

UNIVERSAL FRANCHISE AND THE CIVIL SOCIETY'S ROLE IN PROTECTING DEMOCRACY (A STUDY OF SRI LANKAN POLITICAL CONTEXT)

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Introduction

Democracy literally means 'rule by people', though, in fact, only the elite class had the right to rule and participate. Up to now there is still no consensus exists on how to define democracy. There is merely the identification of the core elements which are legal equality, political freedom and rule of law. Hence, the lack of a unanimous definition of "democracy" leads to the diversified interpretation, implementation and gaps. In many countries, the definition of democracy has been contested and interpreted differently. Some believe that having merely an election is enough to be democratic while some believe that there are many more democratic values such as respect the minority, rule of law, political freedom and so forth in order to be considered as democratic.

Sri Lanka has been governed by three constitutions since independence. The first was rejected in the early 1970s as it was considered a colonial relic, a document that lacked legitimacy. The 1st Republican constitution of 1972 was heralded as autochthonous and therefore, more legitimate. We have enjoyed franchise since as far back as 1931. Unlike some of

her South Asian neighbours, Sri Lanka enjoyed uninterrupted democracy. However, especially since the 1980s, Sri Lankan democracy has gradually incorporated elements of authoritarianism into its fold. Since then politicians have become less and less accountable to their electorates, while corruption has become a kind of a new social contract. In the backdrop of patronage politics, elections have become less efficient in upholding and improving the quality of democracy. Issues such as minority rights, rights of various economic groups, rampant corruption, accountability etc. have always been the slogans of the parties in the opposition which, once in power, they ignore. In this context, this article critically analyzes the role of the Sri Lankan Civil Society contributed immensely to uphold the democratic fabric of South Asia's oldest democracy.

Universal franchise is one of the most important human rights included in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It says that "Everyone has the right to take part in the government of his country, directly or through freely

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chosen representatives.”² The United Nations Declaration also proclaims that “the will of the people shall be the basis of the authority of government,”³ and adds that the will of people “shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁴

On the other hand, right to vote is the most important political right in any democratic society, livelihood or right to earn a living without which even franchise would be meaningless. However, we are living in a nation in which the constitution declares that ‘Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.’⁵

² The Universal Declaration of Human Rights, Article 21 (1)

³ *ibid*, Article 21 (3)

⁴ *ibid*

⁵ ‘Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka.’ Article 01, Sri Lankan Constitution 1978.

⁶ ‘In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.’ Article 3 of the Constitution of Sri Lanka

⁷ ‘The Sovereignty of the people shall be exercised and enjoyed in the following manner

Franchise or the right to vote did not receive express recognition as a fundamental right in the Republican Constitution of 1972 or the Constitution of Sri Lanka. Although the franchise is not expressly included among the fundamental Rights enshrined in Chapter III of the Constitution of Sri Lanka, it is clearly recognized in Article 3 of the Constitution which deals with the Sovereignty of the people.⁶

In the time I’m writing this article I observe a complete change of attitude on the Democracy, Rule of Law and good governance within the executive presidency and also legislature. The Article 3 of the Constitution clearly says that the Sovereignty lies with the people of this Country and under Article 4 of the Constitution the Members of the Parliament represent and exercise our sovereignty in the legislature.⁷ Chapter XIV of the Constitution then goes on make detailed

(a) The legislative power of the people shall be exercised by Parliament, consisting of elected representatives of the people and by the people at a referendum;

(b) 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.....

(e) The franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.’, Article 4 of the Constitution of Sri Lanka

provisions regarding franchise and elections, and Chapter XIVA provides for the establishment of an independent Election Commission.

Electoral system, the Right to vote and the Representative Democracy

Democratic elections are widely recognized as a foundation of legitimate government. By allowing citizens to choose the manner in which they are governed, elections form the starting point for all other democratic institutions and practices. This inevitably makes an electoral system in a multi-ethnic and a multi-cultural society a critical component to ensure democratic principles.

Sri Lanka had experienced a number of elections held under the proportional representation system. From the elections so far held the proportional representation system, appears to be a more democratic system where the representation in parliament alone is concerned. But it had resulted in forming loose coalition Governments which would not last long. Moreover, over dependence on small parties, a majority of which are formed on communal lines would defeat the ultimate goal of achieving one nation, one Sri Lanka.

Since 1931, Sri Lanka has resorted to a whole range of electoral devices, single and multimember constituencies, weightage for rural areas, nominated seats for minorities

and proportionate system. Since independence, it has changed the structure of its democratic system from a Parliamentary one (1948-1977) to an Executive Presidency (since 1978). Almost all the changes were devised to cope with conflicting demands of its diverse population ever since its independence and the episodes of violence that erupted in different phases in its history.

At the time of transfer of power (1947-1948) Sri Lanka was a unique case in British Colonial history, when a colony seeking its independence already had an electorate based on universal suffrage. In fact, a detail examination of electoral systems was an integral part of the negotiations for the transfer of power. Then the Board of Ministers had to gain the support of the three quarters of all the members of the national legislature, the State Council in a situation where representatives of the Sinhalese Majority were insistent on territorial representation and the minorities had represented demanded for “balanced representation” which presupposed the creation of some form of communal electorate. The Ministers squared the circle by adopting an electoral structure based on the weightage in favor of the rural areas. The advantages of such scheme were many. It was acceptable to the majority Sinhalese because the communal representation was avoided.⁸

⁸ Welikala, Asanga and Edirisinghe, Rohan (2008) The Electoral Reforms Debate in Sri Lanka, Centre for Policy Alternatives, Colombo. Fonseka Bhavani; Jayawardena, Supipi and Raheem Mirak (2010) A brief commentary and

a table on the Local Government Elections (Amendment) bill 2010, Groundviews, Colombo.

<http://groundviews.org/2010/10/13/a-brief-commentary-and-table-on-the-local->

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The right to vote is not explicitly provided for in the Constitution in the chapter on fundamental rights. However, there are several references to the franchise, and the fact that voting has to be free, equal and by secret ballot.

Article 93 of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978) states that, 'the voting for the election of the President of the Republic and of the members of Parliament and at every Referendum shall be free equal and by secret ballot'.

Election laws mean little in the absence of an independent, non-partisan and competent election authority. The election authority must be willing and able to apply the electoral law fairly, to use sanctions (and the power of persuasion) to deter violations of the law, and to competently administer the electoral process and to challenge any attempts to subvert that process. The Sri Lankan electoral system has, in recent years, been tainted by widespread corruption and malpractice. Though the election laws have been fashioned to ensure standards of freedom, fairness and legality, the electoral process has deteriorated to the extent that voter confidence in the whole electoral system has been endangered. Since 1947 the Department of Elections has been entrusted with the task of maintaining the neutrality of the election management mechanism.

[authoritieselections-amendment-bill-2010](#) /
Accessed in 17th February 2013

⁹ The Commissioner of Elections shall exercise, perform or discharge all such powers, duties or functions as may be conferred or imposed on or vested in him by the law for the time being

Article 103 of the Constitution provides for the appointment of the Commissioner of Elections. According to this section, the Commissioner of Elections shall be appointed by the President and would hold office during good behaviour. This is a wholly irregular provision as the appointment of the Commissioner by the President gives rise to a valid fear of partiality and a lack of independence on the part of the Commissioner. Article 104 of the Constitution⁹ states the Commissioner of Elections is responsible for the superintendence, direction and control of the preparation of accurate electoral registers annually and for the conduct of elections. The Election Commissioner has been subjected to considerable political pressure from political parties and government officials who seeking to interfere with the electoral process.

It was therefore not surprising that in several landmark decisions, the Supreme Court held that the right to vote was implicit in the freedom of speech and expression. The court has in a series of decisions, issued directions which have sought to uphold the right to vote, and the integrity of the electoral process.

However, this development is paralleled by a more restrained, legalistic approach that is being adopted by the courts when determining election petitions, which are the more familiar of the types of litigation

in force relating to elections to the office of President of the Republic and of Members of Parliament and to Referenda, or by any other written law.

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relating to the electoral process. Indeed, this overly rigid approach has made it virtually impossible for a Petitioner alleging a breach of the election laws or the commission of malpractices or irregularities to succeed in these cases.

Athukorala v. Attorney General¹⁰

In this case it was strenuously argued that Article 4 (e) is not exhaustive of the manner in which the franchise is exercisable and included pradeshia sabha elections even though not expressly mentioned in that article. The Supreme Court took a narrow view of Article 4 (e) and rejected this argument. The Court observed that,

“It would appear from the above provisions that having extended the Concept of Sovereignty by adding fundamental rights and the franchise, limited it to voting at the occasions referred to in Article 4 (e). The wider meaning of franchise which would include voting at other elections such as election of local bodies ...”¹¹

In the landmark decision of **Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of elections and others**¹² the question surfaced once again. This time in the context of provincial Council elections, the petitioner challenged in fundamental rights proceedings, the proclamation made by the president of Sri Lanka under section 2 of the public security ordinance bringing the provisions of part II of the ordinance into operation throughout Sri Lanka, as well as the emergency

Regulation made by the president under Section 5 of the ordinance had the legal effect of cancelling the date of the poll with respect to five provincial councils for which nominations had already closed.

In the much-publicized election petition case **Sirimavo Bandaranaike v Ranasinghe Premadasa and Chandananda De Silva**¹³

which challenged the election of President Premadasa at the presidential election of 1988, the interpretation of the law and the principles of law as clarified and laid down by the Supreme Court has made it extremely difficult for elections to be successfully challenged. The desirability and logic of this position needs to be questioned, especially in view of the recent affirmation of the right to vote and the interventions of the Supreme Court in the area of the franchise, particularly in the exercise of its fundamental rights jurisdiction under Articles 17 and 126 of the Constitution.

In many jurisdictions, the judiciary has acknowledged that in matters relating to the franchise, the courts have a special responsibility to guarantee the sanctity of the democratic process. The decisions of the Supreme Court of Sri Lanka on the right to vote may be viewed as being consistent with the Ely approach.

Sri Lankan Political context and the civil society’s role in protecting Democracy

¹⁰ (1996) 1SLR 238

¹¹ (1996) 1SLR 238 to 242

¹² (1999) 1SLR 157

¹³ (1992) 2 SLR.1

Civil society and its institutions are playing a vital role in building and strengthening democracy and its institutions. In fact, it plays as an intermediate between state and the citizen and link these two institutions for good governance. However, it is very difficult to define the concept 'civil society' because of the different view of the concept. Civil society describes them altitude of associations, movements and groups where citizens organize to pursue shared objectives or common interests. The effective states are based on an evolving relationship between the state and the citizens. Civil society can make a significant difference in improving democracy and governance as investigators of state abuse, monitors of state institutions.

The importance of civil society lies in the capacity of its organizations to address the caring needs and functions of society. A strong civil society entails (a) the existence of rule of law conditions that effectively protect citizens from state arbitrariness, (b) the existence of strongly organized non-state interest groups capable of checking eventual abuse of power by those control the means of administration and coercion, (c) the existence of a balanced pluralism among civil society interests so that none can establish absolute domination.¹⁴

Democracy needs mechanisms for the civil society to express their interests and check the exercise of state power continuously.¹⁵

¹⁴https://www.researchgate.net/publication/301285328_Civil_Society_Activism_for_Democracy_and_Peace-Building_in_Sri_Lanka

¹⁵ Diamond L. 1999. Developing Democracy: Toward Consolidation, JHU Press

As the Lankan experience has repeatedly indicated without free, fair and regular elections, regimes cannot be held accountable. However, just holding elections alone do not necessarily ensure an accountable democracy and rule of law. The ruling elites appear to have manipulated the judiciary and all other arms of government.¹⁶ It is essential therefore that the values of civil society need to go beyond narrow individual interests and grasp social interests as the norm. Even when democracy is established, civil society action is needed for keeping its quality.

Conclusion

The above analyze explains how the practice of Sri Lankan democracy has contributed towards the illiberal democracy over the past era and the role of the Sri Lankan civil society how contribute to uphold the liberal democratic character of good governance in the context. The electoral reforms in the Sri Lankan context have passed various milestones in its political history from pre-independent era, from a first-past-the post system to a proportionate representation to a mixed system. However, the challenges of representative democracy in a multi-ethnic, multi-religious state remains active for the policy makers. While the proposed system. Hence, it is for all the political parties to

¹⁶ <http://www.freedomfromtorture.org/news-blogs/8786>

make the effort to demand to review the new law and suggest improvements considering this post-war window of opportunity to make positive contributions to legislative changes that will have significant implications for democracy and governance in Sri Lanka.

For that, Sri Lanka needs a fresh Constitution to overcome the crisis and maintaining and improving the liberal democratic character of good governance. For that we have embarked on an ambitious national project to adapt a new constitution designed to strengthen democracy, enthrone the rule of law, promote the integrity of the judiciary and freedoms of all citizens and reach a just settlement of the issues that have divided the nation. The active participation of all the political parties and civil society gives cause for cautious optimism. Every country claims to have a constitution but majority of people in the world do not live under constitutional government. The immense challenge facing Sri Lanka is to achieve and maintain constitutional government. This cannot be done by politicians and officials. It needs also a supporting popular culture to which professional bodies, civil society organs and grass roots leadership can and must make critical contributions.

Civil society and its organizations are important in linking people with state and controlling state power. They are playing a vital role in building and strengthening democracy and its institutions. In fact, it plays as an intermediate between state and the citizen and link these two institutions for good governance. Sri Lankan democracy is yet to become more liberal, transparent, and institutionalized. Only civil society through its activity can engender the political pressure and power to push those who had been elected to bring about reform. Otherwise the cycle of violence, corruption, social inequity and ethnic scapegoating could again become the norm.

What is the main reason for the weakness of civil society in Sri Lanka is that the failure to build and integrate strong civil society in Sri Lanka, in fact, contemporary civil society and its organizations are fragmented in nature and deeply controlled by state power and donors. Then, how it can contribute or influence in democratization in a positive way, Therefore, it is necessary to rebuild or strengthen civil society organizations toward democracy and good governance in contemporary Sri Lanka.