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Abstract

The President of Democratic Socialist Republic of Sri Lanka is the head of the state, chief executive and commander in chief of the armed forces. President J. R. Jayewardene who conceptualized and institutionalized the Executive presidency, from 1966, emphasized the need to transform the parliamentary model of government in Sri Lanka. He emphasized it was the best form of government for developing country like Sri Lanka. The Constitution has granted many powers and functions to the executive president. Therefore, Executive president has given overriding the executive, legislature and judiciary powers. Additionally Constitutional amendments have been used to increase the powers and functions of the executive president. Therefore, this study attempted to analyze the powers and functions of executive presidency under the Constitution of 1978 and the subsequent Constitutional Amendments.

In this research, an attempt has been made to examine (1) how powers and functions of executive president defined in the constitution and through the subsequent Constitutional Amendments? 2) What are the positive and negative impacts of centralizing all the powers and functions in the executive president?
The study is based on secondary data. Study found that powers and functions are vastly concentrated to the Executive presidency comparing to other two branches of the government. There is no check and balances to control President’s powers and functions. Abolishing the 17th amendment and introducing the 18th amendment constitution helped to dramatically increase the powers and functions of the executive presidency with the establishment of Parliamentary Council and removal of the two-term limit of a president. Additionally, through the Parliamentary Council, president could interfere over the public service and the judiciary service in Sri Lanka. Finally it can be concluded that creating the more powerful president helped to collapse the good governance and democracy in Sri Lanka.

Key Words: Executive Presidency, Constitutional Amendments, Check and Balance, Parliamentary Council and Good Governance

Introduction

1978 Second Republican Constitution has introduced Executive Presidential form of government in Sri Lanka. It has experienced 34 years of executive presidency since 1978. There have been many criticisms against this form of government from very start of the system.

According to the provisions of 1978 Constitution, the president is made the head of the state of republic of Sri Lanka, chief of the Executive, the head of the government and the commander in chief of the armed forces (Silva 1993). President J.R. Jayewardene who conceptualized and institutionalized the Executive presidency, from 1966, emphasized the need to transform the parliamentary model of government in Sri Lanka (Wilson 1980). He delivered an important seminal address to the Twenty second Annual Sessions of the Ceylon Association for the
Advancement of Science in 1966 of 24th December. It conceptualizes his vision in an embryonic form. He observed that,

“Our cabinet, the Executive government, is chosen from the legislature and throughout its life is dependent on its maintaining a majority therein; we have followed the British Constitution in this respect. In some countries, the Executive is chosen directly by the people and is not dependent on the legislature during the period of its existence, for a specified number of years… The new French Constitution is a combination of the British and the American systems. Such an Executive is a strong Executive, seated in power for a fixed number of years, not subject to the whims and fancies of an elected legislature; not afraid to take correct but unpopular decisions because of censure from its parliamentary party. This seems to me a very necessary requirement in a developing country faced with grave problems such as we are faced with today” (Ibid 1980).

His argument was that such a high powered post is suited for developing country like Sri Lanka more than any form of government. His main argument is based on inability of a nominal head of a state to intervene into political disputes which lead to political instability which impede development (Wijemanne 1996).

Hence, the major objective of Constitution of 1978 has been to create stable, strong and independent executive. It was expected that such a strong presidency would guide to development as he can work independently of legislature which has to be responsive to the political strife’s of society. However, many have questioned the achievements of objectives based on experience (Warnapala 1993). It has argued that it has contributed to root a constitutional dictatorship and political instability rather than development of the country.
The constitution has granted the executive president in Sri Lanka, a wide range of powers ranging including legislative, executive and judicial affairs of the governing the country. The constitution has made president not accountable to any of the other state institution and cannot be questioned before a court of law whether the case belong to civil or criminal law (Abeysinghe 1999). As authorities on Sri Lankan politics has pointed out “the constitution is tailor made to suit the fancies and whims of the president Jayawardene (Wilson 1980). Hence, the president enjoys the ceremonious powers to dissolve legislature, prolong the sessions of parliament and power to call referendum, appointment of judges to higher courts etc. a head of state enjoys under a Cabinet Form of Government (Ibid). Many of the constitution amendments have been designed not strengthen democracy but to give the president to give more and more power to maintain his grip over the decision making process of the country. The eighteenth amendment in 2011 is a milestone in this regard which has taken away anything democratic in the constitution leading to a de jure and de facto constitutionally established dictatorship in Sri Lanka. The objective of the present study is to examine the process of making the constitutional dictatorship through constitution and constitutional amendment and it is based on the critical examination of literature and constitution making process. The article starts with a discussion of constitutional provision in relation to president in the original and then proceeds to discuss important amendments introduced according to the desires of incumbent presidents from time to time.

**Powers and Functions of the Executive President**

The Executive president of Sri Lanka with all its special features cannot be analyzed in isolation. A meaningful study requires to discuss it in relation to mode of election, the period of president’s office, the power in relation to the cabinet and
ministers, the power of dissolving parliament, making appointments to the judiciary, and the judicial control of Executive acts (Perera 2001).

The chapter seven of the present constitution spells out the powers and functions of president. It has provided for the president become the head of the state, head of the government and head of the cabinet of ministers and commanding chief of the three forces. The article 30 of the constitutions stipulates as follows:

30. (1) there shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces. (Department of government printing 1978).

The experience during the impeachment motion against late President R Premadasa reveals that even the ceremonial powers can be used to strengthen the presidential grip over the rest of government organ which ultimately lead to degeneration of democracy in the country.

Though at glance of the constitution gives the expression of separation of power principle is included in the fundamental law of the country, the president is given important legislative powers making the parliament a timid organ of the government in the face of a powerful president. The constitution has made provisions for the president to intervene into powers of the national legislature. According to the Constitution, President is responsible for any acts done or not done. However, Late N. M. Perera had observed that the particular provision remains only a constitutional decoration (2001). Article 42 of 1978 Constitution states that the President shall be responsible parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to
public security (Ibid). But there are no concrete provisions to implement this responsibility.

It has already pointed out that the drafters of the constitutions have deliberately abandoned the checks and balances with regard to the powers of the Executive President as done in other democracies that have adopted Presidential Form of Government. The inevitable consequence of the abandonment of checks and balances in the constitution making process is the emergence of dictatorship through law (Abeyrathne 2012). It is to be noted that the power of the Executive President was not dependent on the confidence of the legislature and also he need not answer the national parliament. Though the president is made the minister of important ministries, the constitution has not made for any provisions to control his/her conduct by the Parliament (Perera 2001).

The article33 of the constitution, in addition to the powers and functions expressly conferred on or assigned to president or by any written law whether enacted before or after the commencement of the constitution, he is to have the power

a) To make the Statement of Government Policy in Parliament at the commencement of each session of Parliament and

b) To preside at ceremonial sittings of Parliament.

c) It is the President who makes the statement of government policy at the commencement of each session of parliament and he presides at ceremonial sittings of parliament (The open university of Sri Lanka 1990).

The ceremonial powers over the legislature under the constitutions are to summon, prorogue and dissolve parliament. The limitations over the exercise of such powers are the followings:
I. Parliament must be summoned to meet at least once every year whenever the President prorogues parliament it must be recalled within two months.

II. Whenever the President dissolves parliament, he must fix a date or dates for the general election and summon the new parliament to meet within three months from the date of the proclamation dissolving parliament.

III. If during the period, intervene the dissolution of parliament and the conclusion of the general election, state of emergency arises, parliament has to be called into session

IV. When a general election has been held consequent upon dissolution of parliament at the wish of the President he cannot dissolve the newly elected parliament for a period of one year; unless parliament itself requests dissolution.

V. The President shall not dissolve parliament on the rejection of the statement of government policy at the commencement of the first session of parliament after a general election.

VI. The President’s power to dissolve parliament is suspending during a time when parliament is proceeding to remove the President from his office and

d) When the President has not dissolved parliament consequent upon the rejection by parliament of the appropriation bill, the President shall dissolve parliament rejects the next appropriation bill (Ibid).

President Chandrika Bandaranaike concluded the parliament session in 4th October 2003 without consulting the speaker of the parliament to avoid impeachment motion against Chief justice Sarath N. Silva (a confident chief justice of her and her appointee to the post) and issued a gazette to summon the new parliament session in 19th of November 2003(http://transcurrents.com/tc/2009/06/post_381.html).
The President has the unrequited power to dissolve parliament subject to ineffectual restrictions. Under Article 70 of the Constitution, several powers are devolved on the President to establish his/her supremacy over a hostile legislature (Panditharathne and Rathnam 1998). The article bestows on the President the power to order a fresh general election, including the power to recall the dissolved parliament into office if the President in his/her subjective opinion is satisfied that a condition of emergency has arisen. The President continues in office notwithstanding dissolution of the cabinet of ministers. His powers during the period between dissolution and assumption of office by the newly elected parliament include under Article 48(2), the power to assume the functions of not only the prime minister, but the rest of the cabinet as well. This violates the standard democratic practice of the former government continuing in office as a caretaker until a fresh verdict from the electorate has been declared (Panditharathne and Rathnam 1998). Article 85(2) provision of constitution proclaims that the President may in his discretion submit to the people by referendum any bill which has been rejected by parliament (Department of government printing 1978). Taken together, it can be argued that this has created a legislative rival to the parliament.

After discussing the powers and functions of president over the legislature, it is pertinent to discuss the executive powers given to the president. As the head of the executive, president enjoys all the powers and functions which are enjoyed by a president under presidential form of government and nominal powers enjoyed by the nominal head of a state under a Cabinet System of Government. All of executive powers and functions revolve around the executive president. He has got the power to appoint high rank of officials such judges of the superior courts, election commissioner, ombudsman etc.
Article 4 of the constitution provide for Executive Power of the People is to be vested in the President. On the other hand, Article 43 of the Constitution provides for Cabinet of Ministers charged with the direction of republic (The open university of Sri Lanka 1990). It may amount a false expression that there may be a conflict between two articles. However reading of the constitution as a whole and experience for the last decades executive power de jure and de facto vested solely in the hands of the president. The constitution has provided for the president to act his discretion in appointing ministers to the cabinet and removal of them together with the Prime Minister at any time without presenting any reason reveals that real power and the most important in governing the country is the executive president.

44(1) the President shall, from time to time, in consultation with the prime minister, where he considers such consultation to be necessary (Department of government printing 1978).

a) Determine the number of ministers of the cabinet of ministers and the ministers and assignment of subjects and functions to such ministers; and

b) Appoint from among the members of parliament, ministers to be in charge of the ministries so determined.

(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 and may for that purpose determine the number of Ministries to be in 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 constructed as a reference to the President.
(3) 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 (Ibid).

According to the 1978 Constitution, Article 45 states power and function of President on cabinet.

45(1) the President may, from time to time, in consultation with the prime minister where he considers such consultation to be necessary (The open university of Sri Lanka 1990).

a) appoint from among members of parliament, ministers who shall not be members of parliament, ministers and

b) Determine the assignment of subjects and functions to, and the ministers, if any, which are to be in charge of, such ministers.

45(2) the President may at any time change any appointment or assignment made under paragraph (1) of this Article.

According to the 1978 Constitution, Executive President possesses enormous powers as the head of the Executive. He is not limited by any of the provision; he is protected by the Constitution. He has the power to appoint the ministers of the cabinet, and he determines the number of ministers. President is also a member of the President and the head of the cabinet. The President can remove the prime minister, the ministers and the deputy ministers from the cabinet and he can dissolve the cabinet.

President has the sole authority to determine the size of the cabinet, the assignment of subjects and functions among the respective ministers and appointment of
ministers. On the basis of the same provision, he could take charge of any subject or function not assigned to the prime minister or other minister. It also empowered him to change the assignment of subjects and functions and the composition of the cabinet of ministries. It was mainly on this ground that the President took charge of the Katunayake airport in May 1978. Further, the Department of Civil Aviation and the Fertilizer Corporation came under his authority. The latter, which was until then under the minister of Agriculture, was brought under the President’s aegis in March 1982 (Warnapala 1993). The Executive power, including the defense of Sri Lanka is vested solely in the President. In this respect the Constitution of Sri Lanka departs fundamentally from the Constitutional position that prevailed prior to 4th February 1978 where Executive power was exercised by the cabinet of ministers which was collectively responsible to the legislature and could be ousted from office on a vote of no confidence (Zafrullah 1981). Thus, the presidency which was a symbolic institution under the 1972 Constitution has now been vested with actual Executive power.

Formation of the cabinet of ministers is an important function of the President. The Constitution also provides for the appointment of several categories of ministers. Article 44 provides for the appointment of the cabinet of ministers and the present cabinet, including the prime minister who is in charge of the specific subject of local government and Constitution, consists of 26 ministers. In addition, the President is in charge of two ministries—the ministry of defense and the ministry of plan implementation and this, therefore, means that there are 28 ministers in all (Warnapala 1993). No cabinet of this size has ever functioned in Sri Lanka since the inception of cabinet government.

As head of the Executive, he wields powers of considerable importance, powers which make it absolutely clear that he is in effect far more powerful than a prime
minister could have been under the former system. Firstly he is no longer answerable to the legislature; the Constitution only makes him responsible to parliament. Then there is the fact that the standing orders of the house do not permit any reference to be made to him or his conduct questioned except on a substantive motion (Wilson 1980). Furthermore the prime minister, members of the cabinet and other ministers are entirely dependent on the President for their offices. President Chandrika Bandaranaike arrogated three ministries from the United National Party Government namely that of Ministry of Defense, Ministry of Internal Affairs and Ministry of Media on 6th October 2003.

The president is also bestowed with important powers in the case of judicial affairs of the country in practice which has lead to the erosion of law and order of the country (Abeyrathne & Shanthasiri 2009). The constitution has granted judicial immunity to the president unlike in other democracies that have chosen the Presidential Form of Government. He cannot be prosecuted for anything done or not done under any circumstances in accordance with the article 35 (1) of the constitution, No one can go to the court against him. Sri Lankan Executive President is free from judiciary. Therefore he has more power. He can do nothing. If he does any illegal or prohibited work, he is protected under the immunity from judiciary. It has provided in article 35(2) where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law. This particular provision has contributed to create a constitutional dictator in the country.

The constitution also has provided for the president to appoint chief justices to the supreme courts in Sri Lanka without any check and balances (Perera 2000). The
president also has got a role in removing judges from their post. (Perera 2000). The instrumentality of the above provision has been exemplified when Sarath Nanda Silva faced the danger of ousting from the Post Chief Justice (Moonesinghe 1993). This is clear instance of presidential intervention to buckle impartial administration justice. Presidents have made use of the appointment power to carry favor certain individuals which has lead to deterioration of democracy in the country. Following chart indicates instances where presidential power has misused at the initial stage of enacting of the constitution.

(Source: Moonesinghe 1993)

Further, misuse of president’s power of appointing chief justice has been used to promote individuals who received favors of the incumbent president. For Example justice Sharvananda appointed chief justice on 18th October 1984 who has been promoted to the Supreme Court ahead of other senior judges. Justice Wanasundara had been the senior judge of the court that should has been appointed chief justice but he was not appointed.

The power of the president is further strengthened as he becomes the leader of the party whatever the circumstances. President Rajapakshe has become the leader of the party with expressed reluctance of Chandrika Kumaratunga to resign from the leadership of the party.

The party system and the predominance of the party in preference to the individual legislators’ conscience vote strengthen the President’s control over policy decisions in parliament. This is compounded by the fact that he has the power to dissolve parliament, subjected to few restrictions that has been already discussed. (Panditharathnam and Rathnam 1998).
One of the contributory factors for strengthening the position of the president is the difficult procedure to be followed in impeaching him. Impeachment motion requires to be signed by two third majority members of the parliament or majority members of the parliament and consent of the speaker. Then it has been to be passed by two third majorities and it should get the approval of the Supreme Court which is composed by judges appointed by him and re-passing of the same by two third majorities in the parliament. This entire difficult procedure has given the president the opportunity to win over members of parliament to his side by extra legal means such as offering means of fringe benefits of many kinds. (Panditharathne and Rathnam 1998). The discussion of the original provisions of the constitution in relation to president gives an opportunity to examine how constitutional provisions have been used by incumbent president to maintain his grip over democratic process of constitutional government of the country which ultimately has contributed to the development of a constitutional dictatorship. What follows is the constitutional amendment related to the development of constitutional dictatorship.

**Constitutional Amendments and the Executive Presidency**

What follows is important amendment in this direction. The second amendment was first among in such a direction. The essence of the constitution seems to be with the removal of members who lose membership of party to which he/she belong. It has provided that if a member of the then parliament change or expelled from the party, a parliamentary select committee would be appointed by the parliament and based on its report parliament may decide over his/her membership in the parliament. In essence, this has encouraged members of the opposition to change his/her party through which he/she contested the election and discourage members of the ruling party changing his or her party of election. Many has argued
the motive of this amendment was to secure the position of then President J.R. Jayawardene (Silva 1993; Warnapala 1993; Kularathne 1995; http://www.democracy-asia.org/qa/srilanka/Ambika%20Satkunanathan.pdf).

The Third Amendment was intended for allowing presidents to go for opportune calculation to remain in power provided he/she has completed a four years term in the first term of office. The amendment was enacted on 27 August 1982. President Jayewardene received tactical advantage in a political fiasco which he created within the main opposition party of the country (Silva 1993; Warnapala 1993).

The fourth amendment to the Constitution of Sri Lanka made provision for the first parliament to continue until 4 August 1989. The amendment came into effect on 23 December 1982.

The amendment provides for the extension of the life of the first parliament and was introduced after the referendum of 1982 (Silva 1993). This amendment focused in order to extend the life of parliament, substituted a referendum for a general election. According to the commissioner of election has not been used in the past, especially to extend the life span of an elected legislature. The main purpose of J.R. Jayewardene’s decision was to escape the consequences of the proportional system of representation, under which he was not sure of a two-thirds majority. With this amendment to the Constitution, J.R. Jayewardene destroyed the very foundation of electoral politics in Sri Lanka as his manipulative exercises devalued both the franchise and the basis of parliamentary democracy in Sri Lanka (Warnapala 1993).

The immense power which is placed in the Executive President is given as opportunity to act arbitrarily. This amendment can be mentioned as an incident which is exercised such power by the President for his advantage. Continuation of
a government long time may be caused to severe problems. Such type of circumstance may lose the right of selecting own government according to people’s choice. It will be seriously damaged to the democratic rights of the people. Making free election in time is one of characteristics of democratic country. Therefore opposition parties can not have a chance to come to power. People should have an opportunity to select their own government. But if it is violated it is not suitable for a democratic environment.

In the wake of the 1983 communal violence, the sixth amendment was passed as an urgent piece of legislation and its stated purpose was to prevent people from ‘supporting, espousing, promoting, encouraging or advocating the establishment of a separate state within the territory of Sri Lanka’ anyone who contravenes this becomes liable to the imposition of civic disability for a period up to seven years. In addition, if he is a member of parliament, he loses his seat in parliament. This amendment was inconsistent with article 10 of the Constitution which guarantees freedom of thought and conscience. Tamil United Liberation Front (TULF), which was formally committed to the establishment of a separate state, was the target of this amendment which effectively ‘banned and excluded the TULF Members of Parliament from the parliament deliberations. Tamil community of its voice in parliament through the sixth amendment provided the terrorists with a justification for the violent method of struggle (Ibid 1993). After 1983, with the outbreak of ethnic conflict and a civil war in the north, the Constitution was less tinkered with and amendments were more substantive in character. The sixth amendment banned separatist movements but in the process destroyed Tamil parliamentary opposition, making the Tamil militants the spokes people for the Tamil people (Silva 1993).

This amendment was passed urgently and prohibited violation of territorial integrity of Sri Lanka. This amendment was formed according to urgent need of
the J.R. Jayawardene who was Executive President. In that time Tamil members of parliament were attempted to prepare Wadukkoday agreement. This was regards with separation of the state. So that President tried to form this amendment and sixth amendment was passed by the parliament abruptly. Through that Tamil members’ seats were lost. This amendment directly infringed the rights of the Tamil members of parliament.

The seventh amendment has provided for intervention into the High Court of the Country and the creation of Kilinocchi District. It has stipulated that whence the Minister in charge of the subject of Justice represents to the President that it is expedient that the number of the Judges exercising the jurisdiction and powers or the High Court in any judicial zone should be temporarily increased, the President may, by warrant, appoint one or more Commissioners of the High Court to exercise the jurisdiction and powers of the High Court within such judicial zone as is specified in the warrant of appointment of such Commissioner of the High Court (http://en.wikipedia.org/w/index.php?title=Constitution_of_Sri_Lanka&oldid=454828803). And every Commissioner of the High Court appointed under paragraph (1) shall hold office for the period specified in his warrant of appointment and shall be removable, and be subject to disciplinary control, by the President, on the recommendation of the Judicial Service Commission.

Commissioner of the High Court appointed under paragraph (1) may, during his tenure of office, exercise, according to law, such jurisdiction and powers as is, or are, vested or ordained in the High Court by Parliament, and shall be invested with all the rights, powers, privileges and immunities (except such rights and privileges as relate to tenure of office, of a Judge of the High Court, and for this purpose, a reference to a "Judge of the High Court" in the Constitution or other written law shall, unless the context otherwise requires, be deemed to include a reference to a “

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By this amendment to the Constitution extend the power of the presidents to influence the judiciary. Even the Thirteenth Amendment which has contributed to democratic decentralization of power has included provisions that increase the power of the president. In this context, the Seventeenth Amendment can be viewed as a silver line among the dark clouds of dictatorial tendencies in Sri Lanka. Emergence of Janata Vimukti Peramuna as a third factor in Sri Lankan electoral politics and difficulty of maintaining power by then President Chandrika Kumaratunga has open opportunity for the creation of some Check and Balances to the unfettered power of president to make appointments to public service, judicial service, three forces, other important bodies such as election commission, ombudsman etc which are part and parcel of democratic governance process of the country. The balancing mechanism had been the balanced institution known as Constitutional Council in which no party can have a majority and requires the consent of it for the nomination made by the presidents.

However, presidents have been reluctant to implement the 17th amendment on account, if implemented, it would do away with the inherent tendency of becoming a constitutional dictator. Weaknesses of 17th amendment were used turn the Executive power into autocracy (Punchiheva 2010). However this is the only amendment that intended at least make a limit on constitutional dictatorship created under the present constitution of Sri Lanka.

The democratic desire of people to do away with undemocratic presidency becomes null and void with second term of President Rajapakshe after the war.
victory over Separatist Liberation Tamil Tigers of Elam. The irony is that he promised to do away with the executive presidency and it is who has made arrangement to culminate and perpetuate undemocratic institution of presidency. Eighteenth Amendment has removed the two term restrictions over the incumbent president and it also has abolished the balanced institution of Constitutional Council by introducing a Parliamentary Council where President’s party has got the possibility of having the majority. The situation is disastrous because Mahinda Rajapakse Regime has got all the symptoms of becoming a dynastic family rule through cultural politics.

Conclusion

The discussion of the original provisions of the present constitution in Sri Lanka and consequent amendments introduced reveals that many of them except one have been designed to strengthen the power and positions of the president. It has been designed in a manner that he can become a dictator for a period prescribed in the constitution. Many of the amendments introduced are to patch loopholes in the system that deem needed to become effective dictator. The 18th Amendments has abolished the only democratic amendment which created the Constitutional Council which could work as a check and balance over the unfettered power of president to appoint persons to public posts. The situation has been further aggravated with the emergence of a trend of using parochial cultural elements to perpetuate one single man power in the Sri Lankan political process through catered discourses out of public pocket.
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