Special Assistants to the Chief Adviser: Do their appointments meet the provisions of the Constitution?

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There has been a debate on the constitutional legality of appointment of Special Assistants to the Chief Adviser with the rank and status of the State Minister giving responsibilities of some ministries of the government.

There are two sides of the argument: one side argues in favour of it and views no illegality in their appointments, while the other side argues that such appointment violates the provisions of the Constitution and therefore untenable in law.

General comments:

Before I discuss both sides of the arguments, let me make a few general comments to appreciate both sides of the arguments.

Three elections in the country since 1991 have been held under care taker governments and each election was claimed as free and fair, despite accusations from parties who lost the election. Elections under the care-taker governments compare favourably in creating a congenial atmosphere for holding the parliamentary elections.

The provisions relating to the care-taker government could have been couched in language much better than those at present. They are not neat, often confusing and therefore are liable to various, even opposing interpretations.

Furthermore the tenure of such government was seen by the framers of the amendment of the constitution to last for a three-month period during which time a parliamentary elections would be held (Article 58D (2)

The care-taker government is responsible collectively to the President. This is a departure from the normal time when the executive power is exercised by the Prime Minister and the President "shall act in accordance with the advice of the Prime Minister" (Article 48(3).

The care-taker government in terms of the Article 58D (1) " shall discharge its functions as an interim government and shall carry on the routine functions of such government…except in the case of necessity for the discharge of such functions, it shall not make any policy decision".

The powers of the Chief Adviser are much less than those of the Prime Minister. While the Prime Minister can exercise the executive authority on his/her own, the Chief Adviser has to exercise his powers in accordance with the advice of the Council of Advisers (Article 58B (3).

The Chief Adviser does not have the authority of the Prime Minister to recommend to the President to terminate the appointment of an Adviser if an Adviser does not comply with a request to resign. That is why Advisers had to resign from the care-taker government because there is no provision in the constitution for their termination (Article 58C (9)

Arguments for the Special Assistants:

The care-taker government shall consist of the Chief Adviser at its head and not more than ten other Advisers. The limitation was obviously provided in the context of a three-month normal duration (ninety days) by which time elections for the members would be held in accordance with Article 123 (3) of the constitution.

This current care-taker government is a unique one because it came into existence at a time when the country was on the brink of a civil war. The past care-taker governments did not confront such situation in the country.

The constitution does not provide any guide whether additional persons could be appointed to assist the care-taker government if its duration extends more than three month period because elections could not be held for circumstances beyond control.

Accordingly, considering the circumstance of the prolonged nature of the tenure of the current care-taker government, appointment of Special Assistants is imperative to run even the routine functions of the government and is within the powers of the Chief Adviser subject to the consent of the President.

It is argued that since the constitution is silent and does not prohibit such appointments, they are legal and within the ambit of the constitution as being necessary.

It is further argued that Special Assistants are appointed to the Chief Adviser and not to the care-taker government. Though it is a fine split between the two institutions, there is arguably a difference.

Although the Special Assistants may look after ministries of the government, they would work and act under the guidance of the Chief Adviser who would be accountable to the President for action or inaction of those ministries and not the Special Assistants.

It is further argued that such appointment of Special Assistant is intended for the purpose of lessening the onerous burden of responsibilities of the Chief Adviser.

Argument against the appointment of Special Assistants:

It is not the appointment of Special Assistants *per se* that is questioned. What is challenged is that they are given portfolios of ministries of the government without being sworn an oath of office and secrecy under the constitution.

If Special Assistants to the Chief Adviser with rank and status of state ministers were appointed to assist the Chief Adviser without being in charge of the ministries of government, one may argue that such appointment is within the ambit of the constitution.

But when they are appointed to look after the ministries, above the secretaries of the government, it is argued that the appointment of Special Assistants contravenes the spirit of the constitution because they are not accountable either to the care-taker government or to the President. It is a situation comparable to jelly, neither liquid nor solid and is untenable in law because it lacks exactitude.

It is argued that providing rank and status of State Ministers to Special Assistants is untenable under the constitution. Ministers of State to look after the ministries are only to be appointed under Article 56 (2) of the constitution by the President on the advice of the Prime Minister.

It is reported that a case is pending before the High Court Division of the Supreme Court as to whether the then Energy Adviser with the rank and status of the State Minister of the immediate-past government could look after the energy portfolio of the government.

It is also canvassed that State Ministers are to swear an oath of office and of secrecy in performing their functions. The purpose of the oath (a) to discharge their duties without fear or favour and (b) not to reveal or communicate classified or confidential information as they are available to State Ministers to any person

Special Assistants have not taken an oath of office and of secrecy in terms of the constitution, although they are to look after ministries of the government. This means that they are not bound by the provisions of the constitution of impartiality and secrecy and such appointment is arguably unconstitutional.

Conclusion:

There cannot be any definitive view on the legality or otherwise of the appointment of Special Assistants with the rank and status of the State Ministers. Only the Supreme Court can decide on it.

There is a view among legal experts that the President who is empowered to seek an advisory opinion from the Appellate Division of the Supreme Court under Article 106 of the constitution may refer the matter to the highest court of the land and the opinion from the apex court would rest the controversy on the legality of the appointment of Special Assistants.