

Statutory Commissions and Their Consequences in Sri Lanka: A Legal Perspective

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Abstract - Comparative to the limited number of different organizational structures in the private sector, the Sri Lankan public sector has a diverse spectrum of organizational structures such as boards, authorities, commissions, departments, funds, bureau, corporations, institutes, agencies, councils, foundations, centers etc. Similarly, even within the same category of public entities, there are drastic dissimilarities than similarities in many perspectives including their legal characteristics. Thus, such diversifications within a common category of public entities resulted many economic, social, managerial and legal consequences. This study primarily aimed to examine the said issue by selecting statutory commissions in Sri Lanka and their legal repercussions as an example. This is a qualitative study based on primarily desk research supplemented with Black Letter law where necessary. This paper specifically aims to provide a substantive legal critic on the contemporary role and consequences of statutory commissions in Sri Lanka. The findings of the study highlighted the gap between the ideal and actual roles of statutory commissions and how such deviation caused consequence on due process of law as well as public. This study also shed light on necessary legal reforms in order to narrow the said gap and to make statutory commissions more trustworthy to the public and transform them as effective public entities. Also, the findings of this study revealed an absence of systematic and coherent legal framework pertaining to formation, continuation and winding up of such public entities, especially with reference to various commissions in Sri Lanka that have diluted the strength of such structures by curbing the anticipated outcomes. Further, such structures failed to gain public trust and confidence on their findings and recommendations. Hence, this study recommends to formulate comprehensive and systematic legal framework that is applicable to all public entities to streamline and restructure them based on their legal and functional characteristics in general to make the Sri Lankan Public sector more viable, productive and

effective. Further, the recommendations were made to resolve the present loopholes in statutes related to formation and function of commissions in Sri Lanka.

Keywords: *commissions, commission of inquiry, public, president, entities, structures, Sri Lanka*

I. INTRODUCTION

Statutory bodies are entities established either by executive or legislature to function under special area of expertise and to make recommendations for a selected activity. Therefore, such entities gain powers, authority and ruling from the said Constitution or Statute and either from executive or legislature. Sri Lanka has diverse range of statutory bodies with different organizational traits, functions and powers. Due to the said diversification and lack of proper regulatory framework to establish and govern such entities there are many issues pertains to public sector institutions such as high inefficiency, overlap of functions and powers among different institutions and complicated and confusing processes, absence of demarcation of scope and authorities, lack of accountability etc. Upon the examination of frequency of formations of different categories of public entities, Sri Lankan public sector has shown more preference and inclination towards 'commissions' specially after post-independence compared to other statutory bodies such as boards, authorities, departments, funds, bureau, corporations, institutes, agencies, councils, foundations, centres.

The Sri Lankan history of commissions able to trace from 1833 where Ceylon was a British colony. There are many statutory commissions presently functioning in Sri Lanka related to different subject areas such as; Election Commission of Sri Lanka, Public Service Commission, National Police Commission, Commission to Investigate Allegations of Bribery and Corruptions, Finance Commission of Sri Lanka, Delimitation Commission, Official Languages Commission, Public Enterprises Reform Commission, Sri Lanka's Investors Commission,

Securities Exchange Commission of Sri Lanka, Land Reform Commission, Fair Trading Commission, Human Rights Commission, University Grant Commission, Tertiary and Vocational Educational Commission, Telecommunication Regulatory commissions of Sri Lanka, National Transport Commission, National Science and Technology Commission, The National Education Commission and Commission of Inquiry on Lessons Learnt and Reconciliation etc.

Commissions can be broadly categorized in to three types; administrative, legislative and judicial in nature. Commissions may hold hearings, issue summons, conduct research, analyse data, investigate on the subject area and make field visits as they perform their duties. Legislator/ executive have the discretion to tailor composition, structure, tenure and arrangement of the commission based on the anticipated goals of such commissions.

However, it is evident that many of the recently established commissions faced difficulty to fulfil their assigned tasks to the level of satisfaction for both legislature/executive as well as public. Therefore, the public perception and trust towards such commissions has drastically eroded in recent past due to their poor outcomes despite their high frequent formation.

II. RESEARCH PROBLEM

Regardless, there are many researches on public sector reforms pertains to administrative and legal perspectives, there is serious lacuna both globally and locally on studies related to public sector organizational types/ structures and how such different structural formation cause limitations on their performance. This is specifically true for researches on different forms of statutory commissions, their roles and their consequences. Thus, objective of this study is to examine how legal drawbacks related to organizational formations and structures of public entities in Sri Lanka hinder their performances with the example of domestic commissions. In the said backdrop this paper raises the research questions; what are the fundamental legal issues related to formation and structures that hinder the performance of Sri Lankan statutory commissions in general and specially related to commissions of inquiries? And how to overcome such issues and their consequences?

III. METHODOLOGY

This is a qualitative legal study primarily based on desk research supplemented with black letter law where necessary. Study utilized Sri Lankan 1978 constitution and other directly related statutes to the research problem under examination. Case laws and authoritative texts were also utilized used as secondary data to substantiate the key issues and findings. Study adopted a critical analysis approach to interpret the data. The major limitation of the study is the lack of prior studies or literature on research problem or broader research area both locally and in other comparative jurisdictions.

IV. RESULTS & DISCUSSION

A. Principle and purpose of a Statutory Commission

Commissions vary in size, scope, expertise, tenure and powers. There is no legal definition for a commission nor specific traits that are mandatory to identify entity as commission or to differentiate it from other forms of public organizational structures. However, non-legal literature defines commissions as “formal groups established to provide independent advice, to make recommendations for changes in policy or to study or to investigate a particular problem, issue or event or to commemorate an individual, group or event” (Straus, 2021). Whereas Americans define commission as “an establishment of the executive branch ... but which is not an executive department” (Moreno, 1994). However, commission is a multimember independent entity established either by legislators or executive, which has a shorter life span and no going concern, temporary in nature, performs advisory role, whole or partly members of the entity are appointed by the legislator or executive and primarily accountable to the appointed legislator or executive. Nevertheless, these entities supposed to act in the interest of public as they are publicly funded and not elected nor politically accountable.

When commissions are established, they are required to operate under the provisions of the enabled legislation which set out the specific purpose and powers. Further, such legislation may specify financial and non-financial activities of the commission which are authorized to perform, whether such commission able to delegate powers to any other officer and further commission represent the state or not etc. Also, commissions are permitted either full or partial independence depending on

their established purpose. Expected objectives of the commission and duties of members of such commissions are determined by the legislator or executive while government is accountable for public for the funds allocated for such establishments and for their expenditure incurred in the most effective and economical ways.

B. Different forms of Statutory Commissions

When it comes to domestic statutory commissions based on their tenure and goals of such establishments, such statutory commissions can be categorized as permanent statutory commission and interim statutory commissions. Permanent statutory commissions has a going concern similar to other ordinary organizations whereas interim statutory commissions formed to fulfil a particular aim within a shorter time frame. Therefore, such statutory commissions formed with specific purpose are interim bodies where after fulfilling the assigned objectives or tasks naturally get dissolved by the operations of law.

Contemporary Sri Lankan commissions are established in several forms. First, directly under Constitution. There are approximately 7 commissions directly established under present Constitution of 1978. e.g. Article 103 & 104 E - Election Commission, Article 111D- Judicial Service Commission, Article 155A- National Police Commission, 156A- Commission to Investigate Allegations of Bribery and Corruptions, 156B - National Procurement Commission, Public Service Commission originally established under Ceylon (Constitution) Order in Council 1946 with its latest amendment in terms of Sub Article 54(1) of the Constitution by 20th Amendment. Secondly, by an independent Statute passed by the legislature which subsequently comes into effect under a gazette notification to fulfil a specific purpose (e.g. commissions established under different ministries by respective ministers for different purposes).

Thirdly, by His Excellency the President of Sri Lanka under the powers vested in him under Article 33 of 1978 Constitution was able to create a statutory commission as an interim body to achieve a unique purpose within a specified time frame. History of formation of commissions of inquires commenced from appointment of commissions pursuant to Article VII of the Letters of Patent by Governor and Commander in Chief of the Island of Ceylon when Sri

Lanka was Ceylon as a British colony. Subsequently, Commissions of Inquiry Ordinance No.9 of 1872 was enacted. Thereafter, Commission for Inquiry Act (Chapter 393) No. 17 of 1948 as amended by Acts No.8 of 1950, No.40 of 1953, No.8 of 1955, No.29 of 1955., No.16 of 2008 and 03 of 2019. (E.g. Commission on the Simplification of Existing Laws and Regulation in the interest of people - By Extraordinary Gazette No.2209/47 dated 07.01.2021). Thus, there are two main statutes govern Sri Lankan statutory interim commissions namely under executive; Commission for Inquiry Act (Chapter 393) No. 17 of 1948 as amended and Special Presidential Commissions of Inquiry Law No. 07 of 1978 as amended.

According to Section 2 of the Commission of Inquiry Act, it grants the President the discretion and power to set the terms of the commission and appoint to all its members. Section 3 authorizes add new members at discretion of the President. Whereas, Section 4 grant powers to revoke the warrant establishing the commission of inquiry at any time and Section 19 permit appointment of the commission's secretary without needing to consult the Commission or its chairperson. Further, as per Section 2 (2) (d) findings and recommendation whether to publicize or not solely rest on the discretion of the President.

Also, commission of inquiry was vest with powers to ascertain all evidence either written or oral, examine all persons whom the commission thinks should be procured or inquire as witnesses, administer evidence both written or oral of any witness either on oath or affirmation, summon any person residing in Sri Lanka to give evidence or produce any document in their possession, admit any evidence both written or oral notwithstanding any of the provisions of the Evidence Ordinance, to admit or exclude the public from the inquiry or any part, to admit or exclude the press from the inquiry or any part, to obtain certified copies of any proceedings of any case, any document, any other material filed or recorded at any Court of Law or at any tribunal and to require any person to produce any document or material which is in his/her possession or custody and to require any person to provide whatever the information which he/she possesses, in writing. E.g. Commission of Inquiry to Investigate and Inquire into Serious Violations of Human Rights (The Udalagama Commission). Hence, in careful analysis of this Statute it is evident while it grants wide discretion and powers for President to dictate the terms of

composition and function of commission of inquiry. Simultaneously, in absence of such measures commission of inquiry is vested powers that can arbitrarily enforceable due to any regulatory or revisionary measures.

Whereas, Special Presidential Commissions of Inquiry Act No. 07 of 1978 permit formation of Special Presidential Commissions of Inquires. Presidential Commissions of Inquiries are special form of commissions created in ad-hoc nature to conduct inquiries into a defined issue ordered by the President of Sri Lanka and to submit findings, give advice and make recommendations. While Commissions of Inquires function as only fact finding commissions, Special Presidential Commissions of Inquiries have the power to subject a person found guilty to civic disability. E.g. Mrs. Bandaranaike after being summoned before a Special Presidential Commission of Inquiry, she was found guilty and subjected to civic disability, resulting in her expulsion from Parliament. Similarly, a report, finding, order, determination, ruling or recommendation made by a Special Presidential Commission not able to challenge in any court or tribunal. The President has the discretion to appoint Judge of the Supreme Court, Court of Appeal, High Court or the District Court as a member of a Special Presidential Commission of Inquiry. Some of the notable Special Presidential Commissions formed to date are Presidential Commission of Inquiry on the Easter Attacks, Presidential Commission of Inquiry on Bond Issuance, Presidential Commission of Inquiry in relation to the activities of Non-Governmental Organizations, Presidential Commission of Inquiry in relation to the Malpractices and Corruption in State Institutions, Presidential Commission of Inquiry to investigate and inquire into Serious Acts of Fraud, Corruption and Abuse of Power, State Resources and Privileges, Presidential Commission of Inquiry to inquire into the alleged VAT fraud at the Department of Inland Revenue (Paranagama Commission), Presidential Commission on the Disappeared (The Mahanama Tilakaratne Commission), Presidential Commission of Inquiry to Investigate the Management of Sri Lankan Airlines and Mihin Lanka (during the period of January 2006 to January 2018)

However, there is a debate on the powers vested on the both Commission of Inquiry for not having adequate powers while contrary for vesting more powers on Special Presidential Commission of Inquiry. Similarly, legal critics argue that, on one hand Commission of Inquiry appointed under the Commissions of Inquiry Act as amended is not vested with any judicial powers contemplated under Article 4 (c) read with Article 105 of the Constitution, such a Commission of Inquiry would not be empowered to review any decision given by the Attorney General as an ordinary court of law and their merely fact finding bodies. On the other hand, when refer to Section 9 under the Special Presidential Commissions of Inquiry Law No. 07 of 1978, the Special Presidential Commissions of Inquires were vest special powers to makes them more powerful than a Commission of Inquiry to exceed their legal mandate. Thus, legal critics argue Special Presidential Commissions of Inquires violate the separation of powers, the rule of law, and the right to equality guaranteed under Article 12(1) of the Constitution.

Despite the above issues, these two commission types are intended to function as truth commissions. But they were formed as quiz-judicial features. Hence, it is essential for them to utilize their optimal lens of fair hearing when conducting their inquiries. Nonetheless, Section 9 of the Commission of Inquiry Act of 1948 cast duty on the commission to act in a judicial manner. Section 9 says “[...] every inquiry under this Act shall be deemed to be a judicial proceeding within the meaning of Penal Code. However, Penal Code does not define judicial proceeding but Section 2 of the Code of Criminal Procedure Act of 1979 define judicial proceeding as “any proceeding in the course of which evidence is or may be legally taken”. Also, Section 16 of the Commission of Inquiry Act of 1948 attracts principles of natural justice. Thus, commission need adopt judicial proceeding subject to natural justice (Xavier, 2010).

Further, Supreme Court in *Silva and Others v. Sadique and Others*¹ examine whether commissions formed under Commission of Inquiry Act 1948 able to review by of Writ of Certiorari under Article 140 of the 1978 Constitution and held that recommendation made by a Commission of Inquiry are not subject to review as the decisions are not bidding in nature and lacks legal authority.

¹ *Silva and Others v. Sadique and Others* [1978] 1 SLR 166

C. Consequences of Statutory Commissions

Commissions are one of the frequently used statutory entities in the legislative process throughout the legal history world over and especially in Sri Lanka. The primary purpose of a commission is to provide an unbiased expertise opinion and recommendation to legislator or executive for a given complicated and controversial issue after an in-depth study. Hence, commission to be effective it should have an expertise knowledge on the selected subject, high accountability, impartiality, independency and time bound to complete the assign task within a stipulated period. Due to the limitations and delays of ordinary process of law in Sri Lanka the last several decades, the importance and frequency of forming commissions of inquiries were raised.

Scholars around the world called commissions as 'abdication of responsibility' of legislators (Lott, 2002). Thus, commissions are created by legislators specifically as a mechanism of 'blame avoidance' where legislators form commission when they confront a controversial issue without taking a substantive position on the subject in order to averse the associated risk. If the commission outcome becomes popular, legislators/executive take the credit and if the outcome attract negative public feedback blame and responsibility shifted to the commission (Weaver, 1986; Arnold, 1990). Also, they argue many commissions are undemocratic as commissions and does not represent general population of a country or problem at stake nor their diversity. Another popular critic on commissions is predetermined decision makers appointed as commission members and commission findings and recommendations are pre-decided by the legislators/executive. Similarly, members of the commission may have their own agendas, bias and pressure where they work as patronage devices to pay off their past political debts or to gain political benefit in future. Further, critics acquired that commissions largely failed to full their established objectives effectively, key issues are not adequately address, critical findings and recommendations are largely ignored and they are expensive (Straus, 2021). When it comes to contemporary application, role and practise of concept of commissions there is a serious gap in public expectation and actual deliverables especially in domestic context.

There are many negative legal consequences in general related to modern commissions in Sri Lanka such as; transforming interim commissions to permanent public institutions with the use of loop holes in respective statutes, functioning of commissions as legislative/executive power agencies and pressure groups, use of authority vested in commissions to manipulate the related movable and immovable resources under their purview, use of commission as a source of generating permanent and temporary employment, overlap of commissions authorities, powers, scope, resources etc. with other public institutions, change of the initial purpose of establishing such commissions through subsequent amendments to primary statute, lack of transparency and focus to assign tasks, confusion of whether officers assigned to commissions are members or employees in nature of their assignment, on continuation of remuneration payment to commission members and supporting staff, issues related to their performance and/or recommendations, responsibility and drawbacks of post commissional activities such as implementation of suggestions/ recommendations, practicality and effectiveness of recommendations etc.

Criticisms were also levelled against the domestic commissions and they were viewed as a political tool or tactic used by a government either to delay or refrain from taking action in a particular matter at controversy. Past Commissions of Inquiries and Special Presidential Commissions of Inquiries were also condemned for lacking impartiality and transparency and disregarding due process rights guaranteed by the Constitution. Further, these commissions were criticized as they because delays in ongoing legal proceedings, intimidating the victims and witnesses, and also for distort of evidence. (Samarakoon & Ranasinghe, 2021)

Since both statutes vest wide discretion and powers on President similarly these commissions are quiz judicial in nature, law reformers propose to curtail the power vested in President by these statutes in order to reflect and enhance the independence of commissions of inquiries. Further, they emphasis the necessity of President to be obliged to publicize the findings and recommendations of the commissions of inquiries. Also, ideally as commissions of inquiries they are ought to be fact focused and bound to deliver a non-binding conclusions and recommendations without any panel consequences. Hence, to overcome the present public distrust and dissatisfaction towards statutory commissions in Sri Lanka and to

make them more effective in their tasks and to make them accountable for the public funds they consume, it is vital to assess and understand the issues and drawbacks encounters with previous commissions before formation of any future commissions.

Also, when it comes to domestic commissions appoint by President under Commission of Inquiry Act No.17 of 1948 and Special Presidential Commission of Inquiry Act of 1978 shows a clear overlap between the legislature and executive branches where those two statutes are enacted by the parliament but commissions are formed upon the discretion and under the powers of the executive. Thus, the primary accountability of these commissions are questionable? Similar, the independence of such commissions also are at a stake. Broadly, due to the nature of establishment of the commissions, these entities are subject to varying degree of political and state powers.

V. CONCLUSION

The legal status and governance structures of statutory bodies has been described as 'a central puzzle in administrative law' (Gellhorn & Levin, 1990) and 'idiosyncratic' (Mantziaris, 1998). Upon the above analysis it is clearly apparent that it is vital to formulate a systematic legal framework to regulate all categories of public institutions to establish effective public sector in Sri Lanka. Further, it is also important to form a central authority or regulatory body to monitor and maintain the consistency among different categories of public entities which fall within the same category to ensure each and every public function under a systematic legal framework. Also, present domestic Commissions should be segregated under permanent and temporary sub-categories based on their specific purpose to manage such structures more effectively and to conclude their assigned goals and tasks within a stipulated tenure and budgets to avoid misuse and wastage of public funds and to raise public confidence in them.

Also, despite whether it is legislators or executives who breach the principle of arm's length with these commissions and attempt to meddle with a commission it amount to clear breach of independence, impartiality and autonomy of the commission which sufficient to merit the such legislators/executive has exceed their authorities and powers. Therefore, legal reforms need to address

the above issues to overcome the present limitations which are undermine the willingness of the public to engage with these commissions and to bring them forward with evidence it is critical to inspire public confidence and ensure they can interact freely with these commission as trustworthy, transparent and impartial entities.

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Special Presidential Commissions of Inquires were formed
under the provisions of the Special Presidential
Commissions of Inquiry Act, No. 07 of 1978

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