

Failure by elective officers to ensure a free and fair election and thereby many voters were prevented from voting is a violation of their right to freedom of expression.

Mediwake v Dissanayake (2001) 1 SLR 177

Four registered voters at a Provincial Council Election, all members of the same political party alleged election malpractice at several polling stations, which could have affected the final result of the election for that District. They complained that the failure of the Commissioner of Elections to declare void the poll at the affected polling stations and to order a re-poll was a violation of their rights guaranteed by Article 14 (1) (a).

FERNANDO J (WADUGODAPITIYA J and ISMAIL J agreeing)

(His Lordship examined the law relating to Provincial council Elections, the incidents that were alleged to have taken place at polling stations, the votes polled by the three parties and the preferential votes for candidates, the 'nature' of the result of a Provincial Council Election, and concluded that a re-poll ought to have been ordered by the Commissioner. His Lordship proceeded to consider whether the petitioners' freedom of expression was not affected.)

"...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 *Karunathilleke v Dissanayake* (1999) 1 SLR 157.

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 Peoples, 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- 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 claimed 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 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 the 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 dealing 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 included the right to freely choose his representatives, through a genuine election which guarantees the 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 a 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 consequences 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 been 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. 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 Sirimal*, (1993) 1 SLR 264). It may be organized 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 of protest by other half- and the latter's freedom of expression would thereby 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 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 even 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;
Any 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 electors- and following upon that, his failure thereafter to annul the poll, and to order a red-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 those citizens entitled to vote and 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.¹

¹ The Senior Presiding Officers of the polling stations where incidents had taken place were not made parties to the action but this objection was dismissed on the ground that the decision did not depend on allegations against or defaults by them. The candidates of one contesting political party were made respondents and they did not file objections. The court was of opinion that their failure to deny their involvement in chasing away polling agents could mean that they had abused their statutory right to enter any polling station and procured executive or administrative injustice; their conduct fell within the principle laid down in *Faiz v Attorney General* (1995) 1 SLR 372 the court held that the existence of a special remedy for election malpractice did not preclude a fundamental rights application.