

THE CONTRIBUTION OF THE JUDICIARY IN UPHOLDING ELECTORAL DEMOCRACY IN SRI LANKA

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Introduction

Election is the best democratic mechanism to uphold peoples' status as the repository of political power and it is institutionalized in Sri Lanka.¹ Chapter XIV (as amended) of 1978 constitution titled "The Franchise and Elections" provides inter alia the right to vote (Article 88), free and fair election process and equal treatment in elections.

The Supreme Court has the authority to hear and determine any legal proceeding relating to the Presidential election and any appeal from an order of the Court of Appeal in an election petition case (Article 130) and the Court of Appeal has the power to hear election petitions in respect of the General election (Article 144) Provincial Council elections (section 93, Provincial Council Election Act). Provincial High Court is authorized to hear local government elections petitions (part IV A Local Authorities Elections Ordinance).

The objective of the research is to explore the court's jurisdiction and its contribution to upholding electoral rights of the people and its effectiveness.

Methodology

The research involves a qualitative study. The constitutional and statutory provisions relating to elections, case reports, reports on judicial performance and scholarly articles are analyzed.

Results and Discussion

The contribution of the judiciary on many aspects of electoral democracy is to be evaluated in this part. In respect of the right to be an elector, the

¹ Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978

judgment in *Mudanayake v Sivanayanasundaram*² and *Kodakkanpillai v Mudanayake*³ posed a serious challenge. The denial of the right to be an elector, for the upcountry Tamils, was not considered discriminatory in light of Section 29(2) of the Soulbury Constitution. The legitimacy of the parliament to regulate the citizenship affairs of its nationals was endorsed⁴ which was criticized by many including Radhika Coomaraswamy.⁵

With regard to the right to vote, the extension of the life of parliament to six years through referendum, not free and fair, instead of election is undemocratic.⁶ The approval of the same by the court is viewed as a result of sustained political barrage⁷.

The right minded decision in *Karunatilake v Dayananda Disanayake*⁸ case regarded right to vote as a fundamental right through broad interpretation of Article 14(1) (a). In addition to, *Thavaneethan v Dayananda Dissanayake*⁹ case declared the right to vote as a collective right and prevention of people from voting was declared severe infringement of fundamental rights. Further Supreme Court endorsed the right to vote of the disabled in the special determination on Elections (Special Provisions) (Amendment Bill)¹⁰. On the contrary the determination of the Supreme Court, in response to a FR petition filed by SLPF and SLNF, brought down a ruling imposing serious restrictions on

² (1951) 53 NLR 25

³ 1953) 54 NLR 433, at 43

⁴ Kishali Pinto Jayawardena & Others, *The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights in Sri Lanka*. Law and Society Trust, January, 2014

⁵ Coomaraswamy, R. *The Sri Lankan Judiciary & Fundamental Rights-A Realist Critique*. International Centre for Ethnic Studies

⁵ (1951) 53 NLR 25

⁶ Nadesan Satyendra. *Democracy, Sri Lankan Style*. 15 May 1985.

<http://tamilnation.co/saty/850515democracy.htm#A> 'democracy' where general elections.

⁷ Jayawardena, Pinto. Subverted justice and the breakdown of the rule of law in Sri Lanka. <http://www.humanrights.asia/resources/journals-magazines/article2/0602/subverted-justice-and-the-breakdown-of-the-rule-of-law-in-sri-lanka>. Internet access 02.06.2016

⁸ S.C. No. 509/98

⁹ S.C. No. 20/2002(FR) with 25 and 26/2002(FR)

¹⁰ S.D. No. 09/2009, delivered on 6th November, 2009.

the rights of Tamils in areas controlled by the LTTE to vote¹¹, throws doubt on the functioning of the judiciary.

In *Jayantha Liyanage vs Commissioner of Elections* case decided on 17.12.2014, Court held that ordinary legislation cannot supersede the constitutional authorities. This judgment is significant as it protects the election rights from violations not only by election authorities but also from judiciary (Court of Appeal in this case). The right to form political parties is safe guarded. It was held in *Warna Deeptha Rajapakse* case, that the failure to follow due practices in expelling a member from a political party is unconstitutional. Similarly the matter of cross over and expulsion from party membership was dealt with in light of the natural justice principle in *Tissa Attanayake* case (Supreme Court decision 5 May, 2015).

Though the approval of the 25 percent voluntary quota introduced for the political representation of women, in the special determination of Local Authorities (Special Provisions) and Local Authorities Elections (Amendment) Bill¹² empowers women, the ruling that the ‘Constitution does not specifically provide for affirmative action’, reduces the value of the judgment.

The right to contest and the right to be elected is an important aspect of electoral democracy. Recently in the determination on Local Authorities (Special Provisions) and Local Authorities Elections (Amendment) Bill the 5 percent cut-off system was accepted without due attention to alleged violation of equality of small and minority political parties. In addition to this, the comments on the proposed constitutional reform in the same law, has led to a healthy dialog among stakeholders.¹³

In *Sarath Fonseka vs Mahinda Rajapakse & Others*, it was held that even the incidents of intimidation, bribery etc are proved by the petitioner, the failure to seek a declaration that the election was void in terms section

¹¹ Sri Lankan elections :a conspiracy to prevent Tamils from voting,15 November 2005, www.wsws.org

¹² SD No 02/2010

¹³ http://www.onetext.org/wp-content/uploads/2013/03/04_July-2011.pdf.

94(a) of Presidential Elections Act No.15 of 1981 precludes this court from granting a declaration that the election was void. The approach is highly technical and demolishing the purpose of the Constitutional authority.

The decision of the Supreme Court in the *Centre for Policy Alternatives vs. Dissanayake and*¹⁴ case is commendable. The judgment is celebrated for reaffirming the supremacy of the people by declaring that only persons approved by the people can fill vacancies in provincial councils. However the dismissal of the case challenging the appointment of Members of Parliament via national list under Article 99A of the Constitution¹⁵ is disappointing. The appointment of defeated candidates at election as Members of Parliament via national list has been challenged¹⁶ and a purposive decision is expected.

The function of the Attorney General in election petition cases matters, and it must be in light with Mark Fernando J's statement that Attorney General must present balanced, broad, thoughtful and fair approaches than defending the official position and the status quo which would have been the path of least resistance¹⁷. This is absent in Sri Lanka¹⁸

Conclusion

The Sri Lankan judiciary has developed the concept of right to vote, especially of the minority communities. However the overall contribution falls short of standards and its subservient status to authoritarian rule is

¹⁴ (2002) SC 26&27/2002. <http://www.cpalanka.org/landmark-supreme-court-judgmentto-protect-sovereignty-of-the-people/>

¹⁵The Centre for Policy Alternatives Vs. Kabir Hashim and others SC (FR) Application No.54/2016,

¹⁶ <https://www.colombotelegraph.com/wp-content/uploads/2015/10/2015-10-13-PETITION-.pdf> & <https://www.colombotelegraph.com/index.php/chief-justice-sripavan-withdraws-from-national-list-abuse-hearing/> internet access 05 June. 2016.

¹⁷ <http://www.srilankaguardian.org/2010/06/role-of-attorney-general-in-pursuit-of.html>

¹⁸<http://www.thesundayleader.lk/2016/05/29/attorney-generals-department-comes-under-serious-public-scrutiny/>.

the cause commonly known. Only an independent judiciary in terms of structure and behaviour will be able to address the dilemma.

References

Uyangoda, J. *Working and Outcomes of Democracy in Sri Lanka*. Paper prepared for the project on the State of Democracy in South Asia as part of the Qualitative Assessment of Democracy. Centre for the Study of Developing Studies. Delhi.

Udagama, D. *We The People; Reflections on Governance and Civic Engagement in Sri Lanka*. Prof. Nanadadasa Kodagoda 17th Memorial Oration. Colombo. 1st August. 2014.

Uyangoda, J. *Celebrating the Idea of Democracy in a Year of Elections*, 20th Aug. 2015.

Welikala, A. *The Future of Liberal Democracy In Sri Lanka: A skeptical Account*. Paper prepared for the project on the State of Democracy in South Asia as part of the Qualitative Assessment of Democracy. Centre for the Study of Developing Studies. Delhi.

The Constitution of the Democratic Socialist Republic of Sri Lanka, Elections of Parliament Act, Presidential Elections Act, Provincial Councils Election Act & Local Authorities Elections Ordinance and relevant case reports.