

Sri Lanka: Independence without civil liberties is a farce

(Edited text of a statement issued by the Asian Human Rights Commission: AHRC-STM-025-2011, 4 February 2011)

Sri Lanka will be celebrating its independence from the British Empire on 4 February 2011. The lamentation that independence has not meant a great deal to the people of Sri Lanka is commonly heard. However, the causes that created this situation have often not been examined.

The very meaning of independence for citizens of any country is the respect achieved for the liberties of the individuals that constitute the nation. Overcoming the suppression caused to the liberty of the individuals by a foreign power is at the heart of independence. However, the mere absence of the foreign power does not mean that the citizens have gained a victory over the suppression of their civil liberties. A closer examination would show that the extent of the enjoyment of civil liberties by Sri Lankans is now much less than those enjoyed under the British. While territorial independence has been achieved, civil liberties have been reduced, particularly since the adoption of the 1978 constitution.

It is easy to illustrate this. Take the case of habeas corpus. This is the most basic legal protection available to an individual against the arbitrary power of the state. Under the British Empire, this legal protection was available even during the situation of war, as seen in the famous *Bracegirdle* case, the judgment of which was based on the principles of the *Magna Carta*. As stated by Abraham CJ,

There can be no doubt that in British territory there is the fundamental principle of law enshrined in *Magna Carta* that no person can be deprived of his liberty except by judicial process. The following passage from *The Government of the British Empire* by Professor Berriedale Keith, is illuminating and instructive. In Chapter VII of Part I, he discusses 'The Rule of Law and the Rights of the Subject,' p. 234. He says:

"Throughout the Empire the system of Government is distinguished by the predominance of the rule of law. The most obvious side of this conception is afforded by the principles that no man can be made to suffer in person or property save through the action of the ordinary Courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action. The value of the principles was made obvious enough during the war when vast powers were necessarily conferred on the executive by statute, under which rights of individual liberty were severely curtailed both in the United Kingdom and in the overseas territories. Persons both British and alien were deprived legally but more or less arbitrarily of liberty on grounds of suspicion of enemy connections or inclinations, and the movements of aliens were severely-restricted and supervised; the courts of the Empire recognized the validity of such powers under war conditions, but it is clear that a complete change would be effected in the security of personal rights if executive officers in time of peace were permitted the discretion they exercised during the war, and which in foreign countries they often exercise even in time of peace." (From the judgement of the Supreme Court, reproduced in *The Bracegirdle Affair: An episode in the history of the Lanka Samasamaja Party*, edited by Wesley S. Muthiah and Sysdney Wanasinghe, Young Socialist Publication, 1998.)

This is not the case in Sri Lanka any more. The capacity of legal protection under habeas corpus lies with the power of the court to intervene against the decisions of the executive. This power today is much less available than it was under the British Empire. In the *Bracegirdle* case an Australian citizen who

sympathized with the independence struggle of the Sri Lankans was disliked by the colonial administration, and the governor issued an order for his immediate deportation. When challenged in the courts, the courts not only vacated the governor general's order and nullified it, but also stated the obligation of the courts to intervene when individual liberties are curtailed. This obligation was noted as not limited even during conditions of war.

This power that the court had to nullify an order of the governor general representing the British crown, is not available today to nullify an order of the executive president of Sri Lanka. The executive president of Sri Lanka thus enjoys greater power in suppressing individual liberties than that enjoyed by a governor general representing the British crown. Under the constitution the president represents the executive power of the state, and the courts are powerless when the president acts.

Today in fact, all the major actions of the executive are done under the name and direct involvement of the president. This is also true of the execution of all issues relating to public security. If those actions violate individual civil liberties, there is nothing that the courts can do.

Independence means little when the power of the courts is reduced; there is no other component of the government capable of protecting the liberty of individuals. Can the citizens who have less protection under the law be referred to as citizens of an independent country? The absence of such protection virtually takes away the meaning and notion of independence.

Even under the colonial empire the administration recognized the rights of the labour unions to organise themselves and to function freely. In fact, the trade union movement grew within Sri Lanka during the time of the colonial powers. With independence came far greater restrictions on the capacities of labour movements to organise themselves. With the enactment of the 1978 Constitution, a structure was created within which any action could be taken to crush the legitimate struggles of the working people. The way in which the 1980 general strike was crushed and the manner in which 40,000 workers were deprived of their employment due to their participation in the strike symbolizes the deprivation of liberty that has become a hallmark of the way a citizen is treated in this independent nation.

The same can be said for the rights of peasants, farmers, students and all marginalized sections of society. And this of course, includes minorities. Today's minorities are without any kind of protection before the law. They also do not have the protection that goes with the powers that should be provided to their local representatives. The weakening of minority groups has become a boast of the political party in power.

Today, all the basic rights that Sri Lankans gained against their colonizers have been taken away through the 1978 Constitution, including the right of franchise. With draconian limitations imposed on the capacity of Sri Lanka to have free and fair elections, the very meaning of the election of representatives by the franchise of the people has lost much of its meaning. Voting in elections remains a façade; the substance of free and fair elections does not exist.

In short, genuine independence for the Sri Lankan is not possible as long as the 1978 Constitution remains in operation. Sometime back there was a loud claim that the crushing of the LTTE had marked the genuine independence of Sri Lanka. However, experience now shows that this is not the case. The tyranny that was created by the 1978 Constitution has even increased with the 18th Amendment to the Constitution. Liberties of personal freedoms and even property rights can today be attacked with

impunity. The removal of people from their property by force is a symbol of the extent to which all protection is lost .

The struggle for independence is unfinished. The challenge remains to defeat the forces that uphold the 1978 Constitution and remove this constitution altogether, replacing it with a constitution that recognizes the basic civil liberties of all the individuals that constitute the nation. In such a nation, courts must have the power to protect the individual from arbitrary actions of all, including the head of state.

Until that happens all celebrations of independence will be a farce, reminding us of the cynical manner in which a small group of people are having the last laugh while the majority of citizens are deprived of their rights.