

MEDIWAKE AND OTHERS
v.
DAYANANDA DISSANAYAKE, COMMISSIONER OF
ELECTIONS AND OTHERS

SUPREME COURT
FERNANDO, J.
WADUGODAPITIYA, J. AND
ISMAIL, J.
SC APPLICATION NO.412/99
17TH OCTOBER, 14TH AND 16TH NOVEMBER
AND 4TH AND 5TH DECEMBER, 2000

Fundamental rights - Provincial Council Elections - Poll in the Kandy District, Provincial Council, Central Province - Provincial Council Elections Act, No. 2 of 1988 as amended - Unlawful poll at 23 polling stations - Section 46A of the Act - Failure to declare the poll void and to appoint a re-poll - Sections 46A(2) and 46(7)(a) of the Act - Articles 12(1) and 14(1)(a) of the Constitution.

The four petitioners were registered voters of the Kandy District, which is one of the three Districts of the Central Province. The election of Members to the Provincial Council of that Province was held on 06.05.1998 under the Provincial Council Elections Act, No. 2 of 1988 as amended (the Act.). The petitioners were members of the United National Party (the U.N.P.) while the 1st petitioner was also a candidate for the Kandy District; the 4th petitioner was a polling agent.

The 1st and the 2nd respondents were the Commissioner of Elections and the Returning Officer, Kandy District, respectively; the 3rd respondent is the Attorney-General; the 4th - 10th respondents were the General Secretaries of the Political Parties and the 11th respondent was the group leader of an Independent Group, that contested the said Provincial Council election. The 12th - 16th respondents (12th - 15th respondents being P.A. candidates) were persons against whom specific allegations were made by the petitioners.

The petitioners alleged that various incidents had occurred on election day at twenty five named polling stations in that District, including the

premature closure of one polling station as well as ballot stuffing, driving away polling agents and intimidation at several others; and that the 1st respondent by his failure to declare the poll at such polling stations void (except at one polling station) under section 46A(2) of the Act, as amended by Act, No. 35 of 1988 and to appoint a re-poll thereat under section 46A(7)(a) infringed their fundamental rights. Leave to proceed was granted in respect of the alleged infringement of Articles 12(1) and 14(1)(a) of the Constitution.

It was established that ballot stuffing took place at twelve polling stations; that at eleven other polling stations there were incidents of harassment and chasing away of UNP polling agents by means of violence or threatening of violence; and that the 12th to 15th respondents were actively involved in four incidents.

The 1st respondent annulled the poll at the Polwatta polling station, but did not appoint a re-poll.

Held :

1. Section 46A(1)(b) of the Act requires a genuine poll, continuing uninterrupted from beginning to the end, and compels the Commissioner to make a qualitative assessment as to whether the poll was free, equal and secret.
2. Even before the count on 06.04.1999 there was *prima facie* evidence that ballot stuffing and chasing away polling agents had taken place; and there was no proper poll in law. The 1st and 2nd respondents had sufficient notice of those incidents. However, the 1st respondent failed to make adequate inquiries in respect of those incidents and decide whether there was a genuine poll. On the available material the 1st respondent should have annulled the poll not only at Polwatta but also at the other twenty two polling stations.

Per Fernando, J.

"It is true that section 46(A)(2) does not require an automatic annulment of the poll for each and every non-compliance. The word "may" confirms that the 1st respondent has a discretionary power. However, that is a power coupled with a duty; whenever it appears that the proved non-compliance

has interfered with a free, equal and secret ballot, that discretion must be exercised.”

3. The irregularities disclosed at the aforesaid twenty three polling stations would have affected the result of the election for the Kandy District; as such the 1st respondent should have ordered a re-poll at those polling stations in terms of section 46A(7)(a).

Per Fernando, J.

“The fact that the party position might have remained unchanged does not mean that the “result” was not affected.”

4. The right to a free, equal and secret ballot is an integral part of the citizen's freedom of expression, when he exercises that freedom through his right to vote. It makes no difference whether that right is constitutional or statutory. That right is an essential part of the freedom of expression recognized by Article 14(1)(a) of the Constitution, especially in view of Sri Lanka's obligations under Article 25 of the International Covenant on Civil and Political Rights and Article 27(15) of the Constitution.

Per Fernando, J.

“The citizen's right to vote includes the right to freely choose his representatives, through a genuine election which guarantees the free expression of the will of the electors: not just his own. Therefore not only is a citizen entitled himself to vote at a free, equal and secret poll, but he also has a right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs.”

5. The failure of the 1st respondent to ensure a genuine, free, equal and secret poll - a poll which gave true expression to the will of *all* the electors - and following upon that, his failure to annul the poll, and to order a re-poll at all twenty three polling stations aforesaid, infringed the right of the petitioners to the freedom of expression under Article 14(1)(a), and to equality and equal protection under Article 12(1).
6. The 12th to 15th respondents abused their statutory right to enter the polling station, by chasing away polling agents and procured an

executive or administrative injustice. As such they were properly joined as respondents, but no relief was prayed against them. Hence no relief against them is ordered.

7. The petitioners are not precluded from invoking the jurisdiction of the court under Article 126 in view of the availability of the remedy of an election petition which is a limited right which can be filed *only* by a candidate; *only* upon the limited grounds set out in section 92(1) and for redress which may be granted under section 96 of the Act.

Cases referred to :

1. *Edrisinha v. Dissanayake* SC No. 265/99 SCM 23.3.99
2. *Bandaranaike v. Premadasa* (1992) 2 Sri L.R. 1 at 54
3. *Karunatilleke v. Dissanayake* (1999) 1 Sri L.R. 157
4. *Amaratunga v. Sirmal* (1993) 1 Sri L.R. 264
5. *Fatz v. Attorney-General* (1995) 1 Sri L.R. 372 at 383, 403-4
6. *Don Alexander v. Fernando* (1948) 49 NLR 202

APPLICATION for relief for infringement of fundamental rights.

Shibly Aziz, PC. with *A.P. Niles* for petitioners.

Saleem Marsoof, PC. Additional Solicitor-General, with *L.A. Gnanadasan* Deputy Solicitor-General, *U. Egalahewa*, State Counsel, *Suren de Silva*, State Counsel and *R. Gunatillake*, State Counsel for 1st to 3rd respondents.

Sanjeeva Jayawardena for 16th respondent.

Cur. adv. vult.

April 3, 2001

FERNANDO, J.

The four Petitioners were, at all material times, registered voters of the Kandy District, which is one of the three Districts of the Central Province. The election of members of the Provincial

Council of that Province was held on 6.4.99 under the Provincial Council Elections Act, No. 2 of 1988, as amended by Act, No. 35 of 1988 (“the Act”). The Petitioners were members of the United National Party (“UNP”), while the 1st Petitioner was also a candidate for the Kandy District; the 4th Petitioner was a polling agent.

The Petitioners alleged that various incidents had occurred on election day at 25 named polling stations in that District. These included the premature closure of one polling station, as well as ballot-stuffing, driving away polling agents, and intimidation at several others.

The Petitioners pleaded that:

- (1) “. . . it was the duty of each Presiding Officer of the relevant polling stations to act in terms of sections 31 to 46 of [the Act], and to keep order in the polling station, and to make it possible for the polling agents to function freely, and to ensure that ballots were issued properly, and to ensure that only persons entitled to vote were allowed to cast votes”;
- (2) “. . . it was also the duty of each Presiding Officer . . . to forthwith inform the 2nd Respondent Returning Officer of the District of the incidents mentioned above, and it was the duty of the 2nd Respondent to then inform the 1st Respondent Commissioner of Elections, in terms of section 46A(1) of the Act . . .”;
- (3) “upon receiving such information, it was the duty of the 1st Respondent to ascertain the truth of the information, and to declare the poll at such polling station void, in terms of the same section”;
- (4) “the Presiding Officers and/or the 2nd Respondent and/or the 1st Respondent have failed to comply with their duties under the said section. In fact, the purported ballots of all

the abovementioned polling stations have been taken into account in declaring the final results"; and

- (5) "... if the poll was properly conducted ... the final results for the District of Kandy would have been affected."

The Petitioners prayed for declarations that:

- (a) their "sovereign right of franchise under Article 4(e) has been denied and/or violated in respect of the conduct of the poll at [the aforesaid] polling stations," and
- (b) their fundamental rights guaranteed by Articles 12(1), 14(1) (a), 14(1) (c) and 14(1) (g) had been denied and/or violated-
- (i) by the failure of the 1st and/or 2nd Respondents to conduct and/or cause to be conducted a proper poll at the aforesaid polling stations, and
- (ii) by the failure of the 1st Respondent to declare void the poll at those polling stations and to order a repoll;

They also asked for an order directing the 1st Respondent to declare void the poll, and to order a re-poll, at those polling stations, but did not pray for compensation.

The 3rd Respondent is the Attorney-General; the 4th to 10th Respondents are the General Secretaries of the political parties which contested the election; the 11th Respondent was the Group Leader of an independent group; and the 12th to 16th Respondents are persons against whom specific allegations were made by the Petitioners, although no relief was claimed against them.

Leave to proceed was granted on 20.5.99 in respect of the alleged infringement of Articles 12(1) and 14(1) (a). The 1st Respondent was directed to produce the Senior Presiding

Officer's ("SPO's") journal in respect of the 25 named polling stations.

SECTION 46A OF THE ACT

The decision of this case turns largely on the interpretation and implementation of section 46A, the marginal note to which refers to "disturbances at polling stations";

"46A(1) Where due to the occurrence of events of such a nature -

- (a) it is not possible to commence the poll at a polling station at the hour fixed for the commencement of the poll; or
- (b) the poll at such polling station commences at the hour fixed for the opening of the poll *but cannot be continued* until the hour fixed for the closing of the poll; or
- (c) any of the ballot boxes assigned to the polling station cannot be delivered to the counting officer,

the presiding officer . . . shall forthwith inform the returning officer who shall in turn inform the Commissioner.

46A(2) On receipt of an information under subsection (1) in relation to a polling station . . . the Commissioner may, after making such inquiries as he may deem necessary to ascertain the truth of such information by order published in the *Gazette*, declare the poll at such polling station void.

.....

46A(5) The returning officer shall, from the statements under subsection (7) of section 51 furnished to him by all the counting officers, add up and ascertain the number of votes polled by each recognized political party and independent group, *and the number of preferences secured by each candidate* nominated by each such party or group at the election for such administrative district other than the votes polled at the polling

station in respect of which an Order under subsection (2) has been made and shall forthwith forward a statement to that effect to the Commissioner.

.....

46A(7) (a) Where the Commissioner is of the opinion, on receipt of a statement under subsection (5), that *the result of the election for such administrative district will be affected* by the failure to count the votes polled, or the votes which would have been polled, at the polling station in respect of which an order under subsection (2) has been made, he shall forthwith appoint a fresh date for taking a poll at such polling station. [emphasis added]

In view of “the experience gathered in the conduct of the Elections to North Western Province Provincial Council”, the 1st Respondent, by letter dated 27.2.99, had asked the Secretary to the President to “bring to the notice of Her Excellency the President immediately” certain urgent amendments needed to section 46A (1) - namely, the addition after paragraph (c) of five other situations:

- (d) if it was not possible to conduct the poll due to any reason beyond the control of the Presiding Officer;
- (e) if one or more polling agents are chased out during the poll;
- (f) non-arrival of the polling party at the polling station due to obstruction on the way;
- (g) if any disturbance of the peace at the polling station makes it impossible to take the poll; and
- (h) if there is any forcible stuffing of ballot papers.

There was no response. Shortly thereafter, the 1st Respondent issued several circulars and instructions to all Returning Officers. The following are some relevant extracts:

Circular dated 17.3.99 regarding instructions to be issued to SPO's:

"4. SPO should guarantee

- (a) the freedom of the elector to cast his vote in an unhindered manner,
- (b) equality in treatment of all contestants, and
- (c) prevent discrimination or privileges to any party or group.

18. Attention is drawn to section 46A and the record of details of persons, vehicles, incidents, threats on staff or agents, damage to or misuse of any ballot papers, damage to ballot boxes should be recorded [sic]. In such incidents the serial numbers, number of ballot papers lost or stuffed into ballot boxes should be recorded. Messages should be sent to Returning Officer, Commissioner of Elections immediately thereafter for a determination. For this purpose use Part IV of the Journal.

38. With the experience of incidents taken place [sic] at the North Western Province Provincial Council Elections, it is necessary to take precautionary measures in anticipating similar situations or any other incidents. The following steps should be taken in order to safeguard the proper management of the Polling Station. In the event of unauthorised persons in several number or in group [sic] forcibly enter into the polling station and intimidate polling staff and forcibly remove ballot papers and stuffing or create any other violence or disturbances at the

polling station, immediately SPO should intimate police officers on duty and send [a] message regarding this to R.O. and the Senior Police Officer over the phone . . . SPO should send his JPO [for the] purpose of sending this telephone message and ... make a journal entry in this regard in Part IV of the SPO's journal."

Circular dated 17.3.99 regarding "Points to be emphasised at SPOO Class":

"10. Section 46A - Details of persons, vehicles used, the incident and security provided, theft of ballot papers, serial Nos. of ballot papers lost or stuffed into box by force. *Your recommendation on the annulment of the poll.*" [emphasis added throughout]

17. [A repetition of the last sentence of (38) above.]

Circular on "Annulment of a poll at a polling station - section 46A":

"1. Your kind attention is drawn to section 46A [of the Act] under which the poll at a polling station can be annulled, *due to disturbances which could affect the result of the poll.*

3. & 4. [The need to record and report incidents was stressed.]

5. Although a decision may at the furthest depend on the written report of the SPOO, which may reach you only on his return at the close of poll, the other sources of information, if properly alerted, may furnish the information to you much earlier. You are kindly requested to ensure that any such information is transmitted to me immediately as it is received by you."

These instructions are referable to the 1st Respondent's power under section 129 (b) "to issue such directions as he may deem necessary to ensure active execution of the provisions of the Act."

A valuable procedural safeguard was introduced by the 1st Respondent. The SPO's journal consisted of four Parts; Part I, Record of proceedings; Part II, Log entries and complaints; and Part III, Written complaints by candidates etc, and Reports and messages by SPO to RO, ARO, etc (to be maintained in triplicate). A more detailed Part IV was substituted, consisting of a form (which I will refer to as the "section 46A (2) form"), which was one method whereby SPO's could fulfil their duty, under section 46A (1), of informing the Returning Officer. Not only did it facilitate the orderly and systematic recording and reporting of incidents of the kind referred to in the above Circulars, but it also provided for the SPO *either* to certify that no incident had occurred warranting the annulment of the election under section 46A (2) *or* to recommend that the election be declared null and void on account of incidents to be specified. Part IV was issued as a separate booklet in all three languages, in duplicate; and the instructions given to the SPO were that the original was to be detached and enclosed in one envelope (marked "Z"); the duplicate (together with Parts I, II and III) in another envelope (marked "M (2)"); and both handed over to the Returning Officer.

The English version of the section 46 A (2) form is as follows:

**SENIOR PRESIDING OFFICER'S (S.P.O'S) JOURNAL
PART IV**

Section 46A (2) of the Provincial Councils Elections Act, No. 2 of 1988 as amended by the Elections (Special Provisions) Act, No. 35 of 1988.

Disturbances at the Polling Station

From the Presiding Officer of the polling division situated
in the polling district of to the Returning Officer of
District.

Poll commenced at 7.00 a.m./Poll could not commence at
the scheduled time. Poll commenced at Reasons
for such delay are enumerated below.

.....

- * Poll continued until 4.00 p.m./Poll could not continue until the scheduled time. Reasons for such termination at are enumerated below.

.....

- * Ballot boxes could not be handed over to the Returning Officer, for the following reasons.

.....

Particulars of Security Staff at the Polling Station:

Name	Designation & Identification Number
01.	
02.	
03.	
04.	

- * I hereby certify that *no incident has occurred warranting the annulment of the election under Section 46A (2).*

- * *I recommend that the election at this polling station be declared null and void under Section 46A (2), due to the following reasons.* The incidents are briefly set out below in the order in which they have occurred.

1st incident

Time of occurrence

No. of votes cast as at that time

Names/identity of the persons who are responsible for the disturbances as far as I am aware/have learnt.

.....

* Delete whichever is inapplicable

Registered number/s of the vehicle/s used:

.....

Particulars including the numbers of the ballot papers which were forcibly stuffed into the ballot boxes.

Serial No. to Serial No.

Were any ballot papers brought into the polling station from outside, marked and stuffed into the ballot box of the polling station?

The incident/s referred to above is/are briefly indicated below.

.....

Injuries or any other inconveniences to the staff:

.....

Damages to or loss of election articles etc.:

.....

Reasons for the failure of the security staff for not [being] able to prevent this incident as I perceive, are as follows:

I certify that I reported this incident to

the Field Assistant Returning Officer at

Returning Officer at

Police Patrol at

and that I reported so in writing/verbally/through messenger.

02nd incident

.....

03rd incident

.....

Particulars of *any incident where agents of political parties/ independent groups were chased away from the polling station* or where any person caused harassment to them (including the time such incident occurred): (In submitting these particulars regarding agents, the name/s of the party/parties or independent group/s represented, should be stated).

.....

[Signature, name, designation and official address of Presiding Officer] [emphasis added]

Not only was the 1st Respondent conscious of the shortcomings of the North-Western Province Provincial Council elections, but he was reminded of public and judicial concern about possible repetitions. Upon a complaint of imminent infringement (in respect of the poll to be conducted on 6.4.99), he tendered to this Court a set of the letters, circulars and instructions issued by the Inspector-General of Police and himself. Nevertheless, three other deficiencies were brought to his notice, by Counsel and by the Court: the need for a stern warning that swift and appropriate action would be taken against any Police officers found to be in intentional dereliction of their duties, the lack of adequate provision to ensure the safety and freedom of voters, counting agents, and, *particularly, polling agents*, and the use of vehicles, personnel and weapons provided by the State for political activities connected with elections. This Court expressed "confidence that these three matters will also be given due consideration by the Commissioner of Elections and the Inspector-General of Police." (*Edrisinha v. Dissanayake*).⁽¹⁾

THE FACTS

The 1st and 2nd Respondents filed affidavits nearly four months later in which they admitted certain incidents:

(1) Replying to the Petitioners' allegation that at about 10.00 a.m. a mob of about 200 armed Peoples' Alliance ("PA") supporters stormed the Ratnajothi KV polling station No. 15, and threatened the UNP polling agents, and snatched ballot papers, and stuffed about 500 ballots in the ballot box, they stated that "45 ballot papers commencing from 192455-192500 and 49 ballot papers commencing from 192601-192650 totalling 94 ballot papers forcibly stuffed by unknown persons [at that polling station] were identified and excluded from the count . . ." The SPO mentioned this incident in Part III, in a "message" form, but all three copies remained in the journal.

(2) Replying to the Petitioners' allegation that at about 1.20 p.m. PA supporters stormed the Udupitya Muslim KV polling station No. 40 armed with pistols and a bomb, and threatened the UNP polling agents, and snatched a parcel of ballots, and cast them, they stated that "48 ballot papers commencing from serial No.439652-439700 forcibly stuffed by unknown persons [at that polling station] were identified and excluded from the count . . ." The SPO recorded in the journal that a crowd of 30 persons came at 1.20 p.m., and that this was reported to the ARO and the RO, but made no mention of ballot-stuffing.

In respect of these two incidents, it must be noted that the section 46A (2) forms were not produced, and that the 1st and 2nd Respondents have not produced any document by which they were informed of the ballot-stuffing, and the relevant serial numbers. Further, although reference has been made to 45, 49 and 48 ballot papers, the serial numbers given actually cover 46, 50 and 49 ballot papers.

(3) They added that "several ballot papers were removed from counting in certain other polling stations such as in which incidents were reported by the respective Senior Presiding Officers." They named nine polling stations (which are not among the 25 named by the Petitioners). They produced neither the documents by which these incidents were reported, nor the relevant section 46A (2) forms. Further, it is difficult to assume that they meant that those were the *only* other incidents, because

“such as” tends to suggest that there were other incidents as well.

(4) Replying to the Petitioners' allegation that at about 12.30p.m. a mob of PA supporters stormed the Polwatta KV polling station No. 19 and began to stuff the ballot boxes, whereupon the Presiding Officer closed the polling station, and sealed the ballot box, they stated that “the poll [at that polling station] was annulled under section 46A . . .” They did not explain why the 1st Respondent did not order a re-poll under section 46A (7).

(5) Replying to the Petitioners' allegation that a mob of about 50 PA supporters stormed the [Wattegama] polling station No. 34, threatened the UNP polling agents, snatched ballot papers and stuffed about 1,000 ballots, in consequence of which a complaint was made at the Wattegama Police station and an agent was treated at the Wattegama Government hospital, they stated that no incidents of stuffing ballots were reported, but that a report was submitted to the 2nd Respondent by the SPO at 9.10 a.m. regarding an incident of harassment to the UNP polling agents; that the report was submitted to the Police; and that the 2nd Respondent was unaware of the action taken by the Police.

As for the Petitioners' other allegations, they stated that they were unaware of those incidents, and that information regarding them “will have to be obtained from the Senior Presiding Officers' journals . . . which have been sealed after the close of the poll. . . and kept in safe custody.”

At the hearing the sealed packets (in the “M(2)” envelopes) in respect of 23 of the 25 polling stations named by the Petitioners were opened by the Registrar of this Court in the presence of Counsel. (The packet for Wattegama had not been brought to Court because of a mis-description by the Petitioners, but no reason was given for not bringing the Polwatta documents.) The “Z” envelopes containing the original communication by the SPO's to the Returning Officer were not produced by the 1st and 2nd Respondents. However, that could

not have made any difference because each "M (2)" envelope (which was entitled "SPO's Journal") should have contained copies of all four Parts of the SPO's journal.

Those journals contained entries regarding incidents Nos (1) and (2) above, and the following incidents at ten other polling stations.

(6) Kalugaloya KV polling station No. 17. The Petitioners alleged that a mob of armed PA supporters led by the 15th Respondent, a PA candidate, stormed the Police station, threatened the 4th Petitioner, a UNP polling agent, and assaulted him with the Presiding Officer's chair; the agent sustained a fracture of the hand, left the polling station, and was admitted to hospital. The SPO's journal has three relevant entries: one in Part I, to the effect that at 7.40 a.m. the 15th Respondent came, and assaulted and chased away the UNP polling agents, and another in Part III that a crowd assaulted and chased away the UNP polling agents. The 15th Respondent did not file an affidavit denying the 4th Petitioner's affidavit.

(7) Maha Assedduma KV polling station No. 37. The Petitioners alleged that *at about 3.30 p.m.* the 13th Respondent, a PA candidate, accompanied by several armed persons in Police uniform and a mob entered the polling station, threatened UNP agents and the Presiding Officer, and snatched and cast ballots. Part I of the journal contains two entries by the SPO: that *until 3.00 p.m.* there was no disturbance at the polling station and voting took place very peacefully; and that at about 3.30 p.m. unknown persons asked him to allow ballots to be forcibly cast, and because of his refusal he *too* was severely threatened. He made no entry about the situation thereafter. The 13th Respondent did not file an affidavit denying the polling agent's affidavit.

(8) Megodagama KV polling station No. 17. The Petitioners alleged that at about 11.00 a.m. a mob of about 50 armed PA supporters stormed the polling station, threatened the UNP polling agents, snatched ballot papers and stuffed about 300

ballots in the ballot box. The SPO's journal contains two complaints: one recorded at 11.30 a.m. to the effect that the UNP polling agent says he is leaving because outsiders were casting ballots; and the other at 11.55 a.m. that a named UNP candidate states that his agent left because of threats and that near the entrance to the polling station there were eight vehicles and a crowd of about 70 outsiders, who had come to cast illegal votes.

(9) Pahala Yatawara polling station No. 18. The Petitioners alleged that at about 11.00 a.m. a mob of about 50 armed PA supporters stormed the polling station, threatened the UNP polling agents, snatched ballot papers and stuffed about 300 ballots in the ballot box. The SPO has noted in Part I of the journal (under "events of a significant nature") that at 10.00 a.m. a crowd entered the polling station, that he instructed the security to remove them, and that they were removed; and, in a message form in Part III, that a complaint was made by the UNP polling agents, who left at 11.40 a.m.

(10) Girakaduwa PV polling station No. 24. The Petitioners alleged that at about 7.10 a.m. a mob of about 200 armed PA supporters led by the 14th Respondent, a PA candidate, stormed the polling station, threatened the UNP polling agents, snatched ballot papers and stuffed about 200 ballots in the ballot box. The SPO has noted in the journal the complaint made by the polling agents that a group of thugs who came with a PA candidate had threatened to kill them, and that there were illegalities in the voting. He has noted the 14th Respondent's arrival at 7.00 a.m. and departure at 7.05 a.m., and the polling agent's time of departure as 7.40 a.m. The 14th Respondent did not file an affidavit denying the polling agent's affidavit.

(11) Yatirawana MV polling station No. 31. The Petitioners alleged that a mob of about 200 armed PA supporters led by the 16th Respondent, stormed the polling station, threatened the UNP polling agent, snatched ballot papers and stuffed about 750 ballots in the ballot box; a complaint was made to the Kandy Police. The SPO has noted in Part III that at about 9.25 a.m. a

group of unknown persons had attempted to chase away the UNP polling agents, but the security personnel had sent away that group; later that same group returned and chased the two of them. He then noted that if this had not happened, a huge problem would have had to be faced! This entry is in a "message" form, of which one copy appears to have been despatched. There is also an entry in the section 46A (2) form (under "*1st incident*"), signed by two persons, that they were leaving because a group of unknown young persons had threatened them at 9.30 a.m.

The 16th Respondent filed an affidavit denying that he came to that polling station. That was not rebutted, and the Petitioners failed to produce the complaint made to the Police. Accordingly, while it is clear that an incident did occur at this polling station, Mr. Aziz, PC, for the Petitioners, conceded that the Petitioners had failed to establish, on a balance of probability, that the 16th Respondent participated in that incident. For similar reasons he conceded he could not pursue allegations against the 16th Respondent personally in respect of another polling station.

(12) Udadelthota MV polling station No. 19. The Petitioners alleged that at about 9.40 a.m. a group of about 15 PA supporters armed with weapons and bombs led by the 12th Respondent, a PA candidate, stormed the polling station, assaulted and made death threats to a UNP polling agent, and began to stuff 750 ballots in the ballot box; a complaint was made to the Galaha Police. The SPO's journal has three relevant entries, to the effect that the 12th Respondent came with a crowd to the polling station at 9.40 a.m. and again at 10.30 a.m.; that a Police constable told him that only he could enter and not the crowd; that he scolded the constable and created a disturbance; and that the SPO closed the doors of the polling station, and explained matters to the 12th Respondent, but with no result. The security staff sent away the crowd. They returned at 10.30 a.m., and the 12th Respondent threatened the UNP polling agents and chased them away. The security staff have also noted that this incident frightened the voters, and that one officer had to

shoot two shots in the air to prevent danger to life and property. The 12th Respondent did not file an affidavit denying the polling agent's affidavit.

(13) Metideniya MV polling station No. 17. The Petitioners alleged that between 7.20 and 7.30 a.m., a UNP polling agent was assaulted in the polling station; his electoral register was taken; and, after death threats, he was chased away. A complaint was made to the Udadumbara Police. In his journal the SPO has recorded two complaints made by the UNP agent, at 7.20 and 7.45 a.m.; and also (as an "event of a significant nature") that at 7.20 a.m. a crowd demanded ballot papers, which he refused, and that the UNP agents were sent away.

(14) Niyangoda MV polling station No. 37. The Petitioners alleged that shortly after 7.00 a.m., a mob of PA supporters stormed into the polling station, and threatened, assaulted and chased away the UNP polling agents; and that the Presiding Officer stated that he was going to close the polling station, but did not do so. A complaint was made to the Galagedera Police. Only Part IV of the journal was produced. He has entered in the section 46A (2) form (under "*1st incident*", seemingly in support of a recommendation for the annulment of the poll) that between 7.05 and 7.10 a.m., when four votes had been cast, K.M. Alahakoon Banda had assaulted and chased away the two UNP agents, and that the Police have recorded the complaint; and later that he informed the Field Assistant Returning Officer at 7.05 a.m., the ARO at 7.10 a.m., and the Police at 8.00 a.m. However, he did not sign that form, and both signature pages are intact. It appears that a part only of that form had been despatched.

(15) Galagedera Jabbar MV polling station No. 8. The Petitioners alleged that PA supporters had threatened and chased away the UNP polling agents. The SPO records (in a "message" form) that by 8.07 a.m. the UNP polling agents had been called by some groups of people and chased out from the polling booth, and that he had informed two ARO's when they visited that polling station - one at 8.50 a.m. and other at 11.30 a.m.

It is therefore clear now, on a balance of probability, that ballot - stuffing took place at twelve polling stations (incidents Nos. (1) to (4) above); that at eleven other polling stations there were incidents (Nos. (5) to (15) above) of harassment and chasing away of UNP polling agents by means of violence or threats of violence; and that the 12th to 15th Respondents were actively involved in four incidents (Nos. (6), (7), (10), and (12) above). What is more, there was *prima facie* evidence, even before the count on 6.4.99, that these 23 incidents had taken place. Neither the 12th to 15th Respondents nor the General Secretary of the PA have denied those incidents.

The Petitioners alleged incidents at eleven other polling stations. While each of those allegations was supported by a single affidavit, there was neither an admission by any of the Respondents nor a supporting entry in the SPO's journals. I do not propose to take these into account in deciding this case.

SPO's were required, by means of the section 46A (2) form, to furnish to the Returning Officer, *inter alia*, (1) full particulars of ballot-stuffing (with serial numbers), and of harassing or chasing away polling agents, and (2) either a certificate as to the propriety of the poll or a recommendation for its annulment. Despite the 1st Respondent having repeatedly stressed the importance of Part IV of the journal, the factual position in regard to the submission of those forms (in respect of the 23 polling stations at which incidents have been proved) is as follows:

(a) The 1st and 2nd Respondents did not themselves produce with their affidavits the section 46A (2) forms - neither the originals nor the duplicates - in respect of any of those 23 polling stations.

(b) The SPO's journals were not called for in respect of nine of those 23 polling stations (i.e. the nine incidents of ballot - stuffing disclosed by the Respondents - No. (3) above).

(c) In regard to the fourteen (proved) incidents pleaded by the Petitioners, the journals were not produced for Polwatta and Wategama.

(d) In regard to the other twelve, in response to the Court order to produce the SPO's journals, the 1st Respondent produced only the "M (2)" envelopes (but not the "22" envelopes); of those, in six instances neither the original nor the duplicate of the section 46A (2) form was in the "M (2)" envelope; in one instance, there was just one copy of the first page of that form, on which page only one entry had been made; in three instances, the entire booklet was available intact, without any entries; in another instance, the entire booklet was available, with entries made on one page but even that page had not been sent; and in the last instance, about one-half of the form had been completed, but not the signature page, and that portion only appears to have been despatched.

Thus in eleven instances (out of twelve) the section 46A (2) form had neither been duly completed nor sent to the 2nd Respondent; in the twelfth instance only an incomplete and unsigned form had been sent. Since the seals on the "M (2)" envelopes were intact, it is clear that the 2nd Respondent had not even opened those envelopes in order to examine the forms. If he had, he (and, through him, the 1st Respondent) would have become aware that potentially serious incidents had occurred; that none of the SPO's had certified that there were no incidents warranting the annulment of the poll; that other parts of the journals established that polling agents had indeed been harassed and chased away - information expressly called for in the final paragraph of the section 46A (2) form; and that at seven out of the eleven polling stations concerned, polling agents had been chased away by 10.00 a.m. (and at four within the very first hour). It is quite clear from their affidavits that the 1st and 2nd Respondents had not examined Part IV of the SPO's journals (i.e. either the "M (2)" or the "Z" envelopes), despite the 1st Respondent's express and repeated instructions to SPO's to use Part IV as one major channel of communication. They were therefore unaware of all those incidents. Had the 1st Respondent been aware of them, he would have had to consider whether they fell within the scope of section 46A (1), and, if so to make inquiries to ascertain the truth of that information (see

section 46A (2)); and thereafter to consider exercising his discretionary powers of annulling the poll and of ordering a fresh poll.

I must now consider the impact of those incidents on the poll at those polling stations. It is not simply a matter of x ballots being stuffed, or y polling agents being driven out. Such incidents inevitably have an effect far beyond the actual number of ballots or polling agents involved. Their effect on other electors needs to be analysed. Demands for ballot papers for stuffing and/or for the ejection of polling agents, if made by a few unarmed individuals, quietly and inconspicuously entering and leaving a polling station, are bound to fail - unless, of course, there is collusion and connivance by Presiding Officers and staff, security personnel, and polling agents. Such demands can succeed only when made by armed persons or by gangs of thugs, accompanied by violence or a credible threat of violence. Such incidents will be witnessed by electors waiting to vote, and will, through them, become known to others yet to come to the polling station. Undoubtedly some will be deterred from voting - exactly how many, is a matter for speculation. But I can take judicial notice that not every elector is so brave, that he is determined to cast his vote even at the risk of injury (leaving aside, of course, those electors who are resolved at all costs to cast not only their own votes, but the votes of others as well, including the dead and the absent). As we asked Counsel, upon seeing such an incident would a pregnant woman standing in the queue - or an aged person, or a mother carrying an infant - be less likely to go and vote ? Would not a man (or woman) who has just witnessed such an incident go back and dissuade others - aged parents, or spouse, or children, or neighbours - from voting ? Would potential voters not lose confidence in the ability of the law enforcement authorities to protect them against unlawful acts and/or to duly investigate them if they did occur ? Ballot-stuffing and driving out polling agents go hand-in-hand with violence or the threat of violence - which, in turn, will have a deterrent effect on electors in the vicinity as well as on those still in their homes. Impersonators will not have an easy task if there are

polling agents present who might challenge them (and demand declarations under section 41). Obviously, polling agents are not chased away because they are disliked, but because they hinder impersonation. Further, the practice of seizing polling cards from electors must not be forgotten. That is seldom an end in itself, because it does not prevent those electors from voting. However, if those electors can somehow be deterred from voting, and if there are no polling agents likely to object, a seized polling card will be a passport to impersonation. Thus driving away polling agents is a classic symptom of graver and more widespread electoral malpractices, ranging from the intimidation of electors and the seizure of polling cards, to large-scale impersonation.

SECTION 46A (2) : ANNULMENT OF POLL AND RE-POLL

I have now to consider (a) whether the above 23 incidents fell within the scope of section 46A (1) (b), and whether the 1st Respondent ought to have declared the poll at the relevant polling stations void; and (b) if so whether he should, acting under section 46A (7) (a), have ordered a re-poll.

1. Was there a proper Poll ?

Mr. Marsoof, PC, ASG, submitted that the remedy of annulment was confined to the three specific grounds mentioned in section 46A (1) :

“ . . . there was no intention to confer on the Commissioner of Elections the power to make a qualitative assessment of the democratic nature of the poll and annul the poll if in his opinion it was not free and fair. On the contrary, the three grounds specified . . . relate to objective facts, namely (a) the time of commencement of the poll, (b) *the time of conclusion* of the poll, and (c) the ability to deliver the ballot boxes to the counting officer. The legislature has advisedly left the qualitative assessment of the poll to the Election Court. . . [Further] the result of the election at the Administrative District or Province

would not have been affected even if the alleged irregularities took place. In the circumstances the 1st Respondent [was] not duty bound to annul the poll in the Administrative District and order a fresh poll . . ." [emphasis added]

To test that interpretation we put to Mr. Marsoof two hypothetical situations : (1) where the poll duly commenced at 7.00 a.m., but as a result of violence was interrupted from 7.05 a.m. until 3.55 p.m., when the poll was resumed, and concluded at 4.00 p.m. ; and (2) where, for an hour or two, an armed thug allowed electors to vote only for one party (or only after showing him their marked ballot papers). His reply was that even in such circumstances the Commissioner had no power to annul the poll - even if a large number of electors might have been prevented from voting, or from voting for the party or group of their choice, or from voting in secret. His contention was that if the poll had started on time, and ended on time, what happened in between was a matter for the Courts, in an election petition; not for the Commissioner of Elections.

I reject, without hesitation, such a narrow and mechanical interpretation, which ignores the context in which the section appears, as well as its plain words.

Section 46A (1) appears in Part III of the Act, dealing with "The Poll" Many of the provisions of Part III manifest a legislative intention that the poll must be *free* (e. g. sections 33 (2) and 38), *equal* (e. g. sections 35, 36 and 40) and *secret* (e. g. section 37). Besides, contrary to Mr. Marsoof's formulation, the "objective fact" to which paragraph (b) refers is not *the time of conclusion* of the poll, but rather *the continuation of the poll* until the scheduled time of conclusion. What that requires is that, having duly commenced at the scheduled time, the *poll must continue until closing time*.

What is a "poll" ? In my view, a *poll* is a process of voting that enables a genuine choice between rival contenders: necessarily, one that is *free* of any improper influence or pressure; *equal*, where all those entitled to vote (and no others)

are allowed to express their choice as between parties and candidates who compete on level terms; and where the *secrecy* of the ballot is respected.

A mere semblance of a poll is not enough. The elaborate provisions of the Act, and especially Part III, compel the conclusion that Parliament had in mind a genuine poll, and not a mere charade. Such a poll must "*continue*"; i.e. voting must take place not sporadically, but without interruption, from beginning to end.

I therefore conclude that section 46A (1) (b) requires a genuine poll, continuing uninterrupted from beginning to end, and compels the Commissioner to make a qualitative assessment as to whether the poll was free, equal and secret.

If I may digress at this point, it is very clear - from the amendments which he proposed on 27.2.99 - that the 1st Respondent fully realised that ballot-stuffing and chasing away polling agents were factors which prevented a proper poll, and which therefore demanded the annulment of the poll. Further, by means of the section 46A (2) form which he himself prescribed, he required SPO's not only to confirm that opening and closing times had been observed, but also to describe any other incidents which warranted the annulment of the poll. If Mr. Marsoof is right in his submission that the 1st Respondent could annul the poll only where the poll did not commence or conclude at the stipulated time, why did the 1st Respondent unnecessarily burden SPO's by asking them to submit detailed reports on other matters ?

Besides, if Mr. Marsoof's contention is accepted, then neither section 46A nor any other provision of the Act empowers the Commissioner to determine that ballot papers had been stuffed, and to order their exclusion from the count. It is only the broader interpretation of section 46A (1) which brings ballot - stuffing within the scope of paragraph (b), and may perhaps justify the removal of stuffed ballot papers as being an appropriate remedy for ballot-stuffing in *some* cases. Thus where the ballot-stuffing

had no effect on the poll or the electors, apart from the number of ballots actually stuffed, their removal may cure the evil - but certainly not where ballot-stuffing is accompanied by other factors which vitiate a proper poll.

Polling agents have a special role to play in a free, equal and secret poll, and this Court emphasised the need to ensure their security shortly before the disputed poll. Their right to be present at the polling station is expressly recognized by section 33, in the same breath as the right of election staff, the police, and candidates. Their duties commence from the time the empty ballot box is sealed; and *inter alia* they have the right to challenge suspected impersonators. An election, ultimately, is determined by the number of ballots cast. It is the polling agents who play a leading part in ensuring that only those entitled to vote do cast ballots. Chasing away polling agents makes a poll cease to be equal.

I hold that on 6.4.99 there was *prima facie* evidence that ballot-stuffing and chasing away polling agents had taken place; that those incidents prevented the "continuation" of a poll at 23 polling stations; and that there was no proper poll in law. The 1st and 2nd Respondents had sufficient notice of those incidents; the 1st Respondent was under a duty to inquire into the truth of the information available in the SPO's journals; but he failed to inquire into the eleven incidents of chasing away polling agents, and failed to make adequate inquiries in respect of the twelve incidents of ballot-stuffing. The evidence before this Court establishes that if the 1st Respondent had made proper inquiries, he could not reasonably have concluded that there had been a genuine and uninterrupted poll at any of those polling stations.

2. Annulment of Poll

It is true that section 46A(2) does not require an automatic annulment of the poll for each and every non-compliance. The word "may" confirms that the 1st Respondent has a discretionary power. However, that is a power coupled with a duty: whenever

It appears that the proved non-compliance has interfered with a free, equal and secret ballot, that discretion must be exercised. It is only where the lapse was trivial, and had no effect on the rights of electors that the Commissioner could properly refrain from exercising that discretion: as, for instance, if the poll had commenced a few minutes late (or concluded a few minutes early), or was interrupted for a few minutes by some accident or misfortune (e. g. a member of the polling staff being taken ill, or a sudden rainstorm causing a leak in the roof of the polling station, or a drunkard creating a disturbance). If it appears that no one was consequently prevented from voting, it would be an improper exercise of discretion to annul the poll: the word "may" permits the application of the principle that *de minimis non curat lex*. It is not necessary to consider in this case whether the Commissioner could properly refrain from annulling the poll even where a few electors had been affected by an incident not directed against them on account of their political views. But very different considerations apply to organized violence calculated to influence the poll significantly by deterring one section of the electors.

I must deal next with Mr Marsoof's submission that the Commissioner cannot annul the poll unless the result of the election (at the District or Provincial level) would have been affected. Section 46A(2) imposes no such restriction on the Commissioner's powers and duties (unlike section 46A(7) (a)).

I hold that the 1st Respondent should have annulled the poll, not only at Polwatta but also at the other 22 polling stations.

3. Re-poll

Where the Commissioner has annulled the poll at a polling station, section 46A(7) (a) requires him, on receipt of the statements under section 51(7), forthwith to appoint a fresh date for taking a poll at that polling station, if he is of the opinion

that *the result of the election for such administrative district will be affected* by the failure to count the votes polled at that polling station. This must be contrasted with section 92(1) which requires proof - in an election petition - that non-compliance *materially* affected the result of the election.

What is the "result" of an election under the proportional representation system? Section 58 deals with the "Declaration of the result:" the returning officer must declare elected candidates from each party or group, having regard both to the votes obtained by such party or group, and the preferences obtained by each candidate. There is no provision for the declaration of the number of seats won by each party or group, distinct from the identification of the candidates elected. (Section 61A provides for the Commissioner thereafter to declare two more candidates declared elected for the two bonus seats for the province).

The statements under section 51(7) will disclose to the Commissioner (a) the votes polled by each party or group in the district, and (b) the number of preferences secured by each candidate. From that he would be able to determine the number of seats to which each party or group is entitled, as well as which candidates should be declared elected. Nevertheless, the "result" of the election in the district is the declaration that specified *candidates* have been elected.

What the Commissioner had then to determine is whether the failure to count the votes at the polling station where the poll has been annulled "will affect" that result. That does not mean that the Commissioner has to be *certain* that there would be a different result; it is enough if it appears that a re-poll was likely to result in one or more other candidates being elected.

In the Kandy District, the PA and the UNP were each entitled to thirteen seats, and the Janatha Vimukthi Peramuna ("JVP") to one seat. The votes polled by the PA and the UNP candidates

who came 12th to 15th and the JVP candidates who came 1st to 3rd were as follows:

	PA	UNP		JVP
12 th	18,576	16,347 :	1 st	1,794
13 th	18,448	13,478 :	2 nd	1,535
14 th	18,003	12,767 :	3 rd	1,457
15 th	17,123	12,286 :		

The 1st Respondent had annulled the poll at Polwatta. It is possible that even a re-poll at Polwatta alone would have affected the above result: in the case of the PA and the UNP, candidate No. 14 might have got elected in place of candidate No. 13; and the JVP candidate No. 2 in place of candidate No. 1.

But, for the reasons set out above, the 1st Respondent should have annulled the poll in another 22 polling stations besides Polwatta. Had that been done, section 46A (7) (a) would have required him to consider the *cumulative* effect of a re-poll at all 23 polling stations. It was then not merely possible, but very likely that a re-poll would have significantly affected the preference obtained by the "borderline" candidates, and the "result" would then have been different in regard to which candidates were elected. The fact that the party position might have remained unchanged does not mean that the "result" was not affected.

I must now turn to the submission which Mr Marsoof made in this connection. To appreciate that submission, it is necessary to set out the Kandy District election results:

Votes polled	Seats won	
PA	247,250	13
UNP	232,934	13
OTHERS	39,875	2
Majority	14,316	

He submitted that in order to annul the election in the Kandy District the Petitioners must show that the UNP would have polled more votes than the PA and the other parties combined (namely 247,250 plus 39,875 plus one, = 287,126 votes): that, but for the irregularities complained of, the UNP would have polled another 54,192 votes, making a total of 287,126.

In support of this proposition, he cited *Bandaranaike v Premadasa*,⁽²⁾

“There is another relevant matter to which we must refer. Mr Choksy drew our attention to paragraph 05 of the petition where it is averred that according to the results declared by the Commissioner of Elections, the majority by which the 1st Respondent won is 279339 votes. It was the submission of Counsel that even if the Petitioner got one more vote than the majority obtained by the 1st Respondent she would still not have been declared elected. Mr Choksy contended that the Petitioner *in order to win* had to get the total votes received jointly by the UNP and the SLMP plus one more vote. Thus she would have had to get 515059 more votes than she polled *in order to have succeeded at the election*. It appears to us that this submission is well-founded.” [emphasis added]

In a Presidential election the candidate who polls 50% plus one vote is declared elected. If no candidate polls 50% plus one, then there is a further count at which the votes cast for all candidates (other than the first and the second) are ignored, and preference votes are counted to ascertain which candidate has obtained 50% plus one. Either way, the winner-takes-all, and other candidates get nothing. That is fundamentally different to the result of a Provincial Council election, based on the proportional representation system. There the party or group which polls the highest number of votes does not win every seat; and many candidates are elected, from several parties and groups, besides the one who gets the highest number of preferences.

I entirely agree with the *dictum* cited. As stated therein, "in order to win" - i.e. to obtain a judicial declaration that he was duly elected - an unsuccessful *Presidential* candidate must show that he would have obtained 50% of the total votes plus one (and not merely more votes than the successful candidate). But even in a *Presidential* election there can well be an intermediate position between upholding the impugned election and declaring an unsuccessful candidate elected. If it is shown, for instance, that neither the successful candidate nor any other candidate actually got (or would have got) 50% of the total votes polled plus one, then to allow the "result" (namely, that the successful candidate was elected) to stand would be contrary to law; and to determine who actually was elected an order for the count of preference votes becomes necessary. The *dictum* cited does not purport to deal with that situation.

In any event, a Provincial Council election is quite different. The "result" includes several components: which parties or groups are entitled to the seats in the district on the basis of votes polled, which is entitled to the two bonus seats for the province, and which candidates of such parties or groups are entitled to be declared on the basis of preferences. Thus even those irregularities, which affect only the preferences and thereby the identification of the candidates elected, do affect the "result."

It must also be noted that the Petitioners do not claim the annulment of the Kandy District election and a fresh election. Their claim is that the 1st Respondent's failure to order a re-poll in certain polling stations was in violation of their fundamental rights. The *dictum* in *Bandaranaike v. Premadasa* is inapplicable to the Petitioners' claims in this application.

I hold that the 1st Respondent could not reasonably have concluded that the irregularities disclosed at those 23 polling stations would not have affected the result of the poll thereat. Consequently, section 46A(7) (a) left him no choice but to order a re-poll at those 23 polling stations.

It is true that a re-poll would have caused considerable delay in determining the overall result for Kandy District, and consequently for the Central Province as well. But as between avoiding delay and inconvenience, however serious, to a large number of electors, and remedying the infringement of the right of a much smaller number of electors at those 23 polling stations to a free, equal and secret poll, undoubtedly the latter is far more important. It must be noted that not only did the 1st Respondent himself remember the recent experiences at the North Western Provincial Council elections, but he was again reminded on 23.3.99 of the need for adequate provision to ensure the safety and freedom of voters, counting agents, and, *particularly, polling agents*. It was the failure by the 1st Respondent to insist upon the provision of adequate security - personnel, weapons, communication equipment, vehicles, etc - which was a principal cause of those infringements. The 1st Respondent, as one limb of the Executive, can hardly claim infringements caused by culpable inaction on the part of another limb of the Executive should remain unremedied on the ground of inconvenience.

The statutory powers and duties of the 1st Respondent are intended to ensure a free, equal and secret poll. Accordingly, I am confident that at all future elections the 1st Respondent will insist that adequate security be provided at all polling stations, and whenever there is no genuine, free, equal and secret poll at any polling station he will duly exercise his powers to annul an invalid poll and to order a re-poll. Those who seek to prevent a proper poll today must be made to understand that the 1st Respondent will ensure a proper poll tomorrow.

NATURE OF THE RIGHT CLAIMED BY THE PETITIONERS

It is not disputed that the Petitioners, being registered voters of the Kandy District, had a legal right to vote at that election, and that voting, in the exercise of that legal right, was a form of "expression" guaranteed by Article 14(1) (a), as I held in *Karunatileke v. Dissanayake*.⁽³⁾

Provincial Council elections are not expressly mentioned in Articles 4(e) and 93, and it was open to argument that the requirement that elections be “free, equal and by secret ballot” did not apply to such elections. Even though that requirement has not been expressly set out, in my view that requirement is fundamental to any election in any nation which respects the sovereignty of the People, representative democracy and the Rule of Law. I therefore hold that the right to a free, equal and secret ballot is an integral part of the citizen’s freedom of expression, when he exercises that freedom through his right - whether constitutional or statutory makes no difference - to vote.

Further, the constitutional duty of the Commissioner of Elections (under Article 104) extends to all elections conducted under any statute, including Provincial Council elections. The duty imposed by Article 4(d) on all organs of government to respect, secure and advance fundamental rights applies to him too, and it is therefore his obligation to conduct each and every election in such a manner as to safeguard the fundamental rights of every registered voter.

While it is clear that the rights of many voters (registered at the aforesaid 23 polling stations) to a free, equal and secret ballot were infringed, none of the Petitioners claims that he personally experienced even the slightest inconvenience or impediment whatsoever in regard to the exercise of his right to vote. Even the 4th Petitioner who was chased away from a polling station did not allege that this prevented him from voting.

Thus it appears that the irregularities complained of *directly* infringed only the right to vote of others. Do those infringements constitute in law an infringement of the *Petitioners’* fundamental rights under Articles 12(1) and 14(1) (a)? To answer that question, I must consider the true nature of a citizen’s right to vote.

Article 25 of the International Covenant on Civil and Political Rights is a useful starting point:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and *without unreasonable restrictions*:

(a) To take part in the conduct of public affairs, directly or through *freely chosen* representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and *equal suffrage* and shall be held by *secret ballot*, guaranteeing the *free expression* of the will of the electors;” [emphasis added]

Sri Lanka is a party to that Covenant and its sister Covenant, which together constitute the international Bill of Human Rights. It would be idle to argue that our election laws pertaining to Provincial Council elections are not founded on guarantees to every citizen of the right to “take part” in public affairs, through representatives *freely chosen* by him, at a *genuine* election, by universal and equal suffrage, held by *secret ballot*, ensuring the *free expression* of the will of the electorate. Article 27(15) requires the State “to endeavour to foster respect for international law and treaty obligations in dealings among nations.” Accordingly, in interpreting the relevant provisions of an enactment regulating *any* election a Court must, unless there is compelling language, favour a construction which is consistent with the international obligations of the State, *especially* those imposed by the international Bill of Human Rights. I hold that those guarantees are an essential part of the freedom of expression recognized by Article 14(1) (a).

The citizen’s right to vote includes the right to freely choose his representatives, through a genuine election which guarantees the free expression of the will of *the electors*: not just his own. Therefore not only is a citizen entitled *himself* to vote at a free, equal and secret poll, but he also has a right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs. Thus if a citizen desires that candidate x

should be his representative, and if he is allowed to vote for X but other like-minded citizens are prevented from voting for X, then his right to the free expression of the will of the electors has been denied. If 51% of the electors wish to vote for X, but 10% are prevented from voting - in consequence of which X is defeated - that is a denial of the rights not only of the 10% but of the other 41% as well. Indeed, in such a situation the 41% may legitimately complain that they might as well have not voted. To that extent, the freedom of expression, of like-minded voters, when exercised through the electoral process is a collective one, although they may not be members of any group or association.

That is by no means unique. A scrutiny of Article 14 reveals that many fundamental rights have both an individual and a collective aspect.

A citizen's freedom of speech guaranteed by Article 14(1) (a) is violated not only when he is not permitted to speak, but even when others are prevented from listening to him. A corollary of A's freedom of speech is A's right that those to whom he wishes to speak should be permitted to listen to him - provided of course that they want to listen to him. If a part of his audience is driven away, the effectiveness of the exercise of his freedom of speech is impaired, and thereby his right is infringed.

In the exercise of their freedom of expression, a thousand people - each unknown to the other - may decide to support a peaceful noise protest (*a Jana Ghosha* as in *Amaratunga v. Strimal*⁽⁴⁾). It may be organised by some association of which they are not members. If half of them are prevented from participating, that would reduce the effectiveness of the noise protest by the other half - and the latter's freedom of expression would also be infringed.

The freedom of peaceful assembly (under Article 14(1) (b)) is yet another example. If, in the exercise of that right, 50 citizens wish to meet together, but 45 are prevented from coming to the meeting place, that is an infringement of the rights even of the five who experienced no obstruction: true, their right to meet

has not been completely denied, but undoubtedly it has been so severely impaired as to be almost useless.

Article 14(1) (c), (d), (e), (f) and (g) expressly recognise that those freedoms have both an individual and a collective aspect. If ten citizens wish to form an association (whether a political party, a trade union, or a society), and the Executive restrains eight from joining, that necessarily affects also the freedom of the two who are not restrained; they cannot form the association which they wished to form, but only a pale shadow of it.

This is true of Article 14(1) (h) and (i). A citizen married to a non-citizen who wishes to reside in a particular locality may be told that he can live there, but not his spouse. His spouse cannot complain because it is only citizens who enjoy those rights. Particularly because the State is enjoined "to recognise and protect the family as the basic unit of society" (Article 27(12)), a citizen's choice of residence (or freedom of movement) is effectively denied if his spouse is not permitted to be with him. So also if a citizen is told that he can return to Sri Lanka, but not his non-citizen spouse.

The true value of a citizen's vote can never be ascertained in isolation; only collectively, taken together with the votes of others who think alike. To ignore that would set the bell tolling for democracy, for in this context:

"No man is an island, entire of itself,
Every man is a piece of the continent, a part of the main;.....
Any man's death diminishes me because I am involved in
mankind;
And therefore never send to know for whom the bell tolls;
It tolls for thee." (John Donne, *Devotions*)

I therefore hold that the failure of the 1st Respondent to ensure a genuine, free, equal and secret poll - a poll which gave

true expression to the will of *all* the electors - and following upon that, his failure thereafter to annul the poll, and to order a re-poll at all 23 polling stations aforesaid, infringed the right of the Petitioners to the freedom of expression under Article 14(1) (a), and to equality and equal protection under Article 12(1).

I must hasten to add that a genuine, free, equal and secret poll is not confined to what happens within the polling station, between 7.00 am and 4.00 pm on polling day. A genuine democratic election by universal and equal suffrage demands many other safeguards: including, but not limited to (a) proper and timely registration procedures, which ensure the speedy inclusion of all citizens entitled to vote and the exclusion of all those disentitled, as well as the prevention of dual registration and the impersonation of the dead and the absent; (b) ensuring that during the pre-election period all candidates are allowed the freedom to campaign on equal terms and without unreasonable restrictions, with election laws being enforced, and uniformly enforced, and without any misuse or abuse of State media, resources and facilities; and (c) the prevention of electoral wrongdoing, and whenever that is not possible, the prompt investigation and prosecution of election offences.

PRELIMINARY OBJECTIONS

At the commencement of the hearing, Mr. Marsoof took two “preliminary” objections: that persons against whom specific allegations had been made in the petition, in particular the SPO’s of the various polling stations and the Inspector-General of Police, had not been made respondents, and that the petition could not be maintained because a special procedure had been laid down in Part VII of the Act for investigating allegations of the kind set out in the petition, and other remedies were thereby excluded. Mr. Jayawardene submitted that the 16th Respondent was a private individual and his alleged conduct did not constitute “executive or administrative action.”

1. Non-Joinder

This objection could not be determined *in limine*, because the facts had first to be determined. This judgment is based on the defaults of the 1st and 2nd Respondents in relation to incidents at 23 polling stations; it does not depend on allegations against or defaults by the SPO's or the police, and the need to join them does not arise. The objection therefore fails. I express no opinion on the question whether the 1st Respondent could have been held responsible for the acts and defaults of his subordinates, whether joined or not.

2. Executive or administrative action

This, too, was not really a preliminary objection, because it depended on the facts as to the exact nature of the 16th Respondent's acts, and whether the principle in *Faiz v. Attorney-General*,⁽⁵⁾ was, applicable. Since Mr. Aziz later conceded that the Petitioners had failed to establish, on a balance of probability, that the 16th Respondent had participated in the incidents alleged against him, it is unnecessary to consider this objection in relation to the 16th Respondent.

However, it is necessary to decide whether the acts of the 12th to 15th Respondent (who were absent and unrepresented at the hearing although noticed) constituted "executive or administrative action" and whether there is any basis on which relief may be granted against them.

It was the duty of the 1st Respondent to permit polling agents to remain at the polling station, and to ensure that they were not compelled to leave. The 12th to 15th Respondents have not denied their involvement in chasing UNP polling agents from four polling stations, by means of violence, or the threat of violence, which effectively prevented the 1st Respondent (through his officers) from discharging the duty which he owed to the polling agents and the electorate.

Further, they were candidates at the election, and as such section 33(2) gave them (as well as the secretaries of recognized political parties) a special right to enter and remain at *any* polling station. On the other hand, the polling staff, the police, and the polling agents had a right only to remain in the particular polling station assigned to them, while voters could remain there only for the period necessary to vote. That right was not given to candidates in order to get support in one way or another, but to enable them to observe the conduct of the poll and to satisfy themselves that it was being conducted properly: i.e. that the executive functions of the 1st Respondent and his subordinates were being duly performed. By chasing away polling agents they abused their statutory right, and procured an executive or administrative injustice.

I hold that their conduct fell within the principle laid down in *Fatz v. Attorney-General*, and they were properly joined as respondents, thereby giving them an opportunity, which they did not make use of, to rebut the allegations made against them. However, the Petitioners have failed to pray for any relief against them, and hence none is ordered.

3. Special remedy by election petition

Mr. Marsoof submitted that an election petition under Part V11 of the Act is the exclusive remedy for the fair or effective determination of election disputes: that where a statute confers a right and provides for a special mechanism for its implementation, any infringement of that right should be redressed only by resort to the special mechanism provided by that statute; and that election disputes cannot be adjudicated in this Court in the guise of an application under Article 126.

In my view, a fundamental rights ("FR") application and an election petition are legal proceedings which are completely different in character, both in respect of the disputes and the remedies involved.

Any citizen can file an FR application, seeking redress for his own benefit, in respect of the executive violation of his constitutionally guaranteed rights; and such redress will extend to the quashing of impugned acts, directions to perform acts, and the award of compensation. An election petition, however, can be filed *only* by a candidate; only upon the limited grounds set out in section 92(1), which grounds not only include some types of "executive misconduct" but also extend to wrongdoing by a successful candidate; and the only redress which may be granted (section 96) is that an election in a particular district was void, that a successful candidate was not duly elected, and that some other candidate was duly elected. In this case, the Petitioners ask the Court to declare void the poll, and to order a re-poll, at certain polling stations - relief which could not have been granted in an election petition. What is more, the former involves a constitutional right, a constitutional remedy, and a constitutional jurisdiction vested in the highest Court. Ordinary post-Constitution legislation may validly confer new jurisdictions (including election petition jurisdiction) on the Court of Appeal, but cannot dilute or diminish any constitutional jurisdiction of this Court.

Mr. Marsoof attempted to get over these difficulties by contending that "when a candidate files an election petition he does so on behalf of all (sic) the voters in a representative capacity, and the petition becomes a matter in which the whole electorate, not to say the whole country, has an interest," citing *Don Alexander v. Fernando*.⁽⁶⁾ That decision does not in any way support the plainly fallacious proposition that a candidate ever acts on behalf of *all* the voters, including those who opposed him. Further, even where his own supporters have been prejudiced, he may refrain from filing an election petition for reasons of his own. And even if he does file an election petition, because his supporters have been affected by wrongdoing, he cannot seek or obtain any relief for them - but only in respect of the election.

I therefore reject that preliminary objection.

ORDER

Section 50 of the Act lays down the procedure for the count. Each ballot box is opened; after the ballot papers are counted, the ballot papers taken from *all* the boxes for that counting centre are mixed together; and they are then counted. While the ballot papers of Polwatta were excluded from the count, the ballot papers from each of the other 22 polling stations are now mixed with the ballot papers from other polling stations assigned to the same counting centre. Accordingly, if the poll at those polling stations were now annulled, it would be virtually impossible to extract and exclude those ballot papers; and unless that is done a re-poll would be futile.

But even assuming that the removal of those ballot papers is possible, a re-poll contemplates a prompt poll by the same electors. If ordered under section 46A(7) (a) a re-poll should have been held within a few days, and without any change in the electoral list. If a re-poll is ordered now, nearly two years later, the electorate would not be the same: if the old electoral list is used, some of the voters would no longer be living; and if the current list is used, it would include new electors who were not eligible previously.

It is therefore not feasible for this Court now to order the 1st Respondent to declare the poll to be void, and to order a re-poll, at the aforesaid polling stations as prayed for by the Petitioners.

I grant the Petitioners a declaration that their fundamental rights under Articles 12(1) and 14(1) (a) have been infringed by the failure of the 1st Respondent to conduct a proper poll at the aforesaid 23 polling stations; to hold proper inquiries into the incidents of ballot-stuffing and chasing away polling agents; to declare void the poll at the 23 polling stations aforesaid (other than Polwatta); and to order a re-poll at those 23 polling Stations.

The Petitioners have not prayed for compensation. However, they have come to Court to vindicate important fundamental rights, and are entitled to costs. The 1st Respondent made an honest effort - although inadequate - to ensure a genuine election, but was not given the necessary support and resources. An order for costs against him would not be just. The State is directed to pay the Petitioners a sum of Rs 50,000 as costs.

WADUGODAPITIYA, J. - I agree.

ISMAIL, J. - I agree.

Relief granted.