LST REVIEW

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UPHOLDING THE ELECTIVE PRINCIPLE

LAW & SOCIETY TRUST

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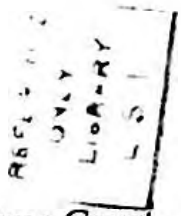
Editor's Note .....



This issue of the Review focuses on a recent judgement by the Supreme Court, which limits and defines the right of a secretary of a political party or leader of an independent group to nominate a person to fill a vacancy caused by the resignation of a member of a Provincial Council.

This power, the Court ruled, is confined to candidates whose names have appeared in the original nomination paper and who have secured some preferences at the elections. Written submissions filed by the parties in one of the applications before court are also published in the Review.

Recent judicial thinking has broadly expanded the right to vote as a fundamental right by articulating the principles that elections should be held rather than postponed, that there should be no statutory interference with the power given to the Commissioner of Elections to fix the date of elections and with the contents of nomination papers already accepted and that the date of the elections should be fixed so as to facilitate rather than hinder the exercise of the right to vote.

Vitally in this regard, it has been ruled that thuggery, intimidation of electors and electoral staff and ballot stuffing imposes particular duties upon the Commissioner of Elections, non compliance of which would lead to violation of the rights of electors.

Further, where citizens are prevented from exercising their right to vote as a result of decisions taken by those in authority, which decision making processes are shrouded in secrecy and are manifestly not bona fide, the right to a free, equal and secret ballot is irrevocably interfered with in a manner that cannot be justified under the Constitution.

The affirming of the right of the electorate to be represented by persons who have faced the voters and obtained their support, as set out in this most recent judgement by the Court, is therefore a logical development.

It is interesting that, in the process, the Court used Directive Principles of State Policy in the Constitution as well as widely accepted international human rights standards to buttress its reasoning upholding the elective principle.

The Review also wishes to record its gratitude to a distinguished Indian advocate, *Mr A. N. Jayaram,* for consenting to write, on invitation, an analysis of prevalent developments in India in regard to higher judicial appointments in that country. The processes by which consensus is sought to be reached in a neighbouring country with regard to the manner in which transparency and accountability could be ensured in this context is of considerable comparative interest to Sri Lanka.

The Supreme Court of the Democratic Socialist Republic of Sri Lanka

SC Appeal No. 26/2002
CA Application No. 487/99

1. Centre for Policy Alternatives
   (Guarantee) Limited,
   32/3, Flower Road,
   Colombo 7

2. Dr. Paikiasothy Saravanamuttu
   Ascot Avenue, Colombo 5

Petitioners-Appellants in SC 26/2002

SC Appeal No. 27/2002
CA Application No. 488/99

Rohan Edirisinha
2/3, Sri Maha Vihara Road
Dehiwela

Petitioner-Appellant in SC 27/2002

vs.

1. Dayananda Dissanayake
   Commissioner of Elections
   Elections Secretatriat
   Sarana Road
   Sri Jayawardenepura-Kotte

2. Samaraweera Weerawanni
   Chief Minister's Office
   Uva Provincial Council
   Badulla

3. D. M. Jayaratne
   General Secretary
   People's Alliance
   65, Rosmead Place,
   Colombo 7

4. The Attorney-General
   Attorney-General's Department
   Hulftsdorp
   Colombo 12

Respondents - Respondents

BEFORE	:	Fernando, J. Gunasekera, J. and Wigneswaran, J.
COUNSEL	:	Dr. Jayantha de Almeida Gunaratne with Ms. K. Pinto Jayawardene for the Appellants in SC 26/2002; Viran Corea for the Appellant in SC 27/2002; Saleem Marsoof, PC, ASG, with A. Gnanathasan, DSG, for the 1st and 4th Respondents; Dr. Jayampathy Wickremaratne, PC, with Ms. P. Wickremaratne for the Respondents.
ARGUED ON	:	17th March 2003
DECIDED ON	:	27th May 2003

FERNANDO, J.

These two appeals were taken up together as the same question of law arose, relating to the nature and extent of the right of the secretary of a recognized political party (or leader of an independent group), under section 65 of the Provincial Councils Elections Act, No. 2 of 1988 ("the Act"), to nominate a person to fill a vacancy caused by the resignation of a member of a Provincial Council: to be precise, whether he was entitled to nominate a person whose name was not on the original nomination paper.

FACTS

The five-year term of office of five Provincial Councils (including the Uva Provincial Council to which these appeals relate) came to an end in June 1998. The respective returning officers, by notices under section 22 of the Act, duly fixed the date of poll for the election to the new Councils for 28/08/1998. Nominations were duly submitted.

The 2nd Respondent had been a Member of Parliament of the People's Alliance during the nomination period, and it is common ground that because he was a Member of Parliament he was not then qualified for election as a member of a Provincial Council. His name was not included in the People's Alliance nomination paper for either of the districts of the Uva Province. His wife's name was included.

On 04/08/1998, the President by a Proclamation under section 2 of the Public Security Ordinance brought the provisions of Part II of that Ordnance into operation throughout Sri Lanka, and made an emergency regulation under section 5 deeming all the notices under 22

of the Act to be, for all purposes, of no effect. No fresh date of poll was fixed. The poll was thereby effectively postponed, and postponed *sine die*. The Commissioner of Elections, the 1st Respondent, took no steps to fix a new date of poll in the exercise of his powers under section 22(6) of the Act. The postponement of the poll and the failure to fix a new date were successfully challenged in an application to this Court under Article 126 (*Karunathilaka* v. *Dissanayake*, [1999] 1 Sri LR 157). On 27/01/99 this Court directed the Commissioner to fix a new date of poll.

While that application was pending, the Provincial Councils Elections (Special Provisions) Bill was placed on the Order Paper of Parliament in November 1998. The provisions of that Bill purported to empower the Commissioner to appoint a date of poll for those five councils and to empower the secretary of a recognized political party (or leader of an independent group) to substitute in the place of any candidate whose name appeared in any nomination paper any other person, even without the consent of, or notice to, the original candidate. In its Determination in respect of that Bill (SC SD Nos 9-14/98, 30/11/98), this Court held that those provisions were unconstitutional. That Bill was not enacted into law.

Immediately after the decision in *Karunathilaka* v. *Dissanayake*, the Commissioner fixed a new date of poll. That date was objected to on several grounds, the validity of which the Commissioner accepted. Upon his application to this Court made on 03/03/99, this court directed him to fix a new date (*Karunathilaka* v. *Dissanayake* (No. 2), [1999] 1 Sri LR 183). The Commissioner thereupon fixed the poll for 06/04/99.

At the election for the Uva Provincial Council held on 06/04/99, the 2nd Respondent's wife was elected. She was later appointed Chief Minister of the Province. On 19/05/99 the 2nd Respondent resigned his seat in Parliament. On 21/05/99 one of the People's Alliance members elected to the Uva Provincial Council resigned; the Commissioner called upon the 3rd Respondent, the secretary of the People's Alliance, to nominate an eligible person to fill that vacancy; and the 3rd Respondent nominated the 2nd Respondent. On 24/05/99 the Commissioner declared the 2nd Respondent to be elected, and on the same day his wife resigned from the office of Chief Minister. On 27/05/99 the 2nd Respondent was appointed Chief Minister.

On 01/06/99 the Petitioners-Appellants ("the Petitioners") in these two appeals filed two applications in the Court of Appeal, praying *inter alia* for *certiorari* to quash the Commissioner's declaration that the 2nd Respondent was elected as a member of the Uva Provincial Council, and for *quo warranto* to declare that he was not entitled to hold the office of Chief Minister. Among the respondents to those applications were another three Members of Parliament, who resigned and became Chief Ministers (of the Sabaragamuwa, North-

Central and Central Provincial Councils) in similar circumstances. However, the Petitioners informed the Court of Appeal that they did not wish to proceed against them, and they were discharged from the proceedings.

On 06/11/2001 the Court of Appeal held that whenever a vacancy arises in the membership of a Provincial Council, section 65(2) of the Act empowers the secretary of the recognized political party (hereinafter referred to as "the secretary"), which had nominated the member vacating office, to nominate *any* eligible person to fill that vacancy even though his name had not appeared in the original nomination paper submitted by that party and even though he had not been eligible for election at the time that nomination paper was submitted.

The Petitioners applied to this Court for special leave to appeal, which was granted on 28/05/2002, upon the following questions:

"(1) Did the Court of Appeal err in holding that a person, whose name did not appear on the nomination list submitted by the relevant political party at the Provincial Council election, could thereafter be nominated by the secretary of the relevant political party to fill a vacancy which arises in the said Council?

(2) Did the Court fail to consider the implications of section 65(3) of the Act for the interpretation of section 65(2)?"

The 2nd Respondent was represented by President's Counsel in the Court of Appeal. According to the journal entries, although notice of the Petitioners' applications for special leave to appeal had been given by registered post to the 2nd Respondent, he was absent and unrepresented on 28/05/2002. On that day this Court directed that notice of the appeals be given to him, and notice was given by registered post. Nevertheless, he was absent and unrepresented at the hearing of the appeals on 17/03/2003.

STATUTORY PROVISIONS

Each Provincial Council consists of two or more administrative districts, and elections are held in respect of each district on the basis of proportional representation. Such elections can be contested by recognised political parties and independent groups. Any such party or group may contest one or more districts, by submitting a nomination paper in respect of such district (section 13(1) of the Act). Section 9 of the Act provides that no person is *qualified* to be elected as a member of a Provincial Council if he is subject to any of the disqualifications specified in section 3 of the Provincial Council Act, No. 42 of 1987. A nomination paper must contain the names of as many candidates as there are members to be elected for that

district, increased by three (section 13(1)), and the written consent of every candidate must be endorsed on it – if not, it must be rejected (section 17(1)(b) and (d)). The Act makes no provision for the substitution of candidates, even upon death or withdrawal (sections 23 and 116). The ballot paper for a district is designed to enable a voter to *vote* for a particular party or group, and to indicate also his *preference* for up to three candidates nominated from that district by that party or group (section 30). A voter must indicate the party or group of his choice, and if he does not his vote would be invalid (section 51). However, he is not obliged to indicate any preference for individual candidates.

The *number* of candidates elected from each party of group from a district is directly proportional to the number of valid votes polled by that party or group (section 58(1)). The *particular* candidates elected from each party or group are determined according to the preferences received by the candidates of that party or group (section 58(1)(e) and (f)). Thus in a district entitled to ten members, a party receiving 20% of the valid votes polled would be entitled to have two of its candidates declared elected, and those two would be the candidates receiving the highest and second highest number of preferences.

There is one departure from proportionality which has a bearing on the decision in these appeals. Section 61 A(2) of the Act provides that the votes cast for each party or group in the several districts of the Province shall be aggregated; that the party or group which polled the highest number of votes in the Province shall be entitled to have two more of its candidates declared elected as members of the Provincial Council ("bonus seats"); and that the Commissioner shall call upon the secretary or group leader to nominate two persons from among the *unsuccessful* candidates nominated by that party or group for that election – i.e. from among the candidates nominated for *any* district in that Province.

These provisions relating to the result of the election, including the bonus seats, establish that the only persons who can be declared elected *immediately after the poll* are persons who were candidates whose names appeared on a nomination paper, on the basis of which the voters cast their votes and expressed their preferences.

The Petitioners relied heavily on section 65(3), to which the Court of Appeal made no reference. Section 65 provides:

> "(1) where the office of a member of a Provincial Council becomes vacant ... the Secretary of the Provincial Council shall inform the Commissioner of the fact of the occurrence of such vacancy. The Commissioner shall fill such vacancy in the manner hereinafter provided.

(2) If the office of a member falls vacant due to death, resignation or for any other cause, the Commissioner shall call upon the secretary of the recognized political party or the group leader of the independent group to which the member vacating office belonged, to nominate within a period to be specified by the Commissioner, a person eligible under this Act for election as a member of that Provincial Council, to fill such vacancy. If such secretary or group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation [by him in the prescribed form] the Commissioner shall declare such person elected ...

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

(3) Where all the candidates whose names were on such nomination paper have been declared elected or where none of the candidates whose names remain on such nomination paper have secured any preferences, or where the member vacating office was not elected from an administrative district, the Commissioner shall forthwith inform the President who may, on receipt by him of such information and at any stage when he considers it expedient to do so, by Order ... direct the Commissioner to hold an election to fill such vacancy ..."

JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal noted that section 65(2) has two limbs – the first authorizing nomination by the secretary when called upon to do so by the Commissioner, and the second requiring nomination by the Commissioner upon default by the secretary. The first limb empowers the nomination of "*a person eligible* under the Act for election") whom the Commissioner must then declare elected "*from the nomination paper* submitted by that party" the candidate who had secured the highest number of preferences next to the last of the members already declared elected. The Court observed that if it had been the intention of Parliament that the secretary's choice should be confined to candidates whose names were on the nomination paper, the first limb would have made reference to the nomination paper in the same way as

the second limb did. Parliament had deliberately used different and wider language, manifesting an intention not to restrict the secretary's choice in that way. Likewise, Parliament did not restrict the secretary's choice to persons who had been eligible at the time of nomination, and it was not open to add such a restriction by way of interpretation.

Further the requirement – in the first limb, but not in the second – of an oath or affirmation by the nominee was significant. The Act required that the original nomination paper be accompanied by an oath or affirmation by every candidate; accordingly, since the Commissioner's choice under the second limb was confined to candidates on the nomination paper, it was unnecessary to insist upon a further oath or affirmation; but as the secretary's choice under the first limb extended to persons outside the nomination paper, an oath or affirmation was required.

The Court of Appeal also dealt with the Petitioners' contention that there were two possible interpretations of section 65(2), and that therefore that interpretation should be preferred which was in harmony with Article 12(1), with the franchise guaranteed by Article 4(e), with the freedom of expression under Article 14(1)(a), and with the ideals of a democratic system of government by the elected representatives of the people. The Court concluded that section 65(2) was clear, plain and unambiguous, and that the Court could not "put its own gloss on the plain words of the section to squeeze out a meaning not borne out by the language of the section."

Reference was also made to two other matters. "According to Article 99(13)(b) of the Constitution when the seat of a Member of Parliament becomes vacant, the candidate from the relevant political party ... who had secured the next highest number of preferences shall be declared elected", and section 65(2) of the Act was a deliberate departure from that procedure. "Section 64(5) of the Parliamentary Elections Act No 1 of 1981 ... [as amended by Act No. 35 of 1988 provides that] ... when there is a vacancy of a Member of Parliament, the secretary of the political party to which the Member vacating his seat belonged can nominate a person to fill the vacancy ... [there being] ... no requirement to nominate such person from the list submitted to the Commissioner or from the nomination paper", and that provision, like section 65(2), recognizes "the supremacy given to the party above the individual candidates."

Unfortunately, the carefully reasoned judgment of the Court of Appeal made no reference to section 65(3) of the Act and the submissions which the Petitioners made in relation to that provision

INTERPRETATION OF SECTION 65

Section 65(1) directs the Commissioner to fill any vacancy "in the manner *hereinafter* provided", and that confirms that sub section 93) cannot be ignored. Mr. Marsoof, PC, ASG on behalf of the 1st and 4th Respondents submitted that sub-sections (2) and (3) provide for three alternative methods by which a vacancy could be filled – the first is set out in the first limb of section 65(2), the second is set out in the second limb, and the third is set out in section 65(3); and that these three alternative methods "are set out in a sequential and a logical order." Dr. Wickramaratne, PC, on behalf of the 3rd Respondent (the secretary of the People's Alliance), submitted that section 65(3) is applicable only when the secretary has not made a nomination under section 65(2). Under section 65(2) the secretary can nominate a person who did not obtain a single preference. If the secretary can nominate a person who had been so decisively rejected by the people, it is futile to argue that a person who did not contest cannot be nominated – "such a person has, at least, not been expressly rejected by the people." He further contended that the words "a person eligible under this Act for election" in section 65(2) are wider than, and are not limited to, an unsuccessful candidate: "eligibility" refers to section 3 of the Provincial Councils Act.

The essence of those submissions is that a vacancy should be filled initially by nomination by the secretary; that the secretary could nominate any person qualified under the Act; that failing such nomination, by the Commissioner; and that if the Commissioner was unable to nominate, then only recourse may be had to section 65(3), resulting in a by-election. That interpretation reduces sub-section (3) to a proviso to the second limb of section 65(2) – although it is certainly not drafted as a proviso.

The Act does not make any express provision regarding the "eligibility" of persons for election. Section 9 of the Act provides that a person shall be *qualified* to be elected, if he is not subject to any of the *disqualifications* specified in section 3 of the Provincial Councils Act. If section 65(2) was intended to empower the secretary to nominate any person *qualified* under the Act, or not *disqualified* under the Act, it should have authorized the secretary to nominate "any person *qualified* under the Act." The Petitioners' contention is that different language was used because a different result was intended, and that a person *qualified* for election becomes a person *eligible* for election only if and when he is duly nominated. However, on examining the Sinhala text of the Act after judgment was reserved, I found that the same Sinhala word is used in both sections. Accordingly, section 65(2) must be interpreted on the basis that, *ex facie*, it authorizes the secretary to nominate a person *qualified* under section 9 at the time of such nomination.

Why, then, did the first limb refer to the nomination of a "person eligible" while the second limb referred to a candidate "from the nomination paper"? I think there is good reason for the difference in language. It is obviously desirable that a vacancy be filled by a then qualified – and not a disqualified – person, for otherwise litigation would inevitably result. However, the Commissioner has no means of knowing (and cannot reasonably be expected to launch an inquiry into the question) whether a candidate on the nomination paper had subsequently become subject to a disqualification. Accordingly, the second limb requires the Commissioner to go by the nomination paper alone. It is not reasonable, however, to allow the same leeway to the secretary who would know, or could quite easily ascertain, whether his candidates are no longer qualified. The burden of verifying eligibility is therefore cast on him alone. It is probably for that reason that section 65(2) permits the secretary to nominate only a "person *eligible*."

Furthermore, if a "person eligible" is held to include a candidate whose name was not on the original nomination paper, that would allow the secretary to nominate even a person who had not given his consent to such nomination, and the Commissioner would nevertheless be obliged to declare him elected. As a matter of principle, a statutory provision should not generally be interpreted as requiring a person to be declared elected to an office without his prior consent. However, if the first limb is restrictively interpreted to include only candidates, their written consent and signatures will be found on the original nomination paper. There is thus some basis for the contention that the secretary's power of nomination is restricted to qualified candidates from the original nomination paper whose consent had been expressed therein.

On the other hand, the first limb requires the secretary to submit an oath or affirmation from his nominee. That is superfluous if his choice is restricted to persons on the original nomination paper. That is a circumstance which supports the Respondents' contention that the secretary can nominee *any* qualified person. Undoubtedly, section 65(2) is not without ambiguity.

It is therefore necessary to examine section 65 as a whole in the context of the entire Act. The Respondents contended that section 65(3) applies only if the secretary fails to nominate. However, scrutiny of section 65(3) reveals that it imposes an imperative duty on the Commissioner "***forthwith***" to inform the President in three situations –

(i) where all the candidates whose names were on the (original) nomination paper have been declared elected, or
(ii) where none of the candidates whose names remain on such nomination paper have secured any preferences, or
(iii) where the member vacating office was not elected from a district.

The third situation needs some clarification: the only members "not elected from a district" would be the two candidates declared elected to bonus seats.

The corrections of the Respondents' interpretation can best be tested by reference to those three situations. In any of those situations, what is the Commissioner's duty? Should he follow the "sequential and logical order", and call upon the secretary to nominate a person? Or should he *forthwith* inform the President? Although sub-section (2) and sub-section (3) appear to create irreconcilable contemporaneous obligations – to call upon the secretary to nominate a successor, and also to *forthwith* inform the President, who may or may not decide to order a by-election – that conflict can be resolved without much difficulty.

The first limb is a *general* provision seemingly applicable to *all* vacancies, while section 65(3) is a *special* provision applicable to vacancies in *three* specific situations. First, as a rule, a special provision prevails over a general provision (which will, to that extent, be reduced in scope). Second, the Commissioner is faced with a choice between *calling upon* the secretary and *forthwith informing* the President. "Forthwith" generally means "at once", "without delay", or "immediately", and in the present context it cannot possibly mean, "if the secretary, upon being called upon to do so, fails to make a nomination." The word "forthwith" is thus a strong indication that sub-section (3) takes precedence over sub-section (2). Third, section 65 must be given an interpretation, if reasonably possible, which gives meaning and effect to every part, rather an interpretation which renders one sub-section nugatory. To hold that the Commissioner must first act under sub-section (2) would mean that even in any of the three given situations the secretary could nominate a successor before the President is informed; and that would make sub-section (3) wholly inoperative – because it would be futile thereafter to inform the President, as by then he would be unable to exercise the discretionary power to order a by-election.

I therefore hold that sub-section (3) takes precedence over sub-section (2), and that the three methods of filling vacancies are not sequential. Where any of the three situations referred to in sub-section (3) arise, the Commissioner must inform the President, "who may ... ***at any stage*** when he considers it expedient to do so" order the holding of a by-election. There is no provision that the President must act within a specified time, or that if the President does not order a by-election, the Commissioner shall call upon the secretary to nominate a successor. Thus the President may decide to wait until several vacancies have occurred before ordering a by-election. This provision ensures that vacancies will be filled, if at all, by persons *elected* by the people.

I have now to consider the case of a vacancy arising at a time when there is on the relevant nomination paper the name of at least one candidate who has secured some preference (whom

I will refer to hereafter as a "qualified candidate"). It is clear that sub-section (3) would not apply, and that the Commissioner must call upon the secretary to nominate. In the light of the provisions of sub-section (3), does the first limb of sub-section (2) empower the secretary to nominate a person from outside the nomination paper ("an outsider")?

If he can nominate an outsider, an anomaly immediately arises. Where there is no qualified candidate remaining on the nomination paper, sub-section (3) applies, and there is no possibility of an outsider being nominated; and the vacancy will be filled, if at all, by a person *elected* by the people. If so, where there ***is*** a qualified candidate it would be illogical and inconsistent for an outsider to be nominated. Can such an anomaly be justified on the basis of "the supremacy of the party" (or its secretary) over members and candidates? In my view it cannot, for this is not a domestic question pertaining to the party, party discipline, and/or party officials, members and candidates. What is involved is the right of the electorate to be represented by persons who have faced the voters and obtained their support, and that in my view is the general scheme of the Act. That is wholly consistent with Article 25 of the *International Covenant on Economic, Social and Cultural Rights,* which recognizes that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or *through freely chosen representatives.*

In reply to the submissions of both learned Counsel for the Petitioners that section 65 should be interpreted in consonance with democratic ideals, constitutional norms and the overriding principles of representative democracy, Dr. Wickramaratne submitted that some of the constitutional norms, prevalent at the time the Act was enacted, were undemocratic and unprincipled: thus Article 99 (prior to its amendment in 1988) provided for the nomination paper of a political party, contesting a Parliamentary election, to have the names of candidates arranged in order of priority as determined by the secretary, thus denying the voter any choice as between candidates; even after its amendment, Article 99 continues to treat the party as supreme, and a voter cannot vote for one party and mark preferences for candidates of another; Article 99 A provides for 29 seats to be filled from the "National List", but a candidate rejected by the people at that election may nevertheless be nominated at the very outset although his name was not on that list; and to fill a subsequent vacancy, the secretary could nominate a person who had not even contested that election. He contended that "in view of the Constitutional provisions relating to elections to Parliament there is nothing unusual about the P.C. Elections Act."

When constitutional or statutory provisions have to be interpreted, and it is found that there are two possible interpretations, a Court is not justified in adopting that interpretation which has undemocratic consequences in preference to an alternative more consistent with democratic principles, simply because there are other provisions, whether in the Constitution

or in another statute, which appear to be undemocratic. Indeed, in the three previous decisions relating to the Uva Provincial Council election, this Court upheld the effective exercise of the right to vote at a fair election. In the first decision, this Court held in favour of the contention that the election should be held, rather than postponed; in the second, that there should be no statutory interference with the Commissioner's power to fix the date of election and with the contents of nomination papers already accepted; and finally, that the date of the election should be fixed so as to facilitate, rather than hinder, the exercise of the right to vote. Now that election has been held, I do not think that this Court should – in the absence of plain and compelling language – stray into a different path, by preferring an interpretation which allows the expressed wishes of the electorate at that election to be superseded. The Judiciary is part of the "State", and as such is pledged to play its part in establishing a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all people; and it is mandated to strengthen and broaden the democratic structure of government. (see Articles 27(2)(a) and 27(4) read with Article 4(d)).

To sum up, section 65(2) is not plain and unambiguous; section 65(3) takes precedence over section 65(2); section 65(3) manifests a legislative intention that vacancies should be filled either by qualified candidates or by election; if section 65(2) is interpreted to mean that the secretary may nominate *any* person who is qualified at the time of such nomination, that gives rise to an anomaly or inconsistency; the general scheme of the Act, from nomination up to the declaration of the result of the poll is that the electorate should be represented by persons who have contested the election; the fact that the nomination paper is required to have three candidates more than the number of members to be elected and cannot be altered indicates that the nomination paper is the pool form which subsequent vacancies should be filled. Accordingly, the wide language of the first limb of section 65(2) must be restrictively interpreted, in the context of section 65(3) as well as the general scheme of the Act and basic democratic principles. I hold that despite the general words used, the secretary's power to nominate is confined to candidates whose names appeared in the original nomination paper and who secured some preferences at the election.

FUTILITY

At the commencement of the hearing both learned President's Counsel for the Respondents submitted that the 2nd Respondent had cease to hold office as Chief Minister and that it would be futile to hear and determine the appeals. Both learned Counsel for the Petitioners contended that the 2nd Respondent had ceased to hold office even prior to the grant of special leave to appeal, but that no objection was taken at that stage; and that special leave to appeal had been granted on a matter of great public importance, If the objection of futility is now upheld, the Court of Appeal judgment will be regarded as authoritative and binding, in respect of all future vacancies in any Provincial Council, and the Commissioner would be bound to act on the basis of that judgment, thereby giving rise to fresh litigation.

In this case we are no faced with a situation in which the impugned decision or declaration had ceased to be operative before the litigation commenced (as in ***Punchi Singho*** v. ***Perera***, (1950) 53 NLR 143) or where an order for relief might be futile because the official to whom it was directed had lawful authority to revoke it (as in ***Ramaswamy*** v. ***Moregoda***, (1961) 63 NLR 115). On the contrary, it is the Law's delays which have given rise to the objection of futility. In ***Sundarkaran*** v. ***Bharathi***, [1989] 1 Sri LR 46, the petitioner prayed for *certiorari* to quash the refusal to issue him a liquor licence for 1987 and for *mandamus* to grant him that licence. In September 1987 the Court of Appeal dismissed the application. In November 1988 – long after the end of the relevant year – this Court set aside the judgment of the Court of Appeal, quashed the decisions of the respondents, and ordered that the respondents should make due inquiry upon its merits in regard to any *future* application which the petitioner might make for a liquor licence. Ameresinghe, J. observed that the Court would not be acting in vain, and that quashing the decision not to issue him a licence for 1987 and requiring that he be fully and fairly heard before a decision is arrived with regard to any future application would not be a useless formality.

I hold that the Court of Appeal erred in law in its interpretation of section 65, and that this Court would not be acting in vain in setting aside the judgment of the Court of Appeal, as it is in the public interest that the Commissioner, political parties, independent groups, candidates and voters should know with certainty the procedure for the filling of vacancies in Provincial Councils.

ORDER

I allow the appeals, set aside the judgments of the Court of Appeal, and grant *certiorari* to quash the Commissioner's declaration dated 24/05/99 that the 2nd Respondent was elected a member of the Uva Provincial Council. The parties will bear their own costs.

JUDGE OF THE SUPREME COURT

GUNASEKERA, J:

I agree.

JUDGE OF THE SUPREME COURT

WIGNESWARAN, J:

I agree.

JUDGE OF THE SUPREME COURT

FURTHER WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANTS

1. Preliminary Statement

01. When the present appeal was taken up for hearing before Your Lordships on 17/03/2003, the Learned Additional Solicitor General as well as the Learned President's Counsel who appeared on behalf of the Respondents having brought to the notice of Court that, the 2nd Respondent to this appeal is no longer holding the post of Chief Minister of the Uva Provincial Council, contended that the hearing of the appeal would be academic and/or futile.

02. However, Your Lordships' having decided to proceed to hear the appeal on merits, Counsel for the appellants moved to tender in writing the reasons against the said contention based on futility raised on behalf of the Respondents. These submissions are made in consequence thereof.

2. Arguments Against the Contention that the Hearing of the Appeal is Academic or Futile

(A) The Factual Aspect

It is submitted with respect that, even at the stage of the special leave to appeal application, the 2nd Respondent abovenamed had ceased to hold office. The Learned Additional Solicitor General submitted that, he was unaware that this was so. It is submitted with respect that, Your Lordships' be pleased not to accept that reason as a ground in support of the Respondent's contention based on futility.

(B) The Nature of Pleadings and the Reliefs Sought in this Appeal

01. Although the relief prayed for in paragraph (c) of the Petition for Special Leave to Appeal (which encompasses paragraphs (a) and (b) of the prayer to the petition in the Court of Appeal – Vide 'X1') cannot be pursued with, it is respectfully submitted that, the Appellants having obtained leave (involving far reaching questions of law for determination), they are entitled to the reliefs prayed for in paragraph (a) of the prayer to the petition for Special Leave to Appeal (that is, to have the judgement of the Court of Appeal set aside along with the reasoning on which the said judgement is based).

02. Apart from that aspect, whether Your Lordships' Court affirms or sets aside the said Court of Appeal judgement that would operate as an authoritative precedent for the future, particularly in view of the fact that, the correctness of the Court of Appeal judgement would be a matter that would be in doubt for the reason that leave against the same has been granted by Your Lordships' Court.

03. Thus, having regard to the grievance of the 1st and 2nd Appellants, their endeavor is jointly in the Public Interest, the right to vote as aforesaid being declared by Your Lordships' Court to be a collective as well as an individual right (Vide the judgement of Your Lordships' Court in ***Jayantha Adikari Egodawela and Others*** v. ***the Commissioner of Elections and Others*** (SCM 3/4/2001)

04. Should Your Lordships' set aside the said judgement of the Court of Appeal, Your Lordships' judgement would operate as an authoritative precedent (as contended for on behalf of the Appellants), in upholding the elective principle and the right to franchise in a representative democracy, **keeping in mind the essential requirements of a sustained democratic order, continually answerable to the will of the people.**

05. Accordingly, given the nature of the justiciability of the issues involved, having a public interest impact at all future Provincial Council elections as long as Act, No 42 of 1987 and Act, No 2 of 1988 remain on the statute book of Sri Lanka, Your Lordships' be pleased to reject the plea based on futility raised on behalf of the Respondents.

06. The criteria of " justiciability of the issues involved" is an aspect that has appealed to the Indian Courts in a comparable context and Your Lordships' attention is respectfully drawn to authorities relating to the same. *(Vide; cited in lectures on Administrative Law, ((Dr) U.P.D. Kesari, under the title "Development of Public Interest Litigation in India" at pages 3331-332, a photostat copy is annexed hereto marked as annexure "A")*

(C) Further Arguments (against the Plea of Futility) Based on Principles discerned from Relevant Authorities

(a) The case of ***Simon Silva*** v. ***A.G.A. Kalutara*** (33 NLR 257 at page 259) is a useful guide which shows circumstances in which a plea based on futility might be upheld, that is, if relief prayed for by a party would lead to a contravention of an Act of Parliament, the relief might be denied. By contrast, in the instant case, the grant of

relief (as prayed for in prayer (a) to the Special leave to Appeal petition, that is, the setting aside of the Court of Appeal judgement (and reasons therefor), it is submitted with respect, would not lead to a contravention of any Act of Parliament.

(b) The case of ***Punchisingho*** v. ***Perera*** (53 NLR 143, at page 144) reveals that, if the relief sought was futile, (in the sense that, it was academic), when the jurisdiction of the Court was first invoked, then a plea based on futility might be upheld.

By contrast, it is respectfully submitted that, when the jurisdiction of the Court of Appeal was invoked in seeking the relevant writs, the reliefs by way of writs were all live issues and, as submitted earlier, the relief the Appellants seek in this appeal is to have the judgement and the reasoning of the Court of Appeal set aside for the reasons adduced earlier in these submissions.

(c) Another principle that may be extracted from the aforementioned case of ***Punchisingho*** v. ***Perera***, (supra) is that, if no advantage will be gained by the grant of the relief sought, then it will not be granted. By contrast, in so far as the reliefs sought in this appeal is concerned, that is, the setting aside of the judgement of the Court of Appeal, the certain advantage would be the preservation of the elective principle for the future. Your Lordships' attention is respectfully drawn to the thinking reflected in ***Sundarkaran*** v. ***Bharathi*** (1989(1) SLR 46, particularly at page 62) which may lend support to the Appellants' contention.

(d) Reliefs may be denied sometimes if the relief sought is dependant on a statutory functionary having to do some act and that, functionary has an 'absolute discretion' in the matter. The case of ***Sethu Ramaswamy*** v. ***Moregoda*** (63 NLR 115 at page 117 bottom) appears to contemplate such a principle.

By contrast, Your Lordships' be pleased to see that, in the instant case, the reliefs pursued is in the nature of declaratory relief, to have it declared that, respectfully, the judgement of the Court of Appeal is wrong.

It is further respectfully stated that assuming that the right that the appellants complain of in this appeal are not legally enforceable by certiorari, still it comprises a legal interest in the context of the universal right to franchise and the elective process in the context of Provincial Council elections.

In this regard, Vythialingam J's approach in ***Mendis, Fowzie and Others*** v. ***Gunewardene*** (1978-79 (2) SLLR, 322 at page 356-357) is commended with respect for Your Lordships' consideration.

Your Lordships' attention is also respectfully drawn in this context, in circumstances or situations comparable with the instant appeal, where the English courts have emphasized the value of declaratory relief rather than certiorari based as it were on a principle of 'historic rather than contemporaneous relief." *(the relevant cases are reflected at page 719 to 720 (particularly at page 720 in Administrative law, Wade and Forsyth, 7th edition, a copy of which is annexed hereto marked "B".*

In this context, it is further submitted that the said decisions of the English courts, in particular, ***R***. v. ***Panel*** on Take-overs and Mergers ex p. Datafin Plc. (1987) QB 815 (above, p.662) and ***Reg***. v. ***Monopolies and Mergers Commission***, Ex parte Argyll Group Plc.(1986) 1 WLR 763 illustrates the extent to which the public interest may be considered in deciding whether to grant such relief.

It is submitted with respect that, the said approach of the English courts would be adopted by Your Lordships' with more force given the fact that, sovereignty under the Sri Lankan Constitution is vested in the people (Article 3) and the immutable aspect of that sovereignty is manifested in Article 4(d) and Article 4(e) of the Constitution which involves the sacred right to franchise and the elective principle for, if the appellant's contention on the merits is right, then at all future provincial elections also, the same mischief that was practised at the impugned election, in the context of Section 65(2) and (3) of the Provincial Councils Act, No 42 of 1987 would continue to be followed if the judgement of the Court of Appeal is allowed to stand.

The Respondents' objection based on futility in effect, seeks to defeat the public interest and the said sacred elective principle upon which the Sri Lankan franchise is based, and that too, after special leave to appeal had been granted by Your Lordships' Court, having regard to the public and constitutional importance of the matter under consideration.

D) For the aforesaid reasons, it is respectfully submitted that, Your Lordships' be pleased to reject the Respondents' contention that, a determination by Your Lordships' Court reviewing the judgement of the Court of Appeal is futile or academic.

3. On The Merits of the Appeal

(A) Background Facts in Brief

01. The matter arises in the context of the election held to the Uva Provincial Council in April 1999. Prior to the election so held, the 1st Respondent (Commissioner of Elections) had published his intention in terms of Section 10 of the Provincial Councils Elections Act No 2 of 1988 to hold the said elections.

02. As envisaged by that Act, several political parties, Independent Groups had submitted Nomination Papers containing the names of candidates.

03. On 6.4.1999, elections were held on the said nomination lists. The 2nd Respondent in this application was a Member of Parliament as at the date of both the nominations and elections. His name thus did not appear in the nomination list of candidates of the Peoples Alliance and indeed as at the said dates, he was not a person qualified to be elected in terms of Section 3 of the Provincial Councils Act, No 42 of 1987 read with Section 9 of the Provincial Councils Act, No 2 of 1988.

(B) Sequence of Events

01. The sequence of events that took place after the said election process was concluded and the electors had exercised their right to franchise which was in relation to the nomination lists submitted by the respective parties and Independent Groups.

a) The election was held on 6/4/1999 and candidates declared elected from the respective nomination lists;

b) The 2nd Respondent who was, during the entire election process, a Member of Parliament, resigned his seat in Parliament on 19/5/1999

c) Shortly thereafter, one Mr Sirisena who had contested the elections and had been declared elected to the said Uva Provincial Council, resigned his seat.

d) On 21/5/1999 (two days after the resignation of Mr Sirisena), the 3rd Respondent (party secretary of the Peoples Alliance), nominated the 2nd Respondent in his place.

e) Three days after that, namely on 24/5/1999, the 2nd Respondent's wife who had contested the said elections and had been elected, thereafter being appointed as the Chief Minister of the said Provincial Council, resigned from the office of Chief Minister.

f) The impugned exercise was completed on 27/5/1999 (three days afterwards) when the 2nd Respondent was appointed as Chief Minister.

02. The resulting position was that, a person who was not only not qualified or eligible to have been nominated or elected as a member of the said Provincial Council but also was not and could not have been a person in the contemplation of the voters, ended up as a Member of the said Provincial Council, finally ending up as its Chief Minister, defeating the very notion of the elective principle and representative democracy.

03. Your Lordships' indulgence is sought at this point to reflect on our basic contention that, the elective principle is reduced to a mockery in that, if the legislative intent as revealed from Section 65 and its subsections (of Act No 2 of 1988) was to achieve just that, then that legislative intent had to be given effect to, (a startling proposition and/or contention in itself).

04. Respectfully bearing in mind, that startling proposition and/or contention, the relevant provisions of the impacting legislation on the question at hand and the approach on the part of the Court of Appeal to the said question may now be addressed, which approach, it is respectfully submitted, stands flawed in the light of principles of statutory interpretation and the hallowed elective principle in a representative democracy, which Sri Lanka is committed to in terms of the Constitution.

05. As a prelude to that theme which we respectfully proceed to address, Your Lordships' consideration is respectfully drawn to a revealing comment made by Walter F. Murphy *(McCormick Professor of Jurisprudence at Princeton and a former member of the New Jersey Advisory Committee to the United States Civil Rights Commission and the Board of Trustees of the Law and Society Association),* in the context of the said theme, these Appellants are urging before Your Lordships. Professor Murphy comments thus;

> *"Several times Harlan reiterated the views he had expressed in his dissent in* ***Poe v. Ullman.*** *There, he had relied in part on Justice Bushrod Washington's opinion in* ***Cofield v. Coryell*** *regarding those rights which are ... fundamental ... which ...belong ...to the citizens of all free governments, and on the Lockean opinion of Samuel Chase in* ***Calder v. Bull*** *(...) regarding those rights for "the purpose (of securing) which men enter into society." (Vide; 'The Art of Constitutional Interpretation", Walter F. Murphy, a photostat copy of which is annexed hereto marked as "C")*

06. It is submitted in this context that every citizen of Sri Lanka (a free government) has a fundamental right to the franchise and to exercise it. It is to that category the voters of the Uva Provincial Council fell into when they proceeded to exercise that right on 6/4/'99 "

for the purpose of electing their representatives to the said Council which in fact, they did, having in contemplation the candidates whose names appeared in the Nomination Lists of the respective parties and political groups. After the election, as a result of the events recounted above, when the party secretary purported to nominate the 2nd Respondent as a member of the said Council (a person who was not in the nomination list of the Peoples Alliance party), it is respectfully submitted that, that right to franchise and the elective principle was reduced to a mockery.

07. At this point, Your Lordships be pleased to examine the reasoning adopted by the Court of Appeal in the interpretation placed on Section 65(2).

a) The main thrust of the Court of Appeal judgement re the Interpretation Placed on Section 65(2) as being the Only Interpretation Possible.
(Vide pages 18-19 of the Judgement – "X")

01. It is true that, specific reference to the nomination list is made in the 2nd part of Section 65(2). But, by not making such specific reference to the nomination list in the 1st part of Section 65(2) could the legislature be presumed to have intended that, the Party Secretary should have a free hand to bring in any person (not in the nomination list) who was not in the contemplation of voters at all? While the Court of Appeal proceeded on the basis that, the plain meaning of the section permitted the Party Secretary to do so, accepting in effect the Respondent's contention that, the statute is designed to recognise the supremacy of the political party over and above the rights of the individual candidates, the Appellants' contention is that, if such political party 'supremacy' (through the party secretary's list) is to be given sanctity to the total exclusion of the rights of the individual candidates and the voters' right to franchise, then it would lead to an absurdity in as much as, through a process of resignations (en bloc) of all the elected candidates, the party secretary would be able to replace the entire list of elected candidates by persons who had never stood for election thereby rendering the whole elective process a farce. As held by Your Lordships' Court in ***Karunatilleke and Deshapriya*** v. ***Dayananda Dissanayake and thirteen others*** (1999, (1) SLLR, 157;

> *"A Provincial Council election involves a contest between two or more sets of candidates contesting for office. A voter has the right to choose between such candidates, because in a democracy, it is he who must elect those who are to govern – or rather, to serve him...."*
> *(per M.D.H. Fernando J.,)*

These appellants reflect at this point on the observations of Walter J. Murphy (*supra*) which strike a common chord with the aforestated proposition in Your Lordship Court's judgment.

02. Your Lordships are further respectfully referred to the aforementioned judgement of Your Lordships' Court in Jayantha Adikari Egodawela and Others vs the Commissioner of Elections and Others *(SCM 3/4/2001)* where the principle of the sanctity of the poll was further emphasized (in the context of Section 46A(7)(a) of Elections (Special Provisions) Act No 35 of 1988 amending Provincial Councils Act, No 2 of 1988) in respect of the ordering of a repoll where an irregular lection results in the **preferences** obtained by the individual candidates being affected. It is respectfully submitted that the imposing of such onerous safeguards in the actual conducting of the poll and consequent election of candidates would be rendered nugatory if as contended by the Respondents in this application, the party secretary could be awarded a free wheeling discretion to nominate any individual whom the latter wishes to fill a vacancy created by the resignation of an elected member.

03. Consequently, it is respectfully asked whether there is anything in Section 65(3) to vest the overriding power on the Party Secretary to the total exclusion of;

(i) the rights of voters;
(ii) the rights of the individual candidates (appearing in the nomination list)

It is respectfully submitted that there is no such overriding power contemplated by the said section to defeat (I) and (ii) above. The only power or discretion flowing as it does from the said concept of party supremacy in the given situation referred to in the 1st part of Section 65(2) is to enable the party secretary to nominate a person from the Nomination List though not necessarily the person who had polled the next highest in terms of the preference votes in that list. It is this construction of Section 65(2) which these appellants are urging for which, it is submitted with respect, would be conducive to an interpretation that would strike a balance between the voters' rights (and the individual candidates' rights) and the concept of the supremacy of the political party.

04. The context in which the concept of "primacy of the political party" as against the individual Member of Parliament has been upheld by Your Lordships' Court, is in the limited context of party discipline. (Vide; M.D.H. Fernando J in ***Gamini Dissanayake*** v. ***M.C.M. Kaleel and Others*** *(1993 (2) Sri LR 138)* which has no relevance to the facts applicable to this Appeal. Consequently, it is respectfully

submitted that, the Court of Appeal, in invoking the concept of party supremacy in the context of Section 65(2) has misdirected itself in opting to interpret the said section in that light, holding as it has, on the plain meaning of the said section which defeats the elective principle in a representative democracy, which Sri Lanka is.

05. It is also very respectfully submitted that, the Court of Appeal has failed to consider the impact of Section 65(3) of Act, No 2 of 1988 on Section 65(2) in as much as if the interpretation placed upon Section 65(2) by the Court of Appeal is to be accepted then, Section 65(3) would be rendered nugatory.

06. At this point, Your Lordships' attention is respectfully drawn to the wording in Section 65(2) in regard to the persons who could be nominated by the Party Secretary in the situation contemplated in the first part of that sub-section. A person so nominated must be a person eligible under the Act for election as a member of the Provincial Council. The 2nd Respondent could not have been declared by the 1st Respondent as a person elected for the reason that, the 2nd Respondent was not qualified under the Act for the election which was held on 6.4.1999 because admittedly he was a Member of Parliament as at that date. (Vide Section 9 of Act, No 2 of 1988 read with Section 3(c) of Act, No 42 of 1987).

07. Thus, a person who was at the time of nomination and consequently at the time of election, was a person not qualified to be elected by reason of the said provisions, such a person could not have been declared as elected by the 1st Respondent on the basis of Section 65(2) of Act, No 2 of 1988 upon being purportedly nominated for that purpose by the Party Secretary and upon the resignation of a member of the Provincial Council.

08. On the concept of

09. "election", Your Lordships' attention may be respectfully drawn to the following;

(i) 'elect' is to choose someone by a vote (P.H. Collin, Law Dictionary, 2nd *edition, page 84)* and 'election' is the 'act of electing.....a representative or representatives" (*supra*) *Annexure 'D"*

(ii) 'elect' is to 'choose; choose by vote' 'election' (= electing or being elected) *Oxford Dictionary, 7th edition, page 310) Annexure 'E")*

(iii) 'election' (the word is also commonly applied to the choosing of officers or representatives, specially the choosing by a constituency..." *Law Dictionary, 3rd edition, West and Neave, page 116, Annexure 'F'*

(iv) 'elections' (parliamentary) the process of choosing (member of parliament) by votes of the electorate. *(Osborne's Concise Law Dictionary, 8th edition, page 127 – Annexure 'G')*

10. In the background of the said definitions of 'elect' and 'election', Your Lordships' be pleased to see the link between the word 'nominated' and 'elected' reflected in Section 3© of Act, No 42 of 1987 and Section 9 of Act, No 2 of 1988 taken over in Section 65(2) of Act, No 2 of 1988 read also in the light of Section 12 of Act, No 2 of 1988 which employs the words "nominated" and 'election". The Court of Appeal, it is respectfully submitted, has overlooked these considerations.

11. Accordingly, it is respectfully asked, could a person 'nominated' by a Party Secretary as at the date of his act of nomination be regarded as a person who was eligible for such nomination (in order to be declared as elected) if demonstrably he was not eligible (or qualified) to be elected as a candidate as at the date of the election?

12. It is respectfully submitted that, in its conclusion, the Court of Appeal has erred and has misdirected itself, proceeding on the reasoning that, the plain meaning of the said Section 65(2) permitted it to be the only interpretation thereby overlooking the established principles of statutory interpretation. In that regard, these appellants rely on the authorities referred to in their original written submissions (a synopsis of which also follows in these submissions). In addition, Your Lordships' attention is respectfully drawn also to the cases of;

(i) ***Selliah*** v. ***de Silva*** (36 CLW, at page 17) and

(ii) ***Shahul Hameed*** v. ***Anna Malay*** (34 CLWW 29)

4. Conclusion

On the basis of the foregoing submissions, it is respectfully submitted that, Your Lordships; be pleased to allow the appellants' appeal and set aside the judgement of the Court of Appeal ('X') in terms of paragraph (b) of the prayer to the petition (in the Special Leave to Appeal Application.)

Attorney-at-Law for the Appellants

Settled by:

Kishali Pinto-Jayawardena
J. de Almeida Guneratne

Counsel for the Appellants

SC Appeal No. 26/2002
CA Application No. 487/99

WRITTEN SUBMISSIONS OF THE 1ST AND 4TH RESPONDENTS – RESPONDENTS

These written submissions are filed on behalf of the 1st and 4th Respondents – Respondents (hereinafter referred to as "Respondents") in terms of the Supreme Court Rules and the Order of Court dated 28th May 2002.

Your Lordship's Court was pleased to grant leave to appeal with respect to the following substantive questions of law and fact:

1. Did the Court of Appeal err in holding that a person whose name did not appear on the nomination list submitted by the relevant political party at the Provincial Council election, could thereafter be nominated by the Secretary of the relevant political party to fill a vacancy that arises in the said Council.

2. Did the Court fail to consider the implications of **Section 65(3)** of the Provincial Councils Election Act No 2 of 1988 for the interpretation of Section 65(2).

Relevant Facts

1. On the 6th April 1999, Provincial Council Elections for the Uva Province were held.

2. On this date the 2nd Respondent, was a Member of Parliament. He resigned from this office with effect from 19th May 1999.

3. K. M. Sirisena who was elected as a member of the Uva Provincial Council from the Administrative District of Monaragala, resigned from this office on 21st May 1999.

4. In order to fill the aforesaid vacancy in the Uva Provincial Council, the 2nd Respondent was duly appointed by the 1st Respondent, on a recommendation made by the 3rd Respondent, in accordance to Section 65(2) of the Provincial Council Elections Act. At that time, the 2nd Respondent was not a Member of Parliament.

5. Mrs. Nalini Weerawanni who was the Chief Minister of the Uva Province, resigned from this position on 24th May 1999 and the 2nd Respondent was subsequently appointed as the Chief Minister of the said Province with effect from 27th May 1999.

Submissions of Law regarding Question (1)

It is respectfully submitted that in accordance with **Section 65** of the Provincial Council Election Act No 2 of 1988 (hereinafter referred to as the "Act"), a person whose name does not appear on the nomination list of a political party at the Provincial Council Elections could thereafter be nominated by the Secretary of the relevant party to fill a vacancy that arises subsequently.

It is submitted with respect that **Section 65** of the Provincial Councils Act is free from any ambiguity in respect to this issue. The scheme of the Section contemplates the filling of the vacancy by the Secretary of the political party to which the member vacating office belonged, but where the Secretary defaults in nominating a person eligible for election within the specified period, it also provides for the vacancy to be filled out of the nomination list where this is possible or through a by-election.

Section 65(2) lays down 2 distinct methods in which vacancies of a Provincial Council may be filled. They are as follows:

1. If the office of a member falls vacant due to death, resignation, or any other cause, the Commissioner shall call upon the Secretary of the recognized political party to which the member vacating office belonged, to nominate within a specified period a person eligible for election under this Act. If such Secretary nominates within the specified period an eligible person to fill such vacancy, the Commissioner shall declare such person elected as a member of the at Provincial Council.

2. If the Secretary fails to nominate within the specified period the Commissioner shall declare as elected as member, from the nomination paper submitted by that party the candidate who has secured the highest number of preferences next to the last of the members declared elected from that party."

Section 65(3) of the Act provides that in 3 situations, namely where –

1. All the candidates whose names were on such nomination paper have been declared elected or;

2. None of the candidates whose names remain on such nomination paper, have secured any preferences,; or

3. Where a member vacating office was not elected from an administrative district.

The Commissioner should hold a by-election to fill a vacancy arising in a Provincial Council.

It is respectfully submitted that this section clearly establishes the intention of the legislature which is, to give the respective political party at the outset, the discretion to nominate a candidate who is most suitable to fill the vacancy, failing which the method prescribed in the second limb of Section 65(2) should be adhered to, and if this is not possible, a by-election should be held as a last resort.

It must be further noted that the discretion of the respective political party, to nominate a candidate, is not restricted to persons named in the nomination list. This becomes obvious from the following: -

(a) **Section 65(2)** of the Provincial Councils Election Act merely states that in order t fill a vacancy arising in the Provincial Council, the person so nominated should be a person "eligible under this Act."

The ground of eligibility for election is provided for in **Section 9 and Section 12** of the Provincial Councils Election Act and **Section 3** of the Provincial Councils Act.

Section 12 of the Provincial Councils Election Act provides that:

> *"Any person who is not disqualified to be elected as a member of Provincial Council ..... may be nominated as a candidate for election."*

Section 9 of the Provincial Councils Election Act provides that:

"No person shall be qualified to be elected ..... if such person is subject to any of the disqualifications as specified in **Section 3** of the Provincial Councils Act, No 42 of 1987.

Section 3 of the Provincial Council Act lays down the grounds of disqualification, one of which is being a member of Parliament. The Section does *not in any way indicate that for a person to be eligible under this Act, his name should have be included in the nomination list.*

(b) If the intention of the legislature was to ensure that only persons named in the nomination list should fill any vacancy in the Provincial Council, it would have expressly said so.

However, *nothing* in **Section 65** or **any other provision of the Act** expressly states or indicates the aforesaid.

(c) **Section 65(2)** also implies, that the Secretary of the respective political party has an option to appoint a person, whose name has not been in the nomination list. This can be witnessed by taking into account the following.

(i) For a persons name to be included in the nomination list, according to **Section 13(2)** of the Act he must annex an oath or affirmation.

(ii) When the Secretary to the relevant political party appoints a person to fill a vacancy under the first limb of **Section 65(2)** of the Act, then an oath or affirmation must accompany such nomination.

(iii) But the 2nd limb of Section 65(2) provides that, when the Secretary fails to so nominate a person, the Commissioner shall declare elected a member from the nomination paper and such person need not make an oath or affirmation.

In other words, when the Secretary of the party nominates a candidate to fill a vacancy in the Provincial Council, the person so nominated is legally bound to make an oath or affirmation. However, when the Commissioner declares a person so elected under the latter part of **Section 65(2)**, such person need not make an oath or affirmation. This is due to the reason that the Commissioner under **Section 65(2)** *could only appoint a person from the nomination paper and such person has already made an oath or affirmation, which is annexed to the nomination list, in accordance with Section 13(2).*

Hence, the fact that the person appointed by the Secretary (under the first limb of Section 65(2), is required to make an oath or affirmation, clearly indicates that the legislature intended the Secretary of the respective political party to nominate a person eligible for election under the Act who is considered suitable by the party to fill the vacancy. There is no intention of restricting his choice to persons named in the nomination list.

Therefore it is submitted with respect, that the Court of Appeal did not err, by holding that a person whose name did not appear on the nomination list submitted by the relevant political party at the Provincial Council Elections, could thereafter be nominated by the Secretary of the relevant political party to fill a vacancy that arises in the said Council.

The 1st and 4th Respondents respectfully submit that the election of the 2nd Respondent to fill the vacancy created by the resignation of K. M. Sirisena, was in accordance with the Provincial Councils Election Act.

Submissions of Law regarding the second issue

There are three alternate methods by which the vacancy of a Provincial Council can be filled under **Section 65** of the Provincial Councils Election Act.

(1) According to the 1st limb of **Section 65(2)**
(2) According to the 2nd limb of **Section 65(2)**
(3) According to **Section 65(3)**

It is respectfully submitted that the 3 alternative methods laid down are distinct and separate from one another, but are set out in a sequential and a logical order. Accordingly, where there is a vacancy in a Provincial Council, that vacancy should be filled initially by applying the first method, which involves nomination by the party Secretary, failing which according to the second method a person from nomination list should be selected, and failing this the third method, that is the holding of a by-election, should be followed.

It is submitted that the Court of Appeal considered the provisions of **Section 65(3)** of the Provincial Councils Election Act No. 2 of 1988 when interpreting **Section 65(2)**. **Section 65(3)** of the Act provides that in 3 situations, namely **where** –

1. All the candidates whose names were on such nomination paper have been declared elected or;

2. None of the candidates whose names remain on such nomination paper, have secured any preferences,; or

3. Where a member vacating office was not elected from an administrative district.

The Commissioner could hold an election to fill a vacancy arising in a Provincial Council.

It is clear from Section 65(3) that a by election should be held where the Party Secretary fails to nominate a person to fill the vacancy and a person cannot be selected in accordance with the second limb of Section 65(2).

Canons of Interpretation

Learned Counsel for the Appellants have invoked the assistance of various rules or canons of interpretation (*eg.* purposive interpretation, the mischief rule, the golden rule etc.) to argue that the Court of Appeal had erred in its decision. It is submitted with respect that no rule or canon of interpretation permits a Court of law to trespass into the realm of legislative activity, particularly where the legislature has in its wisdom, expressly enacted an elaborate scheme to fill vacancies arising in the membership of Provincial Councils.

Lord Diplock made the following observation in ***Johns*** v. ***Wrotham Park Settled Estates*** (1979) 1 All E.R. 286 at 309 –

> *"... I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it.* ***Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*** *1970 – 2 All ER 871 provide an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill was passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such*

an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts."

As for the golden rule, it is relevant to note that as Finnemore J observed in ***Holms*** v. ***Broadfield*** 49 2K.B 1, that –

"The mere fact that the results of a statue may be unjust, or absurd does not entitle this court to refuse to give it effect, but if there are ***two different*** *interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things."*

As Lord Griffiths observed in Pepper (Inspector of Taxes) v. Hart and related appeals (1993) 1 All ER 42 at pg. 52 –

"A statute is, after all, the formal and complete intimation to the citizen of a particular rule of law which he is enjoined, sometimes under penalty, to obey and by which he is both expected and entitled to regulate his conduct. We must, therefore, I believe, be very cautious in opening the door to the reception of material not readily or ordinarily excessible to the citizen whose rights and duties are to be affected by the words in which the legislature has elected to express its will ...

It is however important to stress the limits within which such a relaxation is permissible. It can apply only where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction needs to a manifest absurdity and where the difficulty can be resolved by a clear statement directed to the matte ins issue. Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact ..."

Justice Dheeraratne has observed in ***Alexander*** v. ***Chandrananda de Silva, Commissioner of Elections and others*** (1996) 2 Sri LR 301 pg. 308 that –

" ... the primary question we have to decide is whether or not conditions necessary for the application of a purposive interpretation for the words "the election in respect of any electoral district" have arisen in this case. There must exist a compelling reason for us to give a strained interpretation. Looking at the scheme of the Act, I am not convinced that any absurdity, or repugnancy, or inconsistency or frustration of the purposes of the Act or the like has arisen in the application of the ordinary sense of those words and I am unable to say that they attract any secondary meaning capable of advancing the Appellant's case.."

In the same case, His Lordship Justice Dheeraratne also observed at pg. 309 that –

"Considering the purpose which the enactment sought to achieve, could it ever be said that "it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved"? I should think not.

It is also important to have in mind the words of His Lordship Justice Gratiaen expressed in the course of his judgment in ***Suffragam Rubber & Tea Co. Ltd*** v. ***M.J.M. Mushin*** 55 N.L.R 44 at pg. 47

"In the construction of a statute the duty of the court and a fortiori the duty of a tribunal created by the statute – is limited to interpreting the words used by the Legislature, and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the Legislature"

As was observed by the Supreme Court in ***Mudanayaka*** v. ***Sivasundaram*** 53 NLR 25 at 44 –

"In approaching the decision of this question, it is essential that we should bear in mind that the language of both provisions is free from ambiguity and therefore its practical effect and the motive for their enactment is irrelevant. What we have to ascertain is the necessary legal effect of the statutes and not the ulterior effect economically, socially and politically."

It is submitted with respect that the above *dicta* apply with equal force to the present case. It is therefore submitted with respect that both questions with respect to which leave to appeal was granted should be answered in the negative and the appeal should be dismissed with costs.

Attorney-at-Law
for the 1st & 4th Respondent

Settled by:

A. Gnanathasan
Deputy Solicitor General

Saleem Marsoof, P.C.,
Additional Solicitor General

An Empowered Judiciary

A. N. Jayaram[♠]

Step by unmistakable step, the Supreme Court of India has attained a position where it has near total primacy in higher judicial appointments, freed from executive interference. It is a remarkable story of a constitutional institution evolving itself to play a far stronger and more pervasive role than had been assigned to it by the framers of the Constitution of India (hereafter "Constitution"). It is a development of great moment to the rule of law.

This evolution has its genesis in the interpretation placed by the Supreme Court of India on the constitutional provisions relating to the appointment of Judges.

Article 124(2) of the Constitution confers power on the President of India to appoint every judge of the Supreme Court "after consultation with such judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose ....." Correspondingly for the High Court, Article 217(1) empowers the President to appoint "every Judge of a High Court ..... after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court ....." Thus, the constitutional scheme for the appointments to the higher judiciary provides for a blending of the views of the executive and judiciary.

This approach is wholly in conformity with the prevailing practice of many countries, which have adopted like India, the British pattern of judicial institutions. Thus in Great Britain, it is the Lord Chancellor, a Member of the Cabinet, who is instrumental in appointing the judges. In Canada and Australia, it is the Governor-General-in-Council, who makes the appointments. In the United States again, the appointment is made by the President after obtaining confirmation by the Senate. Thus, in most countries, which follow the Anglo American System of Justice, judicial appointments are the culmination of a process of mutual consultation between the executive and the judiciary.

From the provisions of the Constitution, it is clear that the higher judicial appointments were intended to be made by the executive after consultation with the judiciary, a feature which

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does not seem to raise any question of "primacy." Only by the combined action of the executive and the judiciary can this constitutional mandate be fulfilled. Assigning of primacy to either the executive or the judiciary is alien to this constitutional mechanism.

S. P. Gupta's[1] Case arose in the context of a circular letter written by the then Law Minister of India to the Chief Ministers of all the States and the Governor of one State, of which copies were also forwarded to the Chief Justices of States. In this circular, consent letters were required to be secured from Additional Judges in the High Courts and judges likely to be appointed in the future, so that they could be transferred to Courts other than their own so as to ensure that the component to each High Court comprises of at least 1/3rd number of judges from outside the State "to further national integration and to combat narrow parochial tendencies bred by caste kinship and other local links and affiliations." Several Writ Petitions were filed in the Supreme Court challenging this circular letter, as constituting a serious interference with the independence of the judiciary. The matter was heard by a Bench comprised of seven learned judges presided over by Justice Bhagwati. The matter related to appointment of High Court Judges, but many of the principles settled relate to Supreme Court appointments as well.

In a very elaborate judgment (nearly 700 pages), the Court considered various questions urged before it and held that in making appointments to the higher judiciary, the President of India was obliged to consider and evaluate the advice tendered by the three constitutional functionaries.

> *"It is within reason to hold that the President will ordinarily accept the recommendation ..... That is not to say that the President is bound to accept the recommendation in which the Chief Justice of the High Court and CJI have concurred"*
> (Pathak J).

Desai J went on to hold that –

> *"the President has, however, a right upon consideration of all relevant facts to differ from the other constitutional functionaries for cogent reasons and take a contrary view ..... None of the functionaries can even if he disagrees with the proposal, veto it." The proposal must move on at each*

[1] ***S.P. Gupta*** v. ***Union of India***: AIR 1982 SC 149.

stage. It must reach the President. Ultimately, the President may not accept the proposal and drop the proposal resulting in non-appointment.

Desai J, further held that –

> *"... in the process of consultation, the CJI cannot have primacy."*

Venkataramaiah J held –

> *"From the specific roles attributed to each of them, which may to some extent be overlapping also, it cannot be said that the CJI has been given any position of primacy amongst the three persons who are to be consulted under Article 217(1) of the Constitution. There are no expressed words conveying that meaning. The President has to take into consideration the opinions of all them and he should not accept the opinion of any of them only on the sole principle of primacy. He has to take a decision on the question of appointment of judges of the High Court on the basis of all relevant materials before him ..... Though entitled to great respect and regard, the President is not bound by the opinion of the CJI."*
> *(emphasis supplied)*

The Court also elucidated the meaning of what constitutes "Consultation", which is the key to the understanding of the power vested in the President in Articles 124 and 217. The Court clearly expressed its agreement with the earlier decisions of Shankalchand Seth,[2] Chandramouleshwar Prasad[3] and M. M. Gupta[4] to re-affirm the following position.

On 'Consultation' the Court said: that this means full effective and meaningful consultation between the President and the CJI. It does not mean concurrence. In conclusion, the Court held that while consultation was a pre-condition to evaluate the appointments, primacy in regard to judicial appointments remain with the executive as provided for in the Constitution.

This decision rendered on 30.12.1981 resulted in a storm of protest from all sections of Society. It was viewed as a surrender to the executive and a development, which would strengthen the hands of an already over-bold executive into making further intrusions into the independence of the judiciary.

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[2] ***Union of India*** v. ***Sandalchand Seth***; AIR 1977 SC 2328.
[3] ***Chandramouleshwar Prasad*** v. ***Patna High Court***: (1969) 3 SCC 56.
[4] ***M.M. Gupta*** v. ***State of J & K***: AIR 1982 SC 1579.

It was also stated that this decision placed the judiciary at the mercy of the executive. Seervai[5] noted that the –

> *"majority judgments failed to realise that the framers of our Constitution steered a middle course between the mode of appointing judges in the U.K and in the U.S. That middle course was that absolute power to appoint High Court Judges was not vested in the Government of India (the President) such as what was vested in the Government of U.K. Equally, an absolute power to veto appointment of High Court judges was not conferred upon the CJI unlike the power to veto the appointment of a Supreme Court judge conferred upon the Senate of the U.S. This middle course was designed to eliminate the executive, political and legislative pressure in the appointment of High Court judges ... ... "*

With a sense of injury rankling, when Subesh Sharma's Case[6] came up before the Court, the uneasiness of allowing Gupta's Case to remain as the leading case controlling the field of appointments to the higher judiciary, was expressed in the strongest terms.

While referring Subesh Sharma's Case to a nine member bench for a reconsideration of Gupta's Case, the Court observed –

> *"to say that the power to appoint solely vests with the executive and that the executive after bestowing such consideration as the result of consultations with the judicial organ of the State, would be at liberty take such decision as it may think fit in the matter of appointments is and over-simplification of a sensitive and subtle constitutional sentience and if allowed full play would be subversive of the doctrine of judicial independence ... ... "*

The Court went on to observe that the view which the four learned judges shared in Gupta's Case does not recognise "the special and pivotal position of the institution of the Chief Justice of India."

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[5] H.M. Seervai: Constitutional Law of India Vol. 11 Third Edition, pages 2177 to 2179.
[6] ***Subesh Sharma*** v. ***Union of India***: AIR 1991 SC 631.

When the nine member bench met to consider the issues raised in what has come to be known as the "Second Judge's Case,"[7] the bench presided over by Justice Pandian clearly had the matter in focus, as the first of the questions to be decided by the Court. Namely: "Whether the opinion of the CJI in regard to appointment of judges to the Supreme Court of India and High Courts as well as in regard to the transfer of High Court judges is entitled to primacy?"

Though the bench was constituted to answer the above questions, the deliberations and the reasoning adopted by the learned judges indicate that they had larger questions in mind affecting the very status and functioning of the judicial system. This case was perceived as an opportunity to put the judicial house in order and to repair the damage done by Gupta's Case. The court was concerned not only with reconsidering Gupta's Case but also to "solve other problems within the constitutional framework." Ultimately, the Court was faced with the dilemma of providing a meaning to the expression "consultation", which would fit into the purposes it had in mind and not be hampered by earlier decisions which had consistently and for a long time held in effect that "consultation" did not amount to concurrence. The Court took the view that "consultation" could not be confined to the "ordinary lexicon definition" and that the CJI was entitled to primacy.

The analogy adopted was explained by Pandian J, as follows:

> *"Like the Pope enjoying the primacy in all ecclesiastical and temporal affairs, the CJI being the highest judicial authority has a right of primacy if not supremacy to be accorded to his opinion on the affairs concerning the 'Temple of Justice.' It is a step in the right direction and that step alone will ensure optimum benefits to the society."*

Thus, without relying on the language employed in the constitutional provisions and its own decisions interpreting the same, the Court proceeded to put in place a mechanism for the appointment of judges.

Thus, under the new mechanism, the CJI was required to take the views of two senior-most judges of the Supreme Court and the views of any other judges of the High Court whose opinion was likely to be significant in judging the suitability of the candidate. Support for this reasoning was drawn from the doctrine that "it was most essential to have a healthy

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[7] ***Supreme Court Advocates-on-Record Association*** v. ***Union of India***: AIR 1994 SC 268.

independent judiciary for having a healthy democracy because if the judicial system is crippled, democracy will also be crippled." The Court further added

> *"in fact there are innumerable impelling factors which motivate, mobilise and impart momentum to the concept that the opinion of the CJI given in the process of "consultation" is entitled to have primacy. They inexorably lead to the conclusion that the opinion of the CJI in the process of constitutional "consultation" in the matter of selection and appointment of judges to the Supreme Court and the High Court as well as transfer of judges from one High Court to another High Court is entitled to have a right of primacy."*

Further observations of the Court make it clear that the principle of primacy was strengthened by a mechanism for "consultation" not envisaged in the Constitution.

> *"While granting primacy to the opinion of the CJI it would be a healthy practice as a matter of prudence that the CJI gives his opinion on a consultative process by taking into account the views of two senior-most judges of the Supreme Court and the views of any other judge or judges of the High Court whose opinion is likely to be significant in judging the suitability of the candidate ..... "*

These observations of the majority, invited a powerful dissent from two of the learned judges constituting the bench. Justice Ahmadi stated –

> *"while in the US, UK, Australia and Canada, the appointments to the superior judiciary are exclusively by the executive, our Constitution has charted a middle course by providing for 'prior consultation' with the judiciary before the President, i.e. the executive makes the appointments to the Supreme Court or the High Court. Therefore, however, convincing it may sound to the ideal of the judicial independency that the views of the CJI must have a primacy as his views expressed after consulting his two senior-most colleagues would be symbolic of the views of the entire judiciary, the submission cannot be accepted unless the Constitution is amended. As the constitutional provisions presently stand, the submission based on this line of reasoning is unacceptable ..... The position of the CJI under the Constitution is unique, in that, on the judicial side he is*

primus inter pares, i.e., first among equals, while on the administrative side he enjoys limited primacy in regard to managing of the court business. As regards primacy to be accorded to his views vis-à-vis the President, i.e., the executive although his views may be entitled to great weight he does not enjoy a right of veto, in the sense that the President is not bound to act according to his views ... ... "
(emphasis supplied)

Punchi J also took a strong line of dissent:

"The majority opinion ... follows a path leading to a destination unknown to the Constitution ..... I am in disagreement, though regretfully but respectfully, that the views of the majority in virtually rewriting the Constitution to assign, a role to the CJI, in the whole conspectus of the Constitution, as symbolic in character and to his being a mere spokesman representing the views of the entire judiciary."

This decision rendered on the 6th October, 1993 overruled S.P. Gupta's Case and created a new mechanism for the appointment of persons to the higher judiciary wherein the CJI helped by the views of two of his senior most colleagues had primacy in the matter of appointments and the recommendation made by the CJI could not be rejected by the President.

This development itself clothed the CJI with the power to control the entire range of appointments to the higher judiciary. Further developments were to come, which would make the judiciary even stronger.

The Supreme Court had the further opportunity to build a grand superstructure on the foundation so laid in the 'Second Judge's case", when the President of India requested the Court to give its advisory opinion on 23rd July, 1998 on a "reference" made by him under Article 143.

Article 143 is a unique provision in the Constitution wherein the President is entitled to seek "advisory opinion' from the Supreme Court on a question of law or fact of public importance. President Narayanan referred for the opinion of the Supreme Court, nine questions, which are, in fact, matters arising from the dictum laid down in the Second Judge's case. In particular, advice was sought on the question whether there was a need for the CJI to have a

wider consultation according to the past practice than to consult only two senior- most judges as laid down in Second Judge's case. This opinion is referred to as the 'Third Judge's case."[8]

It is to be noted that an opinion rendered by the Supreme Court in pursuance of the request made by the President under Article 143 is not a "judgment" of the Supreme Court. Nevertheless, it has been held that all Courts other than the Supreme Court would be bound by the opinion though the Supreme Court itself would remain free to re-examine and if necessary, overrule the view taken in an opinion rendered earlier under this Article. In the decision rendered on 28.10. 1998, the court has, *inter alia* given the following opinion:

(i) The Court accepted the suggestions made by the Attorney General for India that the CJI needs to consult a larger number of judges of the Supreme Court before he recommends appointment to the Supreme Court. Accordingly, the size of the collegium was increased so as to include the CJI and four senior most puisne judges

(ii) The opinion of the members of the collegium should be in writing and these must be conveyed by the CJI to the Government along with the recommendation. No one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India.

(iii) Unless there is any strong, cogent reason to justify departure, the order of seniority on an all India basis must be maintained. Merit must be the predominant consideration for purposes of appointment to the Supreme Court.

(iv) The transfer of puisne judges is reviewable only to the extent that the recommendation made by the CJI has not been made in consultation with the four senior–most puisne judges of the Supreme Court.

With this opinion, which takes the matter further from where the Second Judge's case left it, a more elaborate mechanism providing for wider consultation has been stipulated. These developments have undoubtedly made the Indian Supreme Court the most powerful court in the world, considering the width of its jurisdiction, and also the fullness of power it has over higher judicial appointments. It now enjoys a position not given to any apex court in the world.

[8] Special Reference No. 1 of 1998: Reported in JT 1998 (7) SC 304.

It is true that men of the law would be comforted by the thought that the higher judicial appointments are now almost entirely in the hands of the judiciary and that the executive will not be able to dilute or meddle with its independence. It is, however, salutary to recall the words of Dr. Ambedkar, speaking in the Constituent Assembly, about the role of the future Chief Justice of India:

> *"I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudice which we as common people have and I think to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that this is also a dangerous proposition."*

Though law at its highest level is essentially philosophic yet when individual legal principles are driven to the logical extremity of their meaning, strange results may follow.

Many divergent thoughts, some even disturbing, will arise when these developments are appraised. Is this what the people of India solemnly resolved to give unto themselves in terms of the Constitution? Was the participatory process provided for in the Constitution perceived to be so dangerous to the freedom of the judiciary that it had to be thrown out lock, stock and barrel? Will the total freedom now secured for making judicial appointments lead to appointments of the best men suited for the role who will function without "fear or favour" in tune with their oath or is it likely to be a case where the analogy of "war being too dangerous a matter to be left only to generals" will apply? Or will a future Supreme Court reconsider all these matters in view of the fact that the Third Judge's Case is only on "an advisory opinion"? Or will it be a trendsetter for other countries to emulate, as it establishes a new standard for judging the efficacy of the Rule of Law in a country?

It is pertinent to contemplate the thought expressed by Lord Hailsham :[9]

> *"Be you never so high but the law is above you, is a rule for judges no less than Ministers, and if the independence of judges is to be preserved, the limitations on the judicial function must be clearly understood not only by the public and the media, but by the Judiciary themselves, both collectively and individually."*

[9] Lord Hailsham: Hamlyn Revisited: The British Legal System Today (Hamlyn Lectures).

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