

Changing Sovereignty in the Present Context

Mr Mohan Pieris, Chief Justice of Supreme Court.

Concept of sovereignty is something which is perhaps very nebulous or very starry. Not many understand it in the context of the modern times. International jurist, Oppenheim said about sovereignty. According to him there exists no concept of meaning which is more complex than that of sovereignty. It is an indisputable fact that the conception from the moment in which it was introduced into the international arena until the present day has never had a meaning which was universally agreed upon. In researching on the topic to be presented today, to speak frankly I was more confused at the end of the reading than at the beginning for the reason that so much is written about sovereignty.



Mr. Mohan Pieris, Chief justice

When we speak of changing sovereignty in the present context, various questions come to my mind and, I want to share some of those concerns with you. My first question to you is sovereignty actually changing or is there a need to change the concept of sovereignty?. Before answering those questions I think it is appropriate to define the concept in the context of Sri Lanka and take the discussion from there. Having understood the meaning of this expression, thereafter I will conclude by giving you the answers to the questions whether sovereignty in fact has to be changed. The expression sovereignty first appeared in the Sri Lankan constitutional document in the 1972, in Article 3. It said thus,

‘In the republic of Sri Lanka sovereignty is in the people and is inalienable.’

So from 1972, nobody else is sovereign in this country except the people. What it meant was, constitutionally they said that people were sovereign, unlike in England in which parliament is sovereign. Our dispensation is sovereignty of the people or popular sovereignty. Now I must point out ladies and gentlemen that there is no definition of the concept of sovereignty in the constitutions. However, Article 3 of the 1978 constitution says that sovereignty includes powers of the government, fundamental rights and franchise. What are these powers of government? Article 4 of the 1978 constitution divides them into traditional threefold categories namely legislature, executive and the judiciary. Legislative power of the people according to Article 4 is exercised by the legislature. People have delegated the power to make legislation to the parliament and by the people. 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. The judicial power has to be exercised by the courts and other tribunals established by the law.

That is the basic legal structure by which the sovereignty of the people is being translated into real life in real terms through the executive, the judiciary and the legislature. So you can see people exercise sovereignty which includes powers of government through their representatives namely the parliament, the executive and our courts. Now in other words people do not give up sovereignty but merely delegate those powers to the various arms of the government. There is however one aspect that some critics make. Some people say, on the one hand, that you are a powerful sovereign and that you exercise these powers through these organs. But while that being the position, some critics seem to say that while the 1978 constitution grants that sovereignty, those very provisions make inroads into that same sovereignty that the constitution talks about. How does that happen? By giving the parliament the executive and the judiciary almost unlimited powers with little regard for the fact that people can do much better for themselves in many areas of government without central government intervention. That is another criticism that they make. While saying that we are all powerful and sovereign, at the same time you quietly take away the same sovereignty by giving unlimited powers to the executive, legislature and the judiciary making inroad to the power by taking away small functions. For example, you will see that in near future Grama Mandala will be established. Pradeshiy Sabha at a higher level and Provincial councils at a another higher level have already been established. So what they are saying simply is that the parliament therefore has ignored the invaluable principle of subsidiarity. In other words what they are simply saying is that if you are genuinely believing in true sovereignty, most of the functions of the government can be delegated to the micro level. That is one of the criticisms made at this whole concept of sovereignty that you see in the 1978 constitution.

Now were talking about international governance, or global governance. What happens to the sovereignty in the midst of this international activity? Our constitution enables the President to engage in activities that are authorized by the international law. That is the constitutional obligation in article 33(F) and we do have another provision in the constitution in Article 27 which includes directive principles of state policy to state that Sri Lanka shall endeavor to foster respect for international law and treaty obligations in dealing with nations.

But it has consequences. It is in these circumstances that we sign up to treaties and conventions in the belief that the articles of those conventions are beneficial and advantageous to us. We don't just

go and sign up treaties for the sake of doing that. We genuinely believe that a particular treaty or obligation which is signed internationally is something good for us. But what perhaps we don't realize is that there are other things also that come with it. Take for instance the International Covenant on Civil and Political Rights which entered into force in 1976. Sri Lanka signed the covenant in 1980 and enacted our domestic legislation being a dualist nation in 2007. We actually enacted laws in line with it on the basis of ICCPR and we have a piece of legislation in 2007. Similarly we signed the Torture Convention in 1994 and in the same year we enacted our local legislation and we have a domestic Torture Act. In the same year we ratified CEDAW. In 1980 we signed the Convention on the Rights of the Child and we ratified it in 1980. Now all these are very fine stuff. But remember it also brings forth serious obligations on the state and its people. It also has an impact on our sovereignty. Now all these conventions have a monitoring body to which the ratifying country has to report. We are supposed to be accountable and report in terms of those treaties and these committees periodically take up these reports for scrutiny and examination at the public sessions in Geneva. They take these matters up for public review. Now in the course of these scrutinizes, they would critique inadequacy of our domestic law and even can suggest amendments to the existing legislation. Now what happens to our sovereignty? I'm putting it in the context of sovereignty. Here someone sitting in Geneva is telling you that Prevention of Terrorism Act is not good. But I can't turn around and say that I have nothing to do with you, I am going to take up protection against sovereignty.

Now how do we look at the approach of these treaty bodies? Do we look at them as intrusive? or part of our international obligations to comply, so that civil liberties can be advanced and democracy as well. A question I think is perhaps worthy taking home with you and thinking. Do we take it as a nuisance or do we take it as something helpful and which can generate freedom.

An interesting episode of this in the country is the famous Singarasa case. Singarasa, a person tried under the Prevention of Terrorism law was convicted and sentenced to 50 years. He appealed to the Court of Appeal and that sentence was reduced to 35 years. The charge was one of attacking army camps and the confession made by Singarasa had been ruled by the High court as admissible confession made under the section 60 of Prevention of Terrorism Law. The optional protocol of the ICCPR permits individuals to make complaints. Singarasa made use of that and took the matter to the human rights committee in Geneva. By that time we had signed the optional protocol to the ICCPR, and the Human rights committee in Geneva conveyed its view to Sri Lanka that Singarasa should be released or re-tried as his rights to a fair trial has been violated. They also recommended that the Prevention of Terrorism law should be amended. Immediately after the Human Rights Committee conveyed its decision, an application was made to the Supreme Court by the counsel for Singarasa in 2005 to exercise the court's inherent power of revision and seeking an order of the court sending Singarasa's case back to retrial or whatever the order the court thought fit. It had never happened in our judicial history before.

The Supreme Court rejected the application by Singarasa and proclaimed that he was attempting to have the views of our courts substituted by those of the Human Rights Committee on the basis that we are a dualist nation and that we have reflected the Geneva laws adequately in our local laws and that we have adopted those laws in our own statutes and that there was an adequate mechanism to try Singarasa and also that therefore there was no way that the court was going to exercise his

revisionary jurisdiction as required by the Human Rights Committee in Geneva. Now what was so compelling in the judgment of the then Chief Justice is that he went on to invalidate the Sri Lanka's ratification of the treaty. Now we have ratified the treaty on the one hand and the Supreme Court says what nonsense we don't need a treaty, and that he will be tried by our own laws. That was the effect of it. He went on to invalidate Sri Lanka's ratification of the treaty mainly the optional protocol that was the net result of that exercise. The accession to this protocol, which was one of the great accomplishments of late Mr. Lakshman Kadirgamar, was nullified by the Supreme Court. Now the offshoot of all this is that no more individual complaints can be made to the Human Rights Committee. The decision continues to draw criticisms from both here and abroad till today. The simple thing was that we could no longer go to the Human Rights Committee, the CEDAW or CRC or whatever we have ratified. This judgment has been held as one of the steps taken by us to sound the death knell of international obligations that Sri Lanka has undertaken. It is a criticism. I don't agree with that with all respect but they continue to bombard us with that position that we do not live up to our international obligations /our treaty obligations.

I ask you to pose the question, was it sovereignty that the court was concerned of when the court did this? Did you read between the lines? The court without saying we are going to take protection under sovereignty, said all kinds of other things like we are a dualist country, therefore we have our local laws ,we got round it by using juristic mechanisms,perhaps quite cleverly and perhaps quite rightly, but was it the compromising of the sovereignty that the court was really concerned about? There are arguments that are for and against it. I'm sure that jurists will write volumes and media will right volumes about it as time goes by as to what the real reason was. Now I'll pose you another little question, when GSP plus was being contested at Brussels, where it was questioned whether GSP plus should be granted or not, in an eight hour session with the EU, Sri Lanka had to answer a volume of questions. Some of them turned into Sri Lanka's legal system, its laws and international obligations and finally there again the criticism was that we actually did not live up to our treaty obligations. There again we put forward the question of sovereignty. So you see what actually sovereignty does to us. Our position had been that we cannot be dictated by external forces .

Our experience with GSP plus was a classic example and Singarasa was another example. For an example, by being in the WTO, we became the beneficiaries of GSP plus, but imagine the conditionalities imposed are intrusions into legislative power. Simply we are told that you do this or you will not get it and that's what happens to our sovereignty.

Take our experiences in the Human Rights Council last March for examples. By virtue of being a member of the United Nations, obligations are assumed by us. November of this year, Sri Lanka goes before the UN for its Universal Periodic Review which is a novel feature of the Human Rights Council. It is a peer review for which we are ready with milestones and great achievements. Now we undertook to put in a national action plan to promote human rights which you know is an official document today .We are almost ready to show our achievements in implementing the LLRC recommendations and steps taken to its implementation which we are about to launch very shortly.

What happens at the Universal Periodic Review? We are completely open to be reviewed of every department of government whether it be the judiciary, executive or the legislature. They can review

any matter relating to the ICCPR, CEDAW, CRC on any one of those matters. Then what happens to this great thing we enjoy as the sovereignty. All these things tell you only one thing and that is that the internal sovereignty has been eroded by the powers of the international community. As far as they get diluted by politics and biases we do not think we are ready to accept this expanding canvass. If I am to summarize what I said in one or two sentences I may say that sovereignty in the paper and sovereignty in the reality are two different things that we cannot actually reconcile. All these are perhaps nice little constitutional and jurisprudential gymnastics that we can play. Is sovereignty then a plaything for jurisprudential gymnastics or do we really believe in real sovereignty? I'm not too sure whether the one or the other is possible. But a combination of these is something that we can live with.

Just before I finish let me tell you something about the global canvass of sovereignty. The global concept of sovereignty actually comes from what was known as the Westphalian sovereignty-the concept of nation states sovereignty. What is nation states sovereignty? I've been looking at some of the military interventionism the recent times. In 20th century the nation states sovereignty was brought into question by a range of actual and proposed military interventions. For example Yugoslavia, Afghanistan, Iraq and perhaps Sudan. Look at the humanitarian interventions that we have seen globally. Cambodia by Vietnam, Bangladesh, then part of Pakistan, by India, Kosovo by NATO, the bombing over Yugoslavia in 1999 by NATO, Iraq by the United States, Georgia by Russia and Libya by NATO. These interventions have a weak basis in international law, but were carried out on the basis that they were humanitarian interventions aimed at preventing genocide, large scale loss of life, ethnic cleansing or the weapons of mass destruction. Neo-conservatism has fed this line of thinking. Lack of democracy may foreshadow the future humanitarian interventions or that democracy itself constitutes a human right. I was just trying to show you that even the doctrine of nation state sovereignty is crumbling under international pressure.

Did we ever think of a united Europe? No, but now you are talking of Euro currency, Euro central bank, Euro common Visa –where then is sovereignty? Will those concepts flow into Asia? Probably we might end up in a common Asian Market.

So then can we hold on this precious sovereignty that we are so jealously guarding in our constitutional documents in this new world order? That we will see in the times ahead.

I think I was able to sensitize you to the need to think about these matters and not to get so emotional and sensitive when we talk about sovereignty. Think about it. Then I leave you with the thought how sovereign is sovereign?