IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

"LOCAL AUTHORITIES ELECTIONS (SPECIAL PROVISIONS) BILL"

S.C.S.D. No. 01/2025	Petitioner	M. Nizam Kariapper, Secretary, Sri Lanka Muslim Congress, "Dharussalam", No.53, Vauxhall Lane, Colombo 02.
	Counsel	Rauff Hakeem with Ahamed Ilham Nizam Kariapper and Chathurika Perera
S.C.S.D. No. 02/2025	Petitioner	Ibrahim Nisthar Mohommed Miflar, No. 237/6, Meeraniya Street, Colombo 12.
	Counsel	Farman Cassim, PC with Vinura Kularatne
S.C.S.D. No. 03/2025	Petitioner	1. Upul Fernando Gamage, 109/2, Kawdana Road, Dehiwala. 2. Liyanage Shirantha Jayalath Perera, 635, Halgahadeniya, Angoda.
	Counsel	Boopathy Kahathuduwa

S.C.S.D. No. 04/2025	Petitioner	Kaushali Piumi Senerath Samaratunga Jayaweera, No. 34/7, Buthgamuwa Road, Kalapaluwawa, Rajagiriya.
	Counsel	Eraj de Silva, PC with Daminda Wijerathna, Janagan Sundaramoorthi and Zul Luthufi
		Vs.
		Hon. Attorney General, Attorney General's Department, Colombo 12.
		Respondent
Counsel for the State:		Nirmalan Wigneswaran, Deputy Solicitor General with Ms. Sureka Ahmed, Senior State Counsel and Ms. Prabashini Jayasekara, State Counsel

Before: **Yasantha Kodagoda, PC, J.**
Janak De Silva, J.
Arjuna Obeyesekere, J.

The Court assembled for hearing at 10.00 a.m. on 24th and 27th January 2025. In view of certain issues that arose upon a consideration of the written submissions filed by the parties, Court reconvened on 31st January 2025 to obtain certain clarifications.

A Bill in its short title referred to as the *"Local Authorities Elections (Special Provisions) Bill"* [Bill] was published in the Government Gazette of 1st January 2025. It was placed on the Order Paper of Parliament on 9th January 2025.

Four petitions bearing Nos. S.C.S.D. 01/2025, S.C.S.D. 02/2025, S.C.S.D. 03/2025 and S.C.S.D. 04/2025 were filed, challenging the constitutionality of the Bill.

Upon receipt of these petitions, Court issued notice on the Hon. Attorney General as required by Article 134(1) of the 1978 Constitution (Constitution). The Petitioners and the Hon. Attorney-General were heard extensively.

Jurisdiction of Court

This Court is exercising the jurisdiction in terms of Article 120 of the Constitution which reads as follows:

> *"The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution..."*

The scope of our jurisdiction is dealt in Article 123(1) of the Constitution which requires the determination of the Court to be accompanied by the reasons therefor and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution.

When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2) which reads as follows:

> *"(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –*
>
> *(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or*
>
> *(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or*
>
> *(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,*
>
> *and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent."*

Therefore, the jurisdiction of the Court is limited to determining whether the Bill or any provision thereof is inconsistent with the Constitution. Court does not have jurisdiction to determine the constitutionality of any proposed Committee Stage Amendments without determining whether the Bill or any provision thereof is inconsistent with the Constitution. Where Court so determines and in specifying the nature of the amendments which would make the Bill or such provision cease to be inconsistent, it is possible for Court to consider any changes proposed by the Hon. Attorney General or any party to the proceedings.

Further, notwithstanding proposals which the Attorney General submits to Court as being proposed amendments to be introduced during the Committee Stage in Parliament, this Court must determine the constitutionality of the respective clauses of the Bill which has been gazetted.

Particularly, in view of certain submissions that were made by learned counsel for some of the Petitioners and the learned DSG, it is necessary to repeat what has been stated in several previous determinations, that this Court does not have jurisdiction to comment upon the suitability or desirability of underlying policy based upon which the Bill has been developed. The jurisdiction of this Court is restricted to the consideration of the constitutional implications of the Bill as a whole or clauses thereof.

Nevertheless, as correctly pointed out by this Court in **Special Goods and Service Tax Bill** [S.C.S.D. Nos. 01-09/2022, page 10], when a particular provision of a bill which comes under scrutiny by this Court is found to contain policy which when converted into legislation would become inconsistent with the Constitution, it is then the bounden duty of this Court to point out such inconsistency.

Moreover, Articles 16 and 80(3) do not enable Court to call into question any existing provisions of the law. Therefore, it is not within our remit to redress possible constitutional inconsistencies that may exist in existing law which is sought to be addressed by the Bill though urged by the Petitioner in S.C.S.D. No. 01/2025 but rightly conceded to be beyond the remit of Court by the learned Counsel at the hearing.

Outline of the Bill

Clause 2 of the Bill seeks to

(a) deem the nomination papers already received in respect of the Local Authorities elections for the local authorities set out in the Schedule to the Bill but were not

held as scheduled on 9th March 2023 to be of no force and effect as if such nomination papers had never been submitted;

(b) provide for the return of the deposits obtained in respect of such nomination.

Clause 3 of the Bill provides for commencing of steps for the holding of elections to the Local Authorities set out in the Schedule to the Bill.

The Petitioner in S.C.S.D. No. 01/2025 asserts that the Bill violates the fundamental rights of the candidates who have already tendered nominations and infringes upon their sovereign rights recognized under Article 3 of the Constitution. Therefore, the Bill cannot be passed without the special majority required under Article 83 of the Constitution and approved by the People at a Referendum.

The Petitioner in S.C.S.D. No. 02/2025 is a candidate who has duly handed over nominations for the Local Authorities Elections which was due to be held in 2023. He asserts that the Bill violates his fundamental rights as well as the other candidates guaranteed under Article 12 of the Constitution and infringes upon their sovereignty under and in terms of Articles 3 and 4 of the Constitution. Therefore, the Bill cannot be passed without the special majority and approval by the People at a Referendum.

The Petitioners in S.C.S.D. No. 03/2025 are also candidates who have duly tendered nominations for the Local Authority elections 2023. They assert that as their nominations have been accepted, the State has given them a legitimate expectation that the elections will be based on the nominations submitted. They state that they have no guarantee that they will receive nominations again from a recognized political party if the nominations are cancelled since political parties are bound to allocate 25% of the nominations for youths in view of Local Authorities Elections (Amendment) Act, No. 30 of 2023 (Amending Act). Therefore, they contend that the Bill violates Article 12(1) of the Constitution.

They further submit that in SC FR 69/2023, SC FR 79/2023, SC FR 90/2023 and SC FR 139/2023 Court has made a direction to the Election Commission "to schedule the Local Government Elections 2023 at the earliest possible with due regard to their duty to hold other elections as required by law". These Petitioners contend that the Bill seeks to override the judgment of Court in violation of Articles 1, 2, 3, 4, 12(1), 17, 118 and 126 of the Constitution and submit that the Bill requires the approval of the People at a Referendum in addition to the special majority in terms of Article 84 of the Constitution.

The Petitioner in S.C.S.D. No. 04/2025 claims that the Bill is being passed for *mala fide* reasons and/or collateral purposes. It is contended that the Bill as presently constituted, in particular Clauses 2, 3 and 4 are inconsistent with Articles 2, 3, 4, 12, 14(1), 75, 76, 88, 95, 96, 97, 101, 148 and/or 154G of the Constitution. It is submitted that the Bill shall become law only if passed by the special majority in terms of Article 84(2) and approved by the People at a Referendum.

Previous Legislation

Learned DSG brought to our attention by way of background, numerous previous legislations annulling nomination papers when Local Authorities elections have been postponed. They are Local Authorities (Special Provisions) Act No. 24 of 1990, Local Authorities (Special Provisions) Act, No. 2 of 2006, Local Authorities (Special Provisions) Act No. 30 of 2007, Local Authorities (Special Provisions) Act No. 55 of 2007 and Local Authorities (Special Provisions) Act No. 28 of 2017.

Nevertheless, in **Special Goods and Service Tax Bill** [S.C.S.D. Nos. 01-09/2022, page 20], it was held that Court will consider the constitutionality of the impugned clauses of the SGST Bill irrespective of the possible existence of similar or identical provisions of existing laws, while of course noting and taking cognizance of the existence of such provisions in laws previously enacted by Parliament.

Provincial Council List

The Petitioner in S.C.S.D. No. 04/2025 contended in his petition that the subject of the Bill falls within the Provincial Council List. This is misconceived in law. The subject of Elections to Local Authorities is a matter specifically set out in the Reserved List. In **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2010-2012), Volume X, page 17 at 24] it was clearly held that Local Authority Elections are within the Reserved List.

Historical Context

It is important to examine the Bill in its historical context to better appreciate its background and in particular to place the contentions of the Petitioner in S.C.S.D. No. 03/2025 in context.

It is succinctly set out in the judgment of Court in ***Ranjith Madduma Bandara v. Mahinda Siriwardana and Others*** [SCFR Application No. 69/2023, S.C.M. 22.08.2024]. The salient facts are set forth below.

On or around 10.02.2018, the Local Authorities Elections were held across the country (except in Elpitiya), and members were declared as elected to those Local Authorities.

The terms of these Local Authorities expired on or about 08.03.2022.

On or around 09.01.2022, the then Minister of Public Administration, Provincial Councils and Local Government extended the terms of Local Authorities that were due to expire in terms of relevant provisions in the Municipal Council Ordinance, Urban Council Ordinance and Pradeshiya Sabha Act, until 19.03.2023.

Thus, the terms of the Local Authorities (except Elpitiya) were to expire on 19.03.2023, with no further period of extension available in terms of the law.

In terms of Section 25 of the Local Authorities Elections Ordinance as amended (Ordinance), elections shall be held within a period of six months preceding the date on which the term of office of the members to be elected is due to commence.

On or around 04.01.2023, the Election Commission issued notices calling for nominations for Local Authorities Elections 2023 for 340 Local Government Authorities and informing that nominations would be accepted between 18.01.2023 to 21.01.2023.

During the period for making deposits by recognized political parties and independent groups, the Secretary to the Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government, issued a circular dated 10.01.2023 addressed to all the District Secretaries (who had been appointed as Returning Officers) stating that the Cabinet of Ministers directed him to notify the District Secretaries not to accept deposits from the candidates for the Local Authorities Elections of 2023 until further notice.

On the same day (10.01.2023) the Election Commission issued a circular dated 10.01.2023 bearing No. LAE/2023/02, addressed to all the Returning Officers reiterating that it is the duty of the Returning Officers to accept the deposits and nominations.

The Election Commission issued a press release, stating that the Election Commission summoned the said Secretary before the Election Commission on 10.01.2023 and questioned him regarding the issuance of the said circular and thereupon the said Secretary to the Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government informed that he had withdrawn the said circular after about one hour from issuing the same and apologized to the Election Commission for same.

Thereafter, the Election Commission published a notice under Section 27A of the Ordinance, in the Government Gazette (Extraordinary) No. 2315/05 dated 16.01.2023 notifying the political parties that are considered as recognized political parties for the upcoming Local Authorities elections.

The Returning Officers by notices published in the Government Gazette under Section 38(1)(e) of the Ordinance, notified that the election will be held on 09.03.2023.

Nevertheless, the election was not held as scheduled. The reasons therefore are more fully set out in ***Ranjith Madduma Bandara v. Mahinda Siriwardana and Others*** (supra) where Court concluded *inter alia* that:

(a) The Executive Branch of the State represented by the Hon. AG is liable for infringement of the fundamental rights guaranteed under Articles 12(1) and 14(1)(a) of the Constitution for not holding Local Government Elections 2023.

(b) The impugned acts and omissions of the Chairman and the members of the Election Commission who held office during the period of time relevant to these applications had resulted in the infringement of the fundamental right guaranteed under Article 14(1)(a) of the Constitution for lack of proper planning and managing the process and for not using its powers to issue appropriate directions.

(c) The impugned acts and omissions of H.E. the President who is also the Minister of Finance that were impugned by making these applications against the Hon. AG had resulted in the infringement of fundamental rights guaranteed under Articles 12(1) and 14(1)(a) of the Constitution due to arbitrary and unlawful conduct explained in this judgment which resulted in the non-holding of the Local Government Elections 2023.

Purpose and Object of Bill

The learned DSG assisted Court by providing the respective Cabinet Memorandum which was the precursor to the Bill. It provides three justifications for the Bill.

Firstly, it is necessary to provide for those who have registered in the register of electors in the year 2024 as new voters, who would otherwise be deprived of their right to vote at

the new date of polls fixed and their and their right to submit nomination papers for the elections to be held.

Secondly, since the Amending Act has come into operation on November 17, 2023, it has become necessary to provide for the nominations by the youth candidates in accordance with the provisions relating to the nomination of youth candidates when holding fresh election in respect of the Local Authorities set out in the Schedule to the Bill.

Thirdly, the Ordinance does not provide for the recalling of nominations.

The Cabinet was informed that there are previous instances where this process was followed.

These three justifications are mirrored in the Preamble to the Bill.

The learned DSG submitted that there are additional reasons based on common sense and matters of general knowledge for the enactment of the Bill which Court must consider in considering the constitutionality of the Bill. He referred to SCFR/328/2024 pending before Court wherein the petitioner has raised the following concerns:

(a) Some recognized political parties and/or independent groups have ceased to exist.
(b) Several candidates who have submitted nominations in 2023 have changed their political affiliations/parties and/or independent groups and/or joined other political parties and/or groups.
(c) Some candidates have exited politics and/or have changed their desire being an elector during the relevant period (*sic*).
(d) Several candidates who submitted their nomination in the year 2023 have now been elected as Members of Parliament and are thus disqualified to be elected in terms of Section 9(1)(dd) of the Ordinance.
(e) The Ordinance only provides for the eventuality of a death of a candidate and not for other contingencies.

(f) There have been significant changes in the political landscape in the past two years (2022-2024).

In the event we adopt this approach, it will in principle render nugatory an important constitutional safeguard found in Article 78(3) of the Constitution which requires any amendment proposed to a bill in Parliament not to deviate from the *merits* and *principles* of such bill. This is an amendment brought by Section 13(2) of the Twentieth Amendment to the Constitution.

The merits and principles of any bill must be distilled from the relevant Cabinet Memorandum submitted for the consideration of the Cabinet of Ministers, which is tasked with formulation of the policy underlying the bill, and the provisions of the bill itself. On the other hand, the approach proposed by the learned DSG renders it possible for Parliament to consider other matters at the Committee Stage to justify a Committee Stage amendment. This will dilute the constitutional jurisdiction vested in Court and thereby impair an important constitutional safeguard aimed at advancing constitutionalism.

In the SVASTI to the Constitution, it is declared that Parliament enacts the Constitution as the Supreme Law of the Republic. Hence, it is the Constitution that is supreme in Sri Lanka.

Accordingly, any bill as well as any Committee Stage Amendment proposed to the bill must be consistent with the Constitution. The constitutional responsibility of ensuring the constitutionality of a bill has been vested with the Supreme Court.

A judicial confirmation of this founding principle is found in ***Premachandra v. Major Montague Jayawickrema*** [(1994) 2 Sri. L. R. 90 at 111], where it was held that "[i]n Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary".

In terms of Article 120 of the Constitution the Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.

This jurisdiction can be invoked by any citizen pursuant to Article 121 (1) of the Constitution within fourteen days of the bill being placed on the Order Paper of the Parliament. Article 121 (2) prevents Parliament from having proceedings in relation to such bill until the determination of the Supreme Court has been made, or the expiration of a period of three weeks from the date of such petition, whichever occurs first.

The jurisdiction created by Article 120 and the right given to any citizen to invoke such jurisdiction pursuant to Article 121 (1) is given efficacy by Article 78 (1) which requires every bill to be published in the Gazette at least seven days before it is placed on the Order Paper of Parliament.

These constitutional provisions are a necessary corollary of the concept of Sovereignty embodied in the Constitution. Article 3 states that in the Republic of Sri Lanka, sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise. Accordingly, the powers of government are expounded as the legislative power of the People, the executive power of the People and the judicial power of the People.

The People having declared the Constitution to be the supreme law of Sri Lanka, delegated their legislative power to Parliament to enact laws in accordance with the Constitution. Having done so, the People have by Article 120 vested the sole and exclusive jurisdiction to determine any question as to whether any bill or any provision thereof is inconsistent with the Constitution on this Court. Article 121 (1) gives the right to any citizen to invoke this jurisdiction of the Supreme Court within fourteen days of the bill being placed on the Order Paper of Parliament.

Hence, Articles 120 and 121 (1) must be viewed as a check by the People on the exercise of the legislative power of the People by Parliament.

Any impairment of the right of a citizen to invoke the sole and exclusive constitutional jurisdiction of the Supreme Court to check whether the Parliament is exercising the legislative power of the People in conformity with the Constitution will impinge on Articles 3 and 4 of the Constitution.

We are mindful that Article 74 (1) of the Constitution enables Parliament to adopt Standing Orders. It reads as follows:

> *"(1) Subject to the provisions of the Constitution, Parliament may by resolution or Standing Order provide for -*
>
> *(i) the election and retirement of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, and*
>
> *(ii) the regulation of its business, the preservation of order at its sittings and any other matter for which provision is required or authorized to be so made by the Constitution."* (emphasis added)

Accordingly, Parliament has the power to provide for the regulation of its business by resolution or Standing Orders. Nevertheless, the resolution or Standing Orders are subject to the provisions of the Constitution. In other words, such resolution or Standing Orders cannot supersede or be inconsistent with any provisions of the Constitution.

We observe that Standing Order 61 [Standing Orders of the Parliament of the Democratic Socialist Republic of Sri Lanka (As amended up to 23.11.2022), published by the Parliament Secretariat)] reads as follows:

> *"Any amendment may be made to a Clause, or Clauses by deleting, substituting, inserting and adding provisions provided, the same be relevant to the subject matter of the Bill, and be otherwise in conformity with the Standing Orders."*

Accordingly, the power of the Parliament to make a Committee Stage Amendment is recognised. Nevertheless, such power is not an unrestricted or untrammeled power. In modern democracies, there is no such thing as unlimited or unfettered power.

There are at least two restrictions discernible from Standing Order 61 on the power of Parliament to make a Committee Stage Amendment.

Firstly, any such amendment must be relevant to the subject matter of the Bill.

Secondly, and more importantly, any such Committee Stage Amendment must be in conformity with the Standing Orders. Given that Standing Orders themselves must be consistent with the Constitution, a necessary corollary is that any Committee Stage Amendment sought to be done in terms of the Standing Orders must also be consistent with the Constitution.

This is the context in which Article 78(3) of the Constitution must be viewed and interpreted. It has now circumscribed the powers of Parliament on the scope of any Committee Stage amendment.

In the **Twentieth Amendment to the Constitution Bill Determination [Decisions of the Supreme Court on Parliamentary Bills** (2019-2020), Vol. XV, page 87], Court observed that (at page 126):

> *"We observe that this new provision is progressive and enhances the People's legislative power by placing a check on Parliament that exercises legislative power in trust for the People."*

This check on the legislative power of the People must be interpreted in a manner that protects and retains the constitutional right of any citizen to invoke the sole and exclusive jurisdiction of the Supreme Court to determine any question as to whether any bill or any provision thereof is inconsistent with the Constitution. Any contrary interpretation would violate Articles 3 and 4 of the Constitution.

It is in this context that considerations of reasons other than what is set out in the relevant Cabinet Memorandum and/or the Preamble to any bill or reflected in its provisions as justification for a bill becomes impermissible. A contrary approach will make it possible for Committee Stage amendments to be made to any bill based on justifications that were not brought to the attention of the Supreme Court through a Cabinet Memorandum or Preamble to the bill. Where any bill was not challenged before the Supreme Court, a Committee Stage amendment could well be moved by referring to matters not brought to the attention of the Cabinet of Ministers nor set out in the Preamble nor reflected in the provisions of the bill which will render nugatory the amendment made to Article 78(3) of the Constitution.

For the avoidance of any doubt, we recognize the constitutional right of Parliament to move Committee Stage amendments . However, Article 78(3) of the Constitution now mandates that such amendment must not deviate from the *merits* and *principles* of such bill. It is our view that the *merits* and *principles* of such bill can be extracted only from the relevant Cabinet Memorandum, Preamble and provisions of such bill.

Notwithstanding this conclusion, the relevance of the reasons based on common sense and matters of general knowledge will be discussed when examining the nature of the right to vote and the right to contest.

The characterization of these two rights, namely right to vote and right to contest, is at the forefront of the competing positions of the parties on the Bill and its alleged inconsistency with the Constitution. It is submitted that they fall within franchise in Article 3 or the fundamental right of freedom of speech and expression in Article 14(1)(a) of the Constitution.

Characterization of Right to Vote/Right to Contest

A comparative analysis shows that the right to vote/right to contest is characterized either as a constitutional right, human right, fundamental right or a statutory right.

USA

The US Constitution does not explicitly convey the right to vote to anyone. However, the US Supreme Court has through a series of pronouncements characterized the right to vote as a fundamental right. The Supreme Court first alluded to the right to vote as fundamental as far back as 1886 in ***Yick Wo v. Hopkins*** [118 U.S. 356, 370 (1886)] where it held that the right to vote, although not "strictly" a "natural right," "is [still] regarded as a fundamental political right, preservative of all rights. In ***Reynolds v. Sims*** [377 U.S. 533, 561–62 (1964)] Court held that undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights and any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Nevertheless, there is some debate whether the Court has consistently adopted this characterization. The Supreme Court may have contributed to this confusion by creating two lines of election law cases. In one breath, the Court calls the right to vote

"fundamental" and applies strict scrutiny review [See ***Harper v. Virginia. Bd. of Elections,*** 383 U.S. 663 (1966)] while in another, the Court fails to give the right the status of a fundamental right by applying a more deferential standard [See ***Crawford v. Marion County Election Bd.,*** 553 U.S. 181 (2008)].

This inconsistency suggests that while the right to vote is often treated as fundamental, the level of judicial protection it receives depends on the context and the specific burdens imposed by a law.

India

In ***N. P. Ponnuswami v. Returning Officer, Namakkal Constituency*** [AIR 1952 SC 64; 1952 SCR 218] the Supreme Court held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. This question was revisited in ***Jamuna Prasad Mukhariya v. Lachhi Ram*** [AIR 1954 SC 686; (1955) 1 SCR 608] where it was confirmed that the right to stand as a candidate and contest an election is not a common law right but is a special right created by statute and can only be exercised on the conditions laid down by the statute. It was further held that the fundamental rights chapter has no bearing on a right created by statute.

The right to vote is fundamental to democracy and it is somewhat anomalous to characterize it only as a statutory right. Nevertheless, in ***Jyoti Basu v. Debi Ghosal*** [AIR 1982 SC 983; (1982) 1 SCC 691] the Supreme Court affirmed the approach it took earlier and held that the right to elect as well as the right to be elected are not fundamental rights but are statutory rights and subject to statutory limitations. This view was followed in ***P. Nalla Thampy v. B.L. Shankar*** [AIR 1984 SC 135; 1984 SCR (1) 687].

Moreover, in ***Anukul Chandra Pradhan v. Union of India*** [AIR 1997 SC 2814; (1997) 6 SCC 1] it was held that the right to vote is subject to the limitation imposed by the statute which can be exercised only in the manner provided by the statute and that the challenge to any provision in the statute prescribing the nature of the right to elect cannot be made with reference to a fundamental right in the Constitution.

However, this approach on the characterization of the right to vote has now changed. In ***People`s Union For Civil Liberties (PUCL) & Another Vs. Union of India & Another*** [(2003) 2 S.C.R. 1136; 2003 INSC 176] Venkatarama Reddi, J. held that (pages 1201-1202):

> *"The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution, and it is given effect to in specific form by the Representation of the People Act. The Constituent Assembly debates reveal that the idea to treat the voting right as a fundamental right was dropped; nevertheless, it was decided to provide for it elsewhere in the Constitution. This move found its expression in Article 326 which enjoins that "the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than 21 years of age, and is not otherwise disqualified under the Constitution or law on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice-shall be entitled to be registered as voter at such election."*

It was further held that (page 1203):

> *"Though* ***the initial right cannot be placed on the pedestal of a fundamental right,*** *but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of*

expression of the voter. That is where Article 19(1)(a) is attracted. ***Freedom of voting as distinct from right to vote is thus a species of freedom of expression*** *and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. None of the decisions of this Court wherein the proposition that the right to vote is a pure and simple statutory right was declared and reiterated, considered the question whether the citizen's freedom of expression is or is not involved when a citizen entitled to vote casts his vote in favour of one or the other candidate. The issues that arose in Ponnuswami's case and various cases cited by the learned Solicitor-General fall broadly within the realm of procedural or remedial aspects of challenging the election or the nomination of a candidate. None of these decisions, in my view, go counter to the proposition accepted by us that the fundamental right of freedom of expression sets in when a voter actually casts his vote."* (emphasis added)

The position now in India is that the initial right to vote at the elections to the House of people or Legislative Assembly is only a constitutional right but not a fundamental right. However, the freedom of voting as distinct from right to vote is a facet of the fundamental right of freedom of expression enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.

Nevertheless, the characterization of the right to be elected (right to contest) continues to be the position elucidated in ***Ponnusami*** (supra).

In ***Javed and Others v. State of Haryana and Others*** [AIR 2003 SC 3057: (2003) 8 SCC 369], it was held that:

*"**Right to contest an election is neither a fundamental right nor a common law right**. It is a right conferred by a statute. At the most, in view of Part IX having been*

added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right — a right originating in the Constitution and given shape by a statute. But even so, ***it cannot be equated with a fundamental right****. There is nothing wrong in the same statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office."* (emphasis added)

In ***Rajbala and Others v. State of Haryana & Others*** [(2016)1 SCC 463; AIR 2016 SC 33] it was held that both rights, the right to vote and the right to contest an election are constitutional rights of the citizen. The Court stated that the possession of a minimal education degree by a person contesting a local body election has a reasonable nexus with the object sought to be achieved as education is necessary and plays an important role in the development of the country.

This position was recently affirmed in ***Vishwanath Pratap Singh v. Election Commission of India*** in Petition(s) for Special Leave to Appeal (C) No(s).13013/2022.

The present position in India is that although the right to contest an election is a constitutional right, it is not a fundamental right.

Sri Lanka

Jurisprudence shows that Court has appreciated the importance of the right to vote. In ***Bandaranaike v. De Alwis*** [(1982) 2 Sri.L.R. 664 at 673] Samarakoon, C.J. called civic rights "the most precious of them all". In ***B. Sirisena Cooray v. Tissa Dias Bandaranayake and two others*** [(1999) 1 Sri.L.R. 1 at 30] it was held that this right should not be lightly interfered with.

Initially there appears to have been some reluctance on the part of our courts to recognize the right to vote as a constitutional right. In **Re Local Authorities Elections (Special Provisions) Bill** [(1977) Vol. 5, Decisions of the Constitutional Court of Sri Lanka 27 at 31-32] the Constitutional Court was of the view that there is no constitutional right for a person to have his name on a nomination paper or to be elected to a local authority or to continue as such. These rights were held to be rights given by statute and any person can qualify to be entitled to those rights only if he observes the conditions laid down by statute.

An examination of the judicial pronouncements under the 1978 Constitution shows that Court was much more progressive and has examined the right to vote at Local Authorities elections from three perspectives, Articles 3, 4(e) and 14(1)(a).

Article 4(e)

The first line of reasoning examines whether the right to vote at a Local Authorities election is part of the exercise of franchise in terms of Article 4(e) which states that the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.

In **Pradeshiya Sabhas (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, page 69 at 71] it was held that the wider meaning of franchise which would include voting at election of local bodies or Provincial Councils has not been adopted in the Constitution. This approach was followed in ***Atukorale v. Attorney-General*** [(1996) 1 Sri.L.R. 238] and it was held that the right to vote at an election of any local authority election is not an exercise of the franchise as envisaged in Article 4(e). This position was reiterated in **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2010-2012) Vol. X, 17 at 28] and **Local**

Authorities Elections (Amendment) Bill [Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, 16 at 17].

We note that Article 4(e) of the Constitution only refers to the exercise of franchise at the elections for the President, Parliament and at every Referendum. One cannot read into this the exercise of franchise at elections for Local Authorities. To do so would amount to expanding the scope of Article 4(e) contrary to its express provisions.

Article 14(1)(a)

Adopting a different line of reasoning, Court has held that right to vote forms part of the freedom of speech and expression guaranteed by Article 14(1)(a) of the Constitution [See ***Karunathilake and Another v. Dayananda Dissanayake, Commissioner of Elections and others*** [(1999) 1 Sri L.R. 157 at 174], ***Mediwake and Others v. Dayananda Dissanayake, Commissioner of Elections and Others*** [(2001) 1 Sri.L.R. 177 at 209], ***Thavaneethan v. Dayananda Dissanayake, Commissioner of Elections and Others*** [(2003) 1 Sri.L.R. 74 at 90]. This is in conformity with the approach adopted by the Indian Supreme Court.

In ***Hajiar Muhammad and Others v. Election Commission of Sri Lanka and Others*** [S.C.F.R. 35/2016. S.C.M. 15.12.2017] several parties challenged the failure to hold the Local Authorities elections on time after the term of office of the previous elected members expired. The Court stated that the main allegation of the petition is the failure to hold elections which affects the franchise of the people. It was held that franchise is a fundamental right recognized under Article 10 and 14(1) of the Constitution and the failure to hold elections on the due date or postponing is a violation of the fundamental rights of the people. However, in ***Ranjith Madduma Bandara v. Mahinda Siriwardana and Others*** (supra), Court took a different view on the applicability of Article 10.

We agree that the *freedom to vote*, rather than the *right to vote*, forms part of the fundamental right of freedom of speech and expression guaranteed in terms of Article 14(1)(a) of the Constitution.

Although the freedom to vote has found favour as forming part of the freedom of speech and expression of a citizen in terms of Article 14(1)(a), it is difficult in theory to extend that to a right to contest. Freedom of speech and expression seeks to protect the modes of communication available to convey one's convictions, opinions and thoughts freely. Communication by word of mouth, printing, writing, pictures, banners, posters and signs are some of the modes of communication forming part of the fundamental right sought to be protected. No doubt, it is arguable that a candidate may have more opportunities to exercise his freedom of speech and expression. Yet that cannot elevate the right to contest to a fundamental right of freedom of speech and expression.

Article 3

The third line of reasoning examines whether the right to vote is part of the franchise in Article 3.

In **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 389] it was held that the franchise in relation to Local Authorities comes within the purview of Article 3. Court was of the view that Local Authorities have acquired constitutional recognition and the Constitution has to be looked at as an organic whole and its terms cannot be fixed to meanings they may have had at the time of enactment.

The impugned bill sought to *inter alia* deem nomination papers submitted to certain Municipal Councils, Urban Councils and Pradeshiya Sabha in the Northern and Eastern Provinces to be of no force and effect and if such nomination papers had never been

submitted, revoke the notice published in terms of Section 38(3) of the Ordinance and to provide for steps to be commenced for the holding of elections.

It was held that the provisions of the bill as a whole are inconsistent with Article 12(1) of the Constitution. This was on the basis that the candidates who have submitted valid nomination papers have a legitimate expectation of facing the poll, without the intervention of any further candidates and of being elected in terms of the relevant provisions of the Ordinance and the nomination of these candidates are being annulled and their legitimate expectation of being elected to office is thwarted for no fault of theirs. In particular, Court observed that the delay to hold the elections was brought about by an entirely different source.

Court went further to examine whether the bill was inconsistent with Articles 3 and 4. It is in this exercise that it was held that the franchise as contemplated in the Constitution includes the rights of persons qualified under the law to present themselves as candidates. Nevertheless, Court did not hold that the impugned bill was inconsistent with Articles 3 and 4. It was held that Article 3 is a safeguard which prevents an alienation of the elements that constitute the sovereignty of the People and its exercise as provided in Article 4. The fact that the franchise of the candidates who have tendered nominations are impinged upon by the bill does not on that ground alone bring about any inconsistency with Article 3 read with Article 4(e) since the electoral process is kept alive to recommence within 6 months.

A few years later the Court had an opportunity to revisit the issue of franchise in **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2004-2006) Vol. VIII, 115]. The impugned bill sought to render nomination papers received for several local authorities to be of no force or effect and contained provisions for the calling of fresh nominations. The Court held that none of the clauses of the bill

were inconsistent with the Constitution. There is no discussion on whether the right to vote or right to contest is part of franchise.

In **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2007-2009) Vol. IX, 9] the impugned bill sought to render nomination papers received for several local authorities to be of no force or effect and contained provisions for the calling of fresh nominations.

The Court sought to distinguish its previous determination in **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 389] on the ground that if the elections were held on the nominations that have been received in 2006, the operative electoral list is of the year 2004 whereas if fresh nominations are called for as envisaged in the present bill, the electoral list that would be used would be 2006 which reflects a total increase of 10,088 electors in the nine local authority areas and that if the amendment is not made, 10,088 electors would be dis-enfranchised. Although this determination refers to franchise in the context of the right to vote at a Local Authorities election, it is not quite helpful in examining the scope of franchise in Article 3.

In the **Twentieth Amendment to the Constitution Bill** (2017) [Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, page 126 at 136] Court held that right to vote is recognised as a fundamental right and denial or restriction of exercising the franchise amounts not only to violation of Article 10 and 14(1) of the Constitution but also attracts Article 3 of the Constitution.

In ***Ranjith Madduma Bandara v. Mahinda Siriwardana and Others*** (supra) it was held that the right to vote at Local Authorities elections was part of the freedom of speech and expression guaranteed by Article 14(1)(a). Court expressly refrained from examining whether it was part of Articles 3 and 4.

As for the right to contest, in **Provincial Councils Elections (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, page 133 at 141] it was held that franchise is not restricted to merely voting at elections, it includes standing for elections.

In view of the somewhat inconsistent positions reflected in the jurisprudence on the approach to the concept of franchise in Article 3 of the Constitution, it is necessary to examine it in some detail.

The Constitution expressly declares Sri Lanka to be the Democratic Socialist Republic of Sri Lanka. The word *Republic* derives from the Latin word *res publica* literally meaning, "a thing that belongs to the people". This belonginess can be realized only where the people who govern are chosen through the exercise of the free will of the people.

The word *Democratic* is derived from the Greek *dēmokratia*, and literally means, rule by the people. The term is derived from the Greek *dēmokratia*, which was coined from dēmos ("people") and kratos ("rule") to denote the political systems then existing in some Greek city-states, notably Athens.

These attributes in the name are fortified by the use of the word *Representative Democracy* in the SVASTI. A Democracy can be truly representative by recognizing the right of the people to take part in the governance of all institutions of governance. This can only be achieved by recognizing that the people have a right to vote as well as a right to contest for the election of all institutions of governance.

Article 21 of the Universal Declaration of Human Rights recognizes a fundamental point of a representative democracy. It expounds that the will of the people shall be the basis of the authority of government and expressly recognizes that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. This will is to be expressed in periodic and genuine elections which shall

be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 of the International Covenant on Civil and Political Rights declares that every citizen shall have the right and opportunity ... to take part in the conduct of public affairs, directly or through freely chosen representatives. It goes on to recognize the right of every citizen to vote and be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

The concept of Sovereignty in the 1978 Constitution is wider than the 1972 Constitution. In terms of Article 3, it includes the powers of government, fundamental rights and the franchise.

In **Industrial Disputes (Special Provisions) Bill** [S.C.S.D. 30/2022 (at page 9)] Court held that Article 3 of the Constitution seeks to deviate from the traditional meaning attributed to the concept of sovereignty in political theory, which focused only on the power of the State, and extend its meaning to include rights such as fundamental rights and the franchise. It is a non-exhaustive definition as evident by the use of the word *includes*. Hence there are other rights other than fundamental rights and the franchise that form part of the Sovereignty of the people in our Constitution. It was held that *Sovereignty* in Article 3 includes the right to have an independent judiciary.

Applying the same rule of interpretation, Court held in the **Anti-Corruption Bill** [S.C.S.D. Applications Nos. 16-21/2023] that Sovereignty in Article 3 includes the right to a Government free of bribery or corruption.

Accordingly, the right to vote as well as a right to contest at any Local Authority elections fall within definition of Sovereignty and is part of the franchise within the meaning of Article 3.

We note that Article 4(e) of the Constitution only refers to the exercise of franchise at the elections for the President, Parliament and at every Referendum.

Nevertheless, that does not in any way negate the recognition that franchise in Article 3 includes the right to vote as well as the right to contest at any Local Authorities election.

The issue then is whether the Bill is inconsistent with Article 3 of the Constitution as it provides for the cancellation of the nominations already received.

One reason for the cancellation is to provide for those who have registered in the register of electors in 2024 as new electors the right to vote as well as the right to contest.

The need to do so in order to provide them an opportunity of voting is misconceived in law. The correct interpretation of Sections 6 and 43 of the Ordinance is that every person whose name is included in the electoral register for an electoral area *in force on the date the actual poll takes place* is eligible to vote. This inference is more fully expounded below.

Applicable Electoral Register

In terms of Section 6 of the Ordinance, a person is qualified to vote at an election held under the Ordinance if his name is entered in any *parliamentary register for the time being in operation*.

Section 43 of the Ordinance makes the electoral list for the time being in force for any electoral area conclusive evidence for the purpose of determining whether or not a person is entitled to vote at any such election.

Although the Ordinance uses different words in the two sections, namely operation and force, nothing turns on it since the Sinhala Act uses the word "තත්කාලයෙහි බලපවත්නා". Hence, all references herein to the phrase *for the time being in operation* should be read as a reference to the relevant phrase under both Sections 6 and 43 unless the context requires otherwise.

In terms of Section 89 of the Ordinance, the phrase *Parliamentary register for the time being in operation* means any register of electors for the time being in operation under the Ceylon (Parliamentary Elections) Order-in-Council 1946.

These are lists prepared primarily for the conduct of Parliamentary polls for electoral districts. It is clear from the Ordinance that the register used for elections held under the Ordinance are the electoral list for an electoral area.

However, Section 7 of the Ordinance, which sets out the requirements a person should fulfill to be included as a voter in any electoral list for an electoral area, draws a nexus between any parliamentary register for the time being in operation for any electoral district and the electoral list of any electoral area within the meaning of the Ordinance. An electoral register for any electoral area is compiled based upon the parliamentary register for the electoral district within which the electoral area is partly or wholly situated.

The relevant provisions in Ceylon (Parliamentary Elections) Order-in-Council 1946 pertaining to the preparation of registers were repealed by the Registration of Electors Act, No. 44 of 1980 as amended (Act).

As the learned DSG correctly submitted, Section 16(1) of the Interpretation Ordinance then becomes applicable and the phrase parliamentary register for the time being in operation must now be understood to refer to any register of electors for the time being in operation under the Act.

The learned DSG further submitted that the phrase *for the time being in operation* is a reference to the date of the notice under Section 26 of the Ordinance which empowers the elections officer to publish a notice of his intention to hold an election and specify the nomination period.

This appears to be the basis on which Court and parties proceeded in the previous **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2007-2009) Vol. IX, 9].

However, it appears that no attempt was made to interpret the phrase for the time being in operation.

In ***Ellison v. Thomas*** [2 DR. & SM. 563 at 565] it was held that:

> *"The words "for the time being" appear capable of different meanings according to the context; for example, the words may be used with a context which shews that they do not point at one period of time only. It may be that they point to several successive periods of time..."*

In ***Union Territory of Chandigarh and Others v. Rajesh Kumar Basandhi and Anr*** [2019 ACR 466, 2003 Supp(3) SCR 452, AIR 2003 Supreme Court 3230, 2003 (11) SCC 549] the Supreme Court of India held that in general sense, the phrase "for the time being" means time indefinite and refers to state of facts which would arise in future and may vary from time to time. Court quoted with approval the following passage from Law Lexicon by P. Ramanatha Aiyar, 2nd ed., Reprint 2000:

> *"The phrase "for the time being" may according to its context mean the time present or denote a single period of time, but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time. (Ellison v. Thomas,* 31 L.J.Ch. 867; 32 L.J.Ch.32; *Coles v. Pack,* L.R. 5 C.P. 65*) A perusal of the meaning of the expression "for the time being" by different authors, based on decided cases makes it clear that it cannot be said that it must in every case indicate a single period of time. It may be for indefinite period of time depending upon the context in which the phrase is used. It is also evident that generally it denotes indefinite*

period of time... Therefore, to come to a conclusion as to whether it is for one time or for indefinite period of time, the context, purpose and the intention of the use of the phrase will have to be examined."

The phrase for the time being in operation in Sections 6 and 43 of the Ordinance is descriptive of the word register of electors. It seeks to describe the applicable register of electors to determine the eligibility to be a voter by reference to a particular point of time. It has been so used since it was not possible for the legislature to contemplate the dates of on which the electoral process will take place over time. From that perspective it has an indefinite meaning which becomes definite at a particular point in the electoral process. The question for determination is ascertaining that particular point.

There are several possibilities which include:

(1) The date on which the notice of nomination period was published in terms of Section 26 of the Ordinance

(2) The date on which the relevant nomination paper was handed over

(3) The last date of the nomination period

(4) The date on which the notice of poll was published in terms of Section 38(1) of the Ordinance

(5) The date of the poll specified in the said notice of poll

The learned DSG submitted that it should be the date on which the notice of nomination period was published in terms of Section 26 of the Ordinance which in this case is 04.01.2023.

The Act as enacted only provided for the annual revision of the electoral registers. However, it appears that the legislature was mindful that this prevents persons attaining

18 years of age during any particular year from exercising their franchise in an election held during that year.

Thus, the Registration of Electors (Amendment) Act No. 22 of 2021 was enacted making provision for the preparation of three supplementary lists during any one year. In terms of Section 20A(4) of the Act, every registering officer of an electoral district must prepare supplementary lists of persons who have attained the age of 18 years between 1st February to 31st May, 1st June to 30th September and 1st October to 31st January of the subsequent year.

Upon the certification of each supplementary list, it will be attached to the electoral register prepared under the Act for that electoral district. Section 29 of the Act was amended to define "register of electors" to mean the register of electors including the certified supplementary register prepared under section 20A for any electoral district.

Therefore, it is seen that within any one calendar year, the electoral register for any electoral area will have three supplementary lists attached containing the names of the persons who reached 18 years of age during that period. They are entitled to vote at any election held in terms of the Ordinance.

Section 25 of the Ordinance permits the holding of a general election of the members of a local authority to be held within a period of six months preceding the date on which the term of office of the members who are to be elected is due to commence.

Any such election will take place within a period of 52 to 66 days of the publication of the notice in terms of Section 26 of the Ordinance. This makes it possible that there may be one supplementary list, prepared and certified between the day of the publication of the notice in terms of Section 26 of the Ordinance and the date of the actual poll. Fixing the electoral register in force to the one in operation on the day the notice was published in

terms of Section 26 of the Ordinance negates the right to vote of a citizen whose names appear on such supplementary list.

On the other hand, fixing the electoral register in force to the one in force on the day the actual voting takes place has the virtue of enhancing the right to vote of any citizen whose names appear on such supplementary list without in any manner negating the right to vote of any citizen as well as without any need to restart the electoral process in order to give the new voter a right to vote.

Where a statutory provision is capable of two interpretations, one which enhances the right to vote of a citizen and the other which negates such right, the one which enhances the franchise must prevail.

Moreover, this approach is consonant with the legislative intention of enacting the Registration of Electors (Amendment) Act No. 22 of 2021. During the second reading of the bill, the Minister in moving the amendment said that by the amendment seeks to provide persons who attain the age of 18 years during a year the right to register as voters early.

> "ගරු කථානායකතුමනි, දැනට අවුරුද්දකට එක් වාරයක් පමණක් සීමා වී තිබෙන ඡන්දය ලියාපදිංචි කිරීමේ අයිතිය කල් ඇතිව සිදු කිරීමට සහ වයස අවුරුදු 18 සම්පූර්ණ වූ තැනැත්තන්ට අවුරුද්දේ මුල් භාගයේදී ඡන්දය ලියාපදිංචි කිරීමට හැකි වන ලෙස එය සංශෝධනය වෙනවා. යම් වර්ෂයක පෙබරවාරි මස 01 වැනි දින සිට මැයි මස 31 වැනි දින දක්වාත්, ජූනි මස 01 වැනි දින සිට සැප්තැම්බර් මස 30 වැනි දින දක්වාත්, ඔක්තෝබර් මස 01 වැනි දින සිට ජනවාරි මස 31 වැනි දින දක්වාත් ඡන්දය ලියාපදිංචි කිරීමේ අයිතිය ලැබීමෙන් ඡන්දදායකයන්ට, විශේෂයෙන්ම තරුණ පරම්පරාවට තම ඡන්දය ඉක්මනින් ලියාපදිංචි කිරීමේ අවස්ථාව හිමි වෙනවා." [Hansard, 2021 October 07, page 1202]. (emphasis added)

This legislative intent can reach fruition only if such registered voters have the opportunity of voting at the very first election taking place after they are so registered.

This approach is also consonant with the legislative history of the Ordinance. A divisional bench of 7 judges of Court acknowledged in ***Attorney-General and Others v. Sumathipala*** [(2006) 2 Sri.L.R. 126 at 132] that it is well-settled law that the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation.

As originally enacted, Section 38(3) of the Ordinance provided for the appointing of another date for the taking of the poll if it cannot be taken on the day already fixed due to any emergency. This section was amended by Act No. 1 of 2002 which expanded its scope by enabling the date of the poll to be changed where due to unforeseen circumstances the poll cannot be taken on the date already fixed. Accordingly, the date of the poll can now be changed due to any emergency or unforeseen circumstances. Yet, the legislature retained the power given to the elections officer to continue with the electoral process by fixing a new date for the poll rather than cancelling the nominations received and starting the process from the beginning.

Furthermore, in view of the expanded scope of Section 38(3) of the Ordinance, the situation in which the date of poll can change is wider than it was when the Ordinance was enacted. This coupled with the amendment made by the Registration of Electors (Amendment) Act No. 22 of 2021, providing for three possible supplementary registers to come into force in any given year, creates a situation where one or more new supplementary registers come into force between the date originally fixed for the poll and the new date of poll. Fixing the applicable electoral register to be the one in force on the date of the Section 26 notice made in terms of the Ordinance will then require, on the strength of the contention of the State, the nominations already received to be cancelled and new nominations called for to enable the new voters to vote.

In order to counter the proposed interpretation of the phrase *for the time being in force*, learned DSG submitted that there will be administrative inconvenience in fixing the relevant date to be the date of poll. In particular, he drew our attention to the provisions in Section 39A(2) of the Ordinance which requires the returning officer for an electoral area to send an official poll card at least five days before the date of poll. He submitted that there could be situations where a supplementary list or an electoral register comes into force just a few days before the poll which would make it impossible for the returning officer to comply with the provisions in Section 39A(2) of the Ordinance.

Administrative inconvenience simpliciter cannot be an excuse to negate the right of eligible voters who's right to vote is part of his franchise in terms of Article 3 and fundamental right to freedom of speech and expression in terms of Article 14(1)(a). The exercise of this fundamental right may be restricted only as provided for in Articles 15(2), 15(7) and 15(8) of the Constitution. It has not been pointed out how this so-called administrative inconvenience falls within interests of racial and religious harmony, parliamentary privilege, contempt of court, defamation or incitement of offence, national security, public order and the protection of public health or morality, for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society.

In any event, the official polling card is not mandatory for any person to be eligible to cast his vote. As Section 43 of the Ordinance states, the electoral list for the time being in force for any electoral area is conclusive evidence for the purpose of determining whether or not a person is entitled to vote at any such election.

Moreover, any alleged administrative inconvenience can be avoided by making necessary preparations in advance. In this regard, it must be borne in mind that in terms of the Constitution, it is the Election Commission that is vested with power to exercise, perform and discharge all powers, duties and functions relating to the election of members of Local

Authorities and appointing Returning Officers and registering officers. The preparation of supplementary lists is also done by these officers. Therefore, the fixing of the date of the poll can be done bearing in mind the alleged administrative difficulty.

The learned DSG also drew our attention to Section 12(2A) of the Ordinance which deals with the division of a polling area into polling districts. It must be done so that each polling district *at the time of such division*, shall consist of not more than one thousand five hundred voters. Learned DSG thus submitted that no fresh voters can be infused into the electoral process as it would violate this division.

We see no such violation. The division can be done based upon the electoral register in force *at the time of such division* keeping the number of voters within the number specified. Any new voters included based upon any new supplementary list is included *after such division* while giving effect to the clear legislative intent to provide voting rights to the persons who have reached 18 years during the relevant time.

The learned DSG also drew our attention to Section 39B of the Ordinance which deals with postal voting and submitted that fixing the electoral register for the time being in operation to the date of actual poll, will require multiple dates to be given for postal voting.

This overlooks the fact that any person who fails to obtain an opportunity to exercise his vote as a postal voter continues to have the right to vote and can do so physically on the date of the election.

For the foregoing reasons, we hold that the words electoral list for the time being in force in Sections 6 and 43 of the Ordinance is a reference to the electoral list, including any supplementary list prepared in terms of the Act, in force on the date actual voting takes place.

Hence, there is no justification to cancel the nominations already received merely to provide new voters with the right to vote at the election. They are already entitled to do so. Any attempt to cancel the nominations already received on that basis will be irrational and unreasonable and inconsistent with Article 12(1) of the Constitution.

The second reason given for the proposed cancellation of nominations already received is the deprivation of the right to contest of the new voters registered in 2024 if elections are held on the nominations received.

However, it must be emphasized at the outset that the test for determining the eligibility to contest is not registration. There is no correlation between the relevant date for determining the right to vote and the right to contest. Unlike the right to vote, the right to contest Local Authorities elections is not dependent on whether the *name of the person is entered* in the electoral register *in force for the time being*.

According the Section 8 of the Ordinance, any person who is not disqualified as provided by section 9 shall be qualified at any time for election as a member of any local authority if-

> (a) he was, on the date of the commencement of the preparation or revision of the parliamentary register for the time being in operation for any electoral district in which that electoral area or any part thereof is situated, *qualified to have his name entered in that register*; and
>
> (b) he was, on the first day of June in the year of the commencement of the preparation or revision of that register, *ordinarily resident in that electoral area*.

Hence the Bill is partly misconceived in law when the Preamble states that it is now necessary to provide the right to contest *for those who have registered in 2024*. The right to contest is not dependent on registration but only on being qualified to have the name entered and ordinary residence.

Several Petitioners contended that the candidates whose nomination papers have been accepted have a vested right and a legitimate interest of contesting the elections and any cancellation of their nominations will impinge on this legitimate expectation and violate their right to contest. It was submitted that there is no guarantee that they will get fresh nominations and that in any event the chances of getting nomination are reduced by 25% in view of the youth requirement introduced by the Amending Act.

The learned DSG submitted that the persons whose nominations are to be cancelled by the Bill will get a fresh opportunity of submitting nominations when nominations are called afresh as envisaged in the Bill.

This contention is misconceived in law. We are examining the constitutionality of the Bill. The franchise of the persons whose nominations have been accepted will be impinged if the nominations are cancelled. This constitutional inconsistency of the Bill cannot be remedied through that person being granted fresh nominations by a private act of any political party or independent group.

Moreover, there are two competing rights, the right to contest of the persons who have already tendered nominations and the right to contest of the persons who are now qualified to contest after the submission of the nomination in 2023. Both are part of franchise in terms of Article 3.

The learned DSG drew our attention to the arithmetical dimension of the issue. According to the information given by the Election Commission, the number of voters registered for the elections fixed in 2023 were 16,811,341 while the number of voters eligible to vote on or after 1 February 2025 are 17,295,958. The difference is 484, 617. The total number of candidates who submitted nominations in 2023 are 80, 672.

A simplistic arithmetical approach might produce a clear winner in terms of numerical superiority. Nevertheless, the right to contest of two competing groups of persons, those

who have submitted nominations and those who are now qualified to do so, are not private rights but constitutional rights which form an important element of their franchise as part of the Sovereignty of the People.

An examination of the jurisprudence of certain jurisdictions provides an insight on the approach adopted by some jurisdictions to comparable situations.

In ***Campbell v. MGN Ltd.*** [(2004] 2 AC 457] a conflict of fundamental rights arose for consideration. The House of Lords essentially treated the case as one concerning a contest between Ms. Campbell's right to privacy protected under article 8 of the European Convention of Human Rights and the freedom of expression enjoyed by the press guaranteed under article 10 of the European Convention of Human Rights. In such circumstances, the House of Lords recognized that the competition between these two fundamental rights could only be resolved by conducting a balancing exercise. As Lord Hope of Craighead, a member of the majority, observed:

> *"105. The context for this exercise is provided by articles 8 and 10 of the Convention. The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life."*

Lord The Baroness Hale of Richmond (at paragraph 140: held:

> *"140. The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it. The Convention jurisprudence offers us little help with this. The European Court of Human Rights has been concerned with whether the state's interference with privacy (as, for example, in Z v Finland (1997) 25 EHRR 371) or a restriction on freedom of expression (as, for example, in Jersild v Denmark (1994) 19 EHRR 1, Fressoz and Roire v France (2001) 31 EHRR 2, and Tammer v Estonia (2001) 37 EHRR 857) could be justified in the particular case. In the national court, the problem of balancing two rights of equal importance arises most acutely in the context of disputes between private persons."*

In ***Re S*** [(2005) 1 AC 593] a contest arose between the infant's right to privacy protected under article 8 of the European Convention, and the freedom of expression of the press guaranteed under article 10, in relation to both of which the state, and the courts as well, have a positive duty to protect under the Convention. The House of Lords followed its approach in ***Campbell*** (supra). Lord Steyn distilled four relevant principles for the resolution of this conflict of rights.

> *"17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First,* ***neither article has as***

such precedence over the other. *Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the* ***ultimate balancing test.*** *This is how I will approach the present case."* (emphasis added)

After balancing the competing article 8 and article 10 rights, the House of Lords resolved the conflict in favour of the press and dismissed the appeal accordingly.

This "ultimate balancing test" was elaborated on by Sir Mark Potter in ***Re W*** [(2005) EWHC 1564 (Fam), paragraph 53]:

"... each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. ***The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or "trumps" the other.*** *The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each.* ***It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out."***

Hence the approach in the UK is that where Court had to deal with balancing competing interests, they have applied the Proportionality Test on a case-by-case basis.

In ***People's Union of Civil Liberties v. Union of India and Another*** [AIR 2003 Supreme Court 2363; 2003 AIR SCW 2353] the Indian Supreme Court was confronted with a situation where the freedom of speech and expression and the right to privacy were the competing rights. The Court applied the reasonableness test and the compelling State interest test.

In examining the constitutionality of restrictions on fundamental rights, this Court has applied the tests of *rationality*, *necessity* and *reasonableness*.

It has observed that there must be a *proximate or rational nexus* between the restriction on a citizen's fundamental right and the object that is ought to be achieved by the restriction [See ***Joseph Perera alias Bruten Perera v. the Attorney-General and Others*** [1992] 1 Sri.L.R 199 at p. 217)].

In ***Sunila Abeysekera v. Ariya Rupasinghe, Competent Authority and Others*** [(2000) 1 Sri.L.R. 314 at 375], Court observed that the standard of necessity 'involves a review of whether the restrictions are *proportionate* to the legitimate aim pursued'. It was also held (at page 374) that 'the sweeping nature of the restriction can make it over-broad and disproportionate'.

Finally, in ***Wicremabandu v. Herath and Others*** [(1990) 2 Sri. L.R. 348 at 358)] it was held that 'if this Court is satisfied that the restrictions are *clearly unreasonable*, they cannot be regarded as being within the intended scope of the power under Article 15(7)'.

We begin our analysis by accepting that the competing rights takes the same form and content, namely the right to contest as envisaged in Article 3. It is also our view that an application of a proportional test is justified in examining whether that right of one group must take precedence to the right of the other group.

One element of the proportionality test is the reasonableness of the restriction sought to be enforced. The reasons for the failure to hold the Local Authority elections due to be held in 2023 is more fully set out in the judgment of Court in ***Ranjith Madduma Bandara v. Mahinda Siriwardana and Others*** (supra). It was held that thereby the Executive Branch is liable for infringement of the fundamental rights guaranteed under Articles 12(1) and 14(1)(a) of the petitioners in that case. Moreover, the Election Commission was also held responsible for lack of planning and managing the process and not for using its powers to issue directions.

Clearly, the candidates whose nomination papers were accepted are not responsible for the postponement of the elections. Therefore, it is unreasonable to deprive them of the right to contest merely to permit the persons who are now qualified to submit nominations. Moreover, the persons who are newly qualified to submit nominations did so only because the elections scheduled to be held in 2023 were not held in violation of the fundamental rights of the person whose nominations were accepted. In these circumstances, it is unreasonable to deprive the right to contest of the persons whose nominations were accepted.

A contrary conclusion will be an open invitation for elections for Local Authorities elections to be postponed and then cancelling of nominations already received since there are new voters who are qualified to contest.

We are mindful that the failure to hold the Local Authorities elections in 2023 is not an isolated incident. In ***Hajiar Muhammad and Others v. Election Commission of Sri Lanka and Others*** (supra), Local Authorities elections that should have been held between 01.10.2014 and 01.04.2015 were not held as scheduled. It is only after this Court directed, on 15.12.2017, State to take steps to hold elections that the elections were held. Court observed that even though the Local government (Amendment) Act No. 22 of 2012 was enacted in 2012, even up to the date of judgment, Local Authorities elections could not

be held under the amended law as the authorities had failed to implement the legal provisions.

As Dep P.C., J. held (at page 15)

> *"Local Authorities has a long history and it plays an important role at grassroot level. Its functions are regulation, control and administration of all matters relating to the public health, public utility services and public thoroughfares and generally with the protection and promotion of comfort, convenience and welfare of the people and the amenities of the town/village. It is stated that its activities covers from the cradle to the grave. Some local authorities have maternity clinics and burial grounds/cemeteries are controlled and administered by Local authorities. By delay in holding elections people are deprived of representatives who could have addressed their grievances and attend to their welfare needs."*

The provisions in the Bill to cancel the nominations already received is unreasonable and fails the proportionality test and therefore violates Article 12(1) of the Constitution. However, in the circumstances of the Bill it does not lead to the conclusion that Article 3 is also infringed as the Bill requires that the elections should be held within a short-specified time. [See **Local Authorities (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 389 at 394)].

We also note that the Bill in its present form once enacted seeks to annul steps taken by the Election Commission to conduct elections in terms of the law. To that extent it is necessary to observe that the Bill is *ex post facto* legislation and in that regards *may* also impact on Article 12(1). However, we make no conclusions on that issue in view of our findings above.

Before concluding the examination of the right to vote and the right to contest, we would like to refer to the submission made by the learned DSG that other considerations such as that some recognized political parties and/or independent groups have ceased to exists, several candidates who have submitted nominations in 2023 have changed their political affiliations/parties and/or independent groups and/or joined other political parties and/or groups, some candidates have exited politics and/or have changed their desire being an elector during the relevant period, several candidates who submitted their nomination in the year 2023 have now been elected as Members of Parliament and are thus disqualified to be elected in terms of Section 9(1)(dd) of the Ordinance, the Ordinance only provides for the eventuality of a death of a candidate and not for other contingencies and that there have been significant changes in the political landscape in the past two years (2022-2024).

As we have explained above, these are not matters that can be considered as they are not referred to in the relevant Cabinet Memorandum or the Bill. Nevertheless, it is our considered view that these circumstances cannot justify cancelling of the nominations already received. Accepting them to be will provide an easy route for similar cancellations to be made in the future. All what will be needed to disrupt the democratic process is to get sufficient number of candidates to change parties or a few political parties to change their association.

Legislative Overrule

The Petitioners in S.C.S.D. No. 03/2025 contends that in SC FR 69/2023, SC FR 79/2023, SC FR 90/2023 and SC FR 139/2023 Court has made a direction to the Elections Commission "to schedule the Local Government Elections 2023 at the earliest possible with due regard to their duty to hold other elections as required by law". These Petitioners contend that the Bill seeks to override the judgment of Court in violation of Articles 1, 2, 3, 4, 1291), 17, 118 and 126 of the Constitution.

The essence of the argument is that Parliament cannot override a judgment given by the Supreme Court.

As the learned DSG correctly pointed out, the position in India is succinctly set out in ***NHPC Ltd v. The State of Himachal Pradesh Secretary*** [2023 INSC 810] where it was held:

> *"11. What follows from the aforesaid judicial precedent is,* ***a legislature cannot directly set aside a judicial decision.*** *However,* ***when a competent legislature retrospectively removes the substratum or foundation of a judgment to make the decision ineffective, the same is a valid legislative exercise provided it does not transgress on any other constitutional limitation.*** *Such a legislative device which removes the vice in the previous legislation which has been declared unconstitutional is not considered to be an encroachment on judicial power but an instance of abrogation recognised under the Constitution of India. The decisions referred to above, manifestly show that* ***it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict.*** *In other words, the very premise of the earlier judgment should be removed, thereby resulting in a fundamental change of the circumstances upon which it was founded.*
>
> *12. The power of a legislature to legislate within its field, both prospectively and to a permissible extent, retrospectively, cannot be interfered with by Courts provided it is in accordance with the Constitution. It would be permissible for the legislature to remove a defect in an earlier legislation, as pointed out by a constitutional court in exercise of its powers by way of judicial review. This defect can be removed both prospectively and retrospectively by a legislative process and previous actions can also be validated. However,* ***where a legislature merely seeks to validate the acts carried out under a previous legislation which has been struck down or rendered inoperative by a Court, by a subsequent legislation without curing the defects in***

such legislation, the subsequent legislation would also be ultra-vires. *Such instances would amount to an attempt to 'legislatively overrule' a Court's judgment by a legislative fiat, and would therefore be illegal and a colourable legislation."* (emphasis added)

Local Authority Elections (Amendment) Act No. 30 of 2023 (Amending Act)

The other justification expounded in the Preamble to the Bill for the cancellation of nominations is the necessity to provide for the nominations by the youth candidates in accordance with Amending Act which requires 25% youth representation in a nomination paper.

The question is whether the Amending Act applies to the nominations for the Local Authorities elections due to be held in 2023.

The position in English law on retrospective legislation is succinctly set out in ***Walker v. Innospec Limited and others*** [(2017) UKSC 47] where it was held that the general rule, applicable in most modern legal systems, is that legislative changes apply prospectively. Under English law, for example, unless a contrary intention appears, an enactment is presumed not to be intended to have retrospective effect.

Article 75 of the Constitution empowers Parliament to make laws including laws having retrospective effect. Nevertheless, the position on retrospective operation of law appears to be the same as under English law. In ***De Silva v. Weerasinghe*** [(1978-79-80) 1 Sri.L.R. 334 at 337] Wansundera, J. quoted with approval the following extracts:

"Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a

retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication" [Maxwell's Interpretation of Statutes (12th Edn., p. 215)].

"A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. But a statute 'is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing" [Craies' Statute Law, 7th Edn., p. 387].

In ***Balasunderam v. The Chairman, Janatha Estates Development Board and Others*** [(1997) 1 Sri.L.R. 83 at 86], Kulatunga, J. held that the rule against retrospectively is intended to protect vested rights.

On a plain reading of the Amending Act, there is no indication that it has any retrospective effect. In particular, the Parliament was well aware that by the time it was passed, the nominations for the Local Authorities elections due to be held in 2023 has been called and accepted. This is fortified when the time line of the Amending Act is considered.

The Amending Act took the form of a Private Members' Bill by Hon. Premnath C. Dolawatte, Member of Parliament. It was submitted to the Parliament on 8th November 2022 and was thereafter referred, under Standing Order No. 52(6), to the Minister of Public Administration, Home Affairs, Provincial Councils and Local Government for report. It was certified on 17th November 2023 by which date the nominations for the Local Authority elections scheduled to be held in 2023 had been called for and accepted.

Moreover, the candidates who submitted nominations have a vested right to contest the Local Authority elections that were scheduled to be held in 2023. That right cannot be

taken away by a subsequent law unless the intention to do so is clearly reflected in the subsequent law. There is no such indication in the Amending Act.

For the foregoing reasons, we hold that the Amending Act was not intended to apply to the nominations already called for and accepted by the time it was certified. The Bill seeks to apply it now.

Therefore, it is irrational and unreasonable and inconsistent with Article 12(1) of the Constitution.

Judicial Power under the Constitution

Prior to the 1972 Constitution, it was accepted that judicial power remained with the judiciary since the Charter of Justice of 1801 [See ***Liyanage and Others v. The Queen*** (68 N.L.R. 265 at 282)].

The 1972 Constitution, the first autochthonous constitution introduced after independence, sought to constitutionalize the concept of Sovereignty. It acknowledged that the Sovereignty is in the People and is inalienable (Article 3). Nevertheless, it did not recognise the concept of separation of powers. The National State Assembly was the institution through which the Sovereignty of the People was to be exercised (Article 4) and was expressly acknowledged to be the supreme instrument of State Power of the Republic (Article 5). It exercised judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law.

Nevertheless, the Constitutional Court took the view in the **Local Authorities (Imposition of Civic Disabilities) (No. 2) Bill** [Decisions of the Constitutional Court of Sri Lanka, Vol. 6, page 30] that Parliament today is, as the National State Assembly was, incompetent to exercise directly the judicial power which is to be exercised only through courts and similar

institutions. In effect it was acknowledged that there was a functional separation of powers under the 1972 Constitution.

The distortion and dangers created by the convergence of judicial power and legislative power in one institution, is best expounded by Montesquieu [Translation by Thomas Nugent, The Spirit of the Laws, Hafner Publishing Company, 1959, Book XI, Chap. 6, pages 151-152]:

> *"Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislature. Were it joined to the executive power, the judge might behave with violence and oppression."*

Similarly, Blackstone [Blackstone's Commentaries Vol. 1 at p. 269] states:

> *"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."* (emphasis added)

The Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution [Parliamentary Series No. 14 of the National State Assembly] ("Report") took the view that the 1972 Constitution and in particular, Article 5,

did not effectively guarantee the Sovereignty of the People. The Select Committee was of the view (at page 142) that there was no check on either the Legislature or the Executive acting in derogation of the Sovereignty of the People, or even in usurping it.

The Select Committee submitted a Draft Constitution along with the Report. In explaining its functioning, the Report states that, the Legislative, Executive and Judicial powers of the People are to be exercised by the different organs referred to in Article 4 of the Draft Constitution and that adequate safeguards have been provided to prevent the erosion of the Sovereignty of the People.

The Report goes on to state (at page 142) that the division of powers among the different organs of government tends to act as a restraint upon the arbitrary exercise, or abuse of, power by the delegates of the People. Significantly, the Report states (at pages 142-143) that the Draft Constitution makes provision:

> *"[...] for the exercise of judicial power of the People by an independent Judiciary. The independence of the Judiciary is secured, in the case of the minor judiciary, by vesting the powers of appointment, dismissal, transfer, and disciplinary control in an independent Judicial Service Commission. The independence of the Judges of the Superior Courts is secured by making Constitutional provision for the security of tenure of such Judges, for the establishment of the Superior Courts and for the entrenchment of the jurisdiction of the Superior Courts, thereby precluding the abolition of these Courts and the creation of parallel jurisdictions by ordinary legislation."*

It is significant that Article 4 (e) of the Draft Constitution annexed to the Report and Articles 4 (c) of the 1978 Constitution are substantially the same. Article 4 (c) of the 1978 Constitution reads as follows:

> *"The judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law."*

Clearly, Parliament is not the source of the judicial power of the People. The repository of the judicial power of the People is none other than the People themselves on whom the judicial power is vested as part of their inalienable Sovereignty.

Accordingly, the judicial power of the People is exercised by courts, tribunals and institutions created and established, or recognised, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its members.

Even where Parliament has been vested with the judicial power relating to the privileges, immunities and powers of Parliament and of its Members, such judicial power is limited. Section 22 (3) of the Parliament (Powers and Privileges) Act No. 5 of 1978 as amended, states that every breach of the privileges of Parliament which is specified in Part B of the Schedule to that Act and which is committed in respect of, or in relation to, Parliament shall be an offence under that Part punishable by Parliament.

Hence, the judicial power of the Parliament is confined to matters specified in Part B of the Schedule to the Parliament (Powers and Privileges) Act No. 5 of 1978 as amended. In terms of Section 22 (2) every breach of the privileges of Parliament which is specified in

the Schedule to this Act (whether in part A or Part B thereof) shall be an offence under that Part punishable by the Supreme Court under the relevant provisions.

The judiciary is an unelected body unlike the executive and the legislature. Since the 1978 Constitution recognises that Sovereignty is in the People, there is no mode through which the judicial power of the People can be transmitted directly to the judiciary. The transmission of the judicial power of the People to the judiciary through the conduit of the Parliament, assists to keep the nexus between the Sovereignty of the People and the exercise of the judicial power of the People by the judiciary. This gives legal effect to the political theory permeating the notion of Sovereignty being with the People. Article 4 (c) of the Constitution must be read and understood in this context.

Accordingly, under the 1978 Constitution, the judicial power of the People is vested with the judiciary [See ***Hewamanne v. De Silva and Another*** [(1983) 1 Sri.L.R. 1 at 20]; ***Premachandra v. Major Montague Jayawickrema and Another (Provincial Governors' Case)*** [(1994) 2 Sri.L.R. 90 at 107] and ***Dr. Athulasiri Kumara Samarakoon and Others v. Ranil Wickramasinghe and Others (Economic Crisis case)*** [S.C. (F.R.) 195/2022 and 212/2022, S.C.M. 14.11.2023 at page 64] except in so far as the matters specified in Part B of the Schedule to Parliament (Powers and Privileges) Act No. 5 of 1978 as amended where there is concurrent judicial power in Parliament and the Supreme Court.

Accordingly, the position in Sri Lanka on legislative overrule is as follows:

(a) Parliament does not have the power to overrule any judgment of the Supreme Court. A decision of the Supreme Court on any matter is final and binding.

(b) However, Parliament has legislative power to remove the substratum or foundation of a judgment provided it does not transgress on any other constitutional limitation.

For example, in ***Senanayake v. Damunupola*** [(1982) 2 Sri.L.R. 621] the Supreme Court held that the State Lands (Recovery of Possession) Act was not meant to

obtain possession of land which the State had lost possession of by encroachment or ouster for, a considerable period of time by ejecting a person in such possession. Section 3 should not be used by a competent authority to eject a person who has been found by him to be in possession of a land where there is doubt whether the State had title or where the possessor relies on a long period of possession. This judgment was delivered on 8th August 1982. In 1983, the Parliament enacted the State Lands (Recovery of Possession) Act No. 29 of 1983 and introduced a new definition to *State Lands* to include "unauthorized possession or occupation" except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law, and includes possession or occupation by encroachment upon state land.

It was submitted that Court had in SC FR 69/2023, SC FR 79/2023, SC FR 90/2023 and SC FR 139/2023 made a direction to the Election Commission to *"schedule the Local Authorities Elections 2023 at the earliest possible with due regard to their duty to hold other elections as required by law"*. The parties submit that the use of *Local Authorities Elections 2023* is a reference to the elections that were scheduled to be held in 2023 and having a fresh election after calling for new nominations as envisaged by the Bill in 2025 runs counter to the direction made by Court.

A careful reading of the judgment in SC FR 69/2023, SC FR 79/2023, SC FR 90/2023 and SC FR 139/2023 shows that there is no uniformity in the use of the words *Local Authorities Elections 2023*. For example, Court makes a finding (at pages 37-38) that "[...] the Election Commission was bound to hold the *Local Authorities election* before the expiry of the term of Local Authorities on 19.03.2023 in accordance with the provisions in the Local Authorities Elections Ordinance". We observe that the term *Local Authorities Elections 2023* is first found in the pleadings of several petitioners in the said cases.

For the foregoing circumstances, we are not in a position to come to any conclusive finding that Court in making the aforesaid directive, intended the Election Commission to continue the electoral process from where it was stalled due to the factual circumstances more fully set out in the said judgment.

Therefore, we make no finding on whether the Bill amounts to legislative overruling.

Conclusions

For the reasons more fully set out above, we determine that the Bill read as a whole and in particularly Clauses 2 and 3 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

We wish to place on record our deep appreciation of the assistance given by the learned President's Counsel and other Counsel who appeared for the Petitioners and the learned Deputy Solicitor General who represented the Hon. Attorney-General, in these proceedings.

Yasantha Kodagoda, PC

Judge of the Supreme Court

Janak De Silva

Judge of the Supreme Court

I have had the benefit of reading, in draft, the determination of my learned brothers, their Lordships Yasantha Kodagoda, PC, J and Janak De Silva, J. I am respectfully not in agreement with the conclusion reached that the Bill read as a whole and in particular Clauses 2 and 3 are inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

On the classification of the **right to vote** as a fundamental right of freedom of expression guaranteed under Article 14(1)(a) of the Constitution, I am in respectful agreement with their Lordships who have referred to **Karunathilake and Another v. Dayananda Dissanayake, Commissioner of Elections and Others** [(1999) 1 Sri LR 157 at 174], **Mediwake and Others v. Dayananda Dissanayake, Commissioner of Elections and Others** [(2001) 1 Sri LR 177 at 209], and **Thavaneethan v. Dayananda Dissanayake, Commissioner of Elections and Others** [(2003) 1 Sri LR 74 at 90]. The Sri Lankan jurisprudence on this point is unequivocal. In fact, the Divisional Bench of this Court in **Ranjith Madduma Bandara v. Mahinda Siriwardana and Others** [SC (FR) Application No. 69/2023, SC Minutes of 22nd August 2024] specifically reiterates that the "right to vote" is a fundamental right guaranteed under Article 14(1)(a) of the Constitution. Therefore, I am unable to agree with my learned brothers that Sri Lankan jurisprudence only considers the "freedom to vote" as opposed to the "right to vote" as a fundamental right.

My learned brothers have also indicated that it is difficult in theory to extend the right to contest as a concomitant part of the freedom of expression. Article 25 of the International Covenant on Civil and Political Rights ("ICCPR"), to which Sri Lanka is a party, mandates that "*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to vote* ***and to be elected*** *at genuine periodic elections which shall be by universal and equal suffrage ...*" In fact, Article 25 of the ICCPR was the starting point of this Court in **Mediwake and Others v. Dayananda Dissanayake, Commissioner of Elections and Others** (supra) to establish that the denial

of the "right to vote" would be an infringement of Articles 12(1) and 14(1)(a) of the Constitution. The following analysis of Justice Mark Fernando merits reproduction:

"Sri Lanka is a party to that Covenant and its sister Covenant, which together constitute the international Bill of Human Rights. ***It would be idle to argue that our election laws*** *pertaining to Provincial Council elections* ***are not founded on guarantees to every citizen of the right to "take part" in public affairs,*** *through representatives freely chosen by him, at a genuine election, by universal and equal suffrage, held by secret ballot, ensuring the free expression of the will of the electorate. Article 27(15) requires the State "to endeavour to foster respect for international law and treaty obligations in dealings among nations." Accordingly, in interpreting the relevant provisions of an enactment regulating any election a Court must, unless there is compelling language, favour a construction which is consistent with the international obligations of the State, especially those imposed by the international Bill of Human Rights. I hold that those guarantees are an essential part of the freedom of expression recognized by Article 14(1)(a)."*

Thus, it is clear that guarantees given under Article 25 of the ICCPR form an essential part of the freedom of expression recognised by Article 14(1)(a) of the Constitution. It would be imperative upon this Court to give heed to Article 27(15) of the Constitution and give full effect to Article 25 of the ICCPR, which includes the right "to be elected" or, put differently, the right to contest. It is not possible to recognise only the right to vote in Article 25 of the ICCPR and disregard the right to contest, which goes hand-in-hand with the right to vote.

In fact, as this Court has observed in **Mediwake** (supra; at page 214):

"A genuine democratic election by universal and equal suffrage demands many other safeguards: including, but not limited to (a) proper and timely registration procedures, which ensure the speedy inclusion of all citizens entitled to vote and the exclusion of all those disentitled, as well as the prevention of dual registration and the impersonation of

the dead and the absent; (b) ensuring that during the pre-election period all candidates are allowed the freedom to campaign on equal terms and without unreasonable restrictions, with election laws being enforced, and uniformly enforced, and without any misuse or abuse of State media, resources and facilities; and (c) the prevention of electoral wrongdoing, and whenever that is not possible, the prompt investigation and prosecution of election offences."

Thus, the right to vote and the right to contest are all part of the right to take part in public affairs and elections which forms the bedrock of a democratic process, and is an essential part of the freedom of expression guaranteed under Article 14(1)(a). It would therefore not be possible to restrict the scope of the freedom of expression only to one aspect of voting. The right to vote would be meaningless if voters do not have the right to contest.

The background facts that led to the introduction of the Bill have been carefully set out in the said draft determination of their Lordships. Nominations were called on 4th January 2023 for the Local Authorities Elections that were required to be held on or before 23rd March 2023. Although nomination papers were submitted, the election was never held. The failure to hold the elections was the subject matter of four fundamental rights applications and culminated in this Court directing the Election Commission *inter alia* to schedule the Local Government Elections 2023 at the earliest possible date with due regard to their duty to hold other elections as required by law. The Bill seeks to give effect to the said judgment taking into consideration what has transpired during the long period of time that has elapsed since January 2023.

Clause 2(1) of the Bill provides that the nomination papers so submitted are deemed to be of no force and effect as if such nomination papers had never been submitted. Clause 3 provides further that steps shall be commenced under the provisions of the Local Authorities Elections Ordinance, as amended [the Ordinance] for the holding of elections to the Local Authorities set out in the Schedule to the Bill.

The justification for doing so is set out in the preamble as follows:

"And whereas the submission of nominations for the aforesaid Local Authorities was concluded in January 2023 and it has become necessary to provide for those who have registered in the register of electors in the year 2024 as new voters, who would otherwise be deprived of their right to vote at the new date of polls fixed and their right to submit nomination papers for the elections for the aforesaid Local Authorities set out in the Schedule hereto:

And whereas the Local Authorities Elections (Amendment) Act, No. 30 of 2023 has come into operation on November 17,2023 and it has become necessary to provide for the nominations by the youth candidates in accordance with the provisions relating to the nomination of youth candidates under section 28 of the Local Authorities Elections Ordinance, (chapter 262), when holding fresh election in respect of such Local Authorities set out in the Schedule hereto:

And whereas due to the period of time that has elapsed since the submission of nominations in respect of such Local Authorities set out in the Schedule hereto, it has become necessary to provide for the calling of fresh nominations and to make provisions for the holding of fresh elections in respect of such Local Authorities set out in the Schedule hereto:"

Thus, one of the stated objectives of the Bill is to provide those who were registered after January 2023 the right to vote and the right to contest at an election that is being held to elect members to local authorities. This presupposes that otherwise, the election would have to be held on the electoral register that was in force at the time the nominations were called on 4th January 2023. One of the central issues then, though not articulated by any of the Petitioners, is whether voters who are on the electoral register at the point of conducting the poll could vote.

In terms of Section 6 of the Ordinance, a person is qualified to vote at an election held under the Ordinance if his name is entered in any parliamentary register for the time being in operation. Section 43 of the Ordinance makes the electoral list for the time being in force for any electoral area conclusive evidence for the purpose of determining whether or not a person is entitled to vote at any such election.

According to the interpretation given by their Lordships to the words, *'for the time being in operation'* in Section 6 or to the words, *'for the time being in force'* used in Section 43, both of which carry the same meaning, all those electors whose names appear on the electoral register prevailing on the date on which the election actually takes place are eligible to exercise their vote. For this reason, it is the view of their Lordships that one of the principal grounds urged by the State and set out in the preamble to the Bill as being the reason for the introduction of the Bill has no merit and in these circumstances, the rendering of the nomination papers submitted in January 2023 as being of no force in law is arbitrary and violative of Article 12(1) of the Constitution.

For reasons that I shall now refer to, I respectfully differ from their Lordships on the reasoning for the said interpretation. I am in agreement with the learned Deputy Solicitor General that the phrase *for the time being in operation/force* found in Sections 6 and 43 is a reference to the date on which the notice under Section 26 of the Ordinance is issued. Thus, my view is that the electoral register that must apply at an election held to elect members to a local authority shall be the electoral register that is in existence on the date that the notice of nomination in terms of Section 26 of the Ordinance is published. Therefore, the only way in allowing those persons who have registered as electors since the publication of the Section 26 notice on 4th January 2023 to vote at the forthcoming elections to the local authorities, as well as to afford them an opportunity of contesting at such election, is through the declaration contained in Clause 2(1) of the Bill that the nominations submitted pursuant to the notice dated 4th January 2023 are deemed to be

of no force and effect. It is this declaration that would enable the calling of nominations through a fresh notice in terms of Section 26 of the Ordinance. Such an exercise would enable those persons who have registered as electors since the publication of the Section 26 notice on 4th January 2023 not only the right to vote but the opportunity of submitting nomination papers and being an integral part of a representative democracy, thereby securing their right to take part in the governance of this country and in the conduct of its public affairs, to its fullest.

It would be appropriate to refer at this stage to the detailed provisions of Part III of the Registration of Electors Act [the Principal Act], as amended by the Registration of Electors (Amendment) Act, No. 22 of 2021 [the Amendment Act] relating to the preparation of electoral registers and the revision of such registers. The starting point is Section 10 of the Principal Act which required the registering officer of each electoral district to prepare and certify a register for such electoral district containing the names of those persons who are entitled to have their names on such register, together with the qualifying address under which such name so appears. Notice of such certification shall thereafter be given in the Gazette and in at least one newspaper in each of the National Languages that the register has been certified and that such register or a copy thereof is open for inspection. The register shall come into operation on the date of the publication in the Gazette of the aforesaid notice, and such register shall be the register for the time being in operation until superseded by the coming into operation of the next certified register.

In terms of Section 12(1) of the Principal Act, on or before the first day of June in each year after the register for any electoral district is first certified under Section 10, the Commissioner shall cause the revision of such register. This date has been amended to read as 1st February by the Amendment Act, with consequential amendments being made to Section 13, which now require the preparation of the revised list to be completed by the registering officer on or before the 30th of September in the succeeding year. The

revision of registers involves the publication of a preliminary list in the Gazette, keeping it open for inspection, entertaining claims for inclusion of names and objections against names already included, an inquiry into such claims and objections and an appeal process arising therefrom. It is only after the claims and objections have been adjudicated upon that the registering officer of each electoral district shall certify the register for that electoral district, and thereafter publish a notice to that effect in the Gazette. In terms of Section 20(2), the certified register for any electoral district shall come into operation on the date of the publication in the Gazette of the said notice.

The Principal Act only provided for an annual revision of the electoral register. However, the Legislature, being mindful that an annual revision may prevent persons attaining 18 years of age during any particular year from exercising their franchise in an election held during that year enacted the Amendment Act granting such persons the right to register as voters as soon as they reach the age of 18. To achieve this purpose, the Amendment Act provided for the preparation of three supplementary lists during any one year. In terms of Section 20A(4) introduced by the Amendment Act, every registration officer of an electoral district must prepare supplementary lists of persons who have attained the age of 18 years between 1st February to 31st May, 1st June to 30th September and 1st October to 31st January of the subsequent year. The procedure contained above with regard to claims, objections, inquiries and appeals shall apply *mutatis mutandis* in respect of each supplementary list, and as provided in Section 20A(9), the registering officer of each electoral district shall certify the supplementary lists prepared by him immediately after the claims and objections have been adjudicated.

Upon the certification of any supplementary register, Section 20A(10) requires the registering officer to give notice *inter alia* in the Gazette that the register has been certified, with the certified supplementary register for any electoral district coming into operation on the date of the publication of the said notice in the Gazette. The certified

supplementary register shall continue to be in operation until superseded by the coming into operation of the next certified register.

Upon the certification of each supplementary list, it will be attached to the electoral register prepared under the Act for that electoral district. Section 29 of the Act was amended to define "register of electors" to mean the register of electors including the certified supplementary register prepared under section 20A for any electoral district. Therefore, within any one calendar year, the electoral register for any electoral area will have three supplementary lists attached containing the names of the persons who reached 18 years of age during that period, and are entitled to vote at any election held in terms of the Ordinance, as well as contest any such election.

The electoral register therefore has two components at any given time. The first is the list that must be fixed as at 1st February of each year. The second is the supplementary list as at 1st June and 1st October that attaches to the list that was fixed on 1st February, and the third supplementary list that finds itself into the fixed list of the succeeding year on 1st February. Thus, during each of the above three periods, the electoral register together with the supplementary list is a floating list with the possibility of new names being added through the supplementary list at the end of each of the above periods. What is critical is that the entering of names first on the electoral list and thereafter on an electoral register is done through an exhaustive process and the electoral register must finally be certified by the registering officer, with such certification taking place after the end of each supplementary period. It is this certification process that gives finality to the list prepared during each period, gives sanctity to the electoral register and ensures the integrity not only of the electoral register but the entire electoral process that is to follow upon the issuance of a notice in terms of Section 26 of the Ordinance.

Section 25 of the Ordinance permits a general election of the members of a local authority to be held within a period of six months preceding the date on which the term of office of

the members who are to be elected is due to commence. Section 26 provides that whenever an election to elect the members of a local authority is due to be held in any year, the returning officer of the district in which the electoral area of such local authority is situated, shall publish a notice of his intention to hold such election and call for nominations. This in my view is the statutory commencement date of the election process, with the nomination period commencing on the 14th day after the date of the publication of the notice and expiring at 12noon on the 17th day after the date of publication of the notice. Any such election shall take place within a period of 52 to 66 days of the publication of the notice in terms of Section 26 of the Ordinance.

Thus, the moment the notice under Section 26 is issued and the electoral process commences, the electoral register that has been certified as at that date crystallises and attaches itself to the notice issued under Section 26 since that is the register for the time being in force. In other words, the certified electoral register prevailing on that date becomes the electoral register that would be applicable to the election that is to follow within 52 – 66 days of such notice.

This approach is consonant with the legislative intention of enacting the Amendment Act. During the second reading of the bill, the Minister in moving the amendment said that the amendment seeks to provide persons who attain the age of 18 years during a year the right to register as voters at the earliest possible opportunity.

> "ගරු කථානායකතුමනි, දැනට අවුරුද්දකට එක් වාරයක් පමණක් සීමා වී තිබෙන **ඡන්දය ලියාපදිංචි කිරීමේ අයිතිය** කල් ඇතිව සිදු කිරීමට සහ වයස අවුරුදු 18 සම්පූර්ණ වූ තැනැත්තන්ට අවුරුද්දේ මුල් භාගයේදී **ඡන්දය ලියාපදිංචි කිරීමට** හැකි වන ලෙස එය සංශෝධනය වෙනවා. යම් වර්ෂයක පෙබරවාරි මස 01 වැනි දින සිට මැයි මස 31 වැනි දින දක්වාත්, ජූනි මස 01 වැනි දින සිට සැප්තැම්බර් මස 30 වැනි දින දක්වාත්, ඔක්තෝබර් මස 01 වැනි දින සිට ජනවාරි මස 31 වැනි දින දක්වාත් ඡන්දය ලියාපදිංචි කිරීමේ අයිතිය ලැබීමෙන්

ඡන්දදායකයන්ට, විශේෂයෙන්ම තරුණ පරම්පරාවට තම ඡන්දය ඉක්මනින් ලියාපදිංචි කිරීමේ අවස්ථාව හිමි වෙනවා." [Hansard, 2021 October 07, page 1202].

The legislative intent behind the Amendment Act was therefore to enable registration as a voter at the earliest possible opportunity after turning 18 and is given effect to by the adoption of the supplementary register that is in operation on the date of the Section 26 notice.

The learned Deputy Solicitor General submitted that the scheme of the Act does not render itself to an interpretation of the phrase "for the time being in force" as being the register that is in operation at the time of the poll. In support of his submission, he drew the attention of Court to three sections of the Ordinance.

The first was Section 12(2A). He submitted that for the purpose of holding local authorities elections each ward is deemed a polling area, and is divided into one or more polling districts. Section 12(2A) provides that the division of a polling area into polling districts shall be made in such a manner, that each polling district at the time of such division shall consist of not more than one thousand five hundred voters. He submitted further that this is a statutory requirement that must be fulfilled well ahead of the polls, even prior to the printing of the polling cards, since details pertaining to the polling districts have to be included in the polling card and therefore the division of a polling area into polling districts consisting of not more than one thousand five hundred voters must be based on an electoral register that is capable of being determined.

The second was Section 39A, which reads as follows:

"(1) The returning officer for an electoral area in which an election is contested shall, if that electoral area is an area to which this subsection applies, send by post to each voter whose name appears in the electoral list of any ward of that area, an official poll card specifying-

(a) The name of the local authority;

(b) The name, address and number of the voter as stated in the electoral list;

(c) the number of the polling district;

(d) the polling station allotted to the voter; and

(e) the date and hour of the poll.

(2) An official poll card under subsection (1) shall be so sent to a voter as to reach him at least five days before the date of poll. Where a post office fails to deliver such an official poll card to the person to whom it is addressed, it shall be retained in such post office until the date of the poll and shall be delivered to the addressee if he calls for it."

It was accordingly submitted by the learned Deputy Solicitor General that in order to comply with this statutory requirement, it is mandatory that an electoral register that is capable of being ascertained must be available. In other words, the electoral register must be available prior to the poll.

The third is Section 39B which provides for postal voting which is conducted ahead of the date of the poll and for which there must exist an ascertainable electoral register.

The above three provisions are not merely administrative steps that needs to be complied with but are statutory in nature, part of the electoral process that is set in motion pursuant to the issuance of the Section 26 notice and any breach of which may attract appropriate sanctions.

The learned Deputy Solicitor General submitted further that the rationale for the electoral register in force on the date the Section 26 notice is published, being the electoral register on which the election must be conducted is that, once nominations are accepted, the returning officer shall allocate the symbols to candidates and send a report in terms of Section 37 of the Ordinance to the election officer of the area, detailing the allocation of symbols. Pursuant to the receipt of this report, the elections officer of the District to which

such electoral area belongs shall publish a gazette commonly referred to as the 'polling gazette' specifying *inter alia* the electoral area in which the election is contested, the date of the poll, and more importantly, the situation of the polling station or polling stations for each of the polling districts in that electoral area and the particular polling stations, if any, reserved for female voters. Thus, division of the polling area into polling districts consisting of not more than thousand five hundred voters and the calling of nominations, are steps that have to be taken in terms of the Ordinance well ahead of the polls and even prior to the publication of the polling gazette. This cannot be done unless the electoral register in force on the date of the Section 26 notice is adopted.

The learned Deputy Solicitor General cited the above provisions as being indicators of the Legislature's intention when it refers to the electoral register for the time being in operation. I agree with his submission that the Legislature could not have intended the phrase "for the time being in operation" to mean the register in operation at the date of the poll, in view of the above provisions.

The reasoning of their Lordships could lead to the possibility of there being multiple registers that would be applicable at different stages of an election. One register may be applicable at the time of calling for nominations. Another register may be applicable at the time of issuing of polling cards or sending out postal votes or on the date of the poll. Having different lists would not be workable in the context of a single election process that comprises of several elements and which requires meticulous preparation.

I must say that I am mindful that it is possible that a further supplementary list may be certified between the day of the publication of the notice in terms of Section 26 of the Ordinance and the date of the actual poll, and therefore to take the register that prevailed on the date the Section 26 notice was published may on the face of it appear to negate the right to vote of a citizen whose name appears on a supplementary list prepared after the Section 26 notice. However, that is an eventuality that cannot be avoided as the

register must stand crystallised for the purpose of giving effect to the aforementioned provisions of the Ordinance and conducting the election in terms of the Ordinance.

On the contrary, if the electoral list is kept floating without crystallising upon the Section 26 Notice, it would create an anomaly between the right to vote and the right to contest both of which are encompassed in the right of franchise and both of which are mutually reinforcing as explained by me at the outset. This position was laid down in the **17th Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills 1991-2003, Volume VII, 213 at 218] where it was held that, *"... the voters would in terms of the Amendment have a choice of electing candidates to represent their respective Electorate, being a choice not provided as the law stands and which is necessary if franchise is to have its true meaning as provided in Article 3 read [with] 4 (a) and (e) of the Constitution."*

There is another matter that I must emphasise. The Bill not only seeks to confer the right to vote to those who became eligible to vote after 4th January 2023 but also to enable such persons the right to contest at a future election. In terms of Section 8 of the Ordinance, every person who *inter alia* is qualified to have his name entered in the electoral register and who on the first day of June in the year of the commencement of the preparation or revision of that register, is ordinarily resident in that electoral area is qualified at any time for election as a member of the relevant local authority. However, holding the election on nomination papers that were submitted in January 2023 effectively deprives those who qualified to register as voters from January 2023 from submitting nomination papers for an election that is to be held in 2025.

Therefore, when considering the right of franchise, one cannot divorce the right to vote from the right to contest at an election. The mere inclusion of a person's name in the list of registered voters will not amount to safeguarding the right of franchise, if such person is denied the right to contest and thereby the opportunity of being appointed as an

elected member. The right to vote is only one aspect of the right of franchise. Merely affording those who were registered as voters after January 2023 the opportunity to cast their vote, but denying them the opportunity of contesting, amounts to preventing them from exercising their right of franchise to its full extent. Furthermore, it is not merely the right of those persons to contest that will be violated, but also the rights of the citizenry who are being denied the opportunity to select from a list that is current, relevant and representative.

I must finally refer to Section 38(3) of the Ordinance which provides that where due to any emergency or unforeseen circumstances the poll for the election in any electoral area cannot be taken on the date specified in the notice made under Section 38(1), the elections officer may appoint another date for the taking of such poll with such other date not being earlier than the twenty-first day after the publication of the notice under Section 38(1). As the section suggests, any postponement is possible only where there exists an emergency or unforeseen circumstance and not otherwise. To say that the poll must take place on a supplementary register that has come into force after the date of the poll has been rescheduled would in my view require the entire election process from the date of the Section 26 notice to be cancelled and for fresh nominations to be called, which the Ordinance does not provide for. That certainly could not have been the intention of the Legislature in trying to cater to an emergency or unforeseen circumstance.

In these circumstances, to say that all those electors whose names appear on the electoral register prevailing on the date on which the election actually takes place are eligible to exercise their vote is to disregard the provisions of the Ordinance, the practical realities involved in the preparation of the electoral registers and the supplementary list, and the certification process provided by law.

This brings me to the complaint of the Petitioners that the candidates whose nomination papers have been accepted have a legitimate expectation of contesting the elections on

the nominations that have already been handed over. They state further that in the absence of an assurance that the political party on whose nomination paper their names currently appear will re-nominate them in the event of the cancellation of the said nominations, Clause 2(1) of the Bill which seeks to declare the nomination papers as having no force and effect will impinge on their legitimate expectation and violate their right to contest. This they claim is a violation of their fundamental rights guaranteed by the Constitution.

I must state that the Bill does not impose or introduce any new conditions or restrictions that must be satisfied by the candidates in order to secure re-nomination. Clause 2(1) does not take away either the right or the expectation of any person whose name was previously on a nomination paper and who remains qualified, from being nominated again. No material has been placed before us that those persons who have submitted nominations will not get fresh nominations. The fact however remains that the franchise of the persons whose nominations have been accepted will be impinged if the nominations are cancelled. Hence, any decision to cancel the nominations submitted by those candidates is a violation of their right to the equal protection of the law guaranteed by Article 12(1) and Article 14(1)(a).

The Bill therefore brings into play competing rights and interests of two groups. The first are those who have tendered nomination papers in January 2023 and whose rights will be affected if the nominations are declared to be of no force in law. They are an indeterminate number of nominees who form a disparate and non-homogenous group, whose status and aspirations may have changed due to the long period of time that has elapsed since the submission of nominations. The second group are those persons, 484,617 in all, who have been registered as voters since January 2023 and whose fundamental rights guaranteed by Article 14(1)(a) will be affected if they are not permitted to exercise their franchise by exercising their right to vote, as well as their right to contest.

It is in this background that the learned Deputy Solicitor General submitted that even if the rights of the Petitioners are in danger of being violated, such rights can be restricted under Article 15(7), which reads as follows:

"The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or ***for the purpose of securing due recognition and respect for the rights and freedoms of others,*** *or* ***of meeting the just requirements of the general welfare of a democratic society.*** *For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."*

I am in agreement with the submission of the learned Deputy Solicitor General that a law, the singular objective of which is to promote the franchise, indisputably qualifies as one that is intended to secure the due recognition and respect for the rights and freedom of others and one that would meet the just requirements of the general welfare of a democratic society. After all, the essence of democracy is the right to vote.

Whilst acknowledging that the issue before Court is not a simple numbers game, the learned Deputy Solicitor General submitted that the Court must balance the rights sought to be advanced against the rights that are sought to be restricted. Applying this test, on the one side is the right of those who have handed over nomination papers to contest, which right is sought to be restricted by the Bill. On the other side are two categories of persons whose rights are sought to be secured. The first are those who have been registered as voters since January 2023 and whose right to vote and the right to contest will be advanced by the Bill. The second are all other registered voters who will now have the right to vote according to an electoral register that is current, relevant and representative. For the reasons that I have already set out, I am of the view that the right of the latter must prevail.

A similar conclusion was reached by this Court in the **Local Authorities (Special Provisions) Bill**, [Decisions of the Supreme Court on Parliamentary Bills 2007-2009, Volume IX, page 9 at page 10], where Court agreed that, *"If the Elections are held on the nominations that have been received in 2006, the operative electoral list is of the year 2004. On the other hand if fresh nominations are called for as envisaged in the present Bill, the electoral list that would be used would be of 2006, which reflects a total increase of 10,088 electors in the nine Local Authority areas. If the amendment is not made, 10,088 electors would be dis-enfranchised."*

For the foregoing reasons, I determine that the Bill as a whole or any provision thereof is not inconsistent with the provisions of the Constitution and may be enacted with a simple majority of Parliament.

Arjuna Obeyesekere
Judge of the Supreme Court