

# THE 19<sup>TH</sup> AMENDMENT TO THE 1978 CONSTITUTION OF SRI LANKA : IS IT A MOCKERY TO THE CONCEPT OF DEMOCRACY ?

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**Abstract** – Any country in formalizing their constitution which is the supreme law of the country, follows some fundamental legal doctrines like democracy, good governance, check and balance of powers as well the concept of separation of powers. The existing constitution of Sri Lanka is introduced in 1978 and even before it passes twenty years of its existence, it has been introduced 19 amendments to it. These amendments have made crucial changes to the structure of the constitution. The 19th amendment is composed with a wide discretionary power towards the prime minister's office in an implied manner. The 19th amendment states that the public has the right to access information but there was no transparency on the nominations of the constitutional council. If the 19th amendment was composed for the national interest then why does it need to undermine the rule of law? Is it a mockery to the concept of democracy? The latest amendment shows a clear difference between the powers of the president and a conquest of the powers of the judiciary and the legislature. The objective of this study is to identify whether the 19th amendment has truly limited the excessive powers granted to the executive president and how the amendment lays the fundamental grounds to ensure the concept of democracy and the concept of good governance. The selected methodology for the study is a library research where constitution and the 19th amendment are been used as the primary data and the existing literatures are been used as the secondary source. Nonetheless, it has been foreseen and understood that although there is a limitation to the powers of the executive presidency in Sri Lanka through the 19th amendment, it does not protect the fundamental democratic features and it does not ensure the separation of powers and good governance as promised by the present government. Therefore in order to ensure the transparency and the accountability within the government as well to the people, powers exercised by the executive president must

be reduced and further the judiciary and the legislature has to be endowed.

**Keywords** - 19th Amendment, Concept of Democracy, Constitution, Executive President, Good Governance, Separation of Powers

## I. INTRODUCTION

The constitution can be identified as the grundnorm of the law of any country and it provides the basic and the supreme law to the ruling party to govern its people. Although the constitution provides a constant law to the country, with the contemporary social changes the constitution needs some fundamental changes into it. That is where amendments become a significant feature to the constitution. Sri Lanka, is a country with a democratic background has made many amendments to the present constitution and the latest one is the 19th amendment. This very amendment has been introduced at least with the intention of reducing the powers of the executive presidency especially in clause 3, 4, 9 of the 19th amendment, Article 30(2) of the constitution where such power-cut could entrust and empower the democracy within the country. The ex-facie of this very amendment shows resembles of limitation of the powers of the president yet under the Article 30 (1) of the constitution, it still protects the executive powers of the president; he is the Head of State, Head of the executive, Head of the Cabinet, Commander in Chief, all of it. It is true that some of the powers granted through the 18th amendment has been dissolved by the 19th amendment yet none of this has not been able to limit the powers granted through the constitution itself to the president, where this nature of cover-up to the constitution challenges the democratic features of the country as well function as a key feature to mislead the general public by making a mockery out

of the democratic concept. On the other hand nature of bringing amendments by every executive president during their period also question the true identity behind these constant amendments to the constitution. It has become an open secret to the learned Sri Lankans that, these amendments have been composed due to the personal attachment of the leaders. Therefore the substance and the process of the 19th amendments are not much of a conspiracy but has bloated the country to a democratic uncertainty.

## II. METHODOLOGY

The research study has been conducted as a comprehensive library research with especial reference to the Sri Lankan constitution of 1978 and the 19th amendment of it. Further, the research has been identified the significance of both primary data and secondary data where the constitutional amendments; the 19th amendment and the primary constitutional theories as the primary data and relevant literatures and published research studies as the secondary data. In advance, this study can be identified as a pure qualitative research based on the concept of democracy and the contemporary legal aspect of the 19th amendment to the present constitution.

## III. DISCUSSION AND RESULTS

Montesquieu's formulation brings out the doctrine of separation of powers as an insurance against arbitrary rule for the different limbs of the governmental powers. Article 91(1) (d) of the 1978 constitution ensure that there is an organic separation between the judiciary on one hand and the legislature and executive on the other. The organic separation has weakened the doctrine since the cabinet of ministers are both members of the legislature and the executive. It is the government's duty to maintain a good governance. Separation of powers is a safety-net to exercise the people's sovereignty without abusing government powers.

An amendment is an improvement, a correction or a revision to the original framework of the 1978 constitution. These amendments are mainly adopted to change the limits of the government powers. The 19th amendment was the very recent amendment which was adopted to the 1978 constitution of Sri Lanka. The executive powers were vested to the president under the previous amendment. These powers are now being shifted to the prime minister,

who is a member of the legislature as stated in the 19th amendment. As a result the legislature has become monstrosly powerful without any absolute checks either from the judiciary or the executive. It has created an imbalance between the governmental powers. In particular the 19th amendment has made changes to the executive power. The relevant changes are those proposed in articles 33A (2) and (3) of the amendment.

33A(2): The President shall always, except in the case of the appointment of the Prime Minister or as otherwise required by the Constitution, act on the advice of the Prime Minister or such Minister as has been authorized by the Prime Minister to advise the President with regard to any function assigned to that Minister.

33A(3): The President may require the Prime Minister or Minister giving advice to him or her under subsection (2) to reconsider such advice, but the President shall act on the advice given to him or her, after such reconsideration. It is clear that the 19th amendment has weighed the legislature's capacity to thwart the executive powers that were given more weightage by the 18th amendment. As per the article 33A (2) of the 19th amendment it has effectively transferred all executive powers to the prime minister. Yet there is a pin drop silence on how the prime minister can be removed, if such were to become necessary.

According to the article 43 of the 1978 constitution states that, the executive power is exercised by the president and by the cabinet of ministers including the public service. As per the situation in the 19th amendment the head of the government is the prime minister, the leader of the cabinet ministers is the prime minister. Therefore the prime minister holds the portfolio of the public services and the cabinet. And it further states that the president should seek for recommendations by the prime minister before any action being taken.

The 19th amendment has brought a hidden duality towards the prime minister. It can be seen that both executive and legislative powers are eliminated by the prime minister's office.

The concept of democracy could be practiced properly if the government powers are balanced. Article 4(a) and 4(b) read with Article 76(1) of the constitution states that there is a functional separation between the legislature and the executive. However the 19th amendment has almost malfunctioned the president's powers.

Article 136(1) of the constitution derogate the proposition that the legislature and the judiciary are exercised separately in regard to their respective functions. Article 4 (b) and 4 (c) recognize the conceptual powers between the executive and the judiciary. The 19th amendment was embodied in a concept paper that wasn't publicized. It was passed by an urgent bill and have included a provision to repeal the urgent bill which is under article 83 of the constitution. If the removal of urgent bill was included, how could the 19th amendment being passed through an urgent bill? It could be realized that the integrity and the independence of the judiciary has weakened.

According to the case law, *Patrick Lowe and sons vs. Commercial bank of Ceylon ltd* (2001) 1 S.L.R.280, if such act is not permitted by the statutes, it shall be taken as forbidden and the court should struck down as it is being excessive of authority. Thus permitting the prime minister to exercise wide discretionary powers as stated in the bill of 19th amendment clause 11 of article 42-44, the excessive powers should be stroked due to the violation of article 3. According to article 41A (1) of the amendment, covers the nomination of the constitutional council. The President's authority to nominate members has been downgraded. Out of a total of 10 members recommended to be appointed to the constitutional council the President who is elected by the direct vote of the people is authorized to nominate only one member. As per the theory of the articles he doesn't even have the power to raise an objection with regard to the suitability of any of the balance five non-ex-officio members proposed to be nominated as per Article 41 (6). On the other hand, the Prime Minister with the Leader of the Opposition together, can nominate five members in addition to both of them becoming ex-officio members in the constitutional council. That is between the Prime Minister and the Leader of the Opposition, they can hypothetically control 07 members of the Constitutional Council out of a total of 10 members. At every opportune stage, the draft 19th amendment seeks to constrain the power of the President, despite the fact that the President exercises the sovereignty of the people through direct franchise, in all of the nine Provinces in Sri Lanka.

According to the article 3 and 4 of the constitution the sovereignty is the root of the doctrine of separation of powers. The legislative power is exercised by the parliament, consisting of elected representatives of the people and by the people at a referendum. the executive power should be exercised by the president including the defence of srilanka. The judiciary is exercised by the parliamentary through courts, institutions. According to

the 19th amendment of article 35, the president may have powers to institute any offence, the institution carries out major limitations so that the president is limited to institute any civil or criminal proceeding. Article 4 states that the executive powers are vested under the president including the defence. Having compared with the 19th amendment to the constitution of article the prime minister advice is compulsory for the president to appoint offices. it could be seen that the 19h amendment has disrupt the concept of democracy.

The result is that the imbalance of the separation of powers would destabilize the concept of democracy of the state. In such a scenario the biggest concern is on national security, defiance and territorial integrity. For the defense of a country, executive decision-making must be untrammelled and rapid. Any dilly-dallying on the part of the executive, due to differences of opinion between the two 'created power centers' of the Prime Minister and the President, would be detrimental. In Sri Lanka, the concept of 'dual-executive power' is sought to be introduced, through the draft 19th amendment that has led towards a mockery to the concept of democracy.

#### IV. CONCLUSION

The introduction of the 19th amendment to Sri Lanka has been justified by many political entities as an attempt to clear the excessive influence of the executive presidency as dictator. In prima facie, it is true that the 19th amendment has cut off many powers vested on the executive president yet it has failed to reduce the powers president has been granted through the constitution itself.

The present constitution was consist with a little of the concept of separation of powers where the 19th amendment has uprooted that as well. A constitution lies on the foundation of the democracy has the two major elements; transparency and the accountability to its people and that has not ensured through this constitutional amendment. Article 35 (1) of the constitution has been amended by the 19th amendment by giving an opportunity to institute president for any offence, yet this opportunity has been limited by major protection to the president from been instituted through that article itself saying "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"; where it can be identified as a constitutional mockery.

The 19th amendment itself has placed the position of the judiciary in a very challenging position as it compromises with the integrity and the independency of the judiciary. The executive and the legislature grip over the judiciary will never guarantee the independency of the judiciary as remonstrated by Lord Denning as “corrupt elements of executive and judiciary want judges to remain impotent, incapable and sterile in the face of injustice”. The composition of the constitutional council is questionable where the majority of the appointments of the council is made by the president. Such actions does not hold the true purpose of constructing a constitutional council as keep the president away from the higher positions who safeguard the law and order of the country.

## V. RECOMMENDATIONS

- I. The clause 8 of the 19th amendment, Article 41I of the constitution says that the decisions finalized by the constitutional council cannot be challenged in the court of law unless it is regarding the fundamental right issue, yet it is also important to consider the issues arise in due to the public interest where many such recent situations occurred.
- II. The given position to the president as the Head of the cabinet under the Article 30 (1) is a visible barrier for the independence of the legislature as well it goes against the concept of separation of powers. It clearly does not limit the powers of the president. Therefore more than limiting the alternative powers such powers of the president has to be limited.
- III. Constitute the constitutional council as a complete independent authority since it offer appointments to many higher positions who safeguard the law and order of the country.
- IV. The 19th amendment does not address the critical issue of the removal of the Supreme Court judges where during the impeachment of Bandaranayaka J. has showed controversial the gravity of it. Therefore the amendment needs to include the procedure of the removal of Supreme Court judges.

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