LST REVIEW
Volume 13 Issue 185 March 2003

JUDICIAL RECOGNITION OF A RIGHT TO VOTE

LAW & SOCIETY TRUST

CONTENTS

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ISSN - 1391 - 5770

Editor's Note .....

This issue of the LST Review contains a landmark judgement emanating from the Supreme Court of Sri Lanka in late March this year.

The judgement deals with three applications involving virtually identical issues connected with the Parliamentary General Elections held on 5th December 2001. The applications challenged a decision taken by the 3rd Respondent (Army Commander) to close the entry points to 'cleared' areas from the 'uncleared' areas. Because, the Petitioners who were residents of the 'uncleared' areas were thereby prevented from entering the 'cleared' areas to vote at the polling stations allotted to them. Further, it was pointed out by the Petitioners that voters in the Trincomalee district who were similarly under security threats were not hindered in exercising their franchise, and several politicians including the President of Sri Lanka, Speaker Anura Bandaranaike, Prime Minister Ratnasiri Wickremenayake and Anuruddha Ratwatte, were provided with the privilege to exercise their vote in their respective residences despite their living in areas 'unaffected' by war.

Therefore, the Petitioners alleged that the third respondents decision was not in consultation with the 1st Respondent (Commissioner of Elections) and that it was motivated by political considerations and not by a genuine need of public security, thereby treating them differently to the rest of the voters in the country. Hence, all the Petitioners prayed for declarations that their fundamental rights to equality, freedom of movement and expression had been violated and for compensation and costs.

The Judgement and its Implications

The Court held with the Petitioners and came to the following conclusions:

1. There was no 'law' validly imposing restrictions on thePetitioners' freedom of movement.

2. As per *Karunathilaka* v. *Dissanayake [1999] 1 Sri L.R. 157 at 173-174,* "the silent and secret exercise of his right to vote is an exercise of the freedom of speech and expression." This was not merely 'delayed' but was totally denied to the Petitioners.

3. Other voters living in similarly circumstanced 'uncleared' areas ie. Trincomalee, were not subject to similar restrictions, without a plausible explanation.

Therefore, the Court declared that the Petitioners' freedom of movement guaranteed under Article 14 (1) (h); freedom of speech and expression guaranteed under Article 14 (1) (a) read with Article 4 (e) and right to equality and equal protection of the law guaranteed under Article 12 (1) were infringed by the 1st and the 3rd Respondents.

The Court also held that the 1st respondents order ie. To allow six persons to vote at their residences, was arbitrary, unreasonable and discriminatory and in violation of Article 12 (1) of the Constitution, *inter alia* because;

i. "The privileges which the holders of high office enjoy on other occasions or at other times come to an end when it comes to the exercise of the right to vote on Election Day, for elections must be free, equal and secret - so that voters are equal, and must be treated equally."

ii. "If the Commissioner had power under section 129 to introduce such procedures unasked, there is no reason why he did not establish procedures to enable, for instance, voting at embassies abroad by the many migrant workers who contribute so substantially to our national economy."

iii. "A condition precedent to the exercise of the power conferred by section 129 is the existence of a difficulty in implementing any provision of the Act. In this case, the 1st Respondent was not faced with any such difficulty, but only with the alleged personal problems of six voter who apprehended serious difficulty in attending their allotted polling booths."

Justice Mark Fernando delivering judgement for the court made special reference to the context within which these infringements had taken place, in order to highlight their gravity.

> *"The infringements took place at a time when there was a serious erosion of public confidence in the integrity of the electoral process, and when it was extremely important to ensure that elections were free and fair, particularly in the "uncleared" area - because citizens living in those areas need reassurance, if peace and national reconciliation were to become realities, that elections would be truly democratic, that fundamental rights would be respected and protected, and that judicial remedies would be available for wrongdoing. In that context, the infringements were a national disaster"*

The Petitioners were also awarded compensation and costs together with the declarations.

The judgement is significant in making a judicial recognition of the fact that, though the right to vote is not recognised as a fundamental right in the Fundamental Rights Chapter of the Sri Lankan Constitution of 1978, "the silent and secret exercise of his right to vote is an exercise of the freedom of speech and expression" which in turn is recognised as a fundamental right in Article 14 (1) (a) of the Constitution. Furthermore, the denial of the exercise of that right constitutes not only a violation of the freedom of expression but also an infringement of the right to equality which is also enshrined as a fundamental right in Article 12 (1) of the Constitution. Thus, in effect, the Supreme Court has once again[1] elevated the peoples' right to vote, to the status of a fundamental right enshrined in the supreme law of the land.

The Issue also includes the written submissions of SC. FR No: 20/2002 - one of the applications filed in this case.

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[1] See also the judgement of ***Karunathilaka v. Dissanayake [1999] 1 Sri L.R, 157 at 173-174***

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

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

Sothilingum Thavaneethan,
Trincomalee Road,
Vakarai

Petitioner

SC No 20/2002 (FR)

v.

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

2. S. Shanmugam, Returning Officer
   Batticaloa District,
   District Secretariat
   Kachcheri, Batticaloa

3. Army Commander
   Lt.-Gen. L. P. Balagalla
   Army Headquarters
   Colombo 1

4. Major-General N. Mallawarachchi
   Commander, 23rd Division
   Army Camp
   Minneriya

5. B. L. V. de S. Kodituwakku
   Inspector-General of Police
   Police Headquarters
   Colombo 1

6. Douglas Devananda, General Secretary
   Eelam People's Democratic Party
   121 Park Road, Colombo 5

7. Senerath Kapukotuwa, General Secretary
   United National Party
   400, Kotte Road, Rajagiriya

8. M. T. Silva, General Secretary
   Janatha Vimukthi Peramuna
   198/19, Panchikawatte, Colombo 10

9. Achala Ashoka Suraweera
   General Secretary
   Jathika Sangwardena Peramuna
   Surasiri Niwasa
   Peeragolla Watta, Muruthalawa

10. R. Sampanthan, General Secretary
    Tamil United Liberation Front
    146/19, Havelock Road, Colombo 5

11. L. Jayatilake, General Secretary
    New Left Front
    17, Barracks Lane, Colombo 2

12. D. M. Jayaratne, General Secretary
    People's Alliance
    121, Wijerama Mawatha, Colombo 12

13. S. Sathananthan, General Secretary
    Democratic People's Liberarion Front
    16, Haig Road, Bambalapitiya
    Colombo 4

14. Rohan Jayatunga, General Secretary
    Sri Lanka Progressive Front
    7, 7th Lane, Pagoda Road, Nugegoda

15. Abdul Rasool, General Secretary
    Lanka Muslim Katchi
    G3/10, Anderson Flats
    Park Road, Colombo 5

16. Dr. M. Hafrath, General Secretary
    Sri Lanka Muslim Congress
    Sama Manthiraya 53, Vauxhall Lane
    Colombo 2

17. Thilak Karunaratne, General Secretary
    Sihala Urumaya
    655, Elvitigala Mawatha, Colombo 5

18. Mohamed Aliyar Mohamed Ibrahim
    Group Leader, Independent Group 1
    New Selection, Main Street, Balaichenai

19. Mohamed Hussain Mohamed Iliyas
    Group Leader, Independent Group 2
    School Road, Oddamavadi 1

20. Meerasahib Mohamed Ameer
    Group Leader, Independent Group 3
    Mosque Road, Valaichenai

21. Irasaya Thurairetnam
    Group Leader, Independent Group 4
    209, A Lake Road 1, Batticaloa

22. Seyed Ibrahim Seyed Ahamed
    Group Leader, Independent Group 5
    P. S. Road, Oddamavadi 2

23. Mohamed Aboobucker Mohamed Raseethu
    Group Leader, Independent Group 6
    Palliyadi Veethy, Oddamavadi 1

24. Mohamed Ibrahim Mohamed Thahir
    Group Leader, Independent Group 7
    Kirath Road, Valachenai

25. Bazeer Seyed Mohamed Mohamed
    Group Leader, Independent Group 8
    42, Old Market Road, Eravur 3

26. K. M. Noormohamed
    Group Leader, Independent Group 9
    Rahumaniya Vidyalaya Road, Eravur

27. Jamaldeen Mohamed Musthaffa
    Group Leader, Independent Group 10
    561, Odaviyar Road, Eravur 2

28. Attorney-General
    Attorney-General's Department
    Colombo 12

Respondents

1. Thambipillai Thangavel
   Karaiyakantivu, Kannankudah

2. Kanapathipillai Singarajah
   Karaiyakantivu, Kannankudah

Petitioners

SC No 25/2002(FR)

v.

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

2. S. Shanmugam, Returning Officer
   Batticaloa District, District Secretariat
   Kachcheri, Batticaloa

3. Army Commander Lt.-Gen. L. P. Balagalla
   Army Headquarters
   Colombo 1

4. Colonel V. R. L. Anthonisz
   Brigade Commander, 233 Brigade
   Headquarters, Batticoloa

5. Inspector General of Police
   Police Headquarters
   Colombo

6. Attorney-General
   Attorney-General's Department
   Colombo 12

Respondents

1. Thevianayagam Alagasuntheram
   Ilupadichenai, Pankudavely

2. Ponnan Kanthasamy, Vakarai

Petitioners

SC No 26/2002(FR)

v.

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

2. S. Shanmugam, Returning Officer
   Batticaloa District, District Secretariat
   Kachcheri, Batticaloa

3. Army Commander Lt. –Gen. L. P. Balagalla
   Army Headquarters, Colombo 1

4. Colonel V. R. L. Anthonisz
   Brigade Commander, 233 Brigade
   Headquarters, Batticaloa

5. Inspector-General of Police
   Police Headquarters, Colombo

6. Attorney-General
   Attorney General's Department
   Colombo 12

Respondents

BEFORE : Fernando, J.
Ismail, J. and
Wigneswaran, J.

COUNSEL : J. C. Weliamuna with Lavangi Weerapana & Shantha Jayawardena for the Petitioner in SC 20/2002;
K. Kanag-Iswaran, PC, with S. Sumanthiran for the Petitioners in SC 25/2002;
Dr. Jayantha de Almeida Gunaratne with Ms. Kishali Pinto Jayawardena for the Petitioners in SC 26/2002;
S. Marsoof, PC, ASG, and S Barrie, SC, for the 1st to 5th and 28th Respondents in SC 20/2002, and for the 1st to 6th Respondents in SC 25/2002 and SC 26/2002.

ARGUED ON : 7th October 2002

DECIDED ON : 25th March 2003

FERNANDO, J.

These three applications involve virtually identical issues connected with the Parliamentary General Election held on 5. 12. 2001.

The five Petitioners in these three applications are citizens of Sri Lanka registered to vote in the Batticaloa electoral district. They complain that on 5.12. 2001, on their way to the polling stations allotted to them, army personnel prevented them from entering the areas in which those polling stations were situated (thus infringing their freedom of movement guaranteed by Article 14(1)(h)); that in consequence they were prevented from voting (a denial of their freedom of expression guaranteed by Article 14(1)(a) read with Article 4(e)); that although large numbers of voters in the Batticaloa and Vanni electoral districts were similarly prevented from voting – resulting in the absence of a free and fair poll – a repoll was not ordered in the affected areas (a further violation of their freedom of expression); and that they were not treated equally with other voters and/or other sections of voters in Sri Lanka (in violation of their right to equality and equal protection guaranteed by Article 12(1)). The Petitioner in SC (FR) Application No 20/2002 ("the first Application") complains of a further infringement of Article 12(1) in that the Commissioner of Elections, the 1st Respondent, hastened to make special arrangements, not sanctioned by law, to enable a handful of voters to vote from the safety of their homes, although no action was taken to protect the exercise of his own right to vote.

When these applications were taken up for hearing on 7.10.2002, all Counsel informed us that the facts were not seriously in dispute and requested that all three matters be disposed of on written submissions, which were later filed.

THE FACTS

It is sufficient to refer briefly to the facts disclosed in the petition in the first Application. The Batticaloa electoral district consists of three polling divisions, namely Kalkudah, Batticaloa and Paddirippu. Each of those divisions is sub-divided into a number of polling districts, for each of which there were one or more polling stations. In 2001 Kalkudah had 79 polling districts. For polling districts Nos 70 to 79, there was only one polling station, namely, the Mankerny Roman Catholic Tamil Mixed School (hall Nos 1 to 10). Hall No 5 was the polling station for polling district No 74, the Gramasevaka division of Vakarai central, where the Petitioner and his wife resided. In normal circumstances, they should have been allotted a polling station in or near Vakarai as they were residents of Vakarai. However, Vakarai was an "uncleared" area (i.e. an area not within the control of the government and the armed forces of Sri Lanka), and in order to enable persons in "uncleared" areas to vote,

polling stations were allotted to them in "cleared" areas. Such polling stations intended for voters in several different "uncleared" areas were, for convenience and security, situated in one location, in a "cluster." In order to vote at the Mankerny School, hall No 5, the Petioner and his wife had to cross from the "uncleared" to the "cleared" area, and that they had to do at the check-point (or entry point) at the Kadjuwatte Army Camp. The Petitioner's complaint is that on arrival at that check-point at 10.15 a.m. on 5.12.2001, he (and about another 500 voters) were informed by the army officers present that they had received orders from their superior officers not to permit any one to enter the cleared areas that day. Nevertheless, hoping for a change of heart, they waited till 2.30 p.m., but that decision was not changed, and they returned home disappointed.

The Petitioner stated that voters in the "uncleared" areas in the Batticaloa and Vanni districts were similarly prevented from voting, but not those in the Trincomalee district which the ruling People's Alliance had won at the previous Parliamentary General Election in 2000, securing 53,860 votes out of 133,130 valid votes polled. He further pleaded that:

"... the following persons are reported to have been given the voting right at their respective residences though they live in areas unaffected by war:

(a) President Chandrika Bandaranaike Kumaratunga
(b) Speaker Anura Bandaranaike
(c) Prime Minister Ratnasiri Wickremanayake
(d) Anuruddha Ratwatte

... no legal provision is prescribed to facilitate such persons to vote at their residences in this manner."

The Petitioners in the other two applications were similarly prevented, at various check-points, from entering "cleared" areas and voting at the polling stations allotted to them. They alleged that the decision taken by the 3rd Respondent to close the check-points was not in consultation with the 1st Respondent, and was motivated by political factors and not by a genuine security need. They pleaded that they were treated differently to registered voters in the rest of the country.

It is not disputed that at least 40,000 voters (out of a total of about 280,000) in the Batticaloa electoral district, and 15,000 voters (out of a total of about 210,000) in the Vanni electoral district, were similarly prevented from voting. The 1st Respondent nevertheless decided not to order a repoll in the affected polling stations.

All the Petitioners prayed for declarations that their fundamental rights under Articles 12(1), 14(1)(a) and 14(1)(h) had been infringed, and for compensation and costs, while the Petitoners in the first Application also sought a declaration that the voters in the "uncleared" areas of the Batticaloa and Vanni districts are entitled to vote without any hindrance from the Defence authorities as well as a repoll in those areas. The prayer for a repoll was not pressed in the written submissions.

Documents called for by the Court

The first Application was filed on 4.1.2002, and leave to proceed was granted on 24.1.2002. The Respondents were granted time till 11.3.2002 for objections. Since the matter was both important and urgent, as it concerned the franchise, an early date of hearing was fixed, namely 2.4.2002, but it could not be taken up till 7.10.2002. The 1st and 2nd Respondents (the Commissioner of Elections and the Returning Officer for the Batticaloa district) were directed to forward copies of (a) all correspondence with the Defence authorities pertaining to the closure of entry points from "uncleared" areas on 5.12.2001, (b) the material pertaining to the decision of the 1st Respondent not to annul the results of the poll for the Batticaloa district and not to hold a repoll, and (c) the material setting out the circumstances in which the aforesaid four voters were permitted to vote at their residences, and the relevant regulations or orders. The 3rd and 4th Respondents in the first Application (the Commander of the Army, and the Commander of the 23rd Division responsible for the Batticaloa district) were directed to forward copies of (a) the orders, messages and directives pertaining to the decision to close the entry points, and (b) the correspondence and communications between the 3rd Respondent and the officers of the Defence Ministry on that decision.

There was no response from the 4th Respondent. By letter dated 20.2.2002 written on behalf of the 3rd Respondent, the Registrar of this Court was informed that:

"all orders and instructions given to the subordinate officers by the 3rd Respondent with regard to the decision to close the entry points ... and the communication between the 3rd Respondent and the officers of the Ministry of Defence were not written, but verbal."

The Court order was to produce the orders, messages and directives pertaining to the decision to close the entry points. It was not confined to the orders etc, given by the 3rd Respondent to his subordinates, but included the orders etc, given to the 3rd Respondent, as well as orders etc, given by the 4th Respondent (and others in the Army) in order to implement that decision. However, not a single document pertaining to the decision to close the entry points and the communication and implementation of that decision was furnished. The Petitioners in the

second and third Applications produced a copy of a facsimile message sent at 11.34 a.m. on 5.12.2001 from the Headquarters of the 23 Division to the Headquarters of the 233 Brigade:

"From GOC for Bde Comd. Convey the fol text to District Secretary Bco from GOC for Government Agent, District Secretary Bco and ... Returning Officer Bco. All entry points from uncleared area to cleared area have been closed based on intelligence reports, to prevent LTTE plans to disrupt the conduct of free and fair election and also to prevent the LTTE from infiltrating to the cleared area in the guise of voters."

The 2nd Respondent by letter dated 13.2.2002 forwarded to the Attorney-General copies of six documents, requesting that these be submitted to this Court. That was not done despite reminders from the Registrar. One of those documents was described as a "message received from Headquarters of 23 Division, dated 5.12.2001, of the Army delivered to me by the Commanding Officer of 233 Brigade, Batticaloa."

It is clear that there were "orders, messages and directives" pertaining to that decision and that they have been deliberately withheld from this Court.

The 1st Respondent failed to comply with the order made by this Court to submit the material in regard to the aforesaid four voters being permitted to vote at their residences. He filed an affidavit dated 8.3.2002 which in effect denied those allegations. It was only after this Court repeated that direction on 2.4.2002 that the 1st Respondent submitted three documents. One was a Gazette Extraordinary No 1213/11 of 4.12.2001 containing an "Order under section 129 of the Parliamentary Elections Act":

"... having regard to the threat to the lives of the persons whose names are specified in Column II of the schedule to these regulations by the LTTE, [I] do hereby direct the Returning Officer of the Administrative Districts specified in Column I ... to be present at the respective premises described in the corresponding entry in Column III... on December 05, 2001, during the hours of poll and permit the aforesaid persons to cast their votes in respect of the Parliamentary General Elections in his presence at the aforesaid premises...

Column I	**Column II**	**Column III**
Administrative District	**Name of Persons**	**Description of Premises**
Gampaha	1. Chandrika Bandaranaike Kumaratunga	President's House, Fort, Colombo 1
Kalutara	2. Ratnasiri Wickremanayake	Temple Trees, Colombo 03

Colombo	3. Lakshman Kadirgamar	Wijerama Mawatha, Colombo 07
Matara	4. Mangala Samaraweera	Francis Samaraweera Mawatha, Gabada Weediya, Matara
Gampaha	5. Anura Bandaranaike	Horagolla Walauwa, Nittambuwa
Kandy	6. Anuruddha Ratwatte	Mahiyawa, Kandy

That Order did not purport to empower the Commissioner of Elections, or any one else, to issue further directions or instructions.

He also forwarded a photocopy of a letter dated 3.12.2001 written to him by the Secretary to the President ("the Secretary"), with a copy to the Attorney-General, with its annexure dated 4.12.2001 from the Additional Director-General of the Directorate of Internal Intelligence ("ADG/DII") to the 5th Respondent, the Inspector-General of Police.

The Secretary's letter stated:

"This has reference to my telephone conversation with you this afternoon regarding the information received from very reliable sources within Sri Lanka and abroad that [the President, Prime Minister, former Speaker Anura Bandaranaike, Minister Ratwatte, Minister Kadirgamar and Minister Samaraweera] are being targeted by the LTTE to be assassinated on the day of the Poll ... They have been advised by the security forces to avoid attending polling stations to cast their vote as it would be impossible to ensure their safety... If they are to proceed to the polling stations to cast their vote, strict security arrangements would have to be made which would include checking the polling stations, checking all those coming for voting etc. This would cause disorganization of the election process, and I therefore request you to look into the possibility of making alternate arrangements for them to cast their votes with any other authority you consider suitable.

The Government Agent or the Asst Government Agent or any other similar level officer may be arranged to facilitate their voting. These arrangements would be known only to you and the officer who is responsible for this function for security reasons. I have annexed hereto a copy of a report received from the Directorate of Intelligence ... which is self-explanatory. Please make the necessary arrangements and keep me informed of the names of those officers."

The ADG/DII's memorandum, titled "Threat to VVIP and VIPP" (copied to "DIG/PSD"), referred to information from "reliable and sensitive" sources –

"...about a LTTE plan to assassinate the under-mentioned VVIP and VIPP during the Polling Day... [the President, the Prime Minister, Minister Ratwatte, former Speaker Anura Bandaranaike, and Minister Samaraweera]. Information of a specific threat on H.E. the President and General Ratwatte was received earlier, too, from another sensitive source from overseas last week... Hence it is strongly suggested that all precautionary methods be taken when the above–mentioned VVIP and VIPP have to visit a Polling Booth to cast their vote, please."

Both these documents bear the 1st Respondent's date stamp "04 DEC 2001" with "1.00 pm" written by hand. It is clear therefore that the report referred to in the Secretary's letter of 3rd December is the ADG/DII's memorandum of 4th December. That report could not have been available when the Secretary telephoned the 1st Respondent on the 3rd afternoon, and there has been no clarification as to the nature of the "information" which the Secretary conveyed to the 1st Respondent on the occasion.

Documents produced by the Commissioner

It is necessary to refer to some of the other documents produced by the 1st Respondent with his affidavit.

By letter dated 4.12.2001, the Deputy Leader of the Tamil Eelam Liberation Organization ("TELO") complained to the 1st Respondent that the Army had ordered the closure of the Vanni entry point, and asked him to request the 3rd Respondent to lift the restrictions, and "if [that] is impossible, to send a ballot box with the government officials to uncleared area and help them to register their votes."

In two letters dated 5.12.2001, the Returning Officer, Vanni district, complained of the closure of the sole entry point which gave access to voters from the "uncleared" areas of Vavuniya and Mannar; he stated, without contradiction, that a decision had been taken at the Security Co-ordinating conference held as early as 6.11.2001 at the Securtiy Forces Headquarters, Vanni, to keep that entry point open to allow voters of the "uncleared" areas to vote; and he stressed that that arrangement had been communicated to all contestant political parties, independent groups and election observers, and that the failure to open the entry point could be treated as misleading those parties, groups and observers, as well as the voters.

On 5.12.2001 the Returning Officer, Batticaloa, complained about the closure of all the entry points in Batticaloa; he also stated that he had received written complaints from party candidates that large-scale impersonation had taken place at the "cluster" polling stations. A Batticaloa Member of Parliament, Joseph Pararajasingham, also complained, adding that he

had spoken to the 3rd Respondent who had claimed that they had taken a decision on the grounds of security and hence would not allow any person to come from the "uncleared" area; he added:

"This I feel is a decision taken by the Government to prevent the voters from exercising their rights which is a blow to democracy... please use your powers and instruct the [3rd Respondent] to lift the blockade or declare the elections in the Batticaloa district null and void."

The 1st Respondent forwarded those complaints to the Secretary, Ministry of Defence, requesting that instructions be given to allow entry or that a repoll be ordered. It was emphasized that "the contesting candidates had earlier been given permission to campaign in "uncleared" areas [and] it is ironic that the people who were canvassed for their votes are now being denied their basic rights to cast their vote."

The 1st Respondent also produced the minutes of two meetings: one with the 3rd and 5th Respondents on 6.12.2001, and the other with the representatives of political parties and independent groups on 7.12.2001. These documents established that the security forces did not consult him prior to closing the entry points; that the 3rd and 5th Respondents explained that this was due to security reasons, as otherwise LTTE cadres would have mingled with the voters and infiltrated into the "cleared" areas; that the 3rd Respondent maintained that there was only one entry point for Vanni, at which only 300 persons could be checked per nine-hour day, while Batticaloa had a few entry points at which 2,500 to 3,000 could be checked; and that 15,000 voters in the Vanni district and 40,000 in Batticaloa were prevented from voting. As for a possible repoll, the 3rd Respondent stated that the situation would not change in the near future, and suggested that the poll be staggered over a three or four day period. The 1st Respondent did not consider that to be feasible, and decided not to order a repoll. He made no reference to the complaints of large-scale impersonation mentioned by the Returning Officer, Batticaloa.

Newspaper reports

In view of the uncertainty as to who was responsible for the impugned decision, and why and when it was taken, it is necessary to refer to certain newspaper reports and other documents produced by some of the Petitioners – not as evidence of the truth of their contents, but to appreciate the 3rd Respondent's response to them, and to test the credibility of his affidavit.

The Island of Thursday 6.12.2001 reported that:

"On a directive issued by the government on Tuesday, five military controlled civilian entry and exit points [in Vavuniya and Batticaloa] were closed yesterday barring over 50,000 registered voters... government officials said..."

The Sunday Times of 9.12.2001 quoted MP Pararajasingham:

"... thousands of voters in the uncleared areas... had been prevented from voting by the security forces who closed the entry points into the cleared area reportedly on a special directive from President Chandrika Kumaratunga ..."

The Daily News of 13.12.2001 reported:

"The Army in a press release [issued on 5.12.2001] justified the action as a move to ensure free and fair elections. 'To ensure free and fair elections in the cleared areas of Vanni and Batticaloa entry points were not opened today. There were credible intelligence reports that the LTTE were planning to enter cleared areas in the guise of voters to create violence in order to disrupt free and fair elections'. But Vanni district TULF MP... [states] 'The hidden objective of the closure of entry points is to prevent the TULF supporters ... from voting'..."

In its preliminary report issued on 7.12.2001, the European Union Observation Mission commented:

"The decision of the army to close checkpoints at Vavuniya and Batticaloa prevented many thousands of people from exercising their right to vote. It would seem that there is no justification for this action and serious questions have to be raised about the political motivation behind it."

Criticism and speculation about the decision and its motivation led the 3rd Respondent to respond. The Island of 4.1.2002 reported thus:

"Balagalle replies to criticism of army's conduct during polls

The Army Commander at a meeting with the election monitoring group PAFFREL... sought to respond to severe criticism made against the army... 'It is bad for the army's morale to feel that it is politicized' the Army Commander told the group... the Army Commander himself had called the meeting... to explain the events of Dec. 5. According to PAFFREL... General Balagalle explaining the closure of the entry points... had said that it had not been done on

the initiative of the army... at a meeting on December 3 of the top brass of security forces the Inspector-General of Police had filed two reports that the LTTE planned to infiltrate and destabilize the East. This, he said, supplemented military intelligence reports over previous weeks... He had explained that deference had been given to the police reports as it was the Police force that was in charge of elections... The decision to shut down according to him was one taken by the civilian authorities. He had suggested alternatively that the elections be held on a staggered basis, that is over two days, to make it possible for the security forces to have enough numbers to keep the checkpoints open. He had added that when there was a call for a repoll in the East, he had informed the Commissioner of Elections that it would be possible for the security forces to keep the checkpoints open and provide adequate security... The Army Commander [also referred to an army] platoon... specifically told to provide just protection to the Deputy Minister of Defence..."

Respondents' affidavits

The 3rd Respondent did not refer to that report in his affidavit dated 11.3.2002 filed in these proceedings, but stated that:

(a) on 24.11.2001 the Inspector-General of Police (the 5th Respondent) requested that an additional 8,000 army personnel be made available so that police officers could be released for election duty;

(b) a conference was accordingly held at the Joint Operational Headquarters [it was not stated when] and it was pointed out that such a large number could not be provided as it would affect security arrangements;

(c) after further discussions [it was not stated when] between director Operations of the Army and the senior police officer in charge of election security, 99 platoons (of 30 men) were provided from non-operational areas in order to release police officers for election duty and another 72 platoons were placed on reserve in different districts to assist the police;

(d) in the context of inadequate reserve troops to handle the large number of persons who would be crossing over to the cleared areas in order to cast their vote in the Batticaloa and Vanni districts, and the possibility that LTTE cadres may use the opportunity to infiltrate into the cleared areas from the uncleared areas with the objective of disrupting the election, certain discussions were held [it was not stated when] by him with the Field Commanders;

(e) "as the said discussions disclosed the dangers involved in permitting such a large number of persons crossing over to the cleared areas giving rise to security risks, whereby a large number of voters in the cleared areas may be prevented from voting, a recommendation was made to the Chief of Defence Staff to close down all entry points from the uncleared areas to the cleared areas in Vanni and Batticaloa districts in order to prevent LTTE infiltration, which recommendation was approved by the Chief of Defence Staff...",

(f) action to prevent persons crossing from the "uncleared" areas was taken bona fide in the interest of national security, for the preservation of public order, and to enable a peaceful election;

(g) on 6.12.2001 he had agreed to provide security at a repoll provided the poll was staggered over a period of three or four days.

I find the 3rd Respondent's affidavit not worthy of credit for several reasons. First, scrutiny of the affidavit reveals several unsatisfactory features. The rights of over 50,000 voters were involved in a very important, highly controversial, and extremely sensitive matter, but the 3rd Respondent failed to give any explanation for not informing the 1st Respondent, for treating Trincomalee differently, and for the absence of any written record of the impugned decision and its communication. The affidavit did not even disclose whether that decision had been communicated to the President, as Commander-in-chief and Minister of Defence, let alone other high officials of that Ministry and the other branches of the security forces. The necessary implication of his affidavit is that such an important decision (both the recommendation and the approval) was based – not on factual reports – but on a "possibility", and/or "dangers" disclosed at "discussions." It made no mention of a single report from any source whatsoever. Second, the position that there was no written record is inconsistent with the facsimile message of 5.12.2001. Finally, apart from a general denial, the 3rd Respondent did not refer to the claim that he had called the press conference reported in the Island of 4.1.2002, or the accuracy of that report, which contains a wholly different account of the decision-making process.

Some of the glaring contradictions between the 3rd Respondent's explanation at the press conference and his affidavit are as follows. The former attributes the impugned decision to a meeting on 3.12.2001 of the "top brass of the security forces", including the 5th Respondent, while the latter refers to a meeting on an unspecified date between the 3rd Respondent and the Field Commanders without the 5th Respondent; the former refers to police reports which confirmed previous military intelligence reports, while the latter refers only to possibilities and dangers; the former alleges that the impugned decision was not on the initiative of the army but was taken by the "civilian authorities", while the latter unequivocally admits a

recommendation by (or with the concurrence of) the 3rd Respondent to the Chief of Defence Staff to close the entry points; the former implies that the 3rd Respondent was against a closure, and had suggested that the poll be held, though staggered over two days, while the latter admits that he was in favour of the closure; and the former claims that the 3rd Respondent had informed the 1st Respondent that if a repoll was held that the entry points could be kept open and security provided, while the latter made this offer conditional upon the poll being staggered over three to four days.

The affidavits of the 1st and 3rd Respondents were not at all helpful. They denied all the averments in the Petitioners' affidavits "except those hereinafter specifically admitted"; then admitted two or three purely formal averments, and pleaded unawareness of three or four other averments; and finally answered the remaining twenty-odd averments by denying them (i.e. for the second time) "in so far as they were inconsistent with" some facts which they specifically pleaded. The result was that they did not "specifically admit" the grater part of the Petitioners' averments, which had therefore to be taken as denied. The matters denied in this way included the fact that the 6th to 17th Respondents were the General Secretaries of the Political Parties which contested the Batticaloa district, the electoral divisions of that district, the army check-points therein, the Gazette notification of the dissolution of Parliament, and the fact that the 1st Respondent had made arrangements for several persons to vote at their residences. Affidavits filed by State officials must facilitate, rather than hinder, the ascertainment of the truth.

The written submissions filed on behalf of the 1st to 5th Respondents on 20.11.2002 obscured the factual position even further:

"On the eve of the election, army intelligence sources unveiled a plan by the LTTE to infiltrate into cleared areas in the East on the 5th of December, and to lay under siege a large area and to attack several military bases on or about [election] day.

The seriousness of the security situation in the country was further confirmed as the Inspector General of Police was in possession of 2 intelligence reports clearly indicating that the LTTE was planning to enter in large number the cleared area... These reports were produced at a conference held at Joint Operational Headquarters on the 3rd of December 2001 a mere 2 days prior to [election day]."

The Respondents' affidavits did not refer to any "siege" or attacks on military bases, or to a conference on 3.12.2001 at which the 5th Respondent was present and produced intelligence reports in his possession. The conference of 3.12.2001 was referred to only in the Island report of 4.1.2002, and the above submissions seem to accept the accuracy of that report, and

give rise to further questions as to the "civilian authorities" to whom the 3rd Respondent attributed responsibility for the impugned decision.

The 2nd, 4th and 5th Respondents did not file affidavits. The 5th Respondent passed away while these Applications were pending.

THE ISSUES

Several questions arise for decision:

(1) Who took the decision to close the entry points, when, and for what reason?
(2) Was the closure of the entry points an infringement of the Petitioners' freedom of movement?
(3) a. Was that closure an infringement of the Petitioners' freedom of expression?
    b. Was the failure to order and hold a repoll an infringement of the Petitioners' freedom of expression?
(4) Was that closure an infringement of the Petitioners' right to equality and the equal protection of the law?
(5) Was the 1st Respondent's "Order under section 129" an infringement of the Petitioners' right to equal protection of the law?
(6) If so, how grave were those infringements?

DECISION TO CLOSE ENTRY POINTS

There is no doubt whatsoever that on orders given by the 3rd Respondent, or with his concurrence or approval, army personnel did suddenly close the entry points in the Batticaloa and Vanni districts, and that neither the 3rd Respondent nor other high officers of the army informed the 1st Respondent, leaving him to learn of the closure only at the eleventh hour through others. The fact that a complaint was made by TELO on 4.12.2001 show that the decision had become known that day, and hence must have been made on 4.12.2001 or earlier.

The failure to record, and to communicate, that decision in writing gives rise to grave suspicions as to its bona fides. That decision directly affected a significant number of citizens, and not just a handful; it related to the conduct of a general election of serious concern to all citizens (let alone election observers, local and foreign), particularly at a time when public confidence in the integrity of the electoral process was sinking fast. Furthermore, the decision was one that could only have been taken in the due exercise and discharge of public powers and functions, and must have been communicated to the civilian

authorities. There was no need for secrecy. Indeed, the need was for publicity. It was therefore important that the decision should have been, and should also have been perceived as being, both lawful and fair. It should, unquestionably, have been promptly reduced to writing (so as to serve as evidence to guide those functionaries who had to act on that decision, cf ***Mallows*** v ***Commissioner of Income Tax, (1962) 66 NLR 321)***, and communicated in writing. Respect for the Rule of Law required that the decision-making process, particularly in a matter relating to the franchise, should not have been shrouded in secrecy, and that there should have been no obscurity as to what the decision was and who was responsible for making it ***(cf Jayawardena*** v ***Wijayatilake, [2001] 1 Sri LR 132, 143)***. If the 3rd Respondent was truthful when he stated that the decision was not recorded or communicated in writing, such secrecy – in the absence of some good reason for secrecy – points to a desire to conceal some illegality and/or impropriety. If, contrary to what the 3rd Respondent stated, the decision (and its communication) was in fact duly documented, the failure to produce the relevant documents establishes that they were withheld because their production would have disclosed some illegality and/or impropriety.

The real reason for the closure of the entry points remains shrouded in mystery. According to the 3rd Respondent, what was feared were LTTE infiltration, disruption and destabilization. A merely subjective or speculative fear was not enough to justify closure: there had to be an objective and reasonable basis for such fear. However, his affidavit discloses that his own recommendation as well as the approval of the Chief of Defence Staff was not based on any factual reports, but only on a "possibility", and on "dangers" disclosed in the course of discussions, of LTTE infiltration, disruption and destabilization – without any elaboration or supporting material. Had any one of ordinary intelligence been told during the election period that it was proposed to allow voters from "uncleared" areas to enter "cleared" areas in order to vote, his immediate response – without the benefit of any intelligence reports – would have been that there was indeed a danger of such infiltration, etc.

That LTTE cadres, some having voting rights, might mingle with voters and infiltrate into the "cleared" areas was by no means an unforeseen possibility that arose unexpectedly. For the reasons stated in the next paragraph, it is impossible to believe that this possibility occurred to responsible officials in high places only a day or two before polling day.

It was a known and obvious danger from the outset – just as there were other dangers in other districts and provinces. Those charged with assisting in the conduct of a democratic election do not cave in to such dangers, but prepare to meet them. That is why the 1st Respondent and the security forces had been going ahead with arrangements to allow voters to enter the "cleared" areas (as the Returning Officer, Vanni, pointed out, four weeks previously the Security Co-ordinating conference at Vanni had decided to keep the Vanni entry point open);

"cluster" polling stations were established for voters coming from "uncleared" areas; and candidates were allowed to campaign in the "uncleared" areas. Obviously all concerned were of the view that adequate safeguards could be taken in respect of the risks involved. The 3rd Respondent's affidavit did not disclose whether, and how, that situation had changed. Besides, if the 3rd Respondent truly believed that there had been a significant change in the situtation, he was under an obligation immediately to inform the 1st Respondent who was responsible for the overall conduct of the election. The newspaper report of his press interview claimed that the 5th Respondent had filed two reports on 3.12.2001, and the Respondent's written submissions make the same claim. Even if I were to treat the newspaper report as evidence, there are good reasons why the reports said to have been filed by the 5th Respondent cannot be accepted as being the real reason for the impugned decision: the 3rd Respondent claimed at that interview that there had been military intelligence reports received "over previous weeks." If that was true, it meant that well before 3.12.2001 (and probably even before the meeting of 24.11.2001) military intelligence reports had confirmed to him what commonsense had already indicated – but the 3rd Respondent chose not to act on those reports, and did not even consider it worthwhile to inform the 1st Respondent. Further, none of those reports have been produced, no excuse has been offered for that failure, the 5th Respondent has not filed an affidavit, and the Court has not been told of their contents even in a general way. Either way, therefore, the 3rd Respondent has failed to establish that there were reasonable grounds, based on national security, for the closure of the entry point.

Of course, the security forces were entitled – and indeed obliged – to take those risks seriously. Careful search of persons crossing from the "uncleared" areas was essential. The real problem was the difficulty of searching large numbers of such voters within a short space of time. But that was not a difficulty which suddenly arose on 4.12.2001. It existed form the beginning, and was aggravated by the 5th Respondent's request on 24.11.2001 for 8,000 army personnel. If the real reason was that the army was unable to assign enough personnel to search voters, that should have been communicated to the 1st Respondent at once. Besides, if that was the reason, the army should not have closed the entry points completely, but should at least have searched the few who could be searched and allowed them to cross over. I must note also that there would have been no lack of personnel if the poll in the affected areas was taken on a later day, because then personnel from elsewhere could have been brought in.

This makes it necessary to consider why the 3rd Respondent kept the 1st Respondent in the dark. Had the 1st Respondent been informed promptly, there were other options which he could have considered. Section 24 of the Parliamentary Elections Act, No 1 of 1981 ("the Act"), empowers the Commissioner of Elections – where it is necessary due to an emergency – to alter the location of a polling station and/or to postpone the poll in any electoral district. Section 33 empowers him to stipulate different hours of polling. If the real difficulty which

the forces faced was the lack of personnel on 5.12.2001, the 1st Respondent may well have considered postponing the poll in Batticaloa to, say, the 10th and the poll in Vanni to the 15th; and he may have considered suitably relocating the "cluster" polling stations, perhaps to the entry points themselves. The question also arises whether section 24(3) – on the principle that the greater includes the lesser, or read with section 129 of the Act, to which reference is made later in this judgment – permitted the postponement of the poll in respect of a part of the electoral division; and also whether, on a similar basis, he could extend the hours of poll in respect of the "cluster" polling stations only. It is unnecessary to speculate as to what he might have done: the fact is that the failure to inform him prevented him from exploring the feasibility of alternative arrangements, consistent with national security, to enable a significant section of the voters to cast their votes. Having regard to the prompt and decisive action which he took within hours to ensure that a handful of "VVIP and VIPP" were able to vote in safety, one cannot exclude the likelihood of the 1st Respondent devising with equal urgency and ingenuity a course of action to protect the exercise of the franchise by 55,000 votes, albeit ordinary voters.

In the circumstances, the 3rd Respondent's unexplained failure to inform the 1st Respondent makes it likely that his real intention was to prevent them voting either then or later, knowing that that would further the interests of parties or groups not hopeful of their support.

To sum up, the 3rd Respondent was wholly or mainly responsible for the decision to close the entry points; the danger of LTTE infiltration was a known danger, which could and should have been faced; there is no evidence that on the 3rd or the 4th of December that danger suddenly became so grave as to warrant the closure of the entry points; even assuming that it did, at least the few voters who could have been checked should have been allowed to enter the "cleared" area, and what is more the decision to close should not have been concealed from the 1st Respondent; and the secrecy, haste and other circumstances show that the decision was not bona fide, but motivated by extraneous considerations.

FREEDOM OF MOVEMENT

Article 15(6) permits the freedom of movement guaranteed by Article 14(1)(h) to be subjected to restrictions imposed by "law" in the interests of national economy. Article 15(7) permits further restrictions in the interests of national security, public order, the protection of public health or morality, and for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society; and "law" includes regulations made under the law relating to public security.

In the written submissions tendered on behalf of the 1st to 5th Respondents, they "emphatically state" that measures to close the entry points were taken "under the specific powers vested upon them both by the Prevention of Terrorism (Armed Forces) Regulations No 10 of 2001 and the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979, made operative by gazette notification No 1212/15 of 28th November 2001"; that "the Respondents were left with no choice but to ensure security to the public at large even if it involved the restriction of movement of a category of persons seeking clearance at the cleared areas"; and that "the said restriction of movement was imposed purely on the basis that any or all of such persons who were thus restricted were 'suspected terrorists'... in the interest of preserving not only the fundamental rights but also the lives of thousands of other citizens who would otherwise have been affected."

I must note that the above submissions were made on behalf of the 1st and 2nd Respondents as well, and thus imply that they too, now seek to justify the closure.

It was further submitted that Article 15(7) makes the fundamental rights recognized by Articles 12 and 14 subject to "such restrictions as may be prescribed by law in the interests of national security, public order..."; that 'law' "includes regulations made under the law for the time being relating to public security'; that "the term "law" in the given context should essentially constitute an Act of Parliament or its recognized equivalent promulgated in the interest of national security and public order, but is not restricted to regulations made under the Public Security Ordinance"; and that although specific reference has been made to that Ordinance, Article 15(7) "extends to all Acts enacted for the maintenance of national security, public order, etc." The PTA, as its preamble shows, was enacted for the purpose, *inter alia*, of maintaining national security and public order; the regulations and Order made under the PTA constitute "law"; and the restrictions contained therein constitute "restrictions prescribed by law" for the purpose of Article 15(7).

The Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 ("the PTA") empowers the Minister (in Part III) to make detention orders and restriction orders in respect of particular persons suspected of unlawful activity. Our attention was not drawn to any provision authorizing restriction of movement in general, or in respect of unspecified persons.

Section 27 of the PTA empowers the Minister to make regulations for the purpose of carrying out or giving effect to the principles and provisions of that Act. The President, as the minister, made and gazetted on 3.8.2001 the PTA (Armed Forces) Regulations No 10 of 2001, Regulation 2 of which provided:

"The President may, where she is of the opinion that, for the purpose of giving effects to the principles and provisions of [the PTA] and for combating terrorism or other civil disturbances and for the purpose of maintenance of supplies and services essential to the life of the community, it is necessary to do so, by Order, call out the armed forces on active service for the aforesaid purposes in such areas as may be specified in such Order, for assisting the Police Force in carrying out their duties in terms of the aforesaid Act."

The President thereafter made an Order under Regulation 2, gazetted on 28.11.2001, calling out the "armed forces on active service [in specified areas including Batticaloa and Vanni] for the purpose of giving effect to principles and provisions of the PTA and for combating terrorism or other civil disturbances, [etc]."

The essence of the Respondents' contention is that the PTA is a law relating to national security and/or public order; that "law" includes regulations under the law relating to public security, and that (1) the word "includes" indicates that other regulations (besides those under the Public Security Ordinance) are within that definition of "law", and (2) the PTA is in any event part of "the law relating to public security; and therefore that the PTA Regulations No 10 of 2001 and the Order of 28.11.2001 are regulations that validly impose restrictions on Article 14(1)(h).

I agree that the PTA is a law relating to national security and/or public order; however the PTA itself does not impose any restrictions on freedom of movement, except in respect of specified persons, suspected of unlawful activity, in terms of orders made by the Minister. The PTA did not authorize any of the Respondents to impose any restrictions on the Petitioners' rights under Article 14(1)(h).

The word "includes" in Article 15(7) does not bring in regulations under other laws. "Law" is restrictively defined in Article 170 to mean Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation. The effect of the word "includes" was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security.

While at first sight "public security" may seem to cover much the same ground as "national security and public order", it is clear that "the law relating to public security" has been used in a narrow sense, as meaning the Public Security Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control set out in Chapter XVIII of the Constitution. Article 15 does not permit restrictions on fundamental rights other than by plenary legislation – which is subject to pre-enactment review for constitutionality. It does

not permit restrictions by executive action (i.e. by regulations), the sole exception permitted by Article 15(1) and 15(7) being emergency regulations under the Public Security Ordinance because those are subject to constitutional controls and limitations, in particular because the power to make such regulations arises only upon a Proclamation of emergency, because such Proclamations are subject to almost immediate Parliamentary review, and because Article 42 provides that the President shall be responsible to Parliament for the due exercise of powers under the law relating to public security. It is noteworthy that Article 76(2) expressly recognizes that Parliament may delegate to the President the power to make emergency regulations under the law relating to public security. Other regulations and orders which are not subject to those controls made under the PTA and other statutes, are therefore not within the extended definition of "law."

In any event, neither the PTA Regulations nor the Order thereunder purport to impose restrictions on the freedom of movement. The PTA Regulations only authorize the making of an Order to call out the armed forces, for the limited purpose of assisting the Police Force, in carrying out their duties under the PTA.

I hold that there was thus no 'law' validly imposing restrictions on the Petitioners' freedom of movement.

However, the freedom of movement is subject, independently of Article 15, to certain inherent limitations, just as the freedom of speech does not entitle a person to falsely cry, "Fire!" in a crowded theatre (cf ***Vadivelu*** v ***O.I.C. Sithambarapuram Refugee Camp Police Post, SC 44/2002, SCM 5.9.2002)***. Thus during a riot or a fire the police may justifiably restrict entry to an area to which the public would otherwise have a right of access if that was necessary in order to quell the riot or to fight the fire. If the army personnel at the various check-points had prevented the Petitioners from entering the "cleared" areas, bona fide, in order to protect national security or to prevent the disruption of the election, I doubt whether the Petitioners could have complained that their freedom of movement had been infringed. In this instance, however, the army personnel were carrying out orders given mala fide, for extraneous purposes. As I have already observed, the failure to inform the 1st Respondent of the closure, and the fact that even the 300 voters who could have been searched at each entry point were denied entry, confirm that the denial of access was anything but bona fide.

Furthermore, it is clear that the restrictions thus placed on the freedom of movement of the Petitioners cannot be regarded as minor irritants (cf ***Dias*** v ***Secretary, Ministry of Defence, SC 604/2001, SCM 5.9.2002)*** incidental to verifying identity and checking baggage reasonably necessary for regulating entry into "cleared" areas. It was well known that the

Petitioners (and many others) wished to travel on 5.12.2001 in order to vote, and that even a few hours delay would make such travel futile.

I therefore hold that the Petitioners' fundamental rights under Article 14(1)(h) have been infringed by the 3rd Respondent.

FREEDOM OF EXPRESSION

It is not disputed that the closure of the entry points had the foreseen result of denying the Petitioners and numerous other voters the opportunity to exercise their right to vote. As I held in ***Karunathilaka*** v ***Dissanayake, [1999] 1 Sri LR 157, 173-174***, the silent and secret expression of a citizen's preference, as between one candidate and another, by the exercise of his right to vote is an exercise of the freedom of speech and expression. That freedom was totally denied, and not merely delayed.

The Petitioners have also complained that other voters - the wife of the Petitioner in the first Application, other voters in the some electoral district, and even voters in another district - have been prevented from exercising their right to vote. In ***Egodawela*** v ***Dissanayake*** (reported as ***Mediwake*** v ***Dissanayake, [2001] 1 Sri LR 177)*** it was held, for the reasons stated at pages 210-213, that the right to vote had both an individual and a collective aspect. Being a Parliamentary General Election the result at the Petitioners' polling station affected the result in the Batticaloa electoral division, and that in turn affected the result nationally. The Petitioners thus had an interest in the results of all electoral divisions. Impairment of the rights of voters elsewhere diluted the value of their own votes. I do not regard the Petitioners' Applications as being "public interest litigation" to enforce the rights of others, because it is not the rights of others, or of the public, which they seek to vindicate, but an integral aspect of their own fundamental rights.

I therefore hold that the Petitioners' freedom of speech and expression under Article 14 (1) (a) read with Article 4 (e) has been infringed by the 3rd Respondent.

However, that infringement was not final. The law provided a remedy. The minutes of the meeting of 7.12.2001 show that the 1st Respondent himself recognized that the circumstances in which 55,000 voters were suddenly Prevented from voting cried out for a repoll - it was quite plain that there had been no genuine poll in the affected "cluster" polling stations, and the decision in ***Egodawela*** (cf. pages 201-202) was applicable. The 1st Respondent did not order a repoll only because the 3rd Respondent stated that security could not be provided unless the poll was staggered for three or four days. It is not easy to apportion blame, and I would only reiterate what I observed in ***Egodawela:*** the 1st Respondent made an honest effort

- although inadequate - to ensure a genuine election, but his authority was insidiously undermined by withholding the necessary support and resources. It is the obligation of the State to ensure "the full realization of the fundamental rights and freedoms of all persons" and to "strengthen and broaden the democratic structure of government and the democratic rights of the People.... By affording all possible opportunities to the People to participate at every level in national life and in government" (cf. Articles 27(2) (a) and 27 (4)). Here, in one way or another, the State machinery has been manipulated to ensure the converse - a flagrant denial of the fundamental rights of 55,000 voters, which made the election for the Batticaloa and Vanni districts neither free nor fair. The failure to order a repoll would only encourage future infringements.

I hold that the Petitioners' freedom of speech and expression was infringed by the 1st Respondent.

RIGHT TO EQUALITY

The decision to close the entry points was neither bona fide nor merely mistaken; it was arbitrary, and intended to prevent the Petitioners exercising their franchise probably for political reasons.

There were aggravating factors. Other voters, similarly circumstanced, living in "uncleared" areas in the Trincomalee district were not subjected to similar restrictions, and there was not a word of explanation as to how the dangers of LTTE infiltration, disruption and destabilization were averted in Trincomalee. Remedial action in the form of a repoll was denied.

I therefore hold that the Petitioners' rights to equality and the equal protection of the law under Article 12 (1) was infringed by the 3rd Respondent.

ORDER UNDER SECTION 129

Section 129 of the Parliamentary Elections Act provides thus for the "removal of difficulties":

"If any difficulty arises in first giving effect to any of the provisions of this Act, the Commissioner may, by Order published in the Gazette, issue all such directions as he may deem necessary with a view

> to providing for any special or unforeseen circumstances or
> to determining or adjusting any question or matter for the determination or adjustment of which no provision or effective provision is made by this Act."

I have already referred to the letter dated 3rd December sent by the Secretary to the President and to the 1st Respondent, to which was annexed a copy of the memorandum dated 4th December addressed by the ADG/DII to the 5th Respondent.

These documents gave rise to several queries. How did the Secretary's letter of the 3rd refer to and annex a copy of a memorandum which was written only the next day? How did the Secretary conclude, and the 1st Respondent decide, first, that Minister Kadirgamar was under LTTE threat when the memorandum did not mention him? And second, that the security forces had advised the six specified VVIP and VIPP to **avoid** attending polling booths, when the memorandum only advised that precautions be taken **when** they visited polling booths? Had the six VVIP and VIPP requested special voting arrangements? If, as claimed in the memorandum, information had previously been received of a specific threat to the President and General Ratwatte, why did the ADG/DII delay until 4th December to inform the 5th Respondent?

The 1st Respondent's affidavit did not contain a word about the circumstances in which he came to make his "Order under section 129." To clarify matters the Registrar was directed to request the Attorney-General to obtain from the 1st Respondent and submit:

"1. The material on the basis of which the 1st Respondent formed the opinion that there was a threat to the lives of the six persons specified in the Order dated 4.12.2001, including any police reports received by him;
2. the material containing any advice by the security forces to those six persons to avoid attending polling stations on 5.12.2001;
3. the material containing any request by or on behalf of the said six persons to vote elsewhere than at their allotted polling stations;
4. the directions or instructions given to the Returning Officers of each of the Districts mentioned in the Order dated 4.12.2001, pursuant to that Order."

The same three documents were sent again, without any other material relevant to items (1) to (3). In regard to item (4), copies were furnished of the instructions issued to the Returning Officers in regard to the voting procedure for five of the named persons- but not of the instructions relating to Minister Kadirgamar. Those instructions disclosed that special arrangements had been made, quite contrary to the principles and procedures laid down in the Act. Each Returning Officer was directed to order an Assistant Returning Officer to collect the ballot paper of the named individual from the Senior Presiding Officer of the polling station, having placed the official mark thereon and enclosed it in a sealed envelope, to take it in a vehicle with a police escort to that individual's residence, to allow him to vote secretly in a closed room, to take that ballot paper in a sealed envelope to the polling station by vehicle

with a police escort, and then to put the envelope into the ballot box. Safeguards - such as the application of indelible ink-considered essential in the case of ordinary voters were ignored.

The material available to the 1st Respondent did not disclose any threat whatsoever to Minister Kadirgamar, nor did it disclose that the security forces had advised the six VVIP and VIPP to avoid visiting polling booths. In the written submissions filed on behalf of the Respondents it was alleged that two intelligence reports, from internal intelligence sources, produced by the 5th Respondent on 3.12.2001, contained information about this possible assassination attempt, and that the 1st Respondent was apprised of the seriousness of that threat. Those reports were not produced, and the 5th Respondent did not disclose their contents in an affidavit, nor explain how the 1st Respondent had been informed. But that apart, if two such reports, from internal intelligence sources, were already in the 5th Respondent's possession on 3.12.2001, why was it necessary for the ADG/DII in charge of internal intelligence, to inform the 5th Respondent of that threat on the 4th December? There was also no evidence that any of the six VVIP and VIPP had requested any special voting arrangements, and the 1st Respondent should have realized that any one with basic democratic instincts would have squirmed in embarrassment at the very thought of even asking for such preferential treatment at an election. The privileges which the holders of high office enjoy on other occasions or at other times come to an end when it comes to the exercise of the right to vote on election day, for elections must be free, equal and secret - so that voters are equal, and must be treated equally.

It is clear beyond reasonable doubt that - whatever material the security forces may have had - the 1st Respondent himself did not have any material on which he could reasonably have concluded that there was a serious threat to the lives of the six VVIP and VIPP and that the security forces had advised them to avoid attending polling stations. He acted blindly upon the unsubstantiated representations of the Secretary and extended quite extraordinary privileges to six persons without even receiving a request from them. I must also note the otherwise commendable promptitude which the 1st Respondent displayed on that occasion. Having received the Secretary's letter at 1.00 p.m. on 4.12.2001, his Order was made and gazetted the very same day, after having ascertained on his own the electoral districts and residences of the six VVIP and VIPP, but without the precaution of seeking the views of the Attorney-General (to whom that letter had been copied). The Petitioner in the first Application was therefore justified in complaining that 55,000 voters (including himself) from Batticaloa and Vanni were treated very differently: that a few who had the privilege of extensive security provided by the State were given the additional facility of voting at home, while from those who had no security at all even the right to vote had been stealthily taken away.

The 1st Respondent's Order was therefore arbitrary, unreasonable and discriminatory, and in violation of Article 12 (1).

That Order was unlawful for several other reasons as well. Section 129 does not give the Commissioner of Elections any power to issue directions which are contrary to the fundamental principles of the Act. The Act requires, as a general rule, that voters must vote in person, and not by proxy; it is exceptionally, only, that voting by post is permitted for specified categories of persons - persons - basically, because they may have official duties connected with the election itself. Further, voters are required to travel by public transport or on foot-unless with the prior written authority of the Returning Officer given on account of physical disability. "Voting at home" is alien to the fundamental principles of the Act. If the Commissioner had power under section 129 to introduce such procedures unasked, there is no reason why he did not establish procedures to enable, for instance, voting at embassies abroad by the many migrant workers who contribute so substantially to our national economy. Besides, the "difficulty" which section 129 contemplates appears to be a difficulty which the Commissioner (or his staff) encounters in giving effect to the provisions of the Act - not any of the difficulties which individual voters may face in exercising their rights under the Act, for instance, because of death threats.

I hold that section 129 empowers the Commissioner of Elections to give directions only when there is a difficulty in giving effect to a provision of the Act: i.e. a difficulty experienced in implementing any provision of the Act, and not in dealing with a casus omissus. Although section 129 refers to "determining.... any question ..... for the determination ..... of which no provision ... is made", that power to determine a question not covered by the Act can only be exercised, if initially the Commissioner had been faced with a difficulty in implementing some provision of the Act. Thus if the Commissioner took steps, for instance, to implement the provisions of the Act in regard to the postponement of the poll, or the ordering of a repoll, and if in so doing a question arose for which the Act had made no provision, then he could issue directions with a view to determining such question. A condition precedent to the exercise of the power conferred by section 129 is the existence of a difficulty in implementing any provision of the Act. In this case, the 1st Respondent was not faced with any such difficulty, but only with the alleged personal problems of six voter who apprehended serious difficulty in attending their allotted polling booths.

Further, the power under section 129 can only be exercised on the **first** occasion on which a particular difficulty arises. The alleged "difficulty" in this case was the inability to attend the

allotted polling booth. Whether that difficulty arose because of death threats or other threats - from the LTTE, or a political party or an individual - or because threats of injury had been carried out and the victims were immobilized in hospital, made no difference. The Commissioner of Elections, in particular, would have been well aware that that was by no means the **first** occasion on which that particular difficulty had arisen after section 129 was enacted.

Finally, the power to issue directions conferred by section 129 was a power to issue published **general** directions applicable to all similar situations, and not a power to make *ad hoc* decisions in respect of particular voters, on request or otherwise. To interpret 'directions' otherwise would mean that if there were several similar complaints, the Commissioner could issue directions only in respect of the first, with the result that the other complaints would remain unremedied: resulting in unequal treatment. Faced with two possible interpretations of section 129, that which is consistent with equal treatment should be preferred to that which results in unequal treatment. If section 129 did empower the Commissioner to issue directions when there were threats deterring voters from attending their allotted polling booths, those directions should have covered all such instances, and should have applied to future elections as well - thereby effectively "removing" the difficulty. The failure to do so amounted to an infringement of Article 12 (1). Besides, neither section 129 nor the impugned Order authorized the 1st Respondent to issue "instructions", especially unpublished secret instructions, governing the procedure for voting at home. Those instructions were also inconsistent with the gazetted Order: while the latter directed Returning Officers to be present at the residences of the VVIP concerned, by the unpublished instructions the 1st Respondent directed the Returning Officers to delegate their functions to Assistant Returning Officers.

GRAVITY OF THE INFRINGEMENTS

The proved infringements were in themselves serious. The number of voters affected was so large that the elections in the Batticaloa and Vanni districts were neither free nor fair. The decision-making processes which resulted in those infringements were shrouded in secrecy, haste and bad faith. The infringements took place at a time when there was a serious erosion of public confidence in the integrity of the electoral process, and when it was extremely important to ensure that elections were free and fair, particularly in the "uncleared" area - because citizens living in those areas need reassurance, if peace and national reconciliation were to become realities, that elections would be truly democratic, that fundamental rights

would be respected and protected, and that judicial remedies would be available for wrongdoing. In that context, the infringements were a national disaster.

ORDER

I grant the Petitioners in all three Applications declarations that their fundamental rights under Articles 12(1) and 14(1)(a) have been infringed by the 1st and 3rd Respondents, and that their fundamental rights under Article 14(1)(h) have been infringed by the 3rd Respondent. I award the Petitioner(s) in each Application (a) a sum of Rs100,000 as compensation payable by the State (totalling Rs 300,000), and (b) a sum of Rs 30,000 as costs payable personally by the 3rd Respondent (totalling Rs 90,000). I further award the Petitioner in the first Application a sum of Rs 1,000 as nominal compensation in respect of the 1st Respondent's Order under section 129, payable personally by the 1st Respondent. All these payments shall be made on or before 31.5.2003.

JUDGE OF THE SUPREME COURT

ISMAIL, J.

I agree

WIGNESWARAN, J.

I agree

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

In an application made in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Sothilingum Thavaneethan of Trincomalee Road, Vakarai.

Petitioner

SC FR No 20/2002

v.

1. Dayananda Dishanayake, Commissioner of Elections, Election Secretariat, Sarana Mawatha, Sri Jayawardenapura

2. S. Shanmugam, Returning Officer, Batticaloa District, District Secretariat, Kachcheri, Batticaloa

3. General L. P. Balagalla, Commander of the Army, Commander's Secretariat, Army Headquarters, Colombo 1.

4. Major General N. Mallawarachchi, Commander, 23rd Division, Army Camp, Minneriya

5. B. L. V. de S. Kodituwakku, Inspector General of Police, Police Head Quarters, Colombo 1

6. Douglas Devananda, General Secretary, Eelam People's Democratic Party, 121, Park Road, Colombo 5

7. Senerath Kapukotuwa, General Secretary, United National Party, 400, Kotte Road, Rajagiriya

8. M. T. Silva, General Secretary, Janatha Vimukthi Peramuna, 198/19, Panchikawatte, Colombo 10

9. Achala Ashoka Suraweera, General Secretary, Jathika Sangwardana Peramuna, Surasiri Niwasa, Peeragolla Watta, Muruthalawa

10. R. Sampanthan, General Secretary, Tamil United Liberation Front, 146/19, Havelock Road, Colombo 5

11. L. Jayatilake, General Secretary, New Left Front, 17, Barracks Lane, Colombo 2

12. D. M. Jayaratne, General Secretary, People's Alliance, 121, Wijerama Mawatha, Colombo 12

13. S. Sathananthan, General Secretary, Democratic People's Liberation Front, 16, Haig Road, Bambalapitiya, Colombo 4

14. Rohan Jayatunga, General Secretary, Sri Lanka Prograssive Front, 7th Lane, Pagoda Road, Nugegoda

15. Abdul Rasool, General Secretary, Sri Lanka Muslim Katchi, G3/10, Anderson Flats, Park Rd, Colombo 5

16. Dr. M. Hafrath, General Secretary, Sri Lanka Muslim Congress, Sama Manthiraya, 53, Vauxhall Lane, Colombo 2

17. Thilak Karunaratne, General Secretary, Sihala Urumaya, 655, Elvitigala Mawatha, Colombo 5

18. Mohamed Aliyar Mohamed Ibrahim, Group Leader, Independent Group 1, New Selection, Main Street, Valaicheni

19. Mohamed Hussain Mohamed Iliyas, Group Leader, Independent Group 2, School Road, Oddamavadi 1

20. Meerasahib Mohamed Ameer, Group Leader, Independent Group 3, Mosque Road, Valaicheni

21. Irasaya Thurairetnam, Group Leader, Independent Group 4, 209 A, Lake Road 1, Batticaloa

22. Seyed Ibrahim Seyed Ahamed, Group Leader, Independent Group 5, P. S. Road, Oddamavadi 2

23. Mohamed Aboobucker Mohamed Raseethu, Group Leader, Independent Group 6, Palliyadi Veethy, Oddamavadi 1

24. Mohamed Ibrahim Mohamed Thahir, Group Leader, Independent Group 7, Kirath Road, Valaicheni

25. Bazeer Seyed Mohamed Mohamed, Group Leader, Independent Group 8, 42, Old Market Road, Eravur 3

26. K. M. Noormohamed, Group Leader, Independent Group 9, Rahumaniya Vidyalaya Road, Eravur

27. Jamaldeen Mohamed Musthaffa, Group Leader, Independent Group 10, 561, Odaviyar Road, Eravur 2

28. Hon. Attorney General, Attorney General's Department, Colombo 12

Respondents

To: His Lordship the Chief Justice and the Other Lordships of the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

Before : **Hon. Fernando, J.**
Hon. Ismail, J.
Hon. Wigneswaran, J.

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER

1. SUMMARY OF FACTS

1.1 The Petitioner, a voter in Kalkuda polling division of Batticaloa district, received the polling card for the General Election held on 5th December 2001.

1.2 The Petitioner lives in Vakarai, located within an uncleared area. (vide map P4(a)) He was expected to vote at Mankerni Roman Catholic Tamil Mixed School, which is situated in Mankerni, within the Army controlled area.

1.3 People living in uncleared areas have to enter the cleared area through checkpoints (entry/sentry points).

1.4 On the Election Day, the Petitioner and his wife went to the Kadjuwatte checkpoint to enter the cleared area. There were about 500 voters waiting for clearance to enter the cleared areas in order to vote at the respective cluster polling booths. It is common ground that the Army prevented them from entering the cleared area thereby deprived of casting their votes. As admitted by the election officials, about 40,000 voters were thus prevented from casting their votes. (vide paragraph 6(f) of the 1st Respondent's Objections)

1.5 Your Lordships' attention is respectfully drawn to the agreed facts set out in the annexed **Statement of Agreed Facts**.

2. DEPRIVAL OF VOTING RIGHTS viz a viz ARTICLES 12(1) and 14(1)(a)

2.1 Election Commissioner, the sole authority on administration of elections

(a) Your Lordships' attention is respectfully drawn to Articles 103(2) and 104(b) of the Constitution, read with Article 27(2) of the 17th Amendment to the Constitution. It is clear from the Constitutional provisions themselves and the provisions of the Parliamentary Elections Act No. 01 of 1981, as amended, that the Election Commissioner (till the Election Commission assumes office) is the sole authority to conduct elections.

(b) Many previous attempts by the Executive or even by the Legislature to interfere with an existing electoral process have been viewed seriously by Your Lordships' Court. An attempt by the Head of the Executive to interfere with the electoral process was struck down by Your Lordships in ***Karunathilake vs. Dissanayake in 1999 1 SLR 157***. Attempt by the Legislature to authorise the Election Commissioner to ignore the accepted nomination papers while accepting new nomination papers were held to be inconsistent with Article 12(1) of the Constitution in the special determination in **Re Provincial Councils Election (Special Provisions) Bill** determined on 30th November 1998. (A copy of the said determination is tendered)

(c) It is further submitted that franchise, part of sovereignty of the people is exercisable by every citizen, whose name is in the electoral register. [Article 3 read with Article 4(e)] It is now recognised that "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. [Supra Determination Re. Provincial Council Election (Special Provisions) Bill]

(d) In that context, it is submitted that the Election Commissioner is discharging a Constitutional function, in the protection of Sovereignty, which is inalienable from the people.

(e) Accordingly, it is respectfully submitted that neither the Executive nor the Parliament can interfere with an ongoing election process. Needless to say that the military has no right to interfere with the functions of the Election Commissioner relating to an ongoing election.

2.2 Arbitrary decision by the Military, without consulting the Election Commissioner

(a) It is clear from the agreed facts that the Election Commissioner had no prior intimation of the closure of the entry points. As transpires from the minutes of the discussion, the Commissioner had with the Commander, the Commissioner had not been informed of the decision of the security forces to close the entry points leading to cluster polling booths on the polling day. "***Security forces never consulted the Commissioner regarding the intention of closing the entry points***". (vide documents marked P2, R5 and R6)

(b) The Army Commander, (the 3rd Respondent) justifies his position by stating that there was a possibility "that the LTTE carders **may use** the opportunity to infiltrate into cleared areas with the objective of disrupting the election." (vide paragraph 6(d) of the 3rd Respondent's Objections) There were many discussions between the Army Commander and Field Commanders and then the Chief of Defence Staff. It is therefore submitted that the Army Commander had ample time to inform the Election Commissioner of his decision to close the entry points on the Election Day.

(c) In spite of the communications of the Commissioner, the 3rd Respondent or the 4th Respondent did not disclose the decision of the Military to the Commissioner until the 6th December 2001, the day after the elections. (vide paragraphs 6(i) to (k) of the 1st Respondent's Objections)

(d) It is therefore evident that the defence authorities had decided to close the entry points without consulting the Election Commissioner, resulting in considerable number of voters being prevented from reaching the polling stations on the election day.

(e) The question then arises - what could the Election Commissioner have done, had he been informed. It is respectfully submitted that he had plenty of options with him. He could have acted under sections 24(2) or 24(3) or under section 48(7) of the Act. Of all options, he could have exercised his discretion under section 129 of the Act. At the same election the Commissioner permitted 6 persons including the then Speaker and the then Deputy Minister of Defence to vote from their residences, acting under section 129 of the Act. The failure on the part of the defence authorities to inform their decision prior to the closure has effectively prevented the Commissioner of exercising his statutory powers under the Act.

2.3 Arbitrary and unreasonable closure of entry points

(a) The 3rd Respondent states that the Army acted in a bona fide manner in closing the entry points. It is respectfully submitted that the facts are to the contrary.

(b) There is evidence of an attempt by the Army Commander to mislead the Election Commissioner on their purported bona fide act. At the meeting with the Commissioner on 6th December 2001, at paragraph 3 of R5, the Army Commander states, *inter alia*, that "in Batticaloa district, few sentry points are available. There also security forces have to adopt the same procedure and allow about 300 voters at each entry point, and accordingly about 2500 - 3000 voters can come to the polling station during the 9 hours period of poll". The falsity of this statement is demonstrated in paragraphs 2(c) and (d) of the Counter Affidavit of the Petitioner. According to the Petitioner, over 500 people enter the cleared area in Batticaloa daily via Kadjuwatta checkpoint. Those who so enter include public servants, businessmen, fishermen, traders and students. There are 11 checkpoints in Kalkudah polling division alone. If 300 people were permitted, on the election day 3300 persons would have entered cleared areas from Kalkudah division alone. Accordingly, it is submitted that the conduct of the Army should be seriously assessed judging from the normal events. In our submissions, the version of the Petitioner is more creditable than that of the Army.

(c) In paragraphs 6(f) and (g) of the 3rd Respondent's Objections, the Army Commander states that the Army readily agreed to provide adequate security provided that the poll was conducted in a staggered manner, but the Commissioner had decided not to conduct a re-poll. To say the least, this is a clear twisting of facts. This position is not borne out from the minuets of the mandatory consultation marked R5 at page 6.

(d) It is further submitted that as at the date of the elections, there was no rule prescribed by law warranting any actions affecting freedom of expression of the people. That is another ground that clearly establishes arbitrary and mala fide actions on the part of the executive, in particular the Army.

2.4 Role of the Election Commissioner and Secretaries of Political Parties

(a) The question arises as to whether there was any impropriety in the role of the Election Commissioner. It is respectfully submitted that the basic complaint in the instant case is against the Army, depriving the Petitioner from voting. However, the Petitioner respectfully requests Your Lordships to examine the conduct of the Election Commissioner specially from the time of him being informed of the decision to close the entry points.

(b) As pointed out by Your Lordships in ***Karunathilake*** v. ***Dissanayake supra at page 170***, the Commissioner has been entrusted under the then Article 104, with powers, duties and functions pertaining to decisions and has been given guarantees of independence in order that he may ensure that elections are conducted according to law; not to allow election to be wrongfully or improperly cancelled or suspended or disrupted, by violence or otherwise. It is therefore submitted that there was a duty on the Commissioner to assert his rights and ensure that a free and fair poll was conducted in the North and East. This position has not been varied after the 17th Amendment. In fact one reasons for the introduction of the 17th Amendment to the Constitution is strengthen the electoral process by introducing an independent election commission.

(c) The facts in this case reveal that the Commissioner consulted the defence authorities within a reasonable period, in an attempt to take appropriate steps. Perhaps the mandatory consultation held in terms of section 48A(9) stood in his way; If that is the case, it is clear that the Political parties themselves are equally responsible for not protecting the rights of the voters. It is thus submitted that the Political parties, perhaps, with the intention of finalising the results at the earliest, lost sight of the value of franchise of those who lived in uncleared areas. In that context there is no reason why the 6th to 17th Respondents should not be held accountable for instigating the violation of the rights of the Petitioner.

(d) Be that as it may, in our respectful submission, the Commissioner could have exercised his powers under 48A, in the interest of a free and fair poll, which in fact he has failed to discharge.

2.5 Conclusion

(a) It is submitted that the general meaning of Election is worth considering in concluding the instant case. "Elections are the democratic method of choosing representatives of the people. However, elections are held in all types of countries, including those where no democracy exist. Therefore the elections are not confined exclusively to democracies. However, the notion of elections in its proper senses implies competitiveness as well as freedom of choice." (vide – annexed Chapter in **Elections and Electoral System by Dieter Nohlen**)

(b) The franchise has been preserved and entrenched by the Constitution. Sri Lankan general elections are of competitive nature, similar to the elections existing in democratic systems.

(c) At this stage, Your Lordships' attention is respectfully drawn to **Article 1** of the Constitution, which states as follows:

> **Sri Lanka (Ceylon) is a <u>Free, Sovereign, Independent and Democratic</u> Socialist Republic** and shall be known as the Democratic Socialist Republic of Sri Lanka.

It is respectfully submitted that the first limb of this Article guarantees a democratic form of government. (vide - ***Re the Thirteenth Amendment to the Constitution (1987) 2SLR 312 @ 335***) Therefore all core principles in acceptable democratic form of governance as recognised in the Constitution. It is important to note that Article 1 is part of Chapter 1 titled "THE PEOPLE, THE STATE AND SOVERIGNTY".

The preamble "SVASTI" to the Constitution makes it abundantly clear that all forms of democratic values were considered by the framers of the Constitution. Accordingly, fundamental rights including Article 14(1)(a) of the Constitution has been recognised as inalienable rights of the people, which has been given additional protection by being entrenched in Article 1 of the Constitution as it remains part of democratic norms.

(d) Can it be said that the democratic form of government or good governance would prevail when all citizens of this country are not given equal access to vote at elections?

(e) Your Lordships' Court has repeatedly held that the Rule of Law is the foundation of the Constitution. (vide – ***Visualingam*** v. ***Liyanage*** **(1983) 1SLR 203 @ 236;** ***Premachandra*** v. ***Jayawickrama*** **(1994) 2SLR 90 @ 102)**

(f) This case discloses totally whimsical actions on the part of the Army to deprive a large number of citizens of this country of electing their own representatives. Rule of Law, which is the foundation of our Constitution will be found wanting, if citizens do not have access to polling stations on the election day.

(g) International obligations require Sri Lanka to guarantee genuine periodic elections, where every citizen has a right to vote at elections without any discrimination and without any unreasonable restriction. (International Covenant on Civil and Political Rights Article 25A and Universal Declaration of Human Rights Article 21(1)) Your Lordships' Court in many occasions has considered International Obligation as being part of our law in relation to interpretation.

(vide – ***Manawadu Vs. AG (1987) 2SLR 30 @ 47;***
Abeysekara Vs. Ranasinghe (2000) 1SLR 314 @ 334;
Weerawansa Vs. AG (2000) 1 SLR 386 @ 409;
Eppawala Case (2000) 3 SLR 243 @ 316;
Mediwaka Vs. Dissanayake (2001) 1 SLR 210 @ 212)

(h) In the aforesaid circumstances, it is respectfully submitted that denial of the Petitioner to enter the cleared area on the election day to exercise his voting rights at the General Election in the aforesaid circumstances violates fundamental rights guaranteed to him under Article 12(1) and 14(1)(a).

3. DENIAL OF FREEDOM OF MOVEMENT

(a) It is respectfully submitted that Respondents have failed to submit to Your Lordships Court any rule prescribed by law justifying the restriction of the movement of the Petitioner. It is not the case of the Respondents that the Petitioner and other voters attempted to enter cleared areas violating any such rule.

(b) Emergency lapsed on 4th July 2001, as a result of this government failing to secure majority on that date. Although certain regulations were formed under Prevention of Terrorism Act, no regulation was introduced affecting "movement."

(c) Your Lordships' attention is respectfully drawn to the provisions in Article 15. The freedom of movement could only be restricted to non military personnel on the ground of national economy, national security, public order, public health or morality and for the purpose of securing due recognition and respect for others.

However, any such restriction must be prescribed by law. However, in this case, there is no any such prescribed law. (vide ***Vadivelu*** v. ***OIC Sittambarapuram SC No. 44/2002*** and ***Dias*** v. ***Secretary Ministry of Defence SC No. 604/2001***: both SCM 5/9/2002)

(d) It is the position of the 3rd Respondent that the Army had information of a possible LTTE infiltration into the cleared area with the objective of disrupting the election. According to the Army Commander "the action to prevent persons crossing over from uncleared areas in Batticaloa and Vanni districts to the cleared area had to be taken in the interest of National Security and for the prevention of public order to enable the voters to vote at the Parliamentary General Elections, without disturbance and in order to ensure peaceful election through out the country". (vide paragraph 6(d) and (h) of the 3rd Respondent's Objections) It is respectfully submitted that the Army Commander has failed to rely on any rule prescribed by law, but merely states his subjective and 'a bias' opinion.

(e) The Petitioner has clearly indicated in paragraph 11 of the Petition that Election campaign was peaceful both in cleared as well as uncleared areas. This fact was never contradicted. Accordingly, it is submitted that existence of any disruption of the elections by any subversive acts was remote. No material was submitted by the defence authorities to seriously suggest any possibility of such disruption.

(f) In the circumstances it is submitted that the denial of the entry into cleared areas by the Army violates the Petitioner's fundamental right guaranteed to him under Article 14(1)(h).

4. RELIEF

The Petitioner concedes that he is unable to press for the relief to conduct a re-poll in the circumstances. However, having regard to the gravity of the infringement and the far-reaching consequences of the violation, the Petitioner respectfully seeks a declaration, compensation, costs and such other suitable directives Your Lordships may seem meet.

It is respectfully submitted that the closure of entry points could be a beginning of a dark era, unless Your Lordships exercising powers under Article 4(d) of the Constitution prevent any further moves by the executive, with a view to protecting the democratic process for the future generation.

Attorney-at-Law for the Petitioner

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