

Official acts of the President are executive actions and a state officer who acts in reliance of the lawfulness of the President's action can be held responsible for violation of fundamental rights.

Karunathilaka v Dissanayake (1999) 1 SLR 157

The Commissioner of Elections fixed a date for the holding of Provincial Council elections. The President acting under the Public Security Ordinance (PSO) published a Proclamation declaring a 'State of Emergency' and by an Emergency Regulation cancelled the date for the poll. The Commissioner took no steps to hold the elections or to fix a fresh date. Two voters petitioned the Supreme Court that their rights under Article 14 (1) (a) were infringed. It was contended on behalf of the Commissioner that the court lacked jurisdiction by virtue of Article 35 and the ouster clause in section 8 of the PSO.

FERNANDO J (GPS DE SILVA CJ and GUNASEKARA J agreeing)

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

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

I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one, which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct. It is for that reason that this Court has entertained and decided questions in relation to emergency regulations made by the President (see *Joseph Perera v A-G* (1992) 1 Sri LR 199,230, *Wickremabahu v Herath* (1990) 2 Sri LR 348, 361, 374 and Presidential appointments see *Silva v Bandaranayake* (1997 1 Sri LR 92). It is the respondents who rely on the Proclamation and Regulation, and the review thereof by the Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President."