



BRIEF NOTE

FREE AND FAIR ELECTIONS:

**A CRITICAL ELEMENT
OF THE FREEDOM
OF EXPRESSION**

“Free speech is the whole thing, the whole ball game. Free speech is life itself.”

- Salman Rushdie

INTRODUCTION

The formal process of selecting a person for public office or of accepting or rejecting a political proposition by voting is the cornerstone of democracy. It is important to distinguish between the form and the substance of elections.¹ Elections have their own procedures in law, but the core of elections can be lost due to multiple internal and external factors. Mostly it could happen when voters and those who dissent do not have the environment to express their political opinions in a free and fair manner, and candidates or parties do not have an equal ground. Berouk Mesfin depicts “the founding pillars of any democratic political system, whether considered fragile or established, remain undoubtedly elections”²

As Salman Rushdie says “What is freedom of expression? Without the freedom to offend, it ceases to exist.” Holding elections grants the freedom to agree or disagree against the prevailing political system and/or rulers. The significance of elections is, it presents not only the right to vote but also preserve the right to free speech, right to assembly, right to association, freedom of press and the right to protest as stated by the great freedom activist Rev. Martin Luther King Jr. in his final speech on April 3, 1968.

Existing governance systems and its political actors of any country that exercise the holding of elections have the responsibility of taking every type of political, economic and social decision on behalf of its general public. It is simply not a process that uses a ballot to show their preference for a person or a party to govern a country for a period of time, but it holds accountable governments and office bearers as well. They should fulfill the people’s needs and implement policies via their manifestos and policy declarations prior to obtaining votes from citizens.

Sri Lanka is in a transition period. The current economic downturn, post-covid repercussions, lack of tourist arrival, lack of foreign exchange, thus high numbers of unemployment leading to a rapid surge of migration of youth and professionals has caused colossal instability with regard to social security and the country’s stability. The present economic crisis has led to an upsurge of migrant workers from Sri Lanka during the last one and a half years.³ On the other hand outbursts of political instability, and public intimidation carried out in open public spaces by political thugs in the last two years has brought into question the freedom of expression and rule of law of the county. Four years of the current government has not proved fruitful in eliminating these economic, social and political issues.

The objective of this paper is to build an analysis using scholarly opinions and available data focusing on the current situation in Sri Lanka to identify why free and fair elections are important in any democratic situation.

1. Webb, Paul David, Gibbins, Roger & All. Election: Political Science. (2024, June 2). Britannica. <https://www.britannica.com/topic/election-political-science>

2. Mesfin, Berouk. (2008). Democracy, Elections & Political Parties – A conceptual overview with special emphasis on Africa. Institute for Security Studies, 2. <https://www.files.ethz.ch/isn/98951/PAPER166.pdf>

3. Weeratunga, Manori. & Fernando, Eranda Roshan. Recent trends of labour migration in Sri Lanka. (2023, March 29). Daily FT. <https://www.ft.lk/columns/Recent-trends-of-labour-migration-in-Sri-Lanka/4-746819>

LITERATURES REVIEW

The Universal Declaration of Human Rights (UDHR) has enshrined in it the idea of right to freedom of expression through different articles. Article 18 ensures right to thought. Article 19 illustrates right to freedom of opinion and expression including freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.⁴ In elections, right to freedom of assembly has a remarkable role as it sets the platform for both the voters and the candidates to gather and exchange their opinions with each other. This right has been accepted under Article 20 of the UDHR.

Article 21 of the UDHR which provides that, '[t]he will of the people shall be the basis of the authority of government; this will 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'.⁵ The General Assembly of the UN recently reaffirmed the particular obligation to ensure that every citizen has the effective right and opportunity to participate in elections on an equal basis.⁶

Avram Noam Chomsky, an eminent American professor and political critic quoted "if you believe in freedom of speech, you believe in freedom of speech for views you don't like. If you're in favor of freedom of speech, that means you're in favor of freedom of speech precisely for views you despise."⁷

On the publication of *Manufacturing Consent – the political economy of the mass media*, Chomsky and Edward S. Herman thoroughly discussed the effect of media in elections and the effect of the media to change and control democratic electoral system. Under the theme of legitimizing versus Meaningless Third World Elections; they have critically analyzed elections in three countries: El Salvador, Guatemala, and Nicaragua. They said Third world elections provide an excellent testing ground for a propaganda model. Some elections are held in friendly states to legitimize their rulers and regimes, whereas others are held in disfavored⁸ states under the interference of USA. This was not new to Sri Lanka when consider the chaotic recent regimes of the Rajapaksa brothers' governments. This signifies the importance of independent and impartial media.

A BRIEF HISTORY FROM THE INTERNATIONAL AND NATIONAL ARENA

The idea of freedom to speech and freedom of participating in governance systems has a long history. Thousands of years of many civilizations have contributed to preserve the idea of democracy and its basic elements. The necessity of listening, understanding and giving credence to different opinions has been identified as an important function even in the teachings of the Buddha.

The history of the right to franchise goes back to approximately 508 B.C. In ancient Greece, they had a "negative" election that is, each year voters, who were the male land owners (women and slaves were excluded) were asked to vote for the political leader or "candidates" they most wanted to be exiled for the next ten years.⁹ During the 13th century, the Venetian state solidified

4. UDHR

5. International Obligations for Elections – Guidelines for Legal Frameworks. (2014). International Institute for Democracy and Electoral Assistance. <https://www.idea.int/sites/default/files/publications/international-obligations-for-elections.pdf>

6. Ibid

7. 18 Freedom of Speech Quotes You Should Know. (2024, May). Freedom Forum. <https://www.freedomforum.org/freedom-of-speech-quotes/5>

8. Herman, Edward S. & Chomsky, Noam. (2008). *Manufacturing Consent – The Political Economy of the Mass Media*. The Bodley Head Random House

9. History of Elections. (2024). Dual Elections. <https://www.dualelections.com/General-Information/Learn-About-Elections/History-Of->

and elected a Great Council comprising of 40 members.¹⁰ The American Revolution was a turning point of civil and political rights. In 1964, the Supreme Court case **Reynolds v. Sims** ruled that both Houses of all state legislatures had to be based on electoral districts that were approximately equal in population size, under the “one man, one vote” principle.¹¹ The right to vote for women was another milestone in democracy and it was a significant turning point with the first women’s rights convention which was held at Seneca Falls, New York in 1848.

Citizens of Ceylon was granted universal franchise in 1931 under the Donoughmore Commission and both men and women above 21 years old were qualified to cast their vote. Historically Ceylon was among the first Asian countries where women received the right to vote even before most of the developed countries in the West.

The 2nd Republican Constitution of 1978 introduced a semi-presidential system of governance and Proportional Representation (PR) and incorporated several provisions relating to franchise and elections.¹² Thus, the conduct of free and fair elections with oversight by the Elections Commission and the vindication of citizens’ rights arising from contravention of the fundamental principle of free and fair elections through judicial intervention are basic features of the present constitution. The Supreme Court has determined the right to vote is included in Article 14 (1) (a) which guarantee the freedom of speech and expression including publication.¹³

WHAT IS GOING ON WITH SRI LANKA’S ELECTIONS’ MAP?

Voting is not only a privilege given to citizens. It also tests the ability of representatives in working towards sustainable and accountable governance systems. The people have the right to oppose it and re-appoint right representatives through voting.

Sri Lanka is facing the indefinite postponement of two major elections. The right to vote is provided for in the Constitution of Sri Lanka and is an entrenched clause under Article 3. However, there are several references to the franchise, and voting has to be free, equal and by secret ballot¹⁴. By the indefinite postponement of elections this entrenched right of the people are being violated by the politicians in power.

Provincial Councils provide for a devolution of power from the central government. This devolution was provided for through the 13th Amendment to the Constitution. This legal framework involved the relocation of specific governmental powers and functions hitherto exercised at the center at the provincial level. Provincial councils have been inactive for 5 years and Local Council Elections have been postponed since 2022. Thus the purpose of setting up these institutions has thus been effectively eroded by the government.

The opportunity to increase women participating in politics was addressed for the first time through a 25% Quota in Local Governments for women introduced under the 19th Amendment to the Constitution. By the end of this year, Sri Lanka will become the only democratic country that has not had elections beyond the period mandated by law, apart from countries with military regimes and dictatorial regimes.

Elections

10. *ibid*

11. One Person, One Vote – The Constitution Project. (2019, September 24). The Constitution Project. www.theconstitutionproject.com

12. Hatch, NK. (2021). Historical Outline of Constitution Making and Development. In Hiran Jayawardene & Sharya Scharenguivel (Ed.) *Perspective on Constitutional Reforms in Sri Lanka*.

13. Hatch, NK. (2023) Franchise and Elections in Sri Lanka. In PAFFREL (Ed.), *Democracy – Theory and practice, Sri Lankan Experience*, (pp. 95-99). PAFFREL.

14. Edrisinha. Rohan, & De Alwis, Sundari. *The Right to Vote: Its Impact on Election Laws in Sri Lanka* (2007). Centre for Policy Alternatives. www.cpalanka.org

DO WE NEED AN ELECTION? WHY NOW?

For one this is a constitutional requirement and right of the people. Furthermore, free and fair elections show the will of people. What has been witnessed over the last three decades in the region, countries such as Thailand, Myanmar and Philippines are facing grave danger of losing internal democracy. Overruling governments by military dictatorship and interference of military junta in administrative systems has caused elections not being free and fair. It was no secret that Sri Lanka, during the two Rajapaksa brother's regimes, was increasingly and openly moving towards a military state with intimidation and disappearances of dissenting journalists and threats to voters. The current purported liberal incumbent president Ranil Wickramasinghe continues the same agenda of the Rajapaksa brothers. President Wickramasinghe controversially appointed former and current military officials in the administrative and diplomatic service, and an Inspector General of Police who has serious legal charges against him for violation of fundamental rights.

Respect the People's mandate

Ramindu Lakkhika Perera, Senior Lecturer of the Department of Legal Studies at the Open University of Sri Lanka says, President Wickramasinghe has not been appointed in the way any President has been appointed before as he was appointed without the mandate of the people. However he is making decisions on behalf of the State, such as debt restructuring, privatization of public entities, which will have lasting effect on the country for decades to come. President Wickramasinghe's acts are in complete opposition to the manifesto of Gotabaya Rajapaksa who obtained 6.9 million votes.

Without the mandate of the people nobody has the right to make political decisions. This causes fundamental problems for a democracy. Accountability and transparency of the current representation is on hold due to non-holding of elections. Therefore, President Wickramasinghe is legally bound to seek the mandate of the people through an election.

To get transparent public representation

Appointing public representatives through an election as provided for under the Constitution is not an option at the whims and fancies of politicians. It is mandatory by law. Currently Provincial Councils and Local Governments are inactive and the appointment of the current President is without the peoples' mandate. Therefore, the exercise of these sovereign powers of the people guaranteed under the Constitution is being violated.

The Constitutional Expert Nigel Hatch, P.C. stated that "The parliament votes for funds for the elections in the annual budget. Once the parliament passes the funds required for any elections for that matter, the Executive or the Legislature have no further role to play. The only role is to act under the Constitution. The Executive cannot stifle the holding of elections. They must expend those funds without alleging other social and economic downturn." He insisted that "from the president downwards all Members of the Executive and public service are duty bound to assist the Election Commission in having free and fair elections." It is clear that the current government is afraid of losing power.¹⁵

Violation of fundamentals Rights

During the Aragalaya period (public uprising), the Rajapaksa government used its maximum power to silence any form of people's displeasure. The Executive, Parliamentarians and the other public representatives traumatized citizens with the economic and political collapse. Many citizens lost their lives standing in queues for days to obtain basic necessities such as fuel and provisions and without necessary medication.

¹⁵. Hatch, NK (2024, May 18). Free and fair elections: challenging the law (BA Sunethra, Interviewer) [Personal Communication]

Members of the legislature who were appointed to the Parliament from the peoples vote passed the ICCPR, NGO Act of 2024, Online Safety Act and Prevention of Terrorism Act (PTA) which brutally violate core values of democracy. Thousands of social activists and political activists are now “lawfully” arrested using these draconian laws.

The PTA has been used for over 40 years to enable prolonged arbitrary detention, to extract false confessions through torture, and to target minority communities and civil society groups.¹⁶ Muslims and Tamils have been targeted by the Counterterrorism law. Renewed PTA as CTA based on 2019 Easter Sunday attack.¹⁷ By using prevailing laws and passing new laws the government is trying to limit every form of rights such as freedom of assembly, gathering, freedom of the press and freedom of expression.

Questioning the independency of the Election Commission

The Election Commission (EC) which is meant to be an independent body is not performing its duties satisfactorily. There is ongoing litigation in the Supreme Court about the non-holding of elections where a number of parties challenge this grievous and blatant breach of democracy. Although the Parliament has voted to release LKR 1billion in 2022 to hold these elections, Ranil Wickramasinghe’s administration refused to release those funds citing the economic crisis and the alleged basis that this money is required for other more essential social and welfare purposes.

It is clear now that the country is getting back to some normalcy that there is no issue relating to the holding elections. Instead of moving court and demanding the government to release these funds, the EC wrote to the speaker asking the Speaker to intervene. This led the government attempting to appointment a Parliamentary Select Committee to try and prevent or stifle the ongoing Supreme Court deliberations¹⁸.

The Election Commission of India (ECI), is reputed to be invulnerable to political influence and scrupulously nonpartisan, and conducts fair and orderly elections.¹⁹ Hatch, P.C. further stated that the EC of Sri Lanka is nowhere similar to the ECI which is one of the strongest institutional bodies in India in the democratic framework. In Sri Lanka the EC has not yet established a degree of integrity and impartiality where the Executive or Legislature does not contradict or countermand their directions. Even bodies that are meant to be independent genuflect to the Executive power. Such extensive power and more-so its exercise by those holding office has raised grave concerns regarding such power in a democracy where many social activists have moved for the Executive Presidency to be abolished.

It has recently surfaced that the EC allegedly did not have meetings as required of them, where the date to have a Local Government Election was to be decided upon by the then Commissioners. These allegations are yet to be proved in law. But the fact that the allegation has been made that they did not have proper sittings or a proper agenda shows that there are number of serious deficiencies with the EC of Sri Lanka.

Interestingly, prior to the establishment of the EC as a constitutional body there merely was the Department of Elections, but elections were conducted according to the law. The EC despite being a separate, independent body under the constitution is proving to be futile and purely a token body, in comparison to the former Commissioner General of Elections who simply operated under an Elections Department.

Even during the worst of times when the civil war was raging the Elections Department had

16. In a Legal Black Hole - Sri Lanka’s Failure to Reform the Prevention of Terrorism Act. (2022, February 7). Human Rights Watch. <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act>

17. *ibid*

18. Dr. Harini Amarasuriya Vs. KM Mahinda Siriwardena Et all (2023)

19. Encyclopedia Britannica, Election Commission of India. (2024, June 12). Britannica. <https://www.britannica.com/topic/Election-Commission-of-India>

elections (*Ex: Katuayaka Airport suicide raid attack in 2001*). Money was released for elections. The former Commissioner General of Elections did not have police powers and thus had to face some issues relating to security and logistics, but still was independent and carried out their duties. It shows that appointments to the independent commissions by the President has compromised the independence of the functioning of the EC. Members of the EC have resigned from time to time due to the stress and duress they received at both professional and personal levels.

RECOMMENDATIONS & CONCLUSION

Nothing is impossible to achieve when citizens are educated in and are aware of their rights. Lessons in civics should be mandatory in the secondary education system. The judiciary has to be independent as well. CSOs should be active and should move beyond their typical strategies. Election Monitoring Organizations responsible in identifying different moves and tactics in current political contexts and strategies should address them.

The CPA and TISL are moving Court on public interest matters. However, as citizens we should question the independence of the EC as well. If legal strategies do not succeed the public should have a mass movement on the non-holding the elections as this is their sovereign and inalienable right. The media should highlight and report on any kind of illegal action taken by the government and should publicly condemn such acts. This creates a social balance.²⁰ We cannot stop politicians being corrupt or self-serving, but the public can continue to question them. There are no absolute governments. Referendums should be held when making critical decisions. As the EC has already lost the public trust, they must fulfill their constitutional mandates to restore public faith in it and to uphold the rights of the people.

Due to a multiple socio-economic, and technical problems a number of citizens such as security guards, super market and trade zone workers, Buddhist nuns, differently abled citizens, the transgender community and media personnel are facing hardships in casting their votes on the Election Day. Therefore, the government and EC should take necessary steps to facilitate the needs of such segments of society and introduce a more inclusive and accessible voting system.

The high number of postal and regular votes being rejected at every election is another issue that the EC and the government should take steps to minimize. Suitable awareness campaigns must be mandatory. CSOs should use different platforms to educate youth and adults to minimize it. Use of media as a propaganda to change people's vote at election period is another issue that should be mandatorily regulated. A fair process to access national media for small parties and independent candidates to express their political opinion have to be developed. To create an equal ground for every candidate, use of public property at election time has to be prohibited too. Furthermore, transparency in relation to assets and donors towards elections campaigns should be made mandatory by law: where candidates must mandatorily disclose existing assets of themselves and immediate family and release accounts in relation to election donations received.

20. Perera, Ramindu Lakkhika. (2024, May 15). Consequences of postponing elections in Sri Lanka (BA Sunethra, Interviewer) [Personal Communication]

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