

“Regulation of Election Expenditure Bill”

BEFORE : Priyantha Jayawardena PC - Judge of the Supreme Court
P. Padman Surasena - Judge of the Supreme Court
Kumuduni Wickremasinghe - Judge of the Supreme Court

S.C. (S.D.) No. 72/2022

Petitioner : Dasanayaka Mudiyanseelage Dissanayake

Counsel : Vishwa de Livera Tennekoon

Respondent : Hon. Attorney General

Counsel : Dr. Avanthi Perera, Deputy Solicitor-General

Court assembled for hearing at 10.00 a.m. on the 23rd of December, 2022.

A Bill titled “Regulation of Election Expenditure” was published in the Government Gazette on the 29th of November, 2022 and placed on the Order Paper of Parliament on the 8th of December, 2022.

The aforementioned petitioner has, by forwarding the petition to this court on the 14th of December, 2022 invoked the jurisdiction of this court in terms of Article 121(1) of the Constitution to determine whether the Bill or any of the Clauses therein are inconsistent with the provisions of the Constitution.

The Attorney-General was noticed in terms of Article 134(1) of the Constitution. The learned Deputy Solicitor-General who appeared for the Attorney-General assisted the court in considering the constitutionality of the Bill and the Clauses therein.

The Bill consists of the following Clauses;

Clause 2 – Stipulates the application of the Bill

Clause 3 – provides for ‘Authorised amount’

Clause 4 – Restriction on election expenditure by a candidate

Clause 5 – Prohibition on the acceptance of certain donations

Clause 6 – Candidate to submit return of donations or contributions received and expenditure incurred

Clause 7 – Publication of notice relating to receipt of returns and declarations

Clause 8 – Offence of an illegal practice

Clause 9 - Interpretation

The learned Deputy Solicitor-General furnished to court a draft of the proposed amendments to the Bill, along with the written submissions filed on behalf of the Hon. Attorney-General, and submitted that steps would be taken to amend the said Clauses in the Bill at the Committee Stage.

Applicability of the Bill

The learned counsel for the petitioner submitted that the Bill seeks to regulate the expenditure incurred by individual candidates at elections conducted under the Local Authorities Ordinance (Chapter 262), the Provincial Councils Elections Act, No.2 of 1988, the Parliamentary Elections Act, No.1 of 1981, and the Presidential Elections Act, No.15 of 1981.

However, the Bill does not regulate the Election Expenditure of Political Parties. Further, it was submitted that in Sri Lanka, "Party Politics" takes precedence over individual candidates.

Therefore, political parties promote their respective party and its symbol, and the voters in Sri Lanka cast their votes for the party in the first instance.

The learned counsel for the petitioner further submitted that the Bill in its present form seeks only to regulate the contributions and donations received as well as the expenditure incurred by individual candidates, but it does not regulate the contributions and donations received by political parties and their expenditure at an election.

Hence, he submitted that, as the Bill does not restrict the spending of political parties, it would adversely affect some of the candidates as the spending by political parties varies from one party to another depending on their financial capacity.

In the circumstances, it was submitted that regulating certain receipts and expenditure of the candidates at an election would place certain candidates at a disadvantage. Therefore, the Bill as a whole violates Articles 3, 4, and 12(1) of the Constitution.

The long title of the Bill states –

“AN ACT TO REGULATE THE EXPENDITURE INCURRED BY CANDIDATES AT EVERY ELECTION CONDUCTED UNDER THE LOCAL AUTHORITIES ELECTIONS ORDINANCE (CHAPTER 262); THE PROVINCIAL COUNCILS ELECTIONS ACT, NO. 2 OF 1988; THE PARLIAMENTARY ELECTIONS ACT, NO. 1 OF 1981 AND THE PRESIDENTIAL ELECTIONS ACT, NO. 15 OF 1981 AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH AND INCIDENTAL THERETO.”

[emphasis added]

Clause 4(1) of the Bill states;

“A candidate at an election conducted under any law specified in section 2, shall not incur expenditure in excess of the authorized amount in respect of such election.”

[emphasis added]

A careful consideration of the long title and the Clauses in the Bill show that the Bill only regulates the donations and contributions received as well as the expenditure incurred by the candidates contesting an election and not the political parties or independent groups.

Hence, it is necessary to consider whether the absence of provisions in the Bill to regulate the expenditure of political parties and independent groups affects the candidates at an election and also the sovereignty of the people.

In Sri Lanka, recognised political parties or independent groups should submit nomination papers stating the names of their candidates who intend to contest an election. At an election, voters are required to cast their votes in favour of a recognised political party or an independent group of candidates in the first instance. Thereafter, the voters would indicate their preferences in respect of the candidates. However, voting for candidates is not mandatory under the election laws of Sri Lanka.

Further, the Bill in its present form seeks only to regulate candidates and not political parties. Thus, political parties or independent groups can promote themselves without any restrictions. Such campaigns at an election would benefit candidates belonging to certain political parties or independent groups. Furthermore, it may adversely affect the outcome of an election.

Moreover, the absence of provisions to regulate receipts and the expenditure of political parties or independent groups will adversely affect the candidates, as the present electoral system in Sri Lanka requires the voters to vote for a political party or an independent group in the first instance and thereafter vote for the individual candidates if the voter chooses to do so.

Therefore, introducing legislation only to regulate the expenditure of individual candidates would adversely affect not only the candidates at an election but also the sovereignty of the people.

Hence, we determine that the Bill in its present form violates Articles 3, 4, and 12(1) of the Constitution. Accordingly, the Bill may only be passed by a special majority required under Article 84(2) of the Constitution and approved at a referendum by virtue of the provisions of Article 83 of the Constitution.

However, if the long title and the Clauses in the Bill are suitably amended to apply the Bill to individual candidates, political parties, and independent groups contesting at an election, the aforementioned inconsistency will cease and the Bill can be passed in Parliament by a simple majority.

Referendum

The learned counsel for the petitioner submitted that referendums can be held on matters of national importance. However, the Bill does not contain any provisions applicable for referendums and therefore, it affects the sovereignty of the people.

Further, it was submitted that the Bill in its present form creates an opportunity for third parties to influence the outcome of a referendum, and the absence of provisions to regulate expenditure at referendums is violative of Articles 3, 4, and 12 (1) of the Constitution.

The learned Deputy Solicitor-General submitted that the franchise exercised at referendums under Chapter XIII of the Constitution can be distinguished from elections held under the laws referred to in the Bill.

It was further submitted that when the People exercise their franchise at a referendum, it is either in respect of a Bill (under Article 85 of the Constitution) or in respect of a matter of national importance (under Article 86 of the Constitution). Furthermore, referendums are not conducted for the purpose of electing the People's representatives to public office.

Further, in a referendum, either a Bill or a matter of national importance is presented to the People seeking their approval or disapproval in the matter.

Moreover, the mere fact that the People exercise their franchise at a referendum does not transform it into an election.

It was further submitted that since Clause 2 ensures that the Bill applies to all four types of elections where the People elect their representatives to office, there can be no merit in the argument put forth by the petitioner that there is any inconsistency with the Constitution.

Having considered the submissions made by the learned counsel for the petitioner and the learned Deputy Solicitor-General, we are of the opinion that the equality enshrined in Article 12 of the Constitution permits legislation based on a reasonable classification where criteria for such classification advance its objectives. Though the Bill does not apply to referendums, there is a reasonable basis to exclude referendums from the Bill based on a reasonable classification.

Further, an election and a referendum cannot be compared with each other as they are different in nature, though in both instances people exercise their franchise. Hence, we are inclined to agree with the submissions made by the learned Deputy Solicitor-General.

Accordingly, we determine that the absence of provisions applicable to referendums in the Bill does not violate the provisions in the Constitution.

Clause 2

The learned Deputy Solicitor-General furnished the following amendment that would be made to Clause 2 of the Bill at the Committee stage;

Clause 2 in the Bill would be deleted and substituted with the following;

“2. The provisions of this Act shall apply to every election”;

Further, a consequential amendment would be made to the said Clause of the Bill by adding the following amendment;

“election” means an election conducted under –

(a) the Local Authorities Elections Ordinance (Chapter 262);

(b) the Provincial Councils Elections Act, No. 2 of 1988;

(c) the Parliamentary Elections Act, No. 1 of 1981; and

(d) the Presidential Elections Act, No. 15 of 1981;”

Clause 3 - *Calculation of the authorised amount*

Clause 3 states;

“After the conclusion of the period of nomination specified in the Proclamation or Order requiring the conduct of an election under any law specified in Clause 2, the Election Commission shall, in consultation with recognized political parties,

independent groups and other candidates contesting such election, fix by Order published in the *Gazette*, a sum of money in Sri Lankan rupees to be used for the purpose of calculating the authorized amount in accordance with the provisions of this Act, for such election.” [emphasis added]

The said Clause does not specify guidelines or criteria to calculate the ‘authorised amount’ by the Election Commission. The absence of a stipulated criteria or lack of guidance in calculating the ‘authorised amount’ referred to in the said Clause renders the said Clause unreasonable, arbitrary, and capricious.

Therefore, we determined that Clause 3(1) of the Bill violates Article 12(1) of the Constitution and may only be passed by the special majority required by Article 84(2) of the Constitution.

The learned Deputy Solicitor-General furnished the following amendments to Clause 3 of the Bill;

Clause 3 of the Bill would be substituted with the following Clause: -

“3. (1) Within five days after the conclusion of the period of nomination specified in the Proclamation or Order requiring the conduct of an election under any law specified in section 2, the Election Commission shall, in consultation with the recognized political parties and the independent groups contesting such election, fix by Order published in the *Gazette*, a sum of money in Sri Lankan rupees to be used for the purpose of calculating the authorized amount in accordance with the provisions of this Act, for such election:

Provided however, in the case of a Presidential election, candidates shall be consulted, where such candidates do not belong to a political party.

(2) Such sum of money to be fixed under subsection (1) shall be calculated taking into consideration the prevailing inflation rate and the consumer price index of Sri Lanka.”; [emphasis added]

The said amendment stipulates the criteria for calculating the ‘authorised amount’, i.e., by taking into consideration the prevailing inflation rate and the consumer price index of Sri Lanka.

If the aforementioned amendments are affected at the Committee Stage or the said Clause is suitably amended by specifying a criteria to calculate the ‘authorised amount’, the above inconsistency would cease, and the said Clause can be passed by a simple majority in Parliament.

Time Frame for Publications of the Gazette and the Newspaper Notice

Clause 3(3) of the Bill requires the Election Commission to publish the ‘authorised amount’ in the *Gazette*. Further, Clause 7 of the Bill requires the Election Commission to publish a Notice in a national newspaper specifying the place and time to inspect the declarations furnished by the candidates.

However, the said Clauses do not specify a time frame to publish the *Gazette* as well as the newspaper advertisement. The absence of a specific time frame to publish the *Gazette* and the notice in the newspapers would make the said Clauses unreasonable, arbitrary, and capricious, and therefore, those two sub-Clauses in their present form violate Article 12(1) of the Constitution.

Hence, we determined that the said sub-Clause in its present form may be passed by the special majority required by Article 84(2) of the Constitution.

However, by stipulating a time frame for the publication of the *Gazette* and the newspaper advertisement would cease the aforementioned inconsistency and may be passed by a simple majority in Parliament.

Clause 5

Clause 5(1) of the Bill prohibits candidates from accepting certain donations and contributions. However, the said sub-Clause does not provide for the prohibition of accepting donations or contributions indirectly.

The learned Deputy Solicitor-General submitted that the Bill aims to prevent undue interference with the elections and misuse of public funds for election propaganda and therefore falls within the overall objective of the legislation, which is to ensure free and fair elections.

She further submitted that Clause 5 captures third-party campaign financing as it specifically refers to the words “donations” or “contributions”. Moreover, such reference, when read with Clause 6(1) of the Bill, makes it clear that donations and contributions that are accepted, received, and expenditure incurred ‘*on behalf of such candidate for promoting or procuring the election of such candidate*’ are required to be accounted for.

However, at the request of court for the purpose of clarity, the learned Deputy Solicitor-General informed that the following amendment would be moved to the said sub-Clause at the Committee Stage;

Clause 5 - delete line 16 and 17 and substitute the following: -

“5.(1) A candidate at an election conducted under any law specified in section 2, shall not, directly or indirectly accept or receive a ”;

Clause 7(1)

At the request of the court, the learned Deputy Solicitor-General submitted that Clause 7(1) of the Bill would be amended by adding the words ‘national newspaper’ at the Committee Stage.

Clause 7(3) - *Right to Information*

Clause 7(3) of the Bill states;

“The returning officer and the Election Commission shall preserve all returns and declarations received under subsection (1) of section 6, for a period of 6 months after such receipt and may destroy such returns and declarations at the end of that period.” [emphasis added]

Article 14A of the Constitution states that every citizen shall have the right of access to any information as provided by law. The applicable law is the Right to Information Act, No. 11 of 2016.

In terms of section 7(3)(b) of the Right to Information Act, No. 11 of 2016, every public authority shall maintain new records which are created after the said Act came into power and shall preserve them for a period of not less than 12 years from the date when such record was created.

Further, section 4 of the said Act states:

“The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency

of conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.”

Therefore, the requirement in Clause 7(3) of the Bill which requires the Election Commission to preserve all returns and declarations received by it for a period of six months after receipt of the same prior to destroying such returns and declarations is contrary to section 4 of the said Act.

Thus, at the request of court, the learned Deputy Solicitor-General informed court that Clause 7(3) would be deleted at the Committee Stage in order to avoid the said discrepancy in the Bill.

Illegal Practice

Clause 6 of the Bill requires a candidate to submit returns and declarations giving details of the donations and contributions he received and the expenditure incurred by him within 21 days of the publication of the result of an election. Thereafter, the Election Commission shall publish a notice (no date is specified in the Bill) in newspapers specifying a date for the public to inspect such returns and declarations.

The failure to comply with the said requirement or making a false declaration commits the offence of an ‘illegal practice’ in terms of Clause 8 of the Bill. Further, Clause 4 of the Bill states that a candidate who exceeds the authorised amount set out in Clause 3(3) commits the offence of ‘illegal practice’.

Furthermore, Clause 8 of the Bill specifically states that the offence of ‘illegal practice’ shall result in the same consequences as set out in the laws referred to in Clause 2 of the Bill. Accordingly, the Bill contains cross-references to the penalties that already exist in election laws.

Thus, ‘illegal practice’ referred to in the Bill is an offence under the Local Authorities Election Ordinance, the Provincial Councils Elections Act, No. 2 of 1988, the Parliamentary Elections Act No. 1 of 1981, and the Presidential Elections Act No. 15 of 1981.

Further, ‘illegal practice’ is a ground for an election petition under Part IVA of the Local Authorities Election Ordinance.

In terms of section 82AF of the Local Authorities Elections Ordinance, an election petition shall be presented to the relevant High Court established under Article 154P of the Constitution within 21 days of the publication of the results of a local authority election in the *Gazette*.

Further, section 82V(2) of the Local Authorities Election Ordinance requires the Election Judge to conclude the trial of an election petition within a period of 6 months after the date of the presentation of such petition.

The laws applicable to election petitions in respect of Provincial Council Elections, Parliamentary Elections, and Presidential Elections are stipulated in section 108(1) of the Provincial Councils Elections Act No. 2 of 1988 section 108(1) of the Parliamentary Elections Act No. 1 of 1981, and section 102(1) of the Presidential Elections Act No. 15 of 1981 respectively.

Although an 'illegal practice' is an offence under the Bill which would give rise to an election petition, the above time frame stipulated in the Bill to furnish returns and declarations of donations and contributions as well as the expenditure, the publication of the newspaper advertisement informing the public a date to inspect the said returns and declarations, leads to a situation where no one can file an election petition for the offence of 'illegal practice' referred to in the Bill within the stipulated time frame in the aforementioned election laws. Therefore, the deterrent imposed in the Bill for 'illegal practice' has become nugatory. Hence, depriving a person to seek redress for an election offence committed under the Bill affects the franchise guaranteed by Articles 3 and 4 of the Constitution.

Thus, we are of the opinion that the time stipulated in Clauses 6 and 8 of the Bill is unreasonable, arbitrary and capricious. Therefore, the absence of sufficient period to file an election petition for illegal practice violates Article 3, 4, and 12(1) of the Constitution.

Hence, we determine that Clauses 6 and 8 of the Bill in their present form may be passed by the special majority required by Article 84(2) of the Constitution and approved at a referendum by virtue of the provisions of Article 83 of the Constitution.

However, the above inconsistency will cease and the said Clauses can be passed in Parliament by a simple majority, if appropriate amendments are made to the Bill by enlarging the time to file election petitions under the aforementioned Elections laws.

Clause 9 – Interpretation

Further, the learned Deputy Solicitor-General informed court that the following amendments would be made to Clause 9 of the Bill.

- insert immediately after line 26 of the following:-

“administrative district” means the administrative district established under the Administrative Districts Act (Chapter 392);”

- delete line 3 and substitute the following:-

“received directly or indirectly with the express or implied consent”;

- insert immediately after line 31 of the following:-

“election” means an election conducted under –

(a) the Local Authorities Elections Ordinance (Chapter 262);

(b) the Provincial Councils Elections Act, No. 2 of 1988;

(c) the Parliamentary Elections Act, No. 1 of 1981; and

(d) the Presidential Elections Act, No. 15 of 1981;”

Sinhala and Tamil Texts

The Sinhala text of the Bill contains inconsistencies with the English text, some of which were pointed out by the court during the course of the hearing. However, the limited time allowed for the delivery of the Determination does not permit us to make a detailed scrutiny of the entire Sinhala and Tamil text.

In the circumstances, it is suggested to make the necessary amendments to the Sinhala and Tamil texts to bring them in line with the English text. In this regard, the learned Deputy Solicitor-General furnished a list of amendments along with the written submissions that would be made at the Committee Stage in Parliament.

Conclusion

We have examined the other provisions of the Bill and are of the opinion that, subject to the above, none of the provisions in the Bill are inconsistent with the Constitution.

Therefore, we make our determination that the Bill can be passed by a simple majority in Parliament, subject to the amendments stated above.

We wish to place on record our sincere appreciation for the assistance given by the learned Deputy Solicitor-General and the counsel for the petitioner in the consideration of the Bill.

Priyantha Jayawardena PC
Judge of the Supreme Court

P. Padman Surasena
Judge of the Supreme Court

Kumuduni Wickramasinghe
Judge of the Supreme Court