

# Why the Proportional Representation System Fails to Promote Minority Interests?

## A discussion on contemporary politics and the Sri Lanka Muslim Congress

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### **Abstract**

*Proportional representation (PR) is favoured as the most suitable form of electoral system for multi-ethnic societies because it allows every vote to be counted. It, therefore, provides a strong incentive for minority parties and other political groups to promote their political articulations. This article examines the PR system in contemporary Sri Lankan politics. It argues that the executive presidential system has negated the efficacy of the PR system in promoting minority parties and has had disastrous consequences on their political fortunes. The PR system has enabled Muslim communities to elect Muslim representatives from their own province. Specifically, this article emphasizes the dynamics of the political fortunes of the Sri Lanka Muslim Congress (SLMC), which seeks to give a voice to the minority Muslim communities concentrated in the Eastern Province.*

### **Introduction**

In a first-past-the-post (FPP) ballot, the first candidate to gain the highest amount of votes are elected. This electoral system has been deemed controversial in countries with pluralist societies in terms of ethnicity, religion, or language. Through the FPP system, in which a specific constituency elects its representative, the will of the majority can prevail in electing their representative on the basis of the above factors. In contrast, the proportional representation (PR) systems have a low cut-off point – for example, five per cent in Sri Lanka. That can allow for a small minority to gain representation due to the larger number of representatives allocated to a particular district. The system also encourages those

who seek office to nurse and cultivate minorities, as every vote is counted in the ultimate result. However, contemporary politics in Sri Lanka has demonstrated that the PR system does not serve this lofty ideal of providing a voice to the voiceless minorities, such as the Muslim community, Catholics, or the Hindus, wherever such groupings find themselves as a minority.

FPP and PR systems are popular in most national electoral systems worldwide. They represent two general – and often narrowly defined – choices that countries opt for. There are also many differentially applied versions at work in different countries, satisfying different electoral systems. Since the end of World War II, they have generally been used for national legislative/parliamentary elections in democratic states such as the US and Britain and its former colonies, including Australia and Canada. These are the countries that adopted FPP of the Westminster model.

Sri Lanka's electoral system changed to PR when the Second Republican Constitution of 1978 introduced a kind of PR system which replaced the FPP system, or simple plurality system, that had been in practice since independence in 1948. This change was spelt out in Article 99 in 13 paragraphs. It contained some distinctive features. For the first time, voters could vote for the parties and individuals from a list of several names put forward by the parties. Also, there was provision for obtaining bonus seats when a party scored the highest in a district. A third interesting provision was the high cut-off point of 12.5 per cent of the total votes polled in the district. This was the minimum number a party/group had to obtain to acquire an allocation of seats. It was designed with the intention to weaken small parties and ensure the longevity of the major parties. However, with the 14th amendment to the Constitution lowering the cut-off point to five per cent in 1988, smaller parties such as the Sri Lanka Muslim Congress (SLMC) Jathika Hela Urumaya (JHU), and Ilankai Tamil Arasu Kachchi (ITAK), emerged and enjoyed a greater prominence in the parliamentary process in elections held in 1989, 1994, and 2000. While SLMC was the main beneficiary of this system, parties such as JHU and ITAK also gained access to political power through the reduction of the cut-off point. Although the objective of the 14<sup>th</sup> amendment intended to encourage smaller parties/groups to contest elections, one could not claim that the same levels of success persisted, especially for a minority party such as SLMC, after the General Elections held in the subsequent years 2001, 2004 and 2010.

The single transferable vote (STV), a distinctive feature of the PR system, was first put into practice in the general election of 1989. In this system, the voter first elects his/her political party based on a list of candidates published by the party during the nomination period. Then, the voter casts the preferential vote for

three candidates from the chosen party's list. This STV provides voter choice. The PR system replaced features of the FPP system that promoted some significant outcomes such as the two-party system and land-slide parliamentary majorities in excess of electoral support in terms of votes obtained. "Proportional representation was advanced by the framers and defenders of the 1978 Constitution as a major mechanism of minority representation and accommodation, in what is otherwise as extraordinarily centralizing constitutional instrument" (Edrisinha and Welikala, 2009). Although, specific aspects of the PR system under the 1978 Constitution have been critiqued, the basic principle of PR does not seem to have been fundamentally refuted – and to a point in which a return to the FPP would be required. "It has also to be said that PR is the only form of minority accommodation that Sri Lanka has managed to successfully institutionalise so far" (ibid). The early years showed that the PR system promoted the interests of the minority parties – ethno-religious or otherwise – and they flourished where their support became indispensable for the survival and stability of the major parties and governments.

However, recent political developments indicate that while the minorities have consistently expressed their will in a demonstratable fashion, representatives elected under the system have indulged in political horse trading for ministerial offices and other forms of government patronage. This statement cannot be disputed because the trend of going against their obtained mandate has always been one-sided. Most often, representatives end up shifting from opposition to the government after elections. The PR system does not have the provision of seeking endorsement of the electors for political decisions taken by their elected representatives until the next parliamentary elections, especially at times when a minority party's constituency gives a mandate to its representatives to stay in opposition. The representatives who shift allegiance once voted to office often claim that they have consulted their constituency. This in a way threatens to weaken and destroy such a minority party's constituency under the very system that promoted it. One wonders what has caused this strange twist of fate for PR to function in a manner which stifles the will of the minority/small parties, belying its original features that promised to strengthen the interests of the minorities.

The paper intends to point out some positive interpretations of PR and its efficacy in the most immediate context of Sri Lanka. There are many factors challenging the PR system from bringing out its best features in giving voice to minority/smaller parties, as the system initially did. These include a seemingly weak parliament in comparison to the executive presidential system, a judiciary reluctant to resort to judicial activism (for example, in comparison

to the Indian Supreme Court which ordered the immediate distribution of grain that had not been properly stored and eaten by rodents), and the changing context of the political climate of the day. The paper attempts to show why the PR system does not work as it was expected to, highlighting certain circumstances in reference to a minority party such as the SLMC.

### **Historical and theoretical context of PR system in Sri Lanka**

Providing a brief background and historical context in which the PR system was introduced is helpful at this point. The constitution of the First Republic (1972) aimed at strengthening the executive power and maintaining the Westminster model formulated for Sri Lanka by Britain from 1946-1948. The Second Republic of 1978, however, introduced the presidential trend which ushered in new political styles and provisions such as a popularly elected executive president, proportional representation, a reduced role for parliament, referendal democracy, a charter of fundamental rights, and consultative advisory committees to ministers. The prime ministerial and cabinet government was maintained to help decision making.

A. J. Wilson (1980: 1), in his seminal work the *Gaullist System in Asia*, wrote with reference to the Sri Lankan presidential system that: “There were two propositions, really interconnected, which engaged Jayawardene’s attention. Firstly, there was a search for executive stability. Secondly, there was an anxiety to create and maintain consensus politics, both were intended as devices to pull the country out of its economic morass”. Based on a report of the Select Committee that outlined the unsatisfactory clauses of the First Republic, the Second Republic set out to rectify them. Particular features of contention that the Select Committee highlighted included the excessive amount of time a prime minister had to spend as the executive in the legislature, leading to a “sluggish way in which the government and developmental administration was conducted”. Another concern was over the instability in the government. This was caused by defections within the ruling parliamentary group pressures from powerful lobbies, awareness in the movement towards authoritarianism caused by the manner in which the victors obtained sweeping majorities at General Elections, and a desire to return to liberal concepts of government. This desire was to be achieved by the insertion of suitable provisions in the areas of fundamental language and citizenship rights. Above all, there was anxiety to ensure the independence of the judiciary. Government spokesmen appeared to be seriously concerned with the inroads that had been made into the independence of the judiciary during the seven-year phase of the United Front government (Wilson, 1980: 34).

In the 1978 Constitution, the parliamentary system which evolved from the pre-independence period remained in a different form. Unlike in other elections, candidates competing in presidential elections had to compete on an island-wide basis. The executive functions as the head of the cabinet, and is required to appoint a prime minister who is believed to command the confidence of the legislature. It is pertinent here to note that the members of the cabinet and outside the cabinet are appointed by the president and have the authority to assign responsibilities and functions to such ministers. J. R. Jayawardene, who was prime minister, assumed office as president on February 4, 1978, replacing most salient features of the First Republic. In his speech at the second reading stage, he spoke of the influencing sources of his Constitution. The amendment, he said, “would make our Constitution a combination of the presidential system and the parliamentary system as we know it in the United Kingdom”. He alluded to the source of his heart’s desire – the structure that General de Gaulle had fashioned for France. The French created, he said, a “new republican constitution, a combination of the American and British systems where the president is elected by the whole national and he chooses his cabinet from among the members of parliament” (Wilson, 1980: 29).

Thomas Hare, born in 1806, is the founding father of the STV system and PR. He believed that it would serve as a more representative parliament. He advocated that, in order to achieve this, it required a substantial change to a voting system that would help identify and reward candidates on a merit basis rather than merely getting elected on the party ticket. This device was mainly intended to allow representation to significant minority interests, address these groups’ grievances of representation and encourage voter turnout. Hare’s concept allowed for votes to be transferable by getting voters to rank candidates in order of preference on the ballot paper. Votes could, therefore, move from candidates who had already polled sufficient votes or from those who were not so successful.

The transfer process is aimed at reducing the problem of having two kinds of wasted votes. First, the process prevents wasting the votes of candidates who stand little chance of winning. Secondly, they prevent the waste of excess votes a winning candidate needs. Transferring these votes to a voter’s next ranked choice helps the election of another candidate, rather than have votes that are cast but are not helpful in electing anyone. The FPP system is known for its large number of wasted votes compared to the PR, leading to party misrepresentation and under-representation of political minorities, racial minorities, and women, etc.

Although Hare's proposal attracted many political scientists of the day, it was critiqued for not being practical. He envisaged a situation in which voters were to receive a list of candidates covering the entire country (with several thousand names perhaps). With no restriction to geographic areas, he thought voters would be able to list, in order of their preference, members from organisations and interest groups. In Hare's scheme, "the quota would be calculated by dividing the total votes across the country by the number of seats to be filled", a ratio known as the 'Hare quota'. "Surplus votes of candidates reaching the quota in constituencies, as well as papers for unsuccessful candidates, were to be transferred to a national registrar for subsequent allocation according to voters' preferences. Even today, with all the benefits of information technology running an election in this way would be a horrendous task, but in the middle of the 19th century it was a non-starter" (ERS, Newsletter). Hare had, however, introduced the key features of the STV. He laid the foundations from which others, including Catherine Spence (1861) and Henry Droop (1868), developed the system we know today.

### **PR's promotion of coalitions of commitment**

Donald Horowitz (1985) believed that the legislative system adopted for the Second Sri Lankan Republic would be expected to have a moderating effect on ethnic politics.

The principal purpose of the proportional representation scheme that was adopted was to prevent small swings in votes from producing a large swing in number of seats. Sri Lanka has had a change of government in virtually every parliamentary election, and shares of seats have frequently been far out of line with shares of the total vote... but PR does this less prominently than first-past-the-post; and PR does not generally magnify changes in party support when legislative seats are allocated, so it is particularly responsive to the oscillation problem the framers of the Sri Lanka constitution were addressing (Horowitz, 1985: 641).

What does PR mean in ethnic terms in Sri Lanka?

...PR should be conducive to Sinhalese moderation. PR in multi-member constituencies tends to reduce the seat advantage enjoyed by territorially concentrated minorities such as the Tamils... The conciliatory effects derive, rather, from the apportionment of Sinhalese seats... First of all, PR seems likely to achieve the intended effect of reducing the spread between share of votes and seats. With Sinhalese seats more evenly divided between the two main parties, Tamil support should more often be pivotal to the formation and maintenance of parliamentary majorities than it has previously been (Horowitz, 1985: 642).

This also could be applied to the Muslim candidates and the Muslim parties. Like in the case of the Tamil and Muslim parties, although the minority may not gain seats under PR, there may well be an increase in the number of Tamil and Muslim candidates. In multi-member constituencies with Muslim minorities, Muslim candidates might even appear on Tamil and Sinhala party lists. "The constituency list system of PR makes it more attractive for parties to have Tamil candidates than it was under first-past-the post" (ibid). "PR also tends to encourage moderation in electoral appeals where minority voters in a constituency can be alienated by Sinhalese extremism. Under the first-past-the-post [system], at least in some constituencies, minority voters could be ignored by Sinhalese parties without paying a penalty in seats. Now that every last vote counts, this is a less compelling strategy" (ibid:642). Horowitz also theorised the features of 'coalitions of commitment' and 'coalitions of convenience' forged in multi-party systems and based on the fundamentals of PR (ibid:377-388).

Horowitz, in referring to ties across ethnic lines as 'multi-ethnicity' even if there were only two groups involved, believed that this would require "mutual restraint and reciprocal concessions". He believed that it could lead to compromise policies and feelings of exclusions that might further lead to power-sharing arrangements. According to him, such multi-ethnic arrangements came in different packages. The kinds of packages on offer may vary with key features on how and why they are meant to blend, or why they intend to remain permanent but organisationally separate.

According to Horowitz (1985): "Group relations in multi-ethnic party settings can be placed readily along a spectrum, according to the nature and duration of the party's commitments and the organisational form appropriate to each arrangement". According to him there are two categories of alliances. There is first the 'coalition of convenience', stimulated by little or nothing beyond the requisite for ethnic parties to form a government. The second kind is the coalitions of mixed convenience and commitment, referred to as 'coalitions of commitment'. These are, again, nourished and sustained by the need to form a government, but also by some hope of having a beneficial impact on ethnic conflict with a "blend of conviction and convenience" (ibid: 369-388).

In his early observation of Sri Lanka in the 1980s, Horowitz (1985) believed that the PR system would remedy many of the ills in minority grievances related to non-representation. He also believed that the system would give parties a variety of choices, especially in using their independent discretion in alliance making of their choice. The PR system was supposed to ultimately cement coalitions of commitment between the Sinhala, Tamil, and Muslim parties. However, he added a word of caution in that not all these positive

features could be taken for granted in the context of terrorism and, also, with Tamils not being able to play a normal parliamentary role.

The PR system worked ideally for a minority party like the SLMC in the recent past, such as when the party was conceptualised and nurtured, and showed excellent polling results in the 1980s-1990s. That was the time when SLMC flourished under President Premadasa of the UNP from 1989-1994. SLMC sided with the ruling party after showing its strength in the region and the provincial council elections in 1988. SLMC won 17 seats in the then-merged North-East – where it became the chief opposition party – and also proved its worth with 12 seats across the Western, North-Western, Central and Southern provinces. The heyday of SLMC was possible because of the PR system. The newly born minority party was able to flourish and achieve impressive results. This worked as an incentive for incumbent President Premadasa to be benevolent toward SLMC in order to help himself – mainly in view of the ensuing presidential elections.

The subsequent parliamentary elections of 1989 also proved to be successful for SLMC when it won four seats polling independently. The party's founding leader, M. H. M. Ashraff won for himself a massive number of preferential votes. The same favourable climes continued for SLMC when it decided to switch sides to support the front-running presidential candidate from the opposition People's Alliance (PA), Chandrika Bandaranaike Kumaratunga, who became executive president in 1994. The SLMC had earlier showed her evidence of its power. She was also impressed of the party's performance in the elections and was more than happy to accommodate SLMC. In the subsequent parliamentary election in 1994, SLMC won six elected seats and two National List seats contesting under its own symbol in the North-East. Under the new leadership of Rauf Hakeem after the untimely demise of the founder leader Ashraff, SLMC in the general elections of October 2000, had 11 seats in parliament. It also earnestly remained a strong constituent party of the ruling coalition government that lasted until 2001, when SLMC shifted its support to the opposition coalition of United National Front (UNF).

When SLMC earned the wrath of the executive president and judiciary, headed by a chief justice whose determinations in cases of citizens versus state were matters still under public debate, the party was open to powerful attacks by forces that stifled its course. The anti-Muslim riots in Mawanella – in the Kandy District – and the lead role Hakeem played in demanding disciplinary actions against a minister who was allegedly involved in the riots, was a principle cause in souring the good relationship between SLMC and the executive president. The president took no action to appease

the reservations of the SLMC and Muslims in general. The party also signed a memorandum of understanding (MoU) with the main opposition party, the UNP, (the main opposition party) and subsequently joined the opposition benches. This finally developed into a continuing process in which the SLMC switched its allegiance to successive governments and, therefore, gained a reputation for political expediency or political duplicity. In terms of grass-roots political allegiance, the party was weakened.

The variety of interpretations and the different styles of governance by individuals holding office as the executive president, largely determine the use of PR as a tool for truly pluralistic governance. When the outcome from the PR factories produced favourable results, the best features of the PR system's support for the smaller groups were evident. There were also times when the office of the executive president made inroads toward crippling the spheres in which PR functioned especially in the case of the smaller parties' disregarding of PR's importance as a tool for minority group representation.

### **Executive presidency and the judiciary: Designs over minority parties**

#### *a. Executive presidency's promotions of floor crossing and judicial restraints on expulsions by the party.*

A direct reference is made in the Constitution of the SLMC under Chapter IV, Article 4.4 (b), on the 'loss of membership' pertaining to 'floor crossing' as a reason for expulsion of a member from the party. "Any member of the Party without the prior approval of the High Command of the Party and/or against the decision of the Party accepts office in the administration formed by any other Political Party and/or Political Alliance shall ipso facto deemed to have lost his membership in the Party" (SLMC Constitution: 6).

On the occasions when SLMC expelled MPs who had defected to the ruling party, the expelled MPs have been able to win Supreme Court rulings to enable them to retain their party membership. This means that they have been able to retain their membership in parliament and cross over to the ruling party to strengthen the government. In the recent past, the number of times MPs crossing the floor to the government were just too many with the judicial provisions functioning as an enabling factor or an incentive.

In the opinion of the SLMC's General Secretary, M.T. Hassan Ali (2010):

The SLMC is a party that was conceptualised, got its identity and formation under the PR system. Those belonging to Tamil and Muslim communities will always have members to represent them under this system. We were always able to get a representative from outside the

North and the East by forging an alliance with the major party, and contest on our own within the region where the minorities live in higher concentrations, because of this system. The problem lies not with the PR system but with a judiciary that is allegedly on the side of the executive president.

It is not the problem of the PR that affects the minority parties. It is the court rulings on expulsion cases that weaken the party position which PR is supposed to provide. This will pave the way for the eventual extinction of minority parties unless this trend is irretrievably reversed. On the occasions when our party joined the government, we always did so with an MoU signed with the conditions and demands of the community put forward. The party had the strength in numbers and was not too opposed to the policies of the ruling parties at the times of the cross over. Sometimes they lasted, and at times they did not. However, this time (in August 2010) the party (eight members) had to join the government en masse unconditionally, mainly owing to five members who were threatening to defy the discipline of the party and join the government. The decision we had to face was to reduce our party to a miniscule minority of three members of parliament or go along with the five threatening to join the government, whereby we at least preserve the semblance of a political group that will have some bargaining power with the government in power (Hassan Ali, 2010).

The patterns of behavior of the minority parties in the post-2001 period were seen as efforts to wield too much control over the making and breaking of governments. This was a result of the PR system, in which parties such as SLMC obtained a number of seats that would tilt the balance of power. Hence, there was an alleged need on the ruling party's part to devise plans to curb the SLMC's bargaining power.

The Supreme Court's rulings in the expulsion cases are seen to affect the minority parties and favour the individual who takes arbitrary decisions to cross over, irrespective of either the discipline of the party or its political orientation. The recent rulings allow a member of a party to retain his/her membership in parliament in the case of floor crossing, regardless of what party his/her membership is originally. This is in sharp contrast of the same principle that is applicable in India where, in a recent example, the speaker of the state assembly in Karnataka prevented five members of the Karnataka Legislative Assembly from voting in the assembly on a no-confidence motion purely on the basis of a public

declaration by them that they intended to vote against their party. The State Supreme Court, while not endorsing the decision of the speaker until its final determination on the issue, did in fact rule that the members' suspension be sustained until the determination of the court. This is another example of judicial activism in India. In other words, in Sri Lanka, he or she who crossed over could not be expelled from their party which would otherwise strip them of their parliamentary membership and make the floor crossing worthless.

*b. Independent floor crossing and the party's loss of MPs*

Since inception, SLMC has lost as many as 10 of its MPs and members to the opposition. Some have defected the party when they were MPs (elected or forwarded in the National List) by floor crossings and others have defected the party for resisting floor crossing to the opposition, and instead decided to walk out from the government.

According to the Article 99 (13)b and 161(d) (ii) of the Constitution of Sri Lanka, the Supreme Court reserves the right to determine if such an expulsion is valid. A judicial review on 'validity of the expulsion' is imperative. The contending factors in such cases are generally 'rule of natural justice' or the need for consideration of the 'conscience' of the MP, and his/her responsibility towards the constituency (Rajakaruna, 2010:73).

The following are MPs who crossed over to the government when SLMC was in opposition. The party could not expel these members (see Table 1).

Some of the cases pertaining to the members of the SLMC dissidents on their applications as expelled members will now be explained. Bhaila filed an application under Article 99 (13)(a) of the Constitution in the Supreme Court, challenging his expulsion by the UNP<sup>2</sup>. Bhaila entered parliament through the UNP's National List in April, 2004, when SLMC contested under the UNP symbol. "Having entered the parliament under the patronage of UNP, he has on 18<sup>th</sup> of May crossed over from the opposition ranks to the government ranks which were dominated by UPFA" (ibid:91). The SLMC expelled him on January, 2004. The court's ruling was that the expulsion was invalid. "The [Supreme] Court allowed the application of the petitioner on the ground of violation of the rules of natural justice in that the petitioner was not given a fair hearing being a basic requirement in the process of making any decision"<sup>3</sup> (ibid: 91). The petitioner also received a letter from the UNP addressed to the secretary general of parliament stating that the "petitioner has ceased to be a member of the UNP as from March 20th, 2002". The Supreme Court held that neither the SLMC nor the UNP could expel Bhaila. The court held that he was not a member of the SLMC when the cross over happened as he had

resigned from the party in October 2003, and that he was also not a member of the UNP as he ceased to be one of its member since March, 2002 (ibid:92).

*Table 1*

<i>Members of parliament</i>	<i>Date of floor crossing of MP to the ruling coalition UPFA</i>
<p>Hussein Ahmed Bhaila National List MP of UNP-SLMC. Accepted ministerial post soon after floor crossing. <b>President Chandrika Bandaranaike Kumaratunge's (CBK) Government, 2004:</b> Minister for Science and Technology and Small Industries. <b>President Mahinda Rajapakse's(MR) Government, 2005:</b> Deputy Minister for Foreign Affairs until 2010 election.</p>	<p>May 18, 2004</p>
<p>M. N. Abdul Majeed Elected SLMC MP, Mutur, Trincomalee District. Accepted ministerial post soon after floor crossing. <b>CBK Government, 2004:</b> Minister Rehabilitation and Trinco District Development. <b>MR Government, 2005:</b> Minister for Cooperative and was also Deputy Minister for Local Government and Provincial Council until he lost in the 2010 general election.</p>	<p>October 30, 2004</p>
<p>Ameer Ali Elected SLMC MP, 2004, Kathankudy, Batticaloa District. Accepted ministerial post soon after floor crossing. Became Minister of Rehabilitation and Batticaloa District Development until he lost in the general election of 2010.</p>	<p>October 30, 2004</p>
<p>Rishard Badurdeen Elected SLMC MP, Vanni District 2001. Accepted ministerial post soon after floor crossing. <b>CBK Government, 2004:</b> Minister Resettlement and Vanni District Development. <b>MR Government, 2005:</b> Minister of Resettlement and Disaster Relief Services. <b>MR Government, 2010:</b> Minister of Industries and Trade. Got elected in parliamentary elections of 2010 in same district under APMC.<sup>1</sup></p>	<p>October 30, 2004</p>

Why this judicial ruling should affect a minority party has been explained in the following: “This is a good example where the mechanism of National List was abused to enter into the parliament and to cross the floor of the house without being an elected member of any of those political parties”. That the MP changed his party allegiance, by first resigning from SLMC, was neither in the public’s nor a constituency’s interest (ibid).

In the case of other SLMC MPs, three petitioners from the Eastern Province – Ameer Ali (Batticaloa District), M. N. Abdul Majeed (Trinco District), and Rishard Badurdeen (Vanni District) – were immediately expelled by the high command of the SLMC for what it saw as unacceptable cross over for alleged perks and privileges when they supported President Chandrika Kumaratunga’s National Advisory Council for Peace and Reconciliation. These three had, against the party’s will, also accepted project ministerial portfolios from the president. These cases, known as Ameer Ali and others vs Sri Lanka Muslim Congress<sup>4</sup>, were taken up together. “The first two petitioners were elected SLMP MPs nominated by SLMC at the general election held in April 2004 for Batticaloa and Trincomalee districts respectively. The third petitioner was a member of the Vanni District (from the Northern Province) and was elected as a nominee of the UNP” (ibid: 93).

In these cases, the Supreme Court invalidated all three expulsions and determined that “those expulsions were contrary to natural justice, *malafide* and *ultra vires*, the SLMC Constitution. The [Supreme] Court<sup>5</sup> held that an MP could not be expelled from his party save on cogent grounds which are, beyond doubt, in the public interest” (ibid). This was also based on the grounds that these members of parliament had the right to be led by their ‘conscience’ in acting above mere party allegiance.

What ‘cogent’ grounds are is basically in the realm of speculation and ultimately subject to the litmus test of political persuasion. Interpretation of what ‘natural justice’ is falls within the ambit of judicial review. What the dictates of one’s ‘conscience’ is a moral issue. The debate of morality versus politics dates back to Athenian democracy – hence, Plato’s observation that “Philosophers do not make good kings”. Coming to our part of the world, Kautilya, the adviser to the Mauryan King Chandragupta, was explicit on the subject: “Morality is not the business of the King”. However, in modern-day democracy ‘morality’ and ‘good governance’ are integral to the practice of democracy. That should put to rest the detractors who quote cultural relativism to justify the erosion of democratic norms.

In the cases above, the Supreme Court had noted that the “reasons for expulsion have to transcend personal and parochial considerations and should rest on a broader foundation of public

good” (ibid: 99). An MP changing party allegiance and accepting portfolios should also rest on a “broader foundation of the public good because it goes beyond personal and narrow considerations. If the Supreme Court has been amenable to adopt this theory in recent ‘expulsion cases’ in which the respective petitioners crossed over to accept ministerial portfolio, then the decision of those cases would have been much more different from the present position. It is noted that all recent expulsions were invalidated by court” (ibid).

There ought to be a “compromise that seeks to protect the freedom of conscience of members of parliament, the significance and importance of which has not been adequately recognised by the Sri Lankan legal community, while also discouraging floor crossing for less altruistic and legitimate reasons” (Edrisinha and Welikala, 2008:16). This is a controversial issue which is criticised by many constitutional experts. This is because these rulings affect not only the main parties but also severely affect minority parties to the extent where their political relevance ceases to exist. This problem has to also be considered in the context of the social implications of electoral politics in a country like Sri Lanka. The popularity of political leaders does not necessarily rest on their political acumen alone. In closely-knit communities such as the Muslim community in the Eastern Province, leaders are respected and supported due to other attributes such as their wealth, social standing, and family background. In these circumstances, the constituency supports the cross over of the MP not necessarily because of his/her political decision, but on the basis of his/her personal attributes. The party, under these circumstances, experiences difficulty in being able to find a substitute candidate as a replacement – the price of vestigial feudalism in modern day democracy.

### **Floor crossing of party and loss of MPs to the government**

On two occasions of floor crossing, the members crossing over had belonged to the SLMC – a constituent party of the ruling coalition.

In November 2007, SLMC MPs resisted the party’s floor crossing to the opposition benches and remained with the ruling coalition, while retaining their membership in SLMC and ministerial portfolios in the government. They did so as members representing an ‘SLMC faction’, the National Unity Alliance (NUA), or members of a newly formed political party (All Ceylon Muslim Congress, National Congress, etc) up to the elections of April 2010, in which they contested and lost. The party was weary of expelling members and losing expulsion cases in court by this time. Hence, they took no action. What this demonstrated was that electors did not necessarily endorse the cross over of their representatives. At best, they were reconciled to accept a *fait accompli*.

**Occasion one.** In June 2001, the government was in turmoil when SLMC, one of its constituent party, quit and left the PA as a minority in parliament with only 109 out of 225 seats. SLMC had 11 MPs in parliament in 2001, including NUA, which was a constituent part of SLMC. Of the 11 MPs from SLMC, four remained in government in support of President Chandrika Kumaranatunga, opting not to abide with the party's decision to sever the alliance with the government over policy issues. These MPs resisted floor crossing when the party did so from the ruling coalition to the opposition over the Mawanella riots against Muslims in April 2001.

**Occasion two.** In January 2007, SLMC, which was hitherto in the opposition after contesting in coalition with the UNP at the parliamentary election of 2004, carried out a floor crossing and joined the ruling UPFA coalition under the executive president Mahinda Rajapakse. All six members of the party crossed over to the government and accepted government portfolios that year in a relationship that lasted for a mere 11 months.

**Occasion three.** In November 2007 once again, a floor crossing of the party took place to the opposition benches because of a land dispute in Pottuvil. SLMC argued that the Muslims' interests in the East had gone unheard. Two out of the six who crossed to the opposition benches remained with the government and later changed parties.

This trend indicates that each time a minority party leaves the government's ranks and joins the opposition's benches it loses a substantial number of its members who opt to remain with the government. "All splinter groups claimed to serve the community, but as demonstrated subsequently, they served themselves and left the community high and dry. What was common to all these groups was that they all made use of the SLMC to come to power, accepted positions, and enjoyed perks" (Farook, 2009: 97).

In January 2007, "on the eve of joining the government, heated discussions were held at a politburo meeting on whether to join the government. Hakeem was reluctant to join the government, but many others threatened to join whether Hakeem joined or not. As a result, Hakeem was left with little choice – either to go with them or remain in an isolated party which was virtually crippled. Some said Hakeem joined the government under pressure from different sources to avoid a fifth split which perhaps would have ended up as the last nail in the SLMC's coffin" (Farook, 2009: 98). "These Muslim parliamentarians joined the government as individuals and small groups. Thus, they negotiated before joining the government, not as a bloc but as individuals and groups, and got what they wanted – ministerial portfolios and the associated perks" (ibid).

It has to be noted that such switching of political allegiance of individual MPs of the SLMC had never occurred from the ruling

party to the opposition except en masse as a party. But such occasions have not had an impact on the government because there have been other minority parties to immediately step in to fill the breach from the opposition benches – often out of ‘opposition weariness’. Joining the government has mainly meant obtaining ministerial office. One of the principle weaknesses of the PR system in emerging democracies such as Sri Lanka, where institutions and traditions are not deeply rooted in political terms, is government patronage is an essential ingredient for long-term political survival.

In some cases, the defection of MPs also happens under duress and blackmail when they have alleged ‘skeletons’ in their cupboards such as pending trials on charges ranging from misdemeanors to murders. Some are, therefore, willing hostages to their own fortunes. They are compelled to support the ruling party for patronage purposes of different kinds.

**Occasion four.** A similar occurrence happened again when the SLMC, which was in the opposition from November 2007 until August 19, 2010, decided suddenly to vote in favour of the 18th Amendment to the Constitution. This was when five of its eight members showed interest in joining the government. “For Hakeem, there is a big dilemma. At least three of his parliamentarians want to support the constitutional changes and are in favour of joining the government. Does he let them go or does he decide together with them and support the government on the constitutional changes?” (*Sunday Times*, 2010). While three party members remained opposed to the provision of the Constitution, they, too, had to follow suit to favour the government in order not to further split the party.

There are many ongoing debates as to whether it is reasonable to terminate the mandate of an MP when he/she has crossed over? It is also questionable as to whether it is justifiable for an MP to change allegiance, especially to the ruling party, before his/her term ends without a fresh mandate from the people. Such a mandate may be obtained in a bi-election that allows a member to seek endorsement for altered principles or the discovery of a new conscience – the existence of which he/she was not aware of until the offer of political privileges.

SLMC deputy secretary general and lawyer, Nizam Kariyappar noted (Kariyappar, 2010) that those who crossed over had all the right to leave the party on policy matters, but ought to be barred from crossing over only for perks and privileges and ministerial portfolios. Should they defer from party policies, they could sit in a section of parliament for those who were neither in the government nor in the opposition (ibid).

We need an effective judicial mechanism. What is problematic for the minority political parties is the constitutional provision which has given the jurisdiction on floor crossing directly to the

Supreme Court. Since the Supreme Court is the highest court of law, there is no room for further appeals on its judgments. We have discussed with the party leader and also proposed that the constitution should be amended to give the jurisdiction over expulsion cases to both the Supreme Court and a special bench of the Court of Appeal. Then, there is provision to appeal against the judgment in the Supreme Court against unjustifiable cross overs that often happen over perks and privileges. This allows two courts to review such cases, allowing more checks and balances of the judiciary (*ibid*).

The above cases would be prime examples of where the most powerful hand of the executive presidency and the executive-friendly judiciary were seen to collaborate as an incentive for MPs' independence and unbinding actions towards the regulations and principles of a party structure that they belonged to. Most often, the tendency to stay with the earlier rewards and the additional rewards for entirely personal gains made MPs look beyond party interests and rendered them unanswerable to the party or its constituency under the protective wings of the executive presidency – all of which has weakened the party.

### **Minority parties in an executive presidential system**

Why the presidential system proves to be a challenge to the efficacy and the true democratic functions of a parliament based on the principles of PR, is owing to powers vested in the executive president. Some of the following features are broadly contentious as they could allegedly allow for manipulation: As the head of the executive, the president wields significant powers – “powers which make it absolutely clear that he/she is in effect far more powerful than a prime minister could have been under the former system. Firstly, he is no longer answerable to the legislature; the Constitution only makes him *responsible* to parliament... For Article 42(2) recognises the president as head of the cabinet. It is he who appoints the prime minister, determines the number of ministers that should be in the cabinet and assigns subjects and functions to such ministers. In all this he may or may not consult the prime minister; and he could at any time, on his own responsibility even without consulting his prime minister, change the assignment of subjects and functions and the composition of the cabinet of ministers [Article 44(3)]” (Wilson, 1980: 44). This also serves to demonstrate the impotence of the parliament and its workings under a president whose executive authority is totally immune from judicial review. Under these circumstances, the policy of least resistance to executive authority is the most seductive form of participation – either good or bad – in governance. “There is always the possibility that parliament may have a majority opposed to the

president. In such an event, a deadlock can ensue. But the ultimate responsibility for maintaining continuity in government lies with the president” (ibid).

When a coalition party such as the SLMC has proved to be a threat to thinning the numbers in a ruling coalition, the party is put to the test. In the process, at least in the case of SLMC, it has gone through the mill and it has always emerged totally bruised with lasting scars leaving it deformed and increasingly unattractive to its mass base.

### **PR system running in the spirit of FPP**

Another reason for the weakness of the system is that in PR, although implemented by statute, the process of nursing the electorate is still based on the old constituency-based electoral system. Under this, candidates are nominated from the district to nurse a particular geographical area within the district. This encourages the main political parties to field candidates on the basis of the financial resources of the candidates to beat one another within their own party list in terms of the preference votes. This makes one’s political survival dependent on the ability to sustain themselves financially. To that extent, joining the main political party or entering a coalition with such a party remains attractive. This subjects the PR system to the same deficiencies of the FPP system. Under the PR system, the minority parties should thrive because they could provide a voice to the voiceless minority. Yet, in practice, the ruling party has the means to negate the very purpose of the existence of minority parties.

### **How communal-based politics overthrows PR**

Communal-based politics was evident in the presidential elections of 2010 between Mahinda Rajapakse and Sarath Fonseka, compared to the 2004 elections between Mahinda Rajapakse and Ranil Wickremasinghe. In presidential elections in 2005 there was a marginal victory for President Mahinda Rajapakse (50.29 per cent), while his opponent Ranil Wickremasinghe recorded 48.43 per cent. The latter secured the minority leverage, with the majority of his votes coming from the north and the east – the peripheries where Tamil and Muslim minorities were concentrated. In the presidential elections of 2010, President Rajapakse won a comfortable majority of 58 per cent and his opponent General Sarath Fonseka 40.15 per cent. Rajapakse won the Sinhala-majority districts in southern and western parts of Sri Lanka, whereas Fonseka’s stronghold was in the less populous Tamil and Muslim areas in the north and east. The major Tamil party, Tamil National Alliance (TNA), and the major Muslim party, the SLMC, campaigned for Fonseka. They hoped they could become kingmakers once again, as Fonseka

also pledged to vigorously address the minority grievances and abolish the executive presidency. President Rajapakse, however, won without much support from the minorities except the LTTE's breakaway groups that contested elections .

According to a leading political scientist, Jayadeva Uyangoda (2010): "Three key trends in the outcomes of the election [are] prominent. Firstly, the electoral districts with the concentrations of ethnic minorities have overwhelmingly voted for the opposition candidate. Secondly, President Rajapakse has obtained little support in the urban electorates, where ethnic minorities as well as the social elites, represent a sizeable share of voters. Thirdly, and emanating from the first and second, is the fact that President Rajapakse's main and strongest base is in the rural districts and among the voters of the majority Sinhalese community... One way to interpret these trends is to say that the minorities are clearly estranged from the Rajapakse regime (ibid: 5)."

The UPFA won a total of 144 seats out of the 225-member parliament – only six seats short of two-thirds majority – in the parliamentary elections of April 2010 (following on the heels of the January 2010 presidential elections). "Under normal circumstances of the scheme of proportional representation operating in Sri Lanka, no party or coalition could get more than just a simple majority of seats... The gap between the votes received by the UPFA and the UNP in almost every district outside the north and east was unprecedentedly wide, in many instances the UPFA obtaining about 65 per cent and the UNP about 30 per cent" (ibid). One wonders how this was possible.

Uyangoda gave a combination of reasons for this overwhelming victory: one-third of the UNP voters had not voted at all; the lackluster election campaign of UNP; the crisis in the party over the leadership. These, among others, "seem to have caused a great deal of apathy and despair among key sectors of the UNP's vote base. That eventually paved the way for the UPFA to obtain 144 seats – normally a near impossible achievement under the PR system" (ibid: 8).

However, this paper points out that the main reason for a near-impossible victory, apart from the reasons given above, is indisputably the nature of Sri Lankan politics which has become communal based. The presidential elections of 2005, the war victories, the presidential elections of 2010, and the parliamentary elections that followed, gave a tremendous boost to the party in power, mainly owing to the communal politics at play.

As mentioned elsewhere in the paper, in the 1960s-1970s the FPP system did not necessarily reflect the political divisions of the electorate in terms of the numerical representation in the legislature. The introduction of the PR system was intended to avoid such an

eventuality of any party obtaining a two-thirds majority to amend the Constitution. This was demonstrated in the elections of the 1980s-1990s. However, as Uyangoda pointed out, the polarisation of the communities and the triumphalism of Sinhala majoritarian dominance resulted in the ruling party coming very close to a two-thirds majority in the legislature *de facto*. Subsequent defections made it *de jure* two-thirds majority.

The results of the parliamentary elections of April 2010 that gave the SLFP-led UPFA coalition a near two-thirds majority showed how this trend was accelerated, leading the country to a virtual single-party state. This situation questioned all the assumptions that had justified the introduction of PR.

Retrospective analysis is illuminating. In a country where there is a wide disparity in ethnic proportions (75 per cent Sinhalese, 12 per cent Tamil, and eight per cent Muslim), communal-based politics ensures majoritarian dominance while PR principles – intended to support minority/smaller communities and groups – become obsolete.

As far as political theories go, it is only natural that parties prefer to stay in the ruling coalition government. Coalition theorist Kaare Strom (1990) pointed out that under special conditions parties could prefer not to join governing coalitions. In his opinion, there were times when a party preferred to stay in the opposition. This would be mainly if it believed that this would enhance its electoral fortunes and enhance its ability to enter future cabinet coalitions with a stronger bargain/position. Hence, in exceptional cases like in the case of SLMC, we have found that there were times when the party was also satisfied with a formal opposition role because it felt that it would have an influential legislative role by being in the opposition if not a part of the government.

Lijphart (1999) opposed Horowitz's idea that such parties have no incentive to compromise and be in ruling coalitions. Lijphart argued that such parties were the exceptions. "The more usual inclination of parties is to want to be included in cabinets. Because the only way for ethnic or any other parties not just to enter but also to stay in the cabinet is to reach compromises with their coalition partners, they have a very strong incentive to compromise-political power – instead of no such incentive as Horowitz mistakenly argues (ibid).

These arguments remain cogent as far as the theoretical and conceptual level of discussion of a higher order between Horowitz and Lijphart. In reality, the case in point here is the fact that we are attempting to reconcile the best features of PR with an executive presidential system in which the executive is elected, with the entire country considered as a single constituency, and in which voters gravitate towards ethnic identity in such a way not peculiar to Sri

Lanka. For instance, President Obama had a captive constituency of African Americans and Latinos. This will always be the case in a country which votes as a single constituency made up of different ethnic groupings. However, in Sri Lanka the majority Sinhala community forms three-quarters of the population. In effect, this makes it a monolithic state at the expense of the minorities.

The smaller parties in such a system, let alone enjoying the choice of forging a 'coalition of commitment', can hardly stay in a 'coalition of convenience' to begin with. That, too, like in France in the 1962-74 and 1981-86 periods, is considered 'hyper-presidential', where one usually exercises predominant power as opposed to semi-presidentialism (Keeler and Schain 1997: 95-97). The features of a 'hyper-presidential' system were what Sri Lanka emulated in 1978 in introducing those features to the executive presidential system that have prevailed to date in the country. Hence, the credibility of the parliament is bound to be subservient to the executive presidential system and be at its whims and fancies. Hence, the cases presented in the paper point out the fact that the scheme of events, as referred to by Horowitz and Lijphart above, cannot apply to a complex context such as the prevailing political conditions in Sri Lanka. At the end of the three-decade war, what we have got is a Gaullist system or an emerging Bonapartism which takes us back two centuries.

### **Conclusion**

The PR system provided the very process that created the SLMC – the largest political movement of the Muslim community in the country with a singularly Muslim identity. The system has, therefore, helped ambitious Muslim politicians to achieve power. It provided little or no leverage to the minority Muslim community itself. The fragmentation of the SLMC into about three different political groupings occurred as a result of incentives in the forms of political office and other benefits offered by the major political parties and executive presidency. The current situation is a clear demonstration of a very attractive phrase that has gained wide currency in post-presidential election of 2010: "Power is delightful; absolute power is absolutely delightful". Hence, it could be observed through the unfolding events that the PR system worked at its best in the context of a strong parliament with the power of oversight over the executive presidency. Floor crossing, which is one of the concerns of this paper, is of course subject to judicial review. That judicial review has to be within defined guidelines that are transparent. The issue that needs to be adjudicated is whether the member crossing over is in violation of the collective will of the party in terms of party discipline. Here is a parliament that is powerless vis-a-vis the presidential system. The inner workings show how

members desert parties frequently, especially when preferring to be part of the ruling parties. Therefore, the PR system is not very successful in the Sri Lankan context.

Ensuring minority rights while appeasing the aspirations of the majority is possible in an electoral system that combines both PR and FPP systems. It is a process of constitutional engineering that needs to be addressed in a discussion that does not fall within the ambit of this paper. Communal-based politics that has come into play in contemporary Sri Lanka renders the features of PR irrelevant, given the disparities in ethnic proportions that will always override minority interests. In post-war Sri Lanka, the majority triumphalism is a phenomenon that can change only with equitable distribution of resources and with both political and fiscal devolution. Economic prosperity will transcend racial barriers and communal faultlines.

## **Endnotes**

<sup>1</sup> All Ceylon Muslim Congress, formed in 2001, is a breakaway fraction of the SLMC.

<sup>2</sup> Hussein Ahmed Bhaila v Sri Lanka Muslim Congress, United National Party and Others, S.C. spl (expulsion) no; 01/2005, decided on 8/6/2005.

<sup>3</sup> The bench comprised Shirani Banadaranayake J., Nihal Jayasinghe J., and Nimal Ratnayake J.

<sup>4</sup> Ameer Ali and others v Sri Lanka Muslim Congress and others, [2006] 1 Sri LR 189. The three applications were: No 2/2005,3/2005 and 4/2005 filed under Article 99 (13)(a) of the Constitution, and taken up together in the Supreme Court (Rajakaruna 2010:93).

<sup>5</sup> The bench comprised Sarath N. Silva C.J., Nihal Jayasinghe J., N. K. Udalgama J., Ninal Dissanayake J., and Raja Fernando J. (ibid).

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