

**REPRESENTATIONS TO
THE SELECT COMMITTEE OF PARLIAMENT
ON
REFORMS TO PARLIAMENTARY, PROVINCIAL
COUNCILS AND
LOCAL AUTHORITY ELECTIONS**



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A. Introduction

The Law & Society Trust was established in 1982 as a Trust under the Trusts Ordinance. It was subsequently incorporated in 1990 under the provisions of the Companies Act No. 17 of 1982. The Trust works chiefly to use the law as a tool for social change. Working towards the promotion and protection of human rights is an important aspect of the Trust's work

We are of the opinion that reforming the prevalent election laws in order to safeguard the right to franchise of the Sri Lankan voters is imperative and trust that the deliberations of the Select Committee would lead to such positive changes.

With this objective in mind, the Trust has engaged in comprehensive Representations which looks at the specific laws that are the subject of discussion for the Select Committee of Parliament on Electoral Reforms considering reforms to the current system of Parliamentary, Provincial Councils and Local Authority Elections. The Representations also address certain aspects of the constitutional framework governing elections, most importantly the 17th Amendment to the Constitution*.

It is now well accepted, (through judicial interpretation), that the most effective way in which a voter may give expression to his views is by silently marking his ballot paper in the secrecy of the polling booth¹. In consequence, it is our view that special attention should be given to provisions of election laws that are clearly seen to violate the right to franchise and accordingly, the right to vote.

In our submission to the Parliamentary Select Committee, we have used international human rights standards (the right to take part in government; the right to vote and to be elected and the right to equal access to public service) to urge wholesale reform of the laws under review.

B. Preventing Electoral Misconduct; Strengthening the Law

Section 48A of the Parliamentary Act and Section 46A of the Provincial Councils Act No 2 of 1988, (brought in by the Elections Special Provisions Act, No 35 of 1988) outline only narrow instances in regard to which a poll could be declared void and is manifestly inadequate in order to curb the multifarious types of misconduct now common in Sri Lanka.

These sections relate to disturbances at polling stations and specifies three situations in regard to which the Commissioner of Elections is empowered, subsequent to receipt of an information by the returning officer and after making such inquiries as he may deem necessary, to declare the poll void.

* These Submissions were prepared by Deputy Director (LST) and head, Civil and Political Rights Unit Kishali Pinto-Jayawardena. The input provided by former Supreme Court Justice MDH Fernando, LST advisory board member and senior attorney RKW Goonesekera and President's Counsel & consultant to the Civil and Political Rights Unit, Dr J de Almeida Guneratne is appreciated.

These are namely;

Where due to the occurrence of events of such a nature-

- a) it is not possible to commence the poll at a polling station at the hour fixed for the commencement of the poll;
- b) the poll at such polling station commences at the hour fixed for the opening of the poll but cannot be continued until the hour fixed for the closing of the poll;
- c) any of the ballot boxes assigned to the polling station cannot be delivered to the counting officer.

Eleven years after the passing of this special provisions law, it has become clear through the unhappy experience of several parliamentary/presidential and provincial council elections,, that these provisions are highly inadequate to deal with poll malpractices affecting the right of franchise.

The problems faced by the Commissioner of Elections in this regard was succinctly explained in a letter written by him to the President dated 27.02.1999 wherein, the Commissioner requested that certain urgent amendments be made to the Provincial Councils Act No 2 of 1988, as amended by Act No 35 of 1988.

Pointing out that these three situations were inadequate in order to curb situations arising on the day of the poll, the Commissioner suggested five additional sections to Section 46A(1), namely, if not possible to conduct the poll due to any reason beyond the control of the Presiding Officer, if one or more polling agents are chased out during the poll, non-arrival of the polling party at the polling station due to obstruction on the way; if any disturbance of peace at the polling station makes it impossible to take the poll and if any stuffing of ballot papers is forcibly done by unauthorised persons

This letter² had, in fact, been written by the Commissioner to the President following a particularly bad election held in the North Western Province in January 1999. While election malpractice in previous instances had been characterized by a certain measure of order and method, the Wayamba elections saw overt and massive rigging and stuffing of ballot papers by parliamentarians and provincial council politicians of the then ruling party, with the election officials and police officials either helpless and acquiescing in the process.

These suggestions by the Elections Commissioner have also been consistently recommended by civil action/election monitoring groups in Sri Lanka who have made the specific point that the election laws as they presently stand, do not empower the Commissioner of Elections to annul a poll on the basis that there had been stuffing of votes.

Instead, as a consequence of the limited ambit of these sections, election officials merely disregarded the number of votes illegally polled. Particular concerns have been expressed regarding this course of action which does not take into account the following;

- a. the very real intimidation and sense of fear that would adversely affect voters;
- b. loss of time at the polling centre;
- c. the demoralisation and the loss of faith that the election officials and the polling agents would inevitably feel as they remain powerless to prevent such blatant acts of terror;

- d. the sense of apathy and paralysis that stems from the realisation of the effect of political power, police ineptitude and complicity on the right to vote

The Supreme Court has recognised these concerns and interpreted Section 46A of Act No 35 of 1988 relevantly. In *Jayantba Adikari Egodawela and Others vs The Commissioner of Elections and Others*³, the Supreme Court gave relief to four registered voters of the Kandy District, who petitioned court regarding various incidents alleged to have occurred on election day at twenty five polling stations in the District in elections held in the Central Province in April, 1999.

The election malpractice cited included the premature closure of one polling station, ballot stuffing, driving away polling agents and intimidation of several others. The petitioners alleged infringement of their rights under Articles 12(1) and 14(1)(a) of the Lankan Constitution, relating respectively to the right to equality before the law and the right to freedom of expression. The Court ruled that the specific election malpractice in question warranted the annulment of the poll under Section 46A of the Act and that the Commissioner of Elections was under a consequent duty to order a repoll.

This judgement articulates a general principle that is applicable to the Commissioner of Elections and his Returning Officers in relation to the conducting of all elections. We are therefore of the view that Section 48A of the Parliamentary Act and Section 46A of the Provincial Councils Act No 2 of 1988, (vide the Elections Special Provisions Act, No 35 of 1988) should be specifically amended to empower the Commissioner to declare a poll void in the following instances;

Where due to the occurrence of events of such a nature;

- a) it is not possible to commence the poll at a polling station at the hour fixed for the commencement of the poll;
- b) the poll at such polling station commences at the hour fixed for the opening of the poll but cannot be continued until the hour fixed for the closing of the poll;
- c) any of the ballot boxes assigned to the polling station cannot be delivered to the counting officer.
- d) It is not possible to conduct the poll due to any reason beyond the control of the Presiding Officer or as a consequence of the said presiding Officer failing to perform his/her functions;
- e) If one or more polling agents are chased out during the poll;
- f) Non-arrival of the polling party at the polling station due to obstruction on the way;
- g) If any disturbance of peace at the polling station makes it impossible to take the poll;
- h) If any stuffing of ballot papers is forcibly done by unauthorised persons;

- i) If the poll cannot be conducted in a manner **free** of any improper influence or pressure; **equal**, where all those entitled to vote (and no others) are allowed to express their choice as between parties and candidates who compete on equal terms; and where the **secrecy** of the ballot is respected.

We recommend that these amendments, as a whole, be incorporated in the Local Authorities law as well.

It is pertinent to quote from the *Egodawela Case* that election malpractice of this nature is not simply a matter of “x ballots being stuffed or y polling agents being driven out.” Instead;

Ballot stuffing and driving out polling agents go hand in hand with violence or the threat of violence – which in turn, will have a deterrent effect on electors in the vicinity as well as those still in their homes.....driving away polling agents is a classic symptom of graver and more widespread electoral malpractices ranging from the intimidation of electors and the seizure of polling cards to large scale impersonation.

C. General Amendments for the Ensuring of the Right to Franchise

We recommend the following amendments to the relevant sections of the Parliamentary Elections Act No 1 of 1981, (as amended) the Provincial Councils Act No 2 of 1988 (as amended) and the Local Authorities Elections Ordinance No 533 of 1946 (as amended)

- a) Section 68 of the Parliamentary Elections Act No 1 of 1981, (as amended) the Provincial Councils Act No 2 of 1988 (as amended) and Section 81A of the Local Authorities Elections Ordinance (as amended), should be amended to totally prohibit canvassing on election day etc by any person and not merely in the vicinity of the polling station;
- b) Sections 74 (1) (c) of the Parliamentary Elections Act No 1 of 1981, (as amended) the Provincial Councils Act No 2 of 1988 (as amended) and Section 81B (1) (c) of the Local Authorities Elections Ordinance should prohibit the display of public posters even on private property if visible from a public place;
- c) All three laws should provide for enhanced punishments if found guilty of an offence under this section.
- d) Sections 74(5) of the Parliamentary Elections Act No 1 of 1981, (as amended) the Provincial Councils Act No 2 of 1988 (as amended) and Section 81B (5) of the Local Authorities Elections Ordinance should be amended to not only empower police officers but also impose a positive duty on them to forthwith remove illegal posters etc and to produce the offenders in court.

- e) Section 79(4) of the Parliamentary Elections Act, Section 80(4) of the Provincial Councils Act and Section 81 (4) of the Local Authorities Elections Ordinance should cover not only the acts of the actual employers but also of others who threaten to terminate such employment/employment benefits. The sections should also cover termination of other rights, such as licences, contracts, subsidies and welfare payments.

It is recommended that the electoral laws under review should incorporate new amendments which are crucial to safeguarding the right to vote. These amendments may be as follows;

- a) Inclusion of specific procedures to enable voting at embassies abroad by migrant workers;
- b) Declaration of assets and liabilities, qualifications and disqualifications and other relevant information regarding candidates for election and elected members, should be made mandatory with adequately severe penalties (including vacation of seats) for non-compliance and false declarations.

D. Limiting The Authority of the Party Secretary when Filling Vacancies in Elected Bodies

We examine further the effect of Section 65(2) of the Provincial Councils Act and Section 65A of the Local Authorities Elections Ordinance No 53 of 1946, as amended by Local Authorities Elections (Amendment) Act No 24 of 1987 on the right to franchise.

The relevant section of the Provincial Councils Act No 2 of 1988, namely Section 65(2), is as follows;

“(2) If the office of a member falls vacant due to death, resignation or for any other cause, the Commissioner shall call upon the Secretary of the recognised political party or the group leader of the independent group to which the member vacating office belonged, to nominate within a period to be specified by the Commissioner, a person eligible under this Act for election as member of that Provincial Council to fill that vacancy. If such secretary or group leader nominates within the specified period, an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation as the case may be, in the form set out in the seventh schedule to the Constitution, taken or subscribed or made or subscribed as the case may be, by the person nominated to fill such vacancy, the Commissioner shall declare such person elected as a member of that Provincial Council from the administrative district in respect of which the vacancy occurred.

If on the other hand, such Secretary or group leader fails to make a nomination within the specified period, the Commissioner shall declare elected as member, from the nomination paper submitted by that party or group for the administrative district in respect of which the vacancy occurred, the candidate who has secured the highest number of preferences at the election of members to that Provincial Council, next to the last of the members declared elected to that Provincial Council from that party or group. The Commissioner shall cause the name of the member as declared elected to be published in the Gazette.”

In a recent judgement of the Supreme Court⁴ the Court, (in pursuance of its duty under the Constitution, (Articles 27(2)(a) and 27(4) read with Article 4(d), to engage in the full realisation of the fundamental rights and freedoms of people and mandated accordingly to strengthen and broaden the democratic structure of government), limited the power of the secretary to nominate a person eligible under this Act for election as member of that Provincial Council to candidates on the nomination list, who have secured some preferences at the elections. (emphasis ours).

This judgement is in line with previous decisions of the Court which has upheld the right to vote as a fundamental right by articulating *inter-alia*, the following principles;

- a) that elections should be held rather than postponed;
- b) that there should be no statutory interference with the power given to the Commissioner of Elections to fix the date of elections and with the contents of nomination papers already accepted;
- c) that the date of the elections should be fixed so as to facilitate rather than hinder the exercise of the right to vote;
- d) that thuggery, intimidation of electors and electoral staff and ballot stuffing imposes particular duties upon the Commissioner of Elections, non compliance of which would lead to violation of the rights of electors;
- e) that where citizens are prevented from exercising their right to vote as a result of decisions taken by those in authority, which decision making processes are shrouded in secrecy and are manifestly not bona fide, the right to a free, equal and secret ballot is irrevocably interfered with in a manner that cannot be justified under the Constitution.

In this particular decision, it is relevant that the election of a person to that particular Provincial Council was challenged on a two pronged basis; namely that he was not a person eligible for election to the Uva Provincial Council under the Provincial Councils Act No 2 of 1988, as required by the provisions of Section 65(2) of the Act, primarily on the basis that;

- a) his name was not on the nomination lists submitted by his party (the Peoples Alliance) at the elections of 6th April, 1999 and;
- b) in any event, he could not have been so nominated due to the fact that on the date that the said elections were held, he was a Member of Parliament and therefore disqualified from being nominated as a candidate in terms of Section 12 of the Provincial Councils Act No 2 of 1988 read with Section 3 of the Provincial Councils Act No 3 of 1987.

The contention of the petitioners before court, who were voters and who had filed the petition in the public interest was that the rationale of the Provincial Council Elections Act of 1988 is defined by particular key principles relating to representative democracy, a cardinal principle of which was the requirement that a person could be elected under Section 65(2) of the Act only if

his or her name was on the party's nomination lists and if that person was eligible to be nominated for election to that Provincial Council.

The Supreme Court, examining the matter on appeal from a judgement of the Court of Appeal which had been adverse to the petitioners, held that the Court of Appeal had erred in law in holding that a person whose name did not appear on the nomination list submitted by the relevant political party at a Provincial Council election could thereafter be nominated by the secretary of the relevant political party to fill a vacancy that arises in the said Council. It was further held that the Court of Appeal had failed to consider the implications of Section 65(3) of the Act of 1988 for the interpretation of Section 65(2).

In the wake of the said judgement with its explicit reasoning advanced in protection of the elective principle and the right to expression thereto, it is recommended that Section 65(2) be specifically amended incorporating the judicial thinking embodied in the aforesaid judgement of the Supreme Court.

This precedent was followed by the Court of Appeal recently in the specific context of the Local Authorities Ordinance.⁵

The Provincial Councils law and the Local Authorities law as stated above, ought to be amended in order that a primary duty is imposed on political parties and election officials to all political parties to nominate, upon a vacancy arising, candidates whose names have appeared in the original nomination paper and who have secured some preferences at the elections.

E. Special Issues with Regard to Local Authority Elections

Although Article 4(e) of the Constitution contemplates only presidential and parliamentary elections, through judicial interpretation, the right to franchise has been acknowledged in regard to Provincial Councils as well as (by necessary inference) to local authority elections as well.⁶

Looking at the issue also from the perspective of a candidate who comes forward to solicit the said right to vote of a franchised elector, it must be borne in mind that, both the political cum constitutional right of the voter as well as any such candidate (once the party or political group he or she represents has put forward his or her name), are not rights that must be perfunctorily regarded (or disregarded).

Certain provisions of the Local Authorities Elections Ordinance as amended particularly by Act No 25 of 1990 carry the seeds of potentially suppressing the said inseparable link between a voter's right to franchise and the right of an "aspirant representative" thereby reducing to nought, not only Article 4(e) in its constitutional affinity to Article 3 of the Constitution of Sri Lanka but also Article 14(1)(a) and relevant International norms. We refer also to a decided case by the Court of Appeal in the context of principles of Statutory Interpretation.

1. *Provisions of the Local Authorities Elections Ordinance (as amended by Act, No 48 of 1983 and Act, No 25 of 1990 under Review in this Report with particular emphasis on Section 31(1) read with section 31(1)(bbb)*

(1) *Effect of the Sections under Review*

Section 31 (1)(b) (as amended) of the said Ordinance provides that,

“The Returning Officer shall, immediately after the expiry of the nomination period examine the nomination paper received by him and reject any nomination paper.....”
(for any of the reasons set out in paragraph (a),(b),(bb),(bbb),(c),(d) (1d) and (e)”

Section 31(1)(bbb) provides that to the nomination paper containing the list of names of youth candidates (that is, candidates under the age of forty years), there shall be attached certified copies of the birth certificates of the said candidates.

Thus, prima facie, the combined effect of the said two provisions would be to enable the Returning Officer to reject a nomination paper if the birth certificates attached to the said nomination paper are not certified copies.

(2) *Desired legislative intention having regard to the objective of statute notwithstanding the mandatory nature of the language employed in the said provisions*

The clear legislative intent as reflected in Section 3 and Section 14 of Act, No 25 of 1990 is to provide for youth participation. It is however mandatory language in Section 31(1) read with Section 31(1)(bbb) that is liable to purport a Returning Officer to reject a nomination paper for want of a certified copy of a birth certificate of even a single candidate whose name is listed in such nomination paper as was the case in *DM Jayaratne vs Vaas Gunewardene & Others* where the Returning Officer rejected the nomination paper of the one candidate for that reason as if he had no discretion in the matter.⁷.

(3) *Need for Amendment to Section 31 of the Statute under Review*

It must be stated here that, on account of the positive response shown by the Court of Appeal in the aforesaid case, it was *inter alia* directed by Mandamus that, the said Nomination Paper be accepted which enabled the party in question to contest the local authorities election and ultimately secure five seats to the Hali-Ella Pradeshiya Sabha thereby vindicating not only the elective principle in general but also helping to safeguard the legislative intent committed to youth participation.

(4) *Proposed amended Section 31 (bbb) of the legislation under Review*

Accordingly, the said amendment may be further refined as follows;

“the original of the birth certificate of a youth candidate, or a certified copy thereof or a photostat copy which in the opinion of the returning officer is authentic, or an affidavit.....”

2. Time afforded for political parties to remedy technical defects in nomination papers

Appeals filed in the Court of Appeal in the pre-election period concerning applications disqualified by the returning officers due to technical defects relating to the nomination of one or more candidate resulting in the entire nomination list being rejected, have now become common, particularly in regard to local authority elections.

A vast majority of these application concern challenges in regard to the impugned candidates coming within the definition of a 'youth candidate' as contemplated by Section 89 of the Ordinance as amended *inter alia* by Act, No 24 of 1987 and Act, No 25 of 1990. Such disputes were particularly evidenced in the local authority elections of 2006 resulting in severe public dissatisfaction with the electoral process.

This period witnessed a spate of applications in the Court of Appeal. While the petitioners' contention was that, since the age of candidates was involved, it was a matter relating to qualifications as envisaged in Section 9 of the Local Authorities Elections Ordinance (as amended) while the contention of the Returning Officer and other opposing parties was that, it was simply a matter of non-compliance leaving no other option for the Returning Officer but to reject the entire nomination paper upon an ocular examination of the same should the date of birth given of the candidate in question not conform to the age limit decreed by the statute, a provision introduced by the amendment of 1990 and located structurally within the framework of Section 31 and therefore, later in point of time to Section 89 of the Amending Act of 1987, thus clearly showing the legislative intention.

Consequently a meaningful distinction could be drawn between a challenge to a candidate's qualifications^{7a} on the one hand and rejection of a nomination paper for non-compliance^{7b} on the other, a distinction that eventually appears to have proved to be decisive in the recent local authority election cases wherein the rejection of the Gampaha Municipal Council and the Colombo Municipal Council nomination papers of the two leading political parties (among other cases) were upheld by the Court of Appeal.^{7c}

It is our recommendation that, in the interests of securing full democratic participation of all parties in the electoral process which would signify that the entire list ought not be rejected for the want of single candidate, secretaries of parties ought to be given an opportunity to remedy such defects in the nomination papers (once this is brought to their attention) within a period of two days.

F. Remedying the Negative Impact of the Proportional Representation System

The adopting of the proportional representation (PR) system in the 1978 Constitution was ostensibly spurred by the disproportionate legislative majorities obtained by political parties on the FPTP system earlier.

Further revision of the system in the deliberations of the Select Committee during 1983-1988 led to a complex system of voting for a political party and thereafter for a maximum number of three preferences from a list of candidates nominated by the party, accompanied by cut off points and bonus seats. The focus point shifted from a single member electorate to a large district based electorate returning many members.

However, Sri Lanka's experience with PR has not been wholly positive. Though massive electoral majorities in Parliament (which were earlier used by political parties to their own advantage) have been prevented as a result, the following negative factors have been evidenced;

- a) Entrenching of the powers of political parties;
- b) Infighting between candidates of the same political party regarding the preference vote;
- c) Distancing of the political representative from his/her constituents;
- d) Able candidates being deterred by the huge financial resources being necessary for electioneering in a district as opposed to an electorate;
- e) No noticeable increase in the entry of women candidates though a spin off benefit of the PR system was expected to result in increased gender representation;

We take note of these concerns and suggest an amended electoral process. Specifically where local government elections are concerned, close loyalties between representatives and their constituents are necessary and a wholesale return to the ward system is recommended.

G. Provisions in regard to Elections Petitions

The current period of twenty one days specified for the filing of election petitions (Vide Section 108 of the Provincial Councils Elections Act, No 2 of 1988 (as amended), Section 108 of the Parliamentary Elections Act, No 1 of 1981 (as amended) and Section 82AF of the Local

Authorities Elections Ordinance (as amended particularly by Act, No 1 of 2002) is manifestly inadequate. These sections should be amended to provide for a more realistic time frame in that regard. Commensurately, there should be a thorough overhaul of election petition procedures in order to constitute an effective check on election abuses

H. Inclusion of a Gender Quota into Electoral Laws

The contemplated electoral reforms should address the question as to the manner in which women representation at parliamentary/provincial council and local government level could be strengthened. Currently, it remains at a dismal low at all levels. Percentage wise, Sri Lanka ranks lower than India, Bangladesh and Pakistan in South Asia

The 13th Amendment itself did not contain any clauses aimed at helping women access the new political bodies, either through a reserved seat or a specific quota for nominations. The Provincial Councils did not contain any sub-structures focussing on gender concerns nor were there any financial allocations for this purpose.

Proposals in recent years to afford women a specific percentage for nominations at local government elections, similar to the prevalent youth quota were also not implemented by successive administrations. These still remain outstanding concerns which have been noted recently by the Women's Caucus in Parliament.

The Law and Society Trust calls upon the Parliamentary Select Committee to provide for, at the minimum, a quota in nominations for women similar to the currently existent youth quota at local government level or (ideally) the reservation of a specific percentage of seats for women at local government/provincial council and parliamentary elections.

I. Ensuring Freedom of Expression and Information in the Electoral Process

The concept of informed choice involves access to (credible) information about the candidates, the parties and the process. This has been further interpreted to mean that access to the mass media should be guaranteed to political parties and candidates and that such access should be

fairly distributed. In addition, particular duties and responsibilities are cast on both the media and contesting candidates in this regard. Thus;

“Fair media access implies not only allocation of broadcast time or print space to all parties and candidates but also fairness in the placement of timing of such access (ie; prime time versus late night broadcasts or front page versus back page publication. International standards have also stipulated that the use of media for campaign purposes should be responsible in terms of content, such that no party makes statements that are false, slanderous or racist or which constitutes incitement to violence. Not should unrealistic or disingenuous promises be made nor false expectations be fostered by partisan use of the mass media.”⁸

As far as the first part of this caution is concerned, an important part of this electoral regime is an independent body charged with monitoring political broadcasts and allocation of time thereto as well as receiving and acting upon complaints regarding media access, fairness and responsibility.

The jurisprudence of the European Court of Human Rights (ECHR) has established that a complaint about denial of access to broadcasting time could, in principle, be made out in ‘exceptional circumstances’ if one political party was excluded while others were given broadcasting time, where there is clear evidence of bias, arbitrariness or unjustifiable discrimination.⁹

With reference to the duties and responsibilities of the media on the other hand, (constituting as it does the second part of the right to an informed choice that voters are guaranteed), while it is clear that restrictions and penalties for non compliance may be enforced upon the media in this regard, general prohibitions in this respect cannot be tolerated.

In accordance with these principles, particular sections of the election laws in Sri Lanka impacting on the media are analysed from a comparative perspective. We recommend that in so far as illegal practices and the media is concerned, Section 84 of the Parliamentary Elections Act No 1 of 1981 (as amended), Section 85 of the Provincial Councils Elections Act No 2 of 1988 (as amended) and Section 82(H)(i) of Amendment Act No 1 of 2002 to the Local Authorities Elections Ordinance should be further amended in order that liability is limited to false statements of facts only.

These sections state as follows;

- 1) Where there is published in any newspaper, any false statement concerning or relating to-
 - a) the utterances or activities at an election of any candidate or any recognised political party or independent group which is contesting such election; or
 - b) the conduct or management of such election by such candidate or any such recognised political party or independent group;

and such statement is capable of influencing the result of such election, then every person who at the time of such publication, was the proprietor, the manager, the editor, the publisher or other similar officer of that newspaper or was purporting to act in such capacity, shall each be guilty of an illegal practice unless such person proves that such publication was made without his consent or connivance and that he exercised all such diligence to prevent such publication as he ought to have exercised having regard to the nature of his function in such capacity and in all the circumstances.

- 2) In this section, the term ‘newspaper’ includes any journal, magazine, pamphlet or other publication.

Though at first reading, these sections seem rational, a closer analysis would warrant a different view. Their problematic nature is well seen in the analysis of a comparable provision in the same Acts themselves (vide for example, Section 81(c) of the Parliamentary Elections Act) which limits liability to false statement of fact only. These sections make any person making or publishing a false statement of fact in relation to the personal conduct or character of the candidate for the purpose of affecting the return of any candidate at the election, guilty of an corrupt practice unless he can show that he has reasonable grounds for believing and did believe the statement to be true.

This restricted liability is borne out by the comparative section in the law of the United Kingdom (Vide Section 106 of the Representation of Peoples Act of 1983) This section also provides for interim/perpetual injunction to be issued to prevent repetition of such statement.

There are several important differences between prohibiting not any false statement but a statement of fact only. The latter prohibition does not apply to statements of opinion. This distinction has assumed a singular character in the jurisprudence of the English courts. Thus, the assertion of CIA pay mastery has been ruled to be a statement of fact; the description ‘radical traitor’ has been held to be a statement of opinion.

We are of the opinion that the ambit of the aforesaid Section 84 of the Parliamentary Elections Act No 1 of 1981 (as amended), Section 83 of the Presidential Elections Act No 15 of 1981 (as amended), Section 85 of the Provincial Councils Elections Act No 2 of 1988 (as amended), Section 58 of the Referendum Act and Section 82(H)(i) of Amendment Act No 1 of 2002 to the Local Authorities Elections Ordinance has to be narrowed accordingly.

It is our view that the mere condition that the statement has to be false will not prevent the working of these sections in a manner that chills the right to freedom of expression, the safeguarding of which becomes peculiarly important during election times.

Failure to penalise false statements (particularly in newspapers), whether relating to personal conduct or ‘official’ or ‘political’ conduct, could be contended to facilitate the subversion of the voter’s right to an informed choice.

However, the sections under review do not make sufficient allowance for ‘false’ statements of pure opinion, given that statements of opinion cannot be ‘false’ in the sense of that term in as much as they are value judgements that cannot be measured by the barometer of truth or falsity.

This is illustrated in the English case cited above where the term ‘radical traitor’ was held to be a statement of opinion that was outside the ambit of the applicable section.

Likewise, the European Court of Human Rights stated in its seminal *Lingens* ruling that;

“A careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof...As regards value judgements, this requirement to prove their truth is impossible of fulfillment and it infringes freedom of opinion itself.”¹⁰

This view has been re-iterated in later jurisprudence of the Court and has now become settled law. The requirement on the part of domestic courts to prove the truth of statements of opinion has been held to infringe both the right to opinion as well as the right to expression.

In *Obserschlick v Austria*¹¹, the Court considered that the published complaint, stated facts followed by a value judgement and stated that the requirement that a journalist prove the truth of a value judgement is impossible and ‘itself an infringement on freedom of expression.’

Interestingly, here a majority opinion took the impugned statement by a journalist that the leader of the Austrian Liberal Party professed views that ‘corresponded to the philosophy and aims of the National Socialist Party (NSDAP)’, (professing such views was criminalised under Austria’s Prohibition Act), as a statement of opinion with one dissent that categorised the statement as an erroneous statement of fact.

In later cases¹², the Court has suggested that a person should not be held liable for publishing comment, specially regarding matters of serious public concern, that are based on personal or public opinion as for example, in one instance when in calling for a new and more effective police disciplinary system, a journalist called police officers ‘brutes in uniform.’¹³

In the light of the foregoing, we recommend that the defences to the sections of the election laws under review may be expanded to state that pure statements of opinion and/or value judgements will not be caught up within the ambit of these sections.

We also examined legislative attempts to amend these sections from a different perspective as was evidenced for example when in the year 2000, the then government in power proposed an amendment to the aforesaid provision in the Parliamentary Elections Act No 1 of 1981 (as amended), leaving intact the substantive effect of the section in the definition of what was prohibited but expanding its ambit to broadcasts on radio or television. Thus, along with newspapers, licensed radios and television stations were also attempted to be brought in under the section. This amendment, in addition, attempted to stipulate that conviction of such an illegal practice would result in not only a fine and civic disabilities (as provided for by the section) but also an imprisonment term not exceeding six months.

Though presented to Parliament by the Justice Minister on 07th June, 2000, it was withdrawn by the Government following several constitutional challenges being filed in the Supreme Court and amidst heated protests by the media.

It is our considered view that, given the inherent deficiencies in the substantive content of these sections, it would be necessary to amend the said section in accordance with modern electoral norms relating to freedom of expression, prior to expanding the impact of the section to television and radio broadcasts as well.

Thus, these sections should be cumulatively subject to amendment in order to prohibit false statements of fact (and not false statements in general) The due diligence defence should be retained. Once the sections are amended, the prohibition should apply, in the interests of guaranteeing fairness, to television and broadcast media as well as the print media.

J. Amendment of the 17th Amendment ¹⁴

Appointment of the Elections Commission

As recent experience in Sri Lanka has shown, Article 41B has been substantively deficient in its functioning insofar as the appointment of the Elections Commission is concerned due to a deadlock between the members of the Council and the President regarding the recommendation of one individual as the Chairman of the proposed Commission.

In consequence, despite over three years having passed since the recommendations were made, the Elections Commission has not been constituted and the current Elections Commissioner has been virtually compelled to continue to perform in his post despite his pleas of ill health. The possibility of similar conflicts occurring in respect of other appointments specified to be made under this constitutional article is not far fetched.

We are of the view therefore that this article be amended and re-formulated as follows;

Where the President does not approve the name(s) of any person(s) recommended by the Constitutional Council, the President may request the Council to reconsider its recommendations for reasons stated. If after reconsideration, the Council makes the same recommendation, the person recommended will be deemed to have been duly appointed if the President fails to make an appointment within one month.

Misuse of State Resources

The Supreme Court of Sri Lanka, had in numerous recent judgements, affirmed the importance of preventing the misuse of state property by a particular government in power in a manner that violates the right of voters to ensure that their public funds are used for the benefit of all and not those of a particular political persuasion only.

In *Don Ranjith Deshapriya v Divisional Secretary, Dodangoda*¹⁵ the Supreme Court declared in favour of the rights of a Samurdhi Niyamaka who came before court on the basis that he had a right not to be used for electioneering by a political party.

In this instance, the Court affirmed basic norms of conduct to be obeyed by all political parties during electioneering times. The question was simple. Can persons paid out of public funds, collected directly or indirectly from citizens of all shades of political opinion, be used to advance the interests of those of one political persuasion alone?

Samurdhi Niyamakas were persons performing what was described as “the major poverty alleviation programme of the government” However, it was expressly required that they should perform in a manner devoid of politics. They were officers engaged in rendering services to the public, for which they were paid out of public funds. As such, they could not be commandeered to work for one political party.

“...the use of resources of the State, including human resources, for the benefit of one political party or group, constitutes unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals” the Court ruled.

The Court said specifically;

“Not only was free competition among beliefs thereby stifled but the profession of a particular opinion was punished by the virtual deprivation of livelihood. Democracy without dissent is a delusion. Democracy can never prohibit lawful dissent. Indeed, a fundamental characteristic of true democracy is that it not only protects dissent and tolerates it, but genuinely cherishes dissent, recognising that it is only through a peaceful contest among competing opinions that the ordinary citizen will perceive the truth.”

This prohibition would definitely apply to public funds being paid directly to one political party and not to others. It would also make no difference whether such payments are made directly to individuals or indirectly by diverting equipment, facilities of the State to the benefit of one political party.

However, this considerable jurisprudence has only been reflected to a limited extent in the 17th Amendment where Article 104B(4) of the 17th Amendment empowers the Elections Commission to prohibit the use of any movable or immovable property belonging to the State or any public corporation by any candidate, political party or independent group as well as for the purpose of promoting or preventing the election of the above.

This article accordingly does not regard the misuse of state property in its widest sense as including individuals in employment of the State nor could it be said to incorporeal interests.

The following amendments are recommended to the 17th Amendment;

Amendment of Article 104 B(2)

The reference in this article to “...shall be the duty of all authorities of the state charged with the enforcement of such laws, to co-operate with the Commission to secure such enforcement” should be amended to vest the duty of co-operation with all authorities of the state and not limited to only those specifically charged with the enforcement of such laws.

Amendment of Article 104B(4)

We assert that the 17th Amendment, in so far as elections are concerned, should incorporate the general principles relating to the free and fair conduct of elections, viz;

- a) It is a violation of Articles 12(1) and 14(10(a) for state resources of every kind – property, personnel, media – to be used for the advantage of one political party (or to the detriment of another)
- b) It is the duty of the Commissioner to ensure a free, equal and secret ballot and the due exercise of the franchise and it is the duty of the State, its agencies and officers, to provide the resources needed by the Commissioner for those purposes.]

Accordingly, we propose that Article 104B (4) should articulate these general principles.

In so far as enforcement of these provisions are concerned, Article 104B(4) (b) only imposes a vague duty on every person or officer in whose custody or control such property lies, to comply with and give effect to such direction. This should be remedied and the Commissioner/Commission be given specific powers of enforcement.

The same reasoning would apply with regard to the powers of the Elections Commissioner vis a vis directions that he hands out to the print media, for example, regarding balanced reporting as there is no power of compulsion of these directives as opposed to his more specific powers in the case of misuse of state resources by the electronic media.

Article 104B(4) should be amended in this regard.

Amendment of Article 104B(5)

This article should incorporate the general principle that there is a duty of fairness vested in the media in respect of its reporting during times of elections irrespective of specific directions issued in this regard by the Commission. Otherwise, the argument may well be that the duty comes into effect only pursuant to the issuing of such directions which should not be the case.

Special duties are conferred upon the state media by virtue of the fact that these are institutions run with state funds and are therefore under a particular duty to use those funds fairly for the benefit of all political parties and not merely that of the government in power. Thus, special procedures detailed under the 17th Amendment and particular duties imposed on these state media institutions under these provisions of the Sri Lankan election laws are eminently justifiable.

This same logic cannot be applied in its imperative form to private broadcasting media. Therefore, these duties should not be taken wholesale as applying to the private radio and television stations now proliferating throughout this country. However, the private broadcast and telecast media should be put under a duty of fairness in allocating broadcasting facilities during election time.

In consequence of this acknowledgement, we recommend that the 17th Amendment be further amended in order to include a new sub section which empowers the Elections Commission to determine fair allocation of broadcasting time for candidates and political parties in its discretion as far as the private broadcast and telecast media is concerned.

The said new article should further, give the Commission power move the appropriate court to censure and/or impose a fine on such station and/or apply for a restraining order on such station restraining the continuance of such contravention in the event of noncompliance with its directions.¹⁶

Position of the Commissioner vis a vis the Commission.

Another defect in the 17th Amendment, which may hamper the effective working of its provisions with regard to the Elections Commission once it becomes fully operative is the ambiguity that it perpetuates between the Commission itself (comprising of five members) and the Commissioner General of Elections who shall, subject to the direction and control of the Commission, implement the decisions of the Commission and exercise supervision over the officers of the Commission. (Vide Article 104E(6))

The Commissioner General is appointed by the Commission, subject to the approval of the Constitutional Council. His or her removal is however problematic as Article 104E(7) provides in one clause, that it is subject to a prolonged parliamentary process while providing in another

clause that he or she could be removed by the Commissioners on account of ill health or physical or mental infirmity.

It is not difficult to see the nucleus of a potential conflict between the Commissioner General and the Commission in these provisions, at a time when both are fully operative in a manner that will be akin to tussles that we have seen between the Bribery and Corruption Commission and its Director General.¹⁷

End Notes

¹*Karunatileka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* [1999] Sri.L.R. 157]

² See *Edrisinba vs Dissanayake*, SC No 265/99, SCM, 23.3.99 where this document was produced before court in public interest litigation.

³ *The Egodeawela Cae, reported as Mediwake v Dissanayake & Others* [2001], (1) Sri LR 177. The Court ordered Rs 50,000 as costs in the absence of compensation prayed for by the petitioners, payable by the State, on the reasoning that the Commissioner of Elections had made an honest – though inadequate effort to ensure a genuine election but was not given the necessary support and resources.

⁴ *Centre for Policy Alternatives Limited v Dissanayake and Others* [2003](1) SLR 277)

⁵ *Masabir v Returning Office, Kegalle*, [2005](2) ALR, 37)

⁶ Egodawela Case, supra, n 3

⁷ *DM Jayaratne v Vaas Gunewardene & Others* [2004](1) ALR, 37). To the same effect is the decision of the Court of Appeal in CA/336/02, CA Minutes of 28.02.2002 (Unreported). The need for legislative amendment is particularly important in view of the reluctance manifested by the later benches of the Court of Appeal to follow this precedent. See *Kapukotuma v Dissanayake & Others*, CA/515/2002 – CA Minutes 10/09/2002

^{7a} *Vigneswaran & Stephen V Dayananda Dissanayake & Others*, [2002] (3), SLR, 59 (CA) re the Parliamentary Elections Act, No 1 of 1981.

^{7b} *Ediriweera v Kapukotuma* [2003] (1) SLR 228.

^{7c} CA/364/2006 & CA/346/2006 – CA Minutes of 24.03.2006

⁸ *Human Rights and Elections*, Centre for Human Rights, the United Nations, Geneva, 1994, page 13

⁹ *Haider v Austria* (app. No 25060/94) (1995) 83 DR 66, at 74

¹⁰ *Lingens v Austria, Judgement of 8 July, 1986, Series A no 103*

¹¹ *Obserschlick v Austria, Judgement of 23 May 1991, Series A, no 133*

¹² *particularly, Schwabe v Austria, Judgement of 28 August, 1992, Series A. no 242-B*

¹³ *Thorgeirson v Iceland, Judgement of 25 June 1992, Series A. no 239*

¹⁴ Our citation of the 17th Amendment in this respect should, in no way, indicate approval and/or acceptance of its substance in full. As explained in the succeeding analysis, the 17th Amendment is manifestly defective in certain of its provisions relating to elections despite the fact that it did bring about an improvement to the status quo as far as the fair conducting of elections is concerned in Sri Lanka. In addition, as is very manifest now, the non-establishing of the Elections Commission, the continuing non constitution of the Constitution Council and the recent direct presidential appointments to commissions established under the 17th Amendment show a lack of political will in implementing its basic principles.

¹⁵ SC Appl No 118/97, {1999} 2 SLR, 412)

¹⁶ In a different context, another alternative would be to prescribe conditions as regards fair allocation of broadcasting and telecasting time during elections that are applicable to all private stations and make observance of these conditions a factor that could be looked at by the body determining the issuance of licences at the relevant time. This would however, presuppose, the existence of an independent body in charge of this task which is notbly lacking currently.

¹⁷ The situation is very different in India, for example, where there is a Chief Election Commissioner in overall control of a multi member Commission. Even with regard to this far more simplified set up, it is relevant however that several disputes between the Chief Elections Commissioner and his colleagues have been taken to the courts in that country.