KARUNATHILAKA AND ANOTHER
v.
DAYANANDA DISSANAYAKE, COMMISSIONER OF ELECTIONS AND OTHERS
(Case No. 1)

SUPREME COURT
G. P. S. DE SILVA, CJ.,
FERNANDO, J. AND
GUNASEKERA, J.
S.C. APPLICATION NO. 509/98
DECEMBER 04 AND 07, 1998

Fundamental rights – Provincial Councils Election – Date of the poll – S. 22 (1) of the Provincial Councils Elections Act – Cancellation of the date by Emergency Regulation – Articles 12 (1) and 14 (1) (a) of the Constitution.

The period of office of the Central, Uva, North-Central, Western and Sabaragamuwa Provincial Councils came to an end in June, 1998. The Commissioner of Elections (the 1st respondent) fixed the nomination period in terms of section 10 of the Provincial Councils Elections Act, No. 2 of 1988. After the receipt of nominations which concluded on 15.07.1998 each returning officer fixed 28.8.98 as the date of the poll by a notice under section 22 (1) of the Act. The issue of postal ballot papers in terms of section 24 of the Act read with Regulation 10 of the second schedule to the Act was fixed for 4.8.98. But by telegram dated 3.8.98, the respective returning officers suspended the postal voting without adducing any reason therefore. The very next day on 4.8.98 the President issued a Proclamation under section 2 of the Public Security Ordinance (PSO) bringing the provisions of Part II of the Ordinance into operation throughout Sri Lanka and made an Emergency Regulation under section 5 which had the legal effect of cancelling the date of the poll. Thereafter, the 1st respondent took no steps to fix a fresh date for the poll in terms of section 22 (6) of the Act, even after 28.8.98. In the meantime the term of office of the North-Western Provincial Council came to an end and the date of the poll for that Council was fixed for 25.1.99.

Held:

1. The making of the Proclamation and the Regulation as well as the conduct of the respondents in relation to the five elections, clearly constitute "executive action" and the court would ordinarily have jurisdiction under

Article 126 of the Constitution. That jurisdiction is not ousted by Article 35. Article 35 only prohibits the institution of legal proceedings against the President while in office. It does not exclude judicial review of an impugned act or omission against some other person who does not enjoy immunity from suit but relies on an act done by the President in order to justify his conduct.

2. In the exercise of its jurisdiction under Article 126 the court has the power, notwithstanding the ouster clause in section 8 of the PSO, to review the validity of the impugned regulation.

3. The impugned regulation is not a valid exercise of the power under section 5 of the PSO. It is not an Emergency Regulation. It has, rather, the character of an order purporting to suspend notices lawfully issued under the Act. Such an order is not authorized by law. In any event, the impugned regulation cannot be sustained as being for a purpose set out in section 5 of the PSO as the petitioner had established that *prima facie* upto the end of July, 1998, there was no known threat to national security, public order, etc., and the respondents failed to show that even in August, 1998, there was any such threat.

4. The suspension of the issue of postal ballot papers in which the 1st respondent acquiesced was unlawful, arbitrary and not *bona fide;* it was done with knowledge that the impugned proclamation and regulation would be made the next day and for a collateral purpose; whether the impugned regulation was valid or not the 1st respondent had the power to appoint a fresh date for the poll in terms of section 22 (6) of the Provincial Councils Elections Act. He failed to exercise that power. In the meantime the date of the poll for the North-Western Provincial Council was fixed for 25.1.1999 whereby the voters of the other five provinces were treated less favourably. In the circumstances Article 12 (1) was infringed.

5. The respondents also infringed the petitioner's rights under Article 14 (1) (a) of the Constitution. The freedom of "speech and expression" guaranteed by that Article should be broadly construed to include the exercise of the right of an elector to vote at the election.

Per Fernando, J.

"The silent and secret expression of a citizen's preference between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression than the most eloquent speech from a public platform."

Cases referred to:

1. *Joseph Perera v. AG* (1992) 1 Sri LR 199, 230.
2. *Wickremabandu v. Herath* (1990) 2 Sri LR 348, 361, 374.
3. *Silva v. Bandaranayake* (1997) 1 Sri LR 92.
4. *Weerasinghe v. Samarasinghe* (1966) 68 NLR 361.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonesekera with *Suranjith Hewamanne, J. C. Weliamuna* and *Ms. Krishanthi Pinto-Jayawardena* for the petitioners.

K. C. Kamalasabayson, PC, SG with *U. Egalahewa, S. C. Viran Corea,* SC and *M. Gopallawa,* SC for the respondents.

Cur. adv. vult.

January 27, 1999.

FERNANDO, J.

This application is a sequel to the failure to hold elections for the Provincial Councils of the Central, Uva, North-Central, Western and Sabaragamuwa provinces.

The five-year terms of office of those Provincial Councils came to an end in June, 1998, although not on the same day. Each province consists of two or more administrative districts, and each such district constitutes an electoral area for the purpose of elections to the Provincial Council of that province. Section 7 of the Provincial Councils Elections Act, No. 2 of 1988, (the Act), requires the Commissioner of Elections to appoint a returning officer for each such district. Section 10 provides:

> (1) Within one week of the dissolution of a Provincial Council by reason of the operation of Article 154E of the Constitution . . . the Commissioner shall publish a notice of his intention to hold an election to such Council. The notice shall specify [the "nomination period"] during which such nomination papers

shall be received by the returning officer of each administrative district in the province. . .

(2) The nomination period shall commence on the fourteenth day after the publication of the notice . . . and expire . . . on the twenty-first day after the day of publication of such notice."

Notices under section 10 of the Act were duly published in June, 1998. The nomination periods for two elections expired on 3.7.98, for the third on 11.7.98, and for the other two on 15.7.98, and the nomination processes had been completed by those dates. All five elections being contested, section 22 (1) required every returning officer, "as soon as may be after the conclusion of the [nomination] proceedings", to publish a notice specifying the date of poll – "being a date not less than five weeks or more than eight weeks from the date of publication of the notice" – as well as other particulars relating to the duly nominated candidates and the situation of the polling stations. Notices in respect of all the districts – twelve in number – were published on 15.7.98, fixing 28.8.98 as the date of poll.

It appears from the above statutory provisions that the Act was intended to ensure a speedy election, within about three months of dissolution. That object would have been achieved had the poll been taken on 28.8.98. But that did not happen.

In this application the two petitioners complain that the failure of the 1st respondent, the Commissioner of Elections (the Commissioner), and the 2nd to 13th respondents (the returning officers of the twelve districts) to hold elections to the five Provincial Councils, on and after 28.8.98, was an infringement of their fundamental rights under Articles 12 (1) and 14 (1) (*a*).

Before that date of poll was fixed, the 1st respondent had summoned a meeting of all recognized political parties. According to the minutes of that meeting, held on 25.6.98, the 1st respondent stated

that "elections to Provincial Councils will be held on a single day as mentioned at the previous meeting", and the Inspector-General of Police stated that "necessary security will be provided for the election and that he is working out a scheme to fulfil these requirements". He made no reference to any difficulty in providing security, whether the five elections were simultaneous or staggered.

The 1st respondent, in his affidavit filed in these proceedings, did not allege any change in the security situation, or any difficulty in obtaining or providing security for the poll. On the other hand, in support of their contention that security was not a problem during the relevant period, the petitioners pointed out that the Summit of the South Asian Association for Regional Co-operation was held in Colombo, with the participation of the Heads of Member States, during the last week of July.

I must refer at this stage to another important matter. The Act provides for postal voting. Regulation 10 of the Postal Voters' (Provincial Councils Elections) Regulations, 1988, contained in the second schedule to the Act, requires every returning officer "not later than ten days after the last day of the nomination period" to give notice of the time and place at which he would issue postal ballot papers.

Regulation 17 provides that every returning officer "shall, immediately on receipt of a [postal ballot] before the close of the poll, place it unopened in the postal voters' ballot box"; and Regulation 19 provides for the counting of postal votes "as soon as possible after the close of the poll". There is thus no provision – and, indeed, no need for provision – for a separate date of poll in respect of postal voting. The postal voting process is ancillary to the poll itself, and would end with the poll, whether taken on the date originally fixed or on some subsequent date. The Regulations do not expressly authorize the postponement or cancellation of the postal voting process. That is unnecessary: if the original date of poll is postponed, Regulation 17 ensures that the postal voting process would continue

until the close of the poll on the new date; and if the poll itself is validly cancelled, that would automatically abort that process.

It is not disputed that all the returning officers had given notice that postal ballot papers would be issued on 4.8.98. The petitioners produced one such notice dated 23.7.98. If all the notices had been issued on that date, it would mean that in respect of three Provincial Councils notices had been issued more than ten days after the last day of the nomination period. Nevertheless, that would have left 24 days for the completion of the postal voting process. The petitioners averred that "by telegram dated 3.8.98, the respective returning officers suspended the postal voting that was fixed for 4.8.98 . . . and no reasons were given for such suspension", and this the respondents admitted. A copy of one such telegram sent by the Assistant Commissioner of Elections, Kalutatra, was produced. Our attention was not drawn to any provision of the Act or of the Regulations which empowered the Commissioner, an Assistant Commissioner, or returning officers to suspend the issue of postal ballot papers; or to restart that process after suspension. But even if such provisions can be implied, that suspension, at that point of time, made it extremely difficult to restart the postal voting process in time to complete it by 28.8.98. It is most unsatisfactory that neither the 1st respondent, nor the 2nd to 13th respondents, have explained to the public and to this Court, why the issue of postal ballot papers was suspended. Article 103 of the Constitution guarantees to the Commissioner of Elections a high degree of independence in order to ensure that he may duly exercise – efficiently, impartially and without interference – the important functions entrusted to him by Article 104 in regard to the conduct of elections, including Provincial Council elections. But the constitutional guarantee of independence does not authorize arbitrariness. That guarantee is essential for the Rule of Law, and one corollary of independence is accountability. Accordingly, the Commissioner could not withhold the reasons for his conduct – just as the constitutional guarantee of independence of the Judiciary does not dispense with the need to give reasons for judgments.

The very next day, on 4.8.98, HE the President issued a Proclamation under section 2 bringing the provisions of Part II of the Public Security Ordinance (PSO) into operation throughout Sri Lanka, and made the following Regulation (the "impugned Regulation") under section 5 :

> "For so long, and so long only, as Part II of the Public Security Ordinance is in operation in a province for which a Provincial Council specified in Column I of the Schedule hereto has been established, such part of the Notice under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, published in the *Gazette* specified in the corresponding entry in Column II of the Schedule hereto, as relates to the date of poll for the holding of elections to such Provincial Council shall be deemed, for all purposes, to be of no effect."

The previous Proclamation under section 2, made one month before, had brought the provisions of Part II of the PSO into operation in the Northern and Eastern provinces and in *some* parts only of the other seven Provinces : namely, in specified *parts* of seven (out of the seventeen) districts in those seven provinces. Indeed, it was the Petitioners' contention – which was not disputed – that for a considerable period before August, 1998, the Proclamations made, from time to time, under section 2 applied mainly to those two provinces, and not to the whole of Sri Lanka. The petitioners also averred that the 1994 Presidential Election had been held while a similar Proclamation had been in force.

The learned Solicitor-General stated during the oral argument that the impugned Emergency Regulation was the only one made pursuant to the extension of the emergency to the whole of Sri Lanka.

The poll was not taken on 28.8.98. It must be noted that the impugned Regulation did not purport to cancel the five elections altogether, but only to "deem to be of no effect" – in effect, to cancel the particular date of poll (namely, 28.8.98) already fixed by notices

under section 22. It invalidated or suspended those notices, but did not purport to override, amend or suspend any provision of the Act or of the Regulations, and it left untouched the provisions of section 22 (6) :

> "(6) Where at an election of members of a Provincial Council from the administrative districts within the Province for which that Provincial Council is established, *due to any emergency or unforeseen circumstances the poll in any such administrative district cannot be taken* on the day specified in the notice published under subsection (1), *the Commissioner [of Elections] may, by notice published in the Gazette, appoint another day for the taking of the poll* in such administrative district and in every other administrative district within that province, such other day being a day not earlier than the fourteenth day after the publication of the notice in [the] *Gazette.*" [emphasis added]

Although speedy elections were, undeniably, a matter of paramount public importance, the 1st respondent did nothing, on and after 4.8.98, to fix another date of poll.

The petitioners filed this application on 3.9.98, alleging that:

(1) the Proclamation was an unwarranted and unlawful exercise of discretion contrary to the Constitution, not made *bona fide* or in consideration of the security situation in the country or the five provinces, but solely in order to postpone the five elections;

(2) the Proclamation and the impugned Regulation constituted an unlawful interference with and usurpation of functions vested in the Commissioner of Elections, under the Constitution and the Act, and compromised his constitutionally guaranteed independent status;

(3) the impugned Regulation was contrary to Article 155 (2) of the Constitution, because it had the legal effect of overriding and suspending the provisions of the Constitution relating to –

(i) the continued existence of the five Provincial Councils,
(ii) the franchise, and
(iii) Articles 12 (1) and 14 (1) (*a*); and

(4) the conduct of the 1st to 13th respondents in not holding the said five elections was "unreasonable, arbitrary, contrary to law, for a collateral purpose, discriminatory, and in violation of Article 12 (1) and Article 14 (1) (*a*) of the Constitution".

They prayed for a declaration that their fundamental rights under Articles 12 (1) and 14 (1) (*a*) had been violated, and for an order directing the 1st to 13th respondents to nominate a fresh date for the five elections and to take steps to hold those elections in terms of section 22 of the Act forthwith. Although they prayed for costs they did not ask for compensation.

At this stage I must mention two important events which occurred thereafter, in or about November, 1998: the Provincial Councils Elections (Special Provisions) Bill (the Bill) was placed on the Order Paper of Parliament, and the Provincial Council of the North-Western province was dissolved upon the expiration of its five-year term of office.

The Bill sought to achieve two objectives. Clause 2 purported to vest in the Commissioner the duty, within four weeks of the date of commencement of the Bill when enacted into law, to appoint a date of poll for the said five elections "having regard to the periods specified in section 22 (1) (*c*)" of the Act, "in lieu of the date of poll specified in the Notice published under section 22". Clause 3 purported to empower the Secretary of a recognized political party or the group leader of an independent group to substitute, in place of the name of any candidate appearing in an already completed and accepted nomination paper, the name of another person with his consent – but without the consent of, and even without notice to, the former candidate.

The Bill contained no provision which would have enabled the Commissioner or the returning officers, notwithstanding the lapse of

more than ten days after the last day of the nomination periods, to give notice afresh of the time and place of issue of postal ballot papers. It is true that Regulation 10 (2) does provide for a "subsequent issue" of postal ballot papers, but that cannot be done unless an initial issue (ie of the identical ballot papers) had already taken place under Regulation 10 (1). And even if an initial issue had taken place, the "subsequent issue" contemplated by Regulation 10 (2) is an issue of identical ballot papers, and not of "amended" ballot papers.

This Court, in its determination made on 30.11.98, held that both clauses were inconsistent with, *inter alia*, Article 12 (1) of the Constitution. In coming to that conclusion, this Court found that the Act already made provision, in section 22 (6), for fixing another date for the poll, and went on to consider the impact of the Bill on that provision:

> "If for any reason, which falls within the ambit of "any emergency or unforeseen circumstances", the poll cannot be taken on the day specified by the returning officer under section 22 (1), section 22 (6) gives the Commissioner the power to appoint another day. It is clear that he may do so either *before* the appointed day, or *on* or *after* the appointed day; for instance, if one week *before* that day widespread floods (or a serious epidemic) make it evident that a proper poll cannot be held on that day, or if *on* that day, any "emergency or unforeseen circumstances" prevent the taking of the poll. Here, on 4.8.98, the Commissioner was faced with an Emergency Regulation purporting to suspend the notices issued under section 22 in relation to the date of poll. If the Proclamation had ceased to be operative before 28.8.98 (in all five provinces or even in one province) – by virtue of revocation, or disapproval by Parliament, or otherwise – then some or all of those notices would once again have become unquestionably operative, and the poll could have been taken on 28.8.98. But that did not happen, and *ex facie* the Proclamation continued to be operative: and so the poll was not taken on the due date. *As far as the Commissioner was concerned, on and after 28.8.98 the position (whether the Regulation was valid or not) was that the poll had not been taken on the due date because of "emergency or unforeseen*

circumstances". Section 22 (6) was therefore applicable. He had therefore the power to appoint another day for the poll. And if he had done so, a poll would have been taken on the basis of (i) the notice which *he* then issued under section 22 (6), which notice could not have been affected in any way by the Emergency Regulation previously made on 4.8.98, and (ii) the nominations already published in the "nominations" part of the notices issued by the returning officers on 15.7.98, which part the Emergency Regulation had not touched." [emphasis added]

From the learned Solicitor-General's written submissions filed in this application, it appears that he does not agree with the conclusion that "as far as the Commissioner was concerned, on and after 28.8.98 the position (*whether the Regulation was valid or not*) was that the poll had not been taken on the due date because of 'emergency or unforeseen circumstances' [and that] he had therefore the power to appoint another date for the poll". The learned Solicitor-General contended that the Commissioner could exercise his power only if the Proclamation and Regulation are valid: if not, "section 22 (6) cannot be invoked".

I am unable to accept that contention because it requires the addition of restrictive words to section 22 (6), so as to make it read:

"Where . . . due to any emergency or unforeseen circumstances, *arising otherwise than from the unlawful* [*or invalid or improper*] *acts of any person,* the poll . . . cannot be taken on the day specified . . . the Commissioner may . . . appoint another day . . ."

The language of section 22 (6) is plain and unambiguous. The word "any", used in relation to "emergency or unforeseen circumstances", is an unambiguously clear indication that *all* such events and circumstances are included, howsoever caused. There is no justification for restricting that provision in any way: it applies whether the emergency or the unforeseen circumstances are the consequence of natural causes or of human acts; and in regard to

the latter, whether they are the acts of the Commissioner (or his officers), or of candidates (or their supporters), or of third parties. Likewise, the section makes no distinction between lawful and unlawful acts.

Even if there had been any ambiguity or uncertainty (and I am satisfied that there is none), the context demands that a broader rather than a narrower interpretation be adopted. If the Commissioner had power to fix a new date only where the poll was not taken due to a lawful act, it would mean that in all other cases a fresh poll could not be taken: there would then be no election, and therefore no elected Provincial Council. That would render nugatory the provisions of Chapter XVII A, and especially Article 154 A, of the Constitution which contemplate the continued existence of elected Provincial Councils. Further, to accept an interpretation which would not permit the fixing of a new date, where unlawful acts prevented the taking of the poll on the date originally fixed, would be an open invitation for the disruption of the poll – by the political thuggery of contestants, by the terrorist acts of non-contestants, or by any other means. Again, if the Commissioner's officials deliberately destroyed the ballot papers and thereby prevented the poll, the Commissioner would be unable to fix a new date. To restrict the ambit of section 22 (6), as the learned Solicitor-General suggests, would do violence to its language.

In my view, "any", "emergency" and "unforeseen circumstances", and the power of the Commissioner to fix a new date, must be given the widest construction which is reasonably possible, so as to enable an election to be held, and not a construction which would result in its indefinite postponement or cancellation.

The learned Solicitor-General's contention exposes a flagrant contradiction in the 1st respondent's position. The 1st respondent averred that the impugned Regulation was validly made under section 5, and that upon its publication he "had no alternative but to refrain from taking any further steps towards the holding of the Provincial Councils elections". If indeed it was his position that he could exercise

his power under section 22 (6) only if the Proclamation and the Regulation were valid, and if his honest view was that the Proclamation and the Regulation were valid, why did he not promptly fix a new date? The conclusion is inescapable that the 1st respondent did not consider whether the impugned Regulation was valid and what his powers and duties were, but tamely acquiesced in the indefinite postponement of those elections.

It is necessary at this stage to consider whether "may" in section 22 (6) confers an unfettered and unreviewable discretion, or a power coupled with a duty. Since Article 154A contemplates the continued existence of elected Provincial Councils, it follows that elections must not be delayed more than is really necessary. The power to fix a new date must therefore be exercised whenever the circumstances demand it, and especially where the taking of the poll is prevented by unlawful means. Had the 1st respondent refrained, initially, from exercising his discretion because in his honest opinion he reasonably concluded that the prevailing circumstances did not permit a poll to be taken, that would have been a proper exercise of discretion; but even so, he would have been obliged, thereafter, to exercise his discretion no sooner the circumstances changed. Here, the 1st respondent did not even consider, initially or at any subsequent stage, whether he should fix a new date. Instead he simply assumed that he was bound to refrain from taking any further steps towards holding Provincial Council elections. He persisted in his failure to fix a new date, despite the determination of this Court dated 30.11.98, and what transpired on 7.12.98, when judgment was reserved in this case:

> "The Solicitor-General states that he would discuss with the 1st respondent the question of appointing another date for the taking of a poll in respect of these five elections in terms of section 22 (6) . . . in the light of the determination of this Court . . . made on 30.11.98."

We then made it clear that :

> "There is no objection to the 1st respondent taking steps under section 22 (6) while judgment has been reserved."

That failure was the more serious because during the oral argument counsel stated that the term of office of the Provincial Council of the North-Western province had come to an end, and that the nomination process was under way. The date of poll has now been fixed for 25.1.99, following – as the respondents' written submissions state – "the normal procedure in terms of the existing law". The result is that an election will take place first in respect of that Council, dissolved nearly six months after the other five, although a new date of poll has not even been fixed for the latter. Citizens resident in the five provinces are thus being less favourably treated than those of the North-Western province, in respect of their right to vote.

The respondents have attempted to disclaim responsibility for the continuing failure to hold the elections to those five Provincial Councils. The written submissions filed on their behalf claim that "the petitioners' application is misconceived in law for the reason that their main challenge which is in respect of [the impugned Proclamation and Regulation, which] are totally unrelated to the functions of the Commissioner of Elections". It is argued that the impugned Regulation compelled the 1st respondent "to refrain from taking any further steps", and that any action by the respondents contrary to the impugned Regulation "would be dangerous and expose the people and the voters to unnecessary risks". And so, it is urged, "the respondents' action in not proceeding with the election and thereby giving effect to [the impugned Proclamation and Regulation] cannot infringe upon the fundamental rights of the petitioners".

That plea is misconceived both in law and in fact. The Commissioner has been entrusted by Article 104 with powers, duties and functions pertaining to elections, and has been given guarantees of independence by Article 103, in order that he may ensure that elections are conducted according to law: not to allow elections to be wrongfully or improperly cancelled or suspended, or disrupted, by violence or otherwise. He was not entitled to assume that the impugned Regulation was valid; and even if it was valid it was his duty, in the exercise of his power under section 22 (6), to have fixed a new date on which – in his best judgment – a free and fair poll would have been possible.

Further, the undisputed facts establish that the 1st respondent was not acting independently. The learned Solicitor-General was unable to cite any statutory provision justifying the "suspension" of the issue of postal ballot papers even *before* the impugned Regulation was made. The respondents have not given any explanation for that suspension. It was therefore unlawful, arbitrary and not *bona fide*. They do not claim, and it is inconceivable, that it was a mere coincidence that the 2nd to 13th respondents simultaneously decided to suspend the issue of postal ballot papers on the eve of the impugned Regulation; and there is no doubt that suspension was with the full knowledge and approval of the 1st respondent. The irresistible inference is that the respondents had foreknowledge of the impending Proclamation and Regulation. Had that decision been made *bona fide*, the 1st respondent's official files and documents would have contained the official communications, between him and "outsiders", and between him and his officers, leading up to that suspension, as well as his reasoned decision in respect of that suspension; and there would have been a full and frank disclosure of all that material. However, the respondents have failed to produce a single document relating to that suspension, and that failure gives rise to a grave suspicion that the decision was for a collateral purpose. That is not speculation. Clause 3 of the Bill indicates what that collateral purpose probably was. If the issue of postal ballot papers had taken place on 4.8.98, voters would have received ballot papers and could have proceeded to cast their vote. If the postal voting process had commenced in that way, substitution of candidates in the nomination papers would have required the drastic step of cancelling ballot papers already issued, and postal votes already cast. That would have been a serious interference with a pending election. The suspension of the issue of postal ballots would have facilitated the subsequent substitution of candidates without the need to cancel any part of the voting process, and it seems probable that was the purpose of that suspension.

That suspension had two unsatisfactory consequences. If the postal ballot papers had been issued, postal voting could have taken place, on and after 4.8.98, without any fear of disruption: as postal voting did not require public polling booths and the kind of security needed at polling booths. Consequently, if the impugned Regulation had

ceased to be operative – as, for instance, if Parliament had refused to approve the Proclamation, or if HE the President had revoked the Regulation – the poll could have taken place on 28.8.98. But the suspension of the postal voting process virtually ensured that the poll would not take place on that day. The respondents were thus indirectly and partially responsible for the failure to take the poll on 28.8.98. Secondly, the 1st respondent had power to fix a new date, in terms of section 22 (6), with fourteen days' notice. But as a result of the suspension of the postal voting process, it became impossible for the 1st respondent to fix such an early date : he had to allow additional time for the postal voting process to commence afresh. Thus that suspension virtually compelled the postponement of the original poll, and also placed an unnecessary fetter on the 1st respondent's discretion, compelling him to give at least five weeks' notice of any new date of poll.

The 1st respondent therefore was at least partly responsible for the failure to take the poll on 28.8.98; and was wholly responsible for the failure promptly to fix a new date, on and after 28.8.98, after that Regulation had spent its force.

I must now consider whether the conduct of the 1st respondent resulted in an infringement of the petitioners' fundamental rights. Learned counsel urged on their behalf, first, that there was an interference with the franchise, contrary to Article 4 (*e*); that although Article 4 (*e*) does not expressly refer to Provincial Council elections, that was because Provincial Councils were introduced only subsequently, by the Thirteenth Amendment; and that it must now be interpreted as applying to Provincial Council elections as well. The learned Solicitor-General contended that by the Thirteenth Amendment Parliament could have included Provincial Council elections, if it wished to, and that the omission to do so was deliberate; and that in any event a violation of Article 4 (*e*) may not, by itself, amount to a violation of a fundamental right. It is unnecessary to rule on this issue in view of my findings in relation to Articles 12 (1) and 14 (1) (*a*).

Learned counsel for the petitioners submitted that the right to vote is one form of "speech and expression" which Article 14 (1) (*a*)

protects. The learned Solicitor-General urged, however, that there is a clear distinction between the franchise and fundamental rights; that "the franchise cannot be incorporated as a fundamental right as contained in Chapter III"; and that the position is different under the American Constitution because "specific provisions are contained therein which convert the right to vote as a fundamental right".

When Article 14 (1) (*a*) entrenches the freedom of speech and expression, it guarantees *all* forms of speech and expression. One cannot define the ambit of that Article on the basis that, according to the dictionary, "speech" means "X", and "expression" means "Y", and therefore "speech and expression" equals "X" plus "Y". Concepts such as "equality before the law", "the equal protection of the law", and "freedom of speech and expression, including publication", occurring in a statement of constitutionally entrenched fundamental rights, have to be broadly interpreted in the light of fundamental principles of democracy and the Rule of Law which are the bedrock of the Constitution.

I find it unnecessary to refer to the various authorities cited, because in my view the matter admits of no doubt. A Provincial Council election involves a contest between two or more sets of candidates contesting for office. A voter had the right to choose between such candidates, because in a democracy it is he who must select those who are to govern – or rather, to serve – him. A voter can therefore express his opinion about candidates, their past performance in office, and their suitability for office in the future. The verbal expression of such opinions, as, for instance, that the performance in office of one set of candidates was so bad that they ought not to be re-elected, or that another set deserved re-election – whether expressed directly to the candidates themselves, or to other voters – would clearly be within the scope of "speech and expression"; and there is also no doubt that "speech and expression" can take many forms besides the verbal. But although it is important for the average voter to be able to speak out in that way, that will not directly bring candidates into office or throw them out of office; and he may not be persuasive enough even to convince other voters. In contrast, the most effective manner in which a voter may give expression to his views, with

minimum risk to himself and his family, is by silently marking his ballot paper in the secrecy of the polling booth. The silent and secret expression of a citizen's preference as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform. To hold otherwise is to undermine the very foundations of the Constitution. The petitioners are citizens and registered voters, and the 1st respondent's conduct has resulted in a grossly unjustified delay in the exercise of their right to vote, in violation of Article 14 (1) (*a*).

Turning to Article 12 (1), the petitioners' contention was that the failure to take the poll on 28.8.98 and the failure to fix a new date resulted in a denial of equality before the law, and of the equal protection of the law, to voters in the five affected provinces, *vis-a-vis* voters in other provinces. The respondents' reply was that when the impugned Regulation came into operation the only elections that were to be held were for those five Councils; that no other councils were involved; and that therefore the postponement of the poll affected all the Councils which were in the same class equally and without discrimination. They conceded that "presently, [the] date for election has been fixed in relation to [another] province which is not referred to in [the impugned Regulation]. This process has followed the normal procedure in terms of the existing law".

Two distinct issues are involved: first, whether the impugned Regulation was valid and the 1st respondent acted properly in not taking steps to hold the elections on 28.8.98 (which I will consider later in this judgment), and second, whether the 1st respondent's conduct, in permitting the suspension of postal voting and in failing to fix a new date, was in violation of Article 12 (1). Even before the impugned Regulation was made, the 1st respondent acquiesced in, and probably authorized, the suspension of the issue of postal ballot papers; that was unlawful, arbitrary and not *bona fide;* that was done with knowledge that the impugned Proclamation and Regulation would be made the next day, and for a collateral purpose; and he thereby placed a fetter on his discretionary power under section 22 (6). Upon the impugned Regulation being made, the 1st respondent had

power to act under section 22 (6) – whether that Regulation was valid or not – but failed even to consider whether he had such power, and he failed to exercise that power even after 28.8.98 (when the Regulation had ceased to be applicable), despite the decision and observations of this Court; and even when it became evident that elections would take place in the North-Western province before the elections in the other five provinces, thus denying to the voters in those five provinces the protection of the law, by his failure to exercise, perform and discharge the powers, duties and functions reposed in him by the Constitution and the Act, and treating them less favourably than voters in the North-Western province. Article 12 (1) has been infringed.

The 1st respondent's aforesaid conduct in violation of Articles 12 (1) and 14 (1) (*a*) was neither authorized nor justified by any legal provision falling within the ambit of the restrictions permitted by Article 15. Article 15 (2) permits certain restrictions on the freedom of speech only if prescribed by "law" (not including emergency regulations), and Article 15 (7) permits restrictions on the right to equality and the freedom of speech if prescribed by "law" or by emergency regulations, "in the interests of national security, public order and the protection of public health, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society". The 1st respondent's conduct was not authorized by any "law", and so Article 15 (2) was inapplicable. It was not authorized by any emergency regulation, and so Article 15 (7) was inapplicable.

Learned counsel for the petitioners strenuously contended that the impugned Proclamation as well as the Regulation were *ultra vires.* He urged that the Proclamation had been made for the sole purpose of postponing elections; the fact that no other Emergency Regulation had been made pursuant to that Proclamation proved that it had been issued only to enable that Regulation to be made; both were part of one scheme, to postpone these five elections; and that was confirmed by the failure of the respondents to produce any material suggesting that the Proclamation and the Regulation had been made for any lawful purpose, connected with considerations of national security or public order.

In his affidavit, the 1st respondent pleaded that the impugned Regulation could not be questioned by virtue of the PSO. The learned Solicitor-General further submitted that since HE the President could not be made a party by virtue of Article 35, and since the petitioners had not cited as respondents any other persons who could answer the allegations pertaining to the *vires* of the impugned Proclamation and Regulation, this Court should make no pronouncement pertaining to their validity. In any event, he urged, the holding of elections could have affected national security.

The making of the Proclamation and the Regulation, as well as the conduct of the respondents in relation to the five elections, clearly constitute "executive action", and this Court would ordinarily have jurisdiction under Article 126. The question is wheher that jurisdiction is ousted by reason of Article 35, or the failure to join necessary parties, or any relevant ouster clause.

The immunity conferred by Article 35 is neither absolute nor perpetual. While Article 35 (1) appears to prohibit the institution or continuation of legal proceedings against the President, in respect of *all* acts and omissions (official and private), Article 35 (3) excludes immunity in respect of the acts therein described. It does so in two ways. First, it completely removes immunity in respect of one category of acts (by permitting the institution of proceedings against the President personally); and second, it partially removes Presidential immunity in respect of another category of acts, but requires that proceedings be instituted against the Attorney-General. What is prohibited is the institution (or continuation) of proceedings *against the President*. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law. It is also relevant that immunity endures only *"while* any person holds office as President". It is a necessary consequence that immunity ceases immediately thereafter; indeed, it would be anomalous in the extreme if immunity for private acts were to continue. Any lingering doubt about that is completely removed by Article 35 (2), which excludes such period of office, when calculating whether any proceedings have been brought within the prescriptive period. The need for such exclusion arises only because legal proceedings can

be instituted or continued thereafter. If immunity protected a President even out of office, it was unnecessary to provide how prescription was to be reckoned.

I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings *against* the President *while* in office; it imposes no bar whatsoever on proceedings (*a*) against him when he is no longer in office, and (*b*) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct. It is for that reason that this Court has entertained and decided questions in relation to emergency regulations made by the President (see *Joseph Perera v. AG,*[1] *Wickremabandu v. Herath,*[2] and Presidential appointments (see *Silva v. Bandaranayake,*[3]). It is the respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President.

As for the alleged failure to join the "proper" respondents, the learned Solicitor-General submitted that the petitioners should have made responsible officers of the "defence establishment" respondents, because they alone could produce the necessry material on the basis of which the Proclamation and Regulation were made; and the respondents "could never have placed any material before Court on matters of public security".

In fundamental rights applications, the proper respondents (beside the Attorney-General) are those who are alleged to have infringed the petitioner's rights; not persons who may be able to give relevant evidence. It would improper in such applications, as in other legal

proceedings, to join as respondents persons who are no more than witnesses. Here the petitioners' real complaint is the failure to hold the elections on 28.8.98 and to fix a new date in lieu; the alleged infringement was by the 1st respondent and the returning officers, and the Supreme Court Rules did not require anyone else to be made respondents. The Proclamation and Regulation were therefore relevant, not to the petitioners' case, but to the respondents' defence of justification, and the burden was therefore on them to produce evidence from the "defence establishment" if they wished to. It would have been improper for the petitioners to join a person as respondent for the sole purpose of forcing him to produce evidence, however important, to support their own case – even an essential witness is not a necessary party. How then can they be under any obligation to make someone from the "defence establishment" a respondent, in order to compel him to produce evidence in support of the respondents?

I must mention that the respondents' plea that they had no knowledge of the public security aspects of the Proclamation and the Regulation confirms that when the impugned Regulation was made the 1st respondent did not inquire why it was made, and that he failed or declined to fix a new date of poll despite the lack of any information suggesting an adverse security situation. While I agree that it was theoretically possible for the holding of elections to have affected national security – for instance, if a significant number of security personnel had to be withdrawn from the "operational areas" in order to provide security for the elections, that might have affected national security in those areas – yet the Inspector-General of Police did not think so on 25.6.98, and the 1st respondent did not have any material suggesting that any change had taken place at any time thereafter.

I am therefore of the view that neither Article 35 nor the failure to join an officer from the "defence establishment" is a bar to this application.

However, the question whether this Court had jurisdiction to review the Proclamation and the Regulation did arise. It was only towards the conclusion of the oral argument that reference was made to Article

154 J (2), which may oust the jurisdiction of this Court in regard to the Proclamation. Without the benefit of a full argument, I am reluctant to rule on that matter. As I am of the view that the impugned Regulation was invalid, the application can be disposed of without considering the *vires* of the Proclamation. I must also mention that learned counsel for the petitioners submitted that he was not challenging the Proclamation in its entirety, but only in regard to its application to areas additional to those to which the previous Proclamation applied. That involves a further question – whether the Proclamation was severable – and on that too we did not have the benefit of assistance from counsel.

The learned Solicitor-General relied on section 8 of the PSO, which provides that "no emergency regulation . . . shall be called in question in any court", as ousting the jurisdiction of the Courts to review the impugned Regulation. Article 155 (2) imposes a Constitutional limitation on the power to make emergency regulations: they cannot have the legal effect of overriding, amending or suspending the operation of any provisions of the Constitution. If section 8 ousts the jurisdiction of this Court to review emergency regulations, then the consequence would be that even a regulation violative of the Constitution is valid: and Article 155 (2) would be nugatory. However, if Parliament had sought to enact similar legislation, that would have been subject to review by this Court under Article 121. If section 8 ousts the jurisdiction of this Court, then that which Parliament cannot do by legislation, can nevertheless be done by an emergency regulation made in the exercise of delegated legislative power! Article 168 (1) did not keep in force prior enactments where the Constitution expressly provided otherwise. The Constitution has made such express provision by entrenching several jurisdictions of this Court (see Wickremabandu, at 361), and section 8 of the PSO is therefore subject to such express provision. I hold that, in the exercise of the jurisdiction of this Court under Article 126, this Court has power to review the validity of the impugned regulation.

Article 76 (2) permits Parliament to make, in any law relating to national security, provision empowering the President to make emergency regulations. Article 155 deems the PSO to be a law

enacted by Parliament, and section 5 of the PSO authorizes the President to make emergency regulations "as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot and civil commotion, or for the maintenance of supplies and services essential to the life of the community". Section 5 is thus a provision for the delegation of legislative power in a public emergency (see *Weerasinghe v. Samarasinghe*)[4] and emergency regulations are delegated legislation. An emergency regulation must therefore be in form legislative, rather than executive or judicial; it must be a rule, rather than an order or a decision. If it was considered necessary to suspend the notices issued under section 22 of the Act, there should first have been enacted a regulation (ie delegated legislation) conferring power, in general terms, on some authority to suspend notices already issued under section 22, and then only could there have been an exercise of that power, in relation to particular instances. Further, such regulation could not have been absolute and unfettered, but relevant criteria or guidelines (ie "national security-oriented" criteria) were necessary. Thereupon judicial review would have been possible at two stages: first, whether the regulation itself was *intra vires,* and second, whether the act done was a proper exercise of power, in keeping with the criteria or guidelines and for valid reasons. As Sharvananda, CJ. observed in Joseph Perera's case:

> "Regulation 28 violates Article 12 of the Constitution. The Article ensures equality before the law and strikes at discriminatory State action. Where the State exercises any power, statutory or otherwise it must not discriminate unfairly between one person and another. If the power conferred by any regulation on any authority of the State is vague and unconfined and no standard or principles are laid down by the regulations to guide and control the exercise of such power, the regulation would be violative of the equality provision because it would permit arbitrary and capricious exercise of power which is the antithesis of equality before law. No regulation should clothe an official with unguided and arbitrary powers enabling him to discriminate – *Yick Wo v. Hopkins*. Regulation 28 confers a naked and arbitrary power on the Police to grant or refuse permission to distribute pamphlets or posters as it pleases, in

exercise of its absolute and uncontrolled discretion, without any guiding principle or policy to control and regulate the exercise of such discretion. There is no mention in the regulation of the reasons for which an application for permission may be refused. The conferment of this arbitrary power is in violation of the constitutional mandate of equality before the law and is void."

Sharvananda, CJ. was dealing with an emergency regulation which purported to confer a power on an official, and he held the regulation to be invalid because it purported to confer a power which was vague and unconfined, and which could be exercised arbitrarily and capriciously. Here the impugned Regulation does not purport to confer a power (to suspend statutory notices of election under section 22 of the Act): it does not specify the criteria for the exercise of the power; and it purports to suspend such notices without any stated reason.

I hold that the impugned Regulation is not a valid exercise of power under section 5 of the PSO. It is not an emergency regulation. It has, rather, the character of an *order,* purporting to suspend notices lawfully issued under the Act. There was not in force, then or later, any legal provision which authorized the making of an order suspending such notices.

But in any event, even treating the impugned regulation as if it had been an order made under a valid emergency regulation, the suspension of the notices issued under section 22 could have been sustained only if it had been for one of the purposes set out in section 5 of the PSO. The petitioners have established, *prima facie,* that from 25.6.98 up to the end of July, 1998, there was no known threat to national security, public order, etc., which warranted the postponement of the elections. The respondents have failed to adduce any material whatever which suggests that, in August, 1998, there was any such threat. Accordingly, the suspension of the notices by means of the impugned Regulation was arbitrary and unreasonable. That suspension infringed the fundamental rights of the petitioners under Articles 12 (1) and 14 (1) (*a*), for the reasons already stated.