function contained in List II of the Second Schedule as may be specified by the Governor acting on the advice of the Chief Minister of the Region;
- (ii) for the President to make regulations under the law for the time being in force relating to public security having the legal effect of over-riding, amending or suspending the operation of the provisions of any written law, except the provisions of the Constitution, relating to any matter as may be specified by the Governor acting on the advice of the Chief Minister of the Region, in List II of the Second Schedule.

(2). The regulations under sub-paragraph (b) (ii) of paragraph (1) of this Article, shall as far as is practicable be made in consultation with the Governor acting on the advice of the Chief Minister of the Region and the Regional Advocate-General of the relevant Region."

**2. However, Section 222 (7) of the proposed Constitution nevertheless stipulates thus:**

"222 (7). Notwithstanding anything in the preceding provisions of this Article, a Proclamation made pursuant to Articles 220 and 221 shall be communicated forthwith to the Regional Council of the Region in respect of which the Proclamation is made and -

- (a) in the case of a Proclamation made pursuant to Article 220, and which has been in operation in the Region for a period of Ninety consecutive days shall cease to be in force in that Region unless approved by the Regional Council thereof within ten days of the expiration of that period or, if the Regional Council stands adjourned, prorogued or dissolved at the expiration of such period, unless approved at the first meeting of the Regional Council held thereafter;
- (b) in the case of a Proclamation made pursuant to Article 221, shall cease to be in force in that Region unless approved by the Regional Council thereof within the period of fourteen days of such communication or if the Regional Council stands adjourned, prorogued or dissolved at the expiration of such period, unless approved at the first meeting of the Regional Council held thereafter;

Accordingly, after a period of 90 days in the case of Article 220 and in the case of Article 221 within a period of 14 days, the relevant Regional Council has to approve the action taken by the President in terms of Articles 220 and 221. *Hence could not a Regional Council easily negate such action by the President to enforce public security and public order ?*

3. Nevertheless, Article 223 of the proposed Constitution provides for the assumption of powers by the President for the functions and administration of the Region, in circumstances of promoting armed rebellion or insurrection or engaging in intentional violation of Article 1 or 2 or 3 or the provisions of Chapter XV or Chapter XXII of the Constitution by the Region, as per the following terms and conditions:

"223 (1) Where the President, upon being advised by the Prime Minister, is of opinion that a situation has arisen in which a Regional Administration is promoting armed rebellion or insurrection or engaging in an intentional violation of Article 1 or 2 or 3, or the provisions of Chapter XV or Chapter XXII of the Constitution which constitutes a clear and present danger to the unity and sovereignty of the Republic, the President may, by Proclamation:

- (a) assume to the President, all or any of the functions of the administration of the Region and all or any powers vested in, or exercisable by, the Governor, the Chief Minister, the Board of Ministers or any body or authority in the Region; and
  - (b) where it is necessary for the effectual exercise of the powers under sub-paragraph (a) of this paragraph, dissolve the Regional Council.
- (2) Every Proclamation made pursuant to paragraph (1) of this Article shall be forthwith laid before Parliament.
- (3) Any Proclamation made pursuant to paragraph (1) of this Article, may be revoked or varied by a subsequent Proclamation.
- (2) (a) The President shall, within fourteen days of making a Proclamation pursuant to paragraph (1) of this Article, for the purpose of ascertaining the continued existence of the situation which necessitated the making of such Proclamation and any other relevant matter, direct that a tribunal be constituted in the manner provided in paragraph (5) of this Article, to inquire into and report upon such matters within a period of sixty days from the date of such Proclamation.
- (b) Upon receipt of the report of such tribunal, the President shall -
- (i) cause the report to be laid before Parliament within a period of thirty days; and
  - (ii) if the tribunal reports that the situation necessitating a Proclamation made pursuant to paragraph (1) of this Article has ceased to exist, revoke the Proclamation, and in any case where the Regional Council has been dissolved, re summon such Regional Council.
- (5) The tribunal referred to in paragraph (4) of this Article shall consist of a member appointed by the President, a Member appointed by the Chief Minister of the Region, and where the Regional Council for that Region has been dissolved, by the person who held office as Chief Minister at the time of such dissolution, and a Chairperson nominated by the Members so appointed and, where there is no agreement on the nomination of a Chairperson, the Chairperson shall be nominated by the Constitutional Council.

(6) A court or tribunal shall not have the power or jurisdiction to inquire into, pronounce upon, or in any manner call in question a report of a tribunal referred to in paragraph (4) of this Article."

In the given circumstances, if a President neglects or omits to take any action in terms of Article 223 of the proposed Constitution, what redress would the people have to prevent a potential disintegration and the threat and danger to the unity and sovereignty of the country ? To remove the President, even in such circumstances, would it not require a two-third majority of Parliament ? If such two-third majority is not available, then what would be the consequences and/or remedy ?

It would be further seriously noted that the President's power under Section 223 of the Constitution to assume the functions and administration of a Region is subject to the decision by a Tribunal of only 3 persons, composition of which Tribunal should also be noted, i.e.

- one person to be appointed by the President
- one person to be appointed by the Chief Minister of the Region
- the 3<sup>rd</sup> Chairperson to be nominated by the above 2 appointees

If the Report of the Tribunal so recommends, is not the President compelled to revoke the Proclamation by which the President assumed power for the functions and administration of the Region ?

Very significantly, the Report or findings of such 3-Member Tribunal cannot be put in issue and/or challenged in a Court of Law of the country. Why ?

What would the potential consequences of the foregoing be for the disintegration of the country and the threat and danger to its unity and sovereignty ?

Kind regards,

  
Nihal Sri Ameresekere

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