LST REVIEW

Volume 9 Issue 136 February 1999

ELECTIONS AND THE FREEDOM OF EXPRESSION

LAW & SOCIETY TRUST

LST REVIEW

(This is a continuation of the Law & Society Trust Fortnightly Review)

EDITOR
Dr Sumudu Atapattu

Law & Society Trust
3 Kynsey Terrace
Colombo 8 Sri Lanka
Tel: 94 1 691228/684845
Fax: 94 1 686843
e-mail: lst@slt.lk

Editor's note.....

This issue of the LST Review is devoted to the recent Supreme Court judgments on the postponement of the Provincial Councils elections by executive action. We publish the Supreme Court judgment in *Varuna Karunathilaka and Sunanda Deshapriya* v. *Commissioner of Elections and others* (SC Application No 509/98), the proceedings of the symposium held by the Trust on this case and the Supreme Court determination on the Bill titled "An Act to make provision enabling the Commissioner of Elections to fix new date of poll ....." in which the Supreme Court held that certain provisions in this Bill were contrary to the provisions in the Constitution.

The judgment of the Supreme Court in the *Elections Petitions Case* (as it is commonly referred to) is significant in many respects. The Court held that:

I. there was a violation of Article 12(1) - on equal protection of the law - as the petitioners were less favourably treated than those in other Provincial Councils where these Councils were functioning.
II. there was a violation of Article 14(1)(a) - which deals with freedom of speech and expression. The Court held that casting the vote is a form of expression and that it is included in Article 14(1)(a).
III. the immunity of the President is neither absolute nor perpetual and that immunity shields the doer and not the act.
IV. finally, the emergency regulation in question was in the form of an Order and, therefore, is not valid.

The Court, however, did not go as far as saying that the Proclamation under the Public Security Ordinance was invalid.

At the Symposium held at the Trust on this judgment, three presentations were made: by Mr R.K.W. Goonesekera, Mr Shibley Aziz and Dr Jayadeva Uyangoda. A summary of the presentations made by the three speakers are also included in this Issue.

Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an Application under Article 126 of the Constitution

1. Varuna Cudhanimal Karunathilaka, 7, Crestwood 1, Keels Housing Scheme, Hokandara Rd., Talawatugoda.

2. Waduge Methsiri Sunanda Deshapriya, 56/24, Robert Gunawardana Mawathe.

SC Application
No. 509/98

Petitioners

Vs.

1. Dayananda Dissanayake, Commissioner of Elections, Election Secretariat, Sri Jayawardenapura.

2. G.D. Amarakoon, Returning Officer of the District of Monaragala, District Secretariat, Monaragala.

3. W.M.A. Wijekoon, Returning Officer of the District of Badulla, District Secretariat, Badulla.

4. D.M. Nandisena, Returning Officer of the District of Kandy, District Secretariat, Kandy.

5. P.D. Amarasinghe, Returning Officer of the District of Matale, District Secretariat, Matale.

6. D. Hettiarachchi, Returning Officer of the District of Nuwara Eliya, District Secretariat, Nuwara Eliya.

7. J. Hettiarachchi, Returning Officer of the District of Anuradhapura. District Secretariat, Anuradhapura.

8. J.H.K. Abeykoon, Returning Officer of the District of Polonnaruwa, District Secretariat, Polonnaruwa.

9. M.J.K. Perera, Returning Officer of the District of Ratnapura, District Secretariat, Ratnapura.

10. K.M. Ariyaratne,
Returning Officer of the District of Kegalle, District Secretariat, Kalutara (sic).

11. A.I. Wickrama
Returning Officer of the District of Kalutara, District Secretariat, Kalutara.

12. T. Hapangama,
Returning Officer of the District of Gampaha, District Secretariat, Gampaha.

13. S.R. Weerakoon
Returning Officer of the District of Colombo, District Secretariat, Colombo 12.

14. The Attorney-General,
Attorney-General's Department, Colombo 12.

Respondents

BEFORE: G.P.S. de Silva, CJ
Fernando, J.
Gunasekera, J.

COUNSEL: R.K.W. Goonesekera with Suranjith Hewamanna. J.C. Weliamuna and Ms. Krishanthi Pinto Jayawardena for the Petitioners.

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

ARGUED ON: 4th and 7th December 1998

WRITTEN SUBMISSIONS ON: 20th December 1998

DECIDED ON: 27th January 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 20.8.98 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 recognised 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 authorise 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, Kalutara 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 re-start that process after suspension. But even if such provisions can be implied, that suspension, at that point of time, made it extremely difficult to re-start 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 authorise 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 judgements.

The very next day, on 4.8.98, H.E. 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 1 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 11 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 district 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 Council 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 recognised 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 (i.e. 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:

---

* Editor's note: The Supreme Court determination on this Bill is reproduced in this Issue (see p 35).

> **"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 XVIIA, and especially Article 154A, of the Constitution which contemplate the continued existence of elected Provincial Councils. Further, to accept an interpretation which would not permit the fixing of 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 validity 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 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 H.E. 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 <u>all</u> 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 has 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 to 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 authorised, 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).

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 whether 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 A.G. [1992] 1 SriLR 199, 230: Wickramabandu v Herath [1990] 2 SriLR 340, 361, 374) and Presidential appointments (see Silva v Bandaranayake, [1997] 1 SriLR 92). 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 necessary 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 be 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 any one 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 - 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 154J(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 over-riding, 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 authorises 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, (1966) 68 NLR 361), and emergency regulations are delegated legislation. An emergency regulation must therefore be in form of 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 (i.e. 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 (i.e. "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 authorised 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.

Should the 1st Respondent have insisted on the poll being held on 28.8.98 ..... While I appreciate the difficult situation in which he was, nevertheless it is necessary to remember that the Constitution assures him independence, so that he may fearlessly insist on due compliance with the law in regard to all aspects of elections - even, if necessary, by instituting appropriate legal proceedings in order to obtain judicial orders. But the material available to this Court indicates that he made no effort to ascertain the legal position, or to have recourse to legal remedies.

I grant the Petitioners declarations that the 1st to 13th Respondents have infringed their fundamental rights under Articles 12(1) and 14(1)(a) by the suspension of the issue of postal ballots, thereby contributing to the postponement of the poll; and that the 1st Respondent has infringed their

fundamental rights under Articles 12(1) and 14(1)(a) by failing to take steps to enable the taking of the poll, for the five Provincial Council elections, on 28.8.98, and by failing to fix a new date of poll.

I direct the 1st Respondent to take immediate action to fix, within two weeks from today, in respect of all five elections (a) a new date or dates, not later than four weeks from today, for the issue of postal ballot papers, and (b) a new date or dates of poll, not later than three months from today.

The Petitioners have not prayed for compensation. They will be entitled to costs in a sum of Rs. 30,000/= payable by the State.

JUDGE OF THE SUPREME COURT

G.P.S. DE SILVA, CJ:

I agree.

CHIEF JUSTICE

GUNASEKERA, J:

I agree.

JUDGE OF THE SUPREME COURT

The Trust held a symposium on the "Emergency Regulations and the Electoral Process" on 22 February 1999. A summary of the presentations is reproduced below.

Electoral Process and the Freedom of Expression

Mr. R.K.W. Goonesekera[*]

1. Background to the Case:

The term of office of the Provincial Councils is fixed at five years; it goes out of office without any dissolution or proclamation. Thereafter it is left to the Commissioner of Elections to conduct fresh elections to the Provincial Councils. The conducting of fresh elections is important because, unlike in the case of the Parliament where there is a dissolution the Cabinet continues to function, in the case of Provincial Councils, there is a gap, because there is no provision for the Board of Ministers to function in the interim period between dissolution and the return of the new members. That makes it all the more important that elections be held expeditiously and certainly within the time frame given in the elections law, and that is exactly what the Commissioner of Elections proceeded to do. He carefully followed the requirements prescribed in the elections law calling for nominations and then considering objections and finally deciding on the validity of the list. He also assigned symbols to the parties, and gazetted the names of all the candidates. He is also required to gazette the date on which the elections would be held which he fixed for the 28th of August. Having done that, he had only to make other administrative arrangements for the conduct of the poll, such as locating the polling stations and making arrangements for the issue of postal ballots. I mention postal ballots because it has figured rather prominently in the judgment of the Supreme Court.

---

[*] Member, UN Sub Commission on Minorities. Edited for publication.

It was at that stage that there was a proclamation by the President extending the emergency for the entire country. Prior to that the emergency was confined to the North and East, and a few areas in the rest of the country. A state of emergency was declared for the entire country and on the same date, by a gazette notification, a regulation was made by the President. This regulation was to the effect that the date prescribed by the Commissioner of Elections for holding of the elections "shall have no effect." There was no cancellation of an election nor did the Elections Commissioner himself do anything about it. He understood it to mean that he cannot proceed to hold the election on the date prescribed. Between the date of the Gazette and the date fixed for the election, there was a considerable period of time - about 2 1/2 weeks. At this juncture, persons interested could have taken up the matter, but unfortunately, due to reasons best known to the political parties concerned, there was no objection on the scote of not having elections or trying to see whether there was some way in which the Commissioner could be compelled to hold the elections. The Commissioner was absolutely silent. However, people were interested in this issue for the reason that with the legislative bodies which had ceased to function, the whole scheme of devolved government in the five Provinces had come to a standstill. The powers of the Governor were limited. It was at this time that these challenges to the action were contemplated by various persons including only two political parties - UNP and the JVP - to see whether anything could be done. Two process of action were considered. One was going to the Court of Appeal, and filing writ applications to compel the Commissioner to hold elections. Of course by this time it must be noted that the date 28th August had passed.

An application was filed in the Supreme Court on the basis that the non-holding of the election by the Commissioner amounted to a violation of the fundamental rights of the petitioners. The petitioners were two citizens who had the right to vote in these five provinces, it was alleged that by not holding the election, the petitioner's fundamental rights were violated on two grounds. The first ground was unequal treatment, because here the voters of the five provinces were denied the right to elect its members to the Provincial Councils and whereas all the other provinces except, of course, the North and East, the Provincial Councils were functioning, because the date of the termination of the period of five years varies from Council to Council. So some i.e. Southern Provincial Council as well as the North Western (Wayamba) were still functioning at that time. The application was like a shot in the dark, not knowing what treatment it would receive. But I am glad to say that it was

favourably considered, so much so, that we were permitted at the stage of supporting the application even to introduce a new ground: that is that there was a violation of Article 14(1)(a) on the basis that the right to vote is also a kind of expression and, therefore, it has been violated by the Commissioner by not holding elections. These were the two grounds on which the matter was argued. In the course of the argument questions as to the validity of the regulation which had the effect of postponing the election, came into very prominent discussion. There was a strong argument based on the fact that even if you look at the extraordinary powers which the President has under the Public Security Ordinance when a state of emergency is declared, the question was whether or not she had the power to make a regulation of this nature or was it outside the proper scope of the exercise of regulation making power? I think it had been established that no one is capable of flouting express legal provisions, not even the President. So that was a very important issue namely whether this particular regulation - one has to bear in mind that this was the only regulation made soon after the emergency was proclaimed for the entire country - was a valid exercise of power or not. The question was also raised and argued fairly strongly that this is one instance where there was an improper exercise of the power to make proclamations. Ever since the Public Security Ordinance was promulgated in 1948, it has never been accepted that one can question the opinion of the Head of State as to the need to proclaim a state of emergency, because the language is couched in subjective terms as to keep it outside the pale of judicial review. But an argument was made that even here one could examine the role of the President in exercising the powers given under the Public Security Ordinance and that the judiciary had the duty to examine it in the interest of the people of the country where there was such a close nexus between the proclamation and the regulation.

Another argument was that this proclamation of emergency was solely intended for the purpose of making this regulation and nothing else. Thus, if the regulation is bad, the proclamation must also be considered tainted. Having examined the regulation, it was not very difficult to convince the Court that this Proclamation seems to go outside the ambit of the powers conferred on the President, because constitutionally, the function of conducting elections is conferred on the Commissioner of Elections. The Commissioner of Elections is a person who is specifically mentioned in the Constitution, and it was contended that he is a totally independent person. No one can interfere with his functions. In this instance the interference has been

done or the change has been done not by the Commissioner in the exercise of his statutory functions and powers, but by an outsider, and it has been done in very unsatisfactory terms, because all that the regulation said is the date specified in the gazette notification shall be of no effect for as long as the proclamation lasts. There was no difficulty in saying that this regulation was an impermissible interference with the functions given by the Constitution to the Commissioner of Elections and that, therefore, the regulation did not have the backing of the Public Security Ordinance. It was very clear from the affidavit filed by the Commissioner of Elections that he had no reason whatsoever for not holding the election except the proclamation of emergency and the regulation.

He did not say, for example, "I made independent enquiries, and found that there were disturbances throughout the country and that it could not have been possible for me to hold elections, and I was satisfied for that reason." He might have given it as an additional reason than merely relying on the Presidential regulation, but he did not do that. The Court was prepared to accept that the regulation is bad, but thought that it was rather unnecessary to take the more difficult step of saying that the proclamation is bad. We can say that this proclamation is something which is totally suspicious, but there were certain problems. One problem was ouster clause in the Public Security Ordinance which says that proclamations shall not be questioned in any court of law. Whether there is a state of emergency or not that cannot be questioned. There was another thing which had been slipped into the 13th amendment, which also has the same effect of saying that no proclamation can be challenged, although it has been accepted that regulations made by the Head of State in the exercise of powers under the proclamation could be successfully challenged if they were overbroad or if they were in excess of the authority given.

Another interesting issue is that when you examine the regulation which had the effect of postponing the elections, it did not really take the form of a regulation. The Constitution held that it was in the form of an ***order*** and it was pointed out that not ***even the President*** had the power to make orders of this nature under Part II of the Public Security Ordinance. What is given to the President is the power to make ***regulations***. We should invest someone else with the power to make orders, like for example, a competent authority, and tell the competent authority, that it may make orders to close down a printing press or whatever it may be. Those orders can be done. But they

derive authority from a particular regulation. Therefore, there was a second ground for saying that the regulation was bad, because it was bad in form, because it was not in the form of a regulation. It was an order and not an order at the same time because it did not order the Commissioner not to hold elections. It merely said that that the date gazetted had no effect in law.

Freedom of Expression:

The interesting part of the judgment is the pronouncement with regard to the extended meaning given to freedom of speech and expression. We have seen in earlier judgments of our own Court following the judgments in other jurisdictions that speech and expression has not been taken very literally, but has been given an expanded scope, so as to cover various acts of communication even if it does not come within the strict definition of speech, it would certainly come within the definition of expression. A good example is the '*Jana Gosha*' case. If you look at the American Case Law, the communication expressed by the person who hung the American flag upside down, as a way of indicating his disfavour at that time with the conduct of the Vietnam War was considered as a form of expression. The *Jana Gosha Case* was something similar to that, because there was an organised demonstration whereby the demonstrators were only required to do one thing - make noise on a drum or beat saucepans or whatever, at a particular time. Naturally they must have created an unpleasant noise for other people, and the Police Officers took the petitioners' drums and broke them, so it was on that act the case was filed for a violation of the freedom of speech and expression, which the Court upheld.

So if you go thus far, then the argument in a sense is irresistible that election time is a time when people really take an active involvement in the affairs of government. That is the time they participate in writing. One argument was of course that when you cancel an election, you deprive the people of that right of participation in the mechanics of government. But the Court looked at it from the point of view that the marking of a ballot paper itself is an act of expression. You express your sentiments either affirming the party in power or rejecting the party in power by simply marking the ballot paper with a cross. Even if you don't go to the top preferences, that is really an expression of opinion because the whole process of civil society depends on this process from beginning to the end leading to the result which is the collective wish of the people of the electorate concerned and which can only

be expressed by marking a ballot paper. That, I think, is a very important aspect of the decision of the Supreme Court in treating the ballot paper and the choice of a voter at an election as a kind of expression which should not be easily prevented, because that would be regarded as a violation of Article 14(1)(a) which is what they did in fact hold. They held on both grounds.

Emergency Regulations and the Electoral Process

Dr Jayadeva Uyangoda[*]

My comments are meant to highlight how the recent developments in Sri Lanka's electoral process have serious implications for democratic governance.

I wish to make three points about the postponement of provincial council elections under emergency regulations and the recent Supreme Court judgment on it. Firstly, the government's use of the emergency regulations to postpone the provincial council elections occurred in the context of a relentless consolidation of executive governance in Sri Lanka. We have been witnessing, over the past few years, a process of governance characterised by the centrality of the Presidential Secretariat in the structures of the State. The problem, however, is that the Office of the President is involved in making decisions with far-reaching implications for democratic governance, with little or no consideration of how such decisions would impact on the rule of law, the fundamental rights and the provisions of the Constitutions. It may be the case that the President's Office does not have a mechanism by which Presidential decisions and executive actions are reviewed for their constitutionality, before they are implemented. Such a thorough reviewing process needs to be built into the Office of the President, precisely because of the ever-expanding domain of actions which appear to originate from that office.

My second point is that we are continuously witnessing how institutions of representative democracy are being subjected to the agenda and interests of the ruling party. When this trend started in the early eighties, there was public outrage and, of course, a strong argument emerged in our society that the election process should be separated and totally delinked from the agenda of the political parties in power. It is, of course, not a strange practice in a democracy to decide the dates for elections, taking into consideration the general mood of the electorate. But what happened in the postponement of the five provincial council elections was something totally uncalled for, and,

---

[*] Senior Lecturer, Faculty of Arts, University of Colombo. Edited for publication.

indefensible under the principles of the rule of law. Elections were postponed after calling for nominations and while the campaign process was on. In addition, the legal instrument used for the postponement of the election by the executive branch of the state was not the normal law governing elections, but emergency regulations. The emergency regulations were used in an exercise in manipulating the democratic process for the partisan advantage of the ruling party. That is why this action of the executive amounts to extremely bad politics.

Thirdly, it appears to me that one of the serious lacunae in our system of constitutional governance is the absence of mechanisms of checks and balances to prevent executive actions that have the potential to undermine the bases of democratic governance. The legislative branch of the state is a totally inadequate instrument in this regard. Against this backdrop, the higher judiciary is called upon to perform the function of the final oversight body concerning executing governance. When looking at the series of Supreme Court decisions during the past few months, decisions on matters with direct political ramifications, it appears that the higher judiciary is perhaps the only formal body that can check actions, although *ex-post facto*, of the Presidential branch of the state.

I would also like to make an observation about a particularly negative trend in Sri Lanka's politics, a trend that started in the early seventies. Ruling parties, in response to issues concerning governability, appear to exercise state power in an arbitrary manner, knowing very well that such behaviour violates even elementary principles of democratic governance. I call this tendency "regime authoritarianism." During the UNP regime of 1977-1994 we saw regime authoritarianism reaching a peak. What happens under this phenomenon is the blurring of the distinction between the regime and the state. Regimes tend to behave as if they are the state. It is hoped that under the PA regime there would be some attempt by those who use excellent constitutional rhetoric of good governance, to restore the distinction between the regime and the state.

Let me now present to you some observations about Sri Lanka's electoral process. After the Wayamba election, the public debate on electoral reforms has resumed. Most of the blame for violence in Wayamba is now heaped on the proportional representation (PR) system and the mechanism of preferential voting. Personally, I have a tendency to sympathise with persons and

institutions that are isolated, targeted and under attack. While electoral reforms are important in a democracy project, let us not isolate the electoral system from the larger problem of democracy's crisis in Sri Lanka. The PR system is turned into a formula for violence in a political culture which has incorporated violence as an easily accessible means of gaining political power. We must also not forget that our political parties have conducted themselves in such a manner that communities are polarised according to party identities and loyalties. I am not an advocate for the abolition of the multi-party system in favour of a party-less democracy. I merely make an attempt to advocate the restoration of democratic values and norms in the conduct of all political actors.

It appears to me that recent developments in Sri Lanka's electoral politics are symptomatic of a deep crisis of democratic institutions. This crisis manifests itself in the form of our democratic institutions and practices being separated from the elementary normative principles of democracy. Normative values of democracy are not necessarily ones which political philosophers have developed in an unintelligible language. The absence of democratic norms is easily felt, as it happened in Wayamba, when two candidates of two competing political parties cannot campaign in the same town at the same time without igniting a major fight among the armed mobs who tail behind them. Pluralism, tolerance, the ability to disagree and the civility in rivalry are the normative principles that are absent in episodes like this and in our electoral process.

My own reading of Sri Lanka's crisis of democracy is that there is now a clear disjuncture between our democratic institutions and practices, on the one hand, and democratic values, on the other. The bitter partisan rivalry between the PA and the UNP can be seen as the manifestation of another dimension of this crisis of democracy, that is the breakdown in the value consensus among the political elite. One major problem in this regard is that the political leadership is incapable of comprehending the magnitude of this crisis. I have always noticed that one way to measure the severity of a political crisis is to look at how political leaders deny the very existence of the crisis.

The final point I want to make is that reforms in the electoral process should be conceived as a measure to restore electoral democracy in Sri Lanka. That will require the bringing back to democratic institutions and practices the normative values of democracy.

Elections Petition Judgment: A Few Salient Features

Mr. Shibley Aziz[*]

1. Invalidating the Proclamation and the Regulation

Mr. Goonesekera pointed out a very important issue, i.e. the question whether a proclamation of emergency can be questioned? Article 154J(2) of the Constitution introduced this. Unfortunately, in this case the Court did not want to enter upon the whole exercise of invalidating the proclamation, because I think they had other grounds to give the judgment. They also struck down the regulation in question on the basis that it was in the nature of an order and unfortunately, this order did not have the underpinning of legitimacy. It was just an order which was like pulled out of the hat which said that no elections would be held on a particular date.

What would have happened if by chance, the state was able to prove that there was a real need for passing that order? Let us take the worst scenario, where there is fighting at the door step, and we are having lots of problems and in the midst of that we simply cannot have an election. We contended that there was no basis, no justification for postponing Provincial Council elections by emergency regulation. There is no way in which anybody could have put off Provincial Council elections by emergency regulations, because that would be tantamount to suspending the provisions of the Constitution. It was our argument that the Constitution provided for the establishment and the continuing existence of Provincial Councils in a very comprehensive, effective and substantial way. And you cannot, by Emergency Regulations under the Public Security Ordinance, suspend the provisions of the Constitution. It was also pointed out in the Court that a large segment of legislative power, almost one-third of the legislative power, is conferred on Provincial Councils, and you cannot take back those powers in any situation. Such powers are conferred permanently on Provincial Councils. If there were no Provincial Councils to exercise those powers, you are virtually interfering with the legislative power of the people - the sovereignty of the people. Because who

---

[*] President's Counsel. Former Attorney-General. Edited for publication.

else - can the people turn to for the exercise of those powers? The Governor cannot exercise these powers. The main legislator - the Parliament - can exercise them only in specified circumstances. There would have been very serious impediments in the running of the country, if things were allowed to function without Provincial Councils in existence. No emergency regulation can override or suspend that part of the Constitution, and you cannot by emergency regulation postpone Provincial Council elections, because, it would affect the State, the country, and the people. The people would be left without a legislative body to exercise that portion of legislative powers. proof.

2. Immunity of the President

There also a very important matter about Article 35 of the Constitution dealing with the immunity of the President. I have never had any doubts about the immunity of the President, and the Supreme Court put it down in writing. The Constitution said that the immunity of the President is only there during the tenure of office of the incumbent President, and once the President goes out of office the full panoply of criminal prosecutions or civil suites can be put in motion against that person notwithstanding the fact that these happened during the tenure of office.

3. Freedom of expression

I have a slight reservation on the Court's ruling on freedom of expression. The freedom of expression, thought, speech and expression is to do with interface with ideas. So that everybody has a chance of persuading somebody else to come round to his point of view and nobody is stopped from expressing his views. I am a little sceptical as to whether you can expand the freedom of speech and expression to cover franchise. Perhaps I may be in a strong minority, but I am a little sceptical as to whether franchise is a legitimate exercise of the freedom of expression. My difficulty is that you have in the narration of fundamental rights everything of substance, except franchise and also when you come to the entrenched provisions, franchise is referred to as one of the matters entrenched, but not franchise to Provincial Councils. I do not know whether it was intentional, but the fact of the matter is franchise to Provincial Councils is not entrenched and the Court has on several occasions referred to that.

Supreme Court of the Democratic Socialist Republic of Sri Lanka

AN ACT TO MAKE PROVISION ENABLING THE COMMISSION OF ELECTIONS TO FIX A NEW DATE OF POLL FOR WESTERN, UVA, SABARAGAMUWA, CENTRAL AND NORTH CENTRAL PROVINCIAL COUNCILS ELECTIONS

In the matter of petitions under Article 121 of the Constitution

SC Special Determination No 9/98 (SD)

Janatha Vimukthi Peramuna,
198/9, Panchikawatte Road,
Colombo 10.

Petitioner

SC Special Determination No 10/98 (SD)

Pethigama Kuruwitage Piyasena Perera,
265/B, Thalawathugoda Road,
Mirihana, Kotte.

Petitioner

SC Special Determination No 11/98 (SD)

Nuwan Kodikara,
Attorney-at-Law,
257, High Level Road,
Kottawa.

Petitioner

SC Special Determination No 12/98 (SD)

Erantha Priya Sudesh de Silva,
176, Pothuwil Road,
Moneragala.

Petitioner

SC Special Determination
No 13/98 (SD)

Wijekoon Mudiyanselage Tikiri Banda,
"Wijaya", Wewewatta,
Palugama, Keppetipola.

Petitioner

SC Special Determination
No 14/98 (SD)

Gunamuni Halowitage Sumanawathi,
Idangoda, Kiriella.

Petitioner

- vs -

The Attorney-General,
Attorney-General's Department,
Colombo.

Respondent

BEFORE: Fernando, J,
Gunawardana, J, and
Weerasekera, J.

COUNSEL: R.K.W. Goonesekera with J.C. Weliamuna
for the Petitioner in SD 9/98;
A.A. de Silva, PC, with Tissa Yapa, Piyasena
Dissanayaka, Nihal Senaratne and Mahanama
Dissanayaka for the Petitioner in SD 10/98;
Shibley Aziz, PC, with V. Wimalachandran,
A.P. Niles, Miss Priyanthi Gooneratne and
Miss Nazly Buhari for the Petitioner in SD 11/98;
A.S.M. Perera with Gamini Senanayake
and Mrs Shaheeda Barrie
for the Petitioners in SD 12-14/98;
K.C. Kalamasabayson, PC, SG, with
A. Gnanadasan, SSC, and M. Gopallawa, SC,
for the Attorney-General.

DETERMINATION:

Six petitioners were filed, on 10.11.98 and 11.11.98, alleging that clauses 2 and 3 of the Bill entitled "Provincial Councils Election (Special Provision) Bill" ("An Act to make provision enabling the Commissioner of Elections to fix a new Date of Poll for Western, Uva, Sabaragamuwa, Central and North Central Provincial Councils Elections") were inconsistent with Articles 3, 4, 12, 154A(2) and 154Q(a) of the Constitution. The petitions were taken up for consideration together on 16.11.98.

BACKGROUND

The five-year terms of office of five Provincial Councils came to an end about six months ago. After the conclusion of the nomination process for elections to those Councils (in terms of Part II of the Provincial Councils Elections Act, No. 2 of 1988) the returning officers of the several administrative districts concerned published notices, all dated 15.7.98, under section 22(1) of the Act, specifying 28th August 1998 as the date of poll for the several administrative districts of those five Provinces.

On 4.8.98 H.E. the President issued a Proclamation, under section 2 of the Public Security Ordinance, bringing the provisions of Part II of that Ordinance into operation throughout Sri Lanka, and made the following 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 1 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 to effect" [emphasis added throughout].

Counsel informed us that similar Proclamations have been issued every month thereafter. The Regulation did not purport to cancel or invalidate the notices under section 22(1), but only to suspend their operation; and that, too, "so

long only as Part II of the Public Security Ordinance is in operation in (the) Province." Further, that suspension was not of the notices in their entirety, but only of that part which related to the date of poll. Accordingly, the rest of each notice, and especially that part which related to the nominations (the names of the candidates, the symbols, etc.) remained valid and operative.

The poll was not taken on 28th August 1998. It is necessary, for the purpose of this Determination, to ascertain whether the Provincial Councils Elections Act, No. 2 of 1988, makes provision for fixing another day for the poll. Section 22(6) of the Act provides:

> "(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."

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.

Although section 22(6) provided that the Commissioner *"may"* appoint another day, thereby conferring a discretion, it is arguable that, in the context of elections, that was not a pure discretion but a power coupled with a duty. But it is enough for the purpose of this Determination that it was the Commissioner who had the power to fix another date.

While the Commissioner had the power to fix another date, up to now he has not exercised that power.

Counsel informed us that the validity of the Proclamation and the Regulation has been challenged in other proceedings now pending both in this Court and in the Court of Appeal.

That is the background in which the impugned Bill was placed on the Order Paper of Parliament on 4.11.98.

PROVISIONS OF THE BILL

THE BILL IS AS FOLLOWS:

AN ACT TO MAKE PROVISION ENABLING THE COMMISSIONER OF ELECTIONS TO FIX A NEW DATE OF POLL FOR WESTERN, UVA, SABARAGAMUWA, CENTRAL AND NORTH CENTRAL PROVINCIAL COUNCILS ELECTIONS;

WHEREAS nomination papers were submitted for elections to the Western, Uva, Sabaragamuwa, Central and North Central Provincial Councils, in

response to a Notice published under section 10 of the Provincial Councils Election Act, No. 2 of 1988, by the Commissioner of Elections, indicating his intention to hold such elections;

AND WHEREAS by Notices published under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, August 28, 1998, was specified as the date of poll for such elections;

AND WHEREAS by regulation made under section 5 of the Public Security Ordinance, and published in Gazette No. 1039/5 of August 4, 1998, the date so specified was *declared* to be of no effect;

AND WHEREAS it has now become *necessary* to make provision enabling the Commissioner of Elections to fix a new date of poll for such elections;

Now, therefore, be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

1. This Act may be cited as the Provincial Councils Elections (Special Provisions) Act, No.... of 1998.

2. (1) The Commissioner of Elections shall, within four weeks of the date of commencement of this Act, appoint, by Notice published in the Gazette and having regard to the periods specified in section 22(1)(c) of the Provincial Councils Elections Act, No. 2 of 1988, a date of poll for elections to every provincial Council set out in column 1 of the Schedule to this Act, in lieu of the date of poll specified in the Notice published under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, in respect of such Provincial Council, and published in the Gazette set out in the corresponding entry in Column II of the Schedule to this Act; and the provisions of the Provincial Councils Elections Act, No. 2 of 1988 relating to the taking of a poll shall apply to a poll taken in compliance with the first mentioned Notice.

(2) The validity of a poll taken on the date appointed under subsection (i) shall be deemed not to be affected by reason only of the fact that the date so appointed was after the expiration of eight weeks from the date of publication of the second mentioned Notice.

3. (1) The Secretary of a recognised political party or the group leader of an independent group who has submitted a nomination paper for election to a Provincial Council set out in column 1 of the Schedule to this Act, in respect of an Administrative District, may apply to the Returning Officer of such Administrative District, within two weeks of the date of commencement of this Act, to substitute for the name of a candidate appearing in such nomination paper, the name of another candidate (in this section referred to as "the substituted candidate").

(2) Every application made under subsection (1) shall be accompanied by the written consent of the substituted candidate and an oath or affirmation, as the case may be, in the form set out in the Seventh Schedule to the Constitution, taken and subscribed, as the case may be, by the substituted candidate.

(3) On receipt of an application under subsection (1), accompanied by the documents referred to in subsection (2), the Returning Officer shall substitute in the relevant nomination paper, the name of the substituted candidate in place of the other candidate referred to in the application, and the name of the substituted candidate shall be deemed to have been included in the nomination paper submitted by such recognised political party or independent group for such Administrative District and the name of the other candidate omitted therefrom, for all purposes, to be valid and effectual notwithstanding the fact that it has not been endorsed by the substituted candidate or that the names of the other candidates are not in alphabetical order.

(4) After the substitution of [a] candidate in a nomination paper submitted by a recognised political party or independent group in respect of an Administrative District as provided for in this section, the Returning Officer for such Administrative District shall cause the Notice published under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, in respect of such Administrative District to be amended, including the name specified in such Notice, and omitting the name of the other candidate therefrom.

4. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

The Schedule sets out the names of the five Provincial Councils and the numbers and the dates of the Gazettes in which the notices under section 22 had been published,

CLAUSE 2 OF THE BILL

All the Petitioners, with the exception of the Petitioner in No 10/98, challenged the validity of clause 2 on various grounds, which fall into three broad categories.

The Petitioners' first submission is that the Bill is a legislative intrusion into an area which, constitutionally, is the exclusive preserve of the Commissioner of Elections; the power and the discretion to fix a new date of poll in respect of a pending electoral process. It is more than an interference with a purely *statutory* power or process, because Article 104 of the Constitution requires the Commissioner to "exercise, perform and discharge all such powers, duties and functions as may be conferred or imposed on or vested in him by the law for the time being relating to elections to the office of President ..... or *by any other written law;*" and the Provincial Councils Elections Act is one such "written law." The power to fix a new date of poll is presently vested in him under section 22(6), and clause 2 seeks to interfere with that discretion - it seeks to compel the Commissioner to exercise his discretion in a manner different to all other Provincial Council elections, past and future. While the position might have been different if clause 2 had been a <u>general</u> provision, amending section 22(6), clause 2 does not purport to make a general amendment to section 22(6) or to any other provision of the Act; it is not prospectively applicable to future elections, or to future elections as well as these five elections; but applies *only* to these five elections. The resulting position is that the fixing of a new date of poll for all elections, past and future, was and will be a matter for the Commissioner, to be dealt with under section 22(6); but clause 2 requires the Commissioner's power and discretion to be exercised otherwise than in the manner prescribed by section 22(6) only for these five elections - not even for any other election which may take place during the same period. That is also violative of Article 12(1). An improper motive is alleged for this difference in treatment. If the Commissioner had been allowed to fix a new date under section 22(6), the election would have proceeded on the basis of the nominations already received, and the contest would have been between the candidates already on the respective lists. What clause 2 seeks to permit is a contest of a completely different character. As

clause 3 shows, the Bill attempts to allow the substitution of new candidates, in place of old, even against their will; and so the resulting contest could well be one between completely different candidates - a result which could not have been achieved under section 22(6). Further, if the Commissioner had been allowed to retain his discretion under section 22(6), he might opt to allow the minimum period of 14 days' notice. But that would not be sufficient to accommodate the desired process of substitution. Accordingly, the exclusion of the general discretion under section 22(6), and the stipulation of new time frames became necessary. Thus, under the guise of giving the Commissioner the "necessary" power to fix a new date of poll, the Bill attempts to permit a virtually new nomination process - and only for these five elections.

It was pointed out that the fourth preambular clause of the Bill is misleading, because it wrongly asserts that it is "necessary" to make provision enabling the Commissioner to fix a new date of poll; there is no such necessity, because the existing law makes adequate provision.

Not only is clause 2 inconsistent with Articles 12(1) and 104 as aforesaid, but it also interferes with the franchise, contrary to Article 4(e). Although that Article does not mention elections to Provincial Councils, that is because Provincial Councils were only introduced subsequently by the Thirteenth Amendment; Article 4(e) must now be interpreted to cover Provincial Council elections as well. Further, the franchise is not restricted to merely voting at elections; it includes standing for elections, and, indeed, the entire election process from nomination to poll.

It has also been submitted that, despite the lapse of more than two months after the original date of poll, the Bill has not been classified as an "urgent" Bill; there is thus no assurance that it is intended to be passed quickly and brought into operation promptly thereafter, and that would further delay the elections. By contrast, if the Commissioner is permitted to act under section 22(6), a new date of poll can be fixed with just 14 days' notice. While Article 154E provides for the automatic dissolution of a Provincial Council upon the expiry of its five-year term of office, no provision is made for a "caretaker," administration. The necessary implication of that, it is urged, is that the Constitution requires prompt elections; to hold otherwise would be to devaluate the devolution of power.

A second submission was that clause 2 was ambiguous as to the extent of the Commissioner's discretion. While section 22(6) allows the Commissioner to fix different dates for the poll for different Councils, where in his opinion the circumstances - such as the availability of staff, vehicles and equipment, or security considerations, and the like - require it, clause 2 appears to require that one single date be fixed for the elections to all five Provincial Councils (in lieu of "the" date of poll already specified). That is a further interference with his discretion.

The Petitioners' third main submission was that the Bill, in its third preambular clause, purports to legitimise the Emergency Regulation of 4.8.98, the validity of which is presently under judicially review. It is for the Courts to determine that question. It was suggested, relying on *R* v *Liyanage*, (1962) 64 NLR 313, and *Liyanage* v *R*, (1965) 68 NLR 265, that the Bill is not a true exercise of legislative power within the meaning of Articles 4(a) and 75, and is an interference with pending electoral processes and judicial proceedings, because the Bill contemplates alterations in the law not intended for generality of cases, or the improvement of the general law, but limited to one particular situation, leaving all future similar situations to be governed by the pre-existing law.

It is unnecessary to examine the Petitioners' submissions in detail. It is sufficient for the purpose of this Determination to say that clause 2 is inconsistent, at least, with Article 12(1) of the Constitution.

CLAUSE 3 OF THE BILL

Counsel for all the Petitioners submitted that, for the elections for these five Provincial Councils only, clause 3 permitted the Secretary of a party and the group leader of an independent group to replace a candidate, whose name was properly on the nomination paper and the notice under section 22(1), without his consent and even without notice to him, although the general law contained in the Provincial Councils Elections Act does not permit replacement of a candidate even in case of death (cf. section 23) or withdrawal (cf. section 116). Clause 3 is therefore inconsistent with Article 12 as well as an interference with the franchise.

It is unnecessary to refer to the various anomalies and injustices which result from such involuntary substitution, especially to members of independent

groups. Mr. Kamalasabayson did not contend that such substitution was consistent with Article 12(1), but submitted that what had really been intended was to permit the withdrawal of candidates who - discouraged by the long delay in taking the poll - no longer wished to contest. Such an intention does not appear at all from the language of clause 3. Clause 3 plainly confers on the Secretary of a party and the group leader of an independent group the power, arbitrarily or capriciously, to remove a candidate from a valid nomination paper without his consent, without a valid reason, and even without notice; it is a gross violation of the right to equal treatment of candidates standing for election.

DECISION

In the course of the oral submissions it appeared to us that there were formidable questions of inconsistency between clauses 2 and 3 of the Bill, and several provisions of the Constitution particularly Article 12(1). Counsel for all the Petitioners were agreed that delay in the taking of the poll should be minimised. Leaving aside clause 3, we inquired from Counsel whether their objections to the constitutionality of clause 2 would persist if the fourth preambular clause was deleted, and the third preambular clause and clause 2 amended to read as follows:

> AND WHEREAS the said poll has not been taken:.....
>
> 2. (1) The Commissioner of Elections shall, within four weeks of the date of commencement of this Act, appoint, by Notice published in the Gazette and having regard to the periods specified in section 22(1)(c) of the Provincial Councils Elections Act, No. 2 of 1988, a date *or dates for the taking of the poll* for elections to every Provincial Council set out in column 1 of the Schedule to this Act, in lieu of the date of poll specified in the Notice published under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, in respect of such Provincial Council, and published in the Gazette set out in the corresponding entry in Column II of the Schedule to this Act, *unless he has, in the exercise of his power under section 22(6) of the Provincial Councils Elections Act, No. 2 of 1988, appointed a date or dates for the taking of the poll for such elections*; and the provision of the said Act relating to the taking of a poll shall apply to a poll taken in compliance with the first mentioned Notice.

(2) The validity of a poll taken on a date appointed under subsection (1) shall be deemed not to be affected by reason only of the fact that the date so appointed was after the expiration of eight weeks from the date of publication of the second mentioned Notice.

Such an amendment would acknowledge the undoubted power of the Commissioner to fix a new date of poll under section 22(6), and continues to leave him free to exercise that power. It is only in the event that an election cannot be held because he has failed to exercise that power that he would be compelled to fix a new date under clause 2. It would then be, not an interference with the franchise or the electoral process, but a remedy for the interruption which has occurred between nomination and poll; and, further, it would not prejudice any pending litigation.

Mr. Kamalasabayson stated that these amendments were acceptable, and that the Bill would be amended accordingly.

We determine that clauses 2 and 3 of the Bill are inconsistent with, *inter alia*, Article 12(1) of the Constitution, and can only be passed with the special majority prescribed by Article 84(2). However, clause 2 will cease to be inconsistent if amended as suggested above.

30th November 1998

M.D.H. Fernando
JUDGE OF THE SUPREME COURT

A. de Z. Gunawardana
JUDGE OF THE SUPREME COURT

L.H.G. Weerasekera
JUDGE OF THE SUPREME COURT

SUBSCRIPTIONS

The annual subscription rates of the LST Review have been revised due to rising costs of production as follows:

Local:	Rs. 600/=
Overseas:	
South Asia/Middle East	US$ 30
S.E. Asia/Far East/Australia	US$ 35
Europe/Africa	US$ 40
America/Canada/Pacific countries	US$ 45

Individual copies at Rs. 50/= may be obtained from the Trust at No. 3, Kynsey Terrace, Colombo 8, and BASL Bookshop, 129, Hulftsdorp Street, Colombo 12.

Spiral bound and indexed copies from Volume I - VII are also available.

Enquiries: *Librarian*
Law & Society Trust
No.3, Kynsey Terrace
Colombo 8
Tel. 686845/691228
Fax: 94 1 686843