PREMACHANDRA
v.
MAJOR MONTAGUE JAYAWICKREMA AND ANOTHER
(PROVINCIAL GOVERNORS' CASE)

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
BANDARANAYAKE, J.,
FERNANDO, J.
S.C. REFERENCE NOS. 2/93 & 3/93.
C.A. APPLICATION NOS. 376/93 & 377/93.
S.C. REFERENCE NOS. 4/93 & 5/93.
C.A. APPLICATION NOS. 378/93 & 379/93.
JULY 07, 08 AND 09, 1993.

Provincial Councils – Governors' duty to appoint the Chief Ministers – Constitution Article 154F – Appointment of UNP contenders as Chief Ministers – Quo Warranto, Certiorari and Mandamus – Article 154F (4) of the Constitution excluding the proviso – Article 154F (2) and (6) of the Constitution – Reference under Article 125 of the Constitution – Governor's powers – Justiciability of the exercise of the Governor's power and discretion – Judicial review – Infringement of fundamental rights – Constitution, Article 12(1) and (2) – Reference under Article 126(3) to Supreme Court of only the "question" of infringement of a fundamental right – Validity of such reference.

Three recognised political parties – the United National Party (UNP), the Democratic United National Front (DUNF) and the Podujana Eksath Peramuna (PEP) – contested the North-Western and Southern Provincial Council Elections held on 17.5.93. No party gained an absolute majority. In the North-Western Province Elections the UNP won 25 seats, the PEP won 18 seats and the DUNF won 9 seats. In the Southern Province the UNP won 27 seats, the PEP won 22 seats and the DUNF won 6 seats.

The Governors of the two Provinces (Major Montague Jayawickrema, Governor of the North-Western Province and M. A. Bakeer Markar, Governor of the Southern Province) were required to appoint Chief Ministers under Article 154F of the Constitution. The Governors of the two Provinces were faced with rival claims for appointment as Chief Minister – between G. M. Premachandra of the DUNF, Petitioner and Gamini Jayawickrema Perera of the UNP (2nd respondent) in the North-Western Province Provincial Council (S.C. Reference 2/93 & 3/93) and between Amarasiri Gardiyage Hewawasam Dodangoda of the PEP (Petitioner) and M. S. Amarasiri of the UNP (2nd respondent) in the Southern Province

Provincial Council. (S.C. Reference 4/93 & 5/93). On 21.5.93 the Governor of the North-Western Province (Major Montague Jayawickrema) and the Governor of the Southern Province (M. A. Bakeer Markar) appointed the UNP contenders as Chief Ministers of the two Provinces.

Each Petitioner thereupon filed two applications in the Court of Appeal: one for **Quo Warranto** questioning the 2nd respondent's legal right to hold office as Chief Minister and the other for **Certiorari** to quash the appointment of the Chief Minister and **Mandamus** to compel the Governor to appoint the Petitioner as Chief Minister. The four applications were taken up for hearing together in the Court of Appeal.

As questions of constitutional interpretation arose, the following questions for reference under Article 125 to the Supreme Court were agreed on:

"1. Whether the exercise of the power vested in the Governor of a Provincial Council (sic) under Article 154F (4) of the Constitution (excluding the proviso) is solely a matter for his subjective assessment and judgment and therefore not subject to review by Court?

2. Whether the power exercised by such Governor under Article 154F (4) of the Constitution (excluding the proviso) and any act done in consequence thereof is not justiciable, and is essentially a matter political in nature?

3. Whether a decision made by such Governor under Article 154F (4) of the Constitution (excluding the proviso) as to the appointment of a Chief Minister of a Provincial Council could be called in question or set aside by any Court by reason of the provisions of Article 154F (2) of the Constitution?

4. Whether the decision of the Governor under Article 154F (4) of the Constitution (excluding the proviso) is not subject to judicial review on the basis that such decision does not deny or infringe any legal right of the petitioner in each case?

5. Whether the Court should not exercise such review on the basis that there is an alternative remedy provided by the Constitution whereby the Governor's decision can be tested in the Council?

Held:

1. There was no proper reference of the matter under Article 126(3) as it was not of the entire "matter" and only the reference under Article 125 required consideration by the Supreme Court. On the objection taken in the Court of Appeal that Court should at least have inquired whether the Chief Ministers wished to furnish additional affidavits, and being an *inter partes* proceeding, the Court should not have reached a finding that there was a *prima facie* evidence of an infringement of a fundamental right without hearing submissions on behalf of the Chief Minister.

2. It is a cardinal maxim that every power has legal limits, however wide the language of the empowering Act. If the Court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful.

3. There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.

4. The Governor is given a discretion in order to enable him to select as Chief Minister the representative best able to command the confidence of the Council, and thereby to give effect to the wishes of the people of the Province. That discretion is not given for any other purpose personal or political.

5. Answers to reference under Article 125:

(i) The exercise of the powers vested in the Governor of a Province under Article 154F (4), excluding the proviso, is not solely a matter for his subjective assessment and judgment: it is subject to judicial review by the Court of Appeal. In applications for *Quo Warranto, Certiorari* and *Mandamus*, the Court of Appeal has power to review the appointment, *inter alia*, for unreasonableness, or if made in bad faith, in disregard of the relevant evidence, or on irrelevant considerations or without evidence.

(ii) The Governor's selection of a person for appointment as Chief Minister, under Article 154F (4), excluding the proviso, may require the consideration of political factors, nevertheless it is not an act which is purely political in nature, it involves the determination of legal rights, flowing from constitutional provisions concerning the allocation and exercise of powers (relating to the administration of the affairs of the Province) by the elected representatives of the people of the Province. The appointment of a Chief Minister is justiciable, and there is no self-imposed rule or judicial restraint which inhibits judicial review.

(iii) Where a question arises as to whether the Governor must act on advice, or in his discretion, Article 154F (2) requires him to decide that question; Article 154F (2) makes his decision on that question final and precludes anything thereafter done by the Governor being called in question in any Court on the limited ground "that he ought or ought not to have acted in his discretion"; that provision does not apply to the appointment of a Chief Minister under Article 154F (4).

(iv) The Governor's decision involves a constitutional power and the duty of the Governor, and a constitutional right of the Petitioners (in common with

the other Councillors) to the proper exercise of such power and duty; judicial review is not excluded.

(v) This does not raise any question relating to the interpretation of the Constitution.

Cases referred to:

1. *Chandrasekeram v. A.G.* – SC References 1-3/92, SC Minutes of 29.6.92.
2. *Baker v. Carr* (1962) 369 US 186.
3. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K. B. 223
4. *Bhut Nath v. State of West Bengal* AIR 1974 SC 806, 811.
5. *Rooke's Case* (1598) 5 Co. Rep. 99 b.
6. *Roberts v. Hopwood* [1925] AC 578, 613.
7. *United States v. Wunderlich* [1951] 342 US 98, 101.
8. *Hirdaramani v. Ratnavale* [1971] 75 NLR 67, 82.
9. *Liversidge v. Anderson* (1942) A.C. 206.
10. *R. v. I.R.C. ex. p. Rossminister Ltd.* [1980] A.C. 952.
11. *Secretary of State for Education v. Tameside* [1977] A.C. 1014, 1047.
12. *Adegbenro v. Akintola* [1963] 3 All E.R. 544, 551.
13. *Dinesh Chandra v. Charan Singh* AIR 1980 Delhi 114, 117.
14. *Madan Murari v. Charan Singh* AIR 1980 Calcutta 95.
15. *Dissanayake v. Kaleel* SC (Special) Nos. 4-11/91 S.C. Minutes of 3.12.91.
16. *State of Rajasthan v. Union of India* AIR 1977 SC 1361, 1412 – 13.
17. *Nixon v. Harndon* (1926) 273 US 536.
18. *Brown v. Board of Education* (1953) 347 US 483.
19. *Council of Civil Service Unions v. Minister for Services* [1985] 1 AC 374, 418.
20. *U.N.R. Rao v. Smt. Indira Gandhi* 1971 (Supp. S.C.R. 46)
21. *R. v. Governor of Wormwood Scrubbs Prison* [1920] 2 K. B. 305.
22. *The King v. Halliday* [1917] A.C. 160, 170.
23. *Jogendra Nath v. State of Assam* AIR 1982 Gauhati 25, 34.

Reference under Article 125 and 126(3) of the Constitution (see Judgment of Court of Appeal reported in [1993] 2 Sri L.R. 294.

H. L. de Silva, P.C. with *R. K. W. Goonesekera, Gomin Dayasiri, Nihal Jayamanne, P.C., Nimal Siripala de Silva, Nigel Hatch, Elmo Perera, N. M. Musafer* and *M. N. Amerasinghe* for the Petitioners.

Tilak Marapana, P.C., Attorney-General, with *K. C. Kamalasabayson, D.S.G., Kumar Paul S.C., W. D. D. de Alwis S.C.* for the 1st Respondent (Governors).

L. C. Seneviratne, P.C. with *S. C. Crosette-Thambiah, D. H. N. Jayamaha, Daya Pelpola, Naufel Abdul Rahuman, Lakshman Perera, Ronald Perera* and *A. Brito-Muthunayagam* for the 2nd Respondent.

Cur. adv. vult.

August 16, 1993.

G. P. S. DE SILVA, C.J. READ THE FOLLOWING ORDER OF THE COURT:

ORDER OF THE COURT:

Three recognised political parties – United National Party ("UNP"), the Democratic United National Front ("DUNF") and the Podujana Eksath Peramuna ("PEP") – contested the North-Western and Southern Provincial Council Elections held on 17.5.93. No party gained an absolute majority. The official results announced on 19.5.93 were:

	North-Western Province	Southern Province
UNP	25	27
PEP	18	22
DUNF	9	6

The Governors of the two Provinces were required to appoint Chief Ministers, under Article 154F of the Constitution, which provides:

> "(1) There shall be a Board of Ministers with the Chief Minister at the head and not more than four other Ministers to aid and advise the Governor of a Province in the exercise of his functions. The Governor shall, in the exercise of his functions, act, in accordance with such advice, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion.
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> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question in any Court on the ground that he ought or ought not have acted in his discretion. The exercise of the Governor's discretion shall be on the President's directions.

(3). The question whether any, and if so what, advice was tendered by the Ministers to the Governor shall not be inquired into in any Court.

(4) The Governor shall appoint as Chief Minister, the member of the Provincial Council constituted for that Province who, in his opinion, is best able to command the support of a majority of the members of that Council;

Provided that where more then one-half of the members elected to a Provincial Council are members of one political party, the Governor shall appoint the leader of that political party in the Council as Chief Minister.

(5) The Governor shall, on the advice of the Chief Minister, appoint from among the members of the Provincial Council constituted for that Province, the other Ministers.

(6) The Board of Ministers shall be collectively responsible and answerable to the Provincial Council."

The proviso to Article 154F (4) did not apply as the UNP did not have more than one half of the total number of Councillors in both Provinces. The Governors of the two Provinces were faced with rival claims for appointment as Chief Minister; in the North-Western Province, between the Petitioner in CA Application Nos. 376/93 and 377/93, a DUNF Councillor, and the 2nd Respondent, a UNP Councillor; in the Southern Province, between the Petitioner in CA Application Nos. 378/93 and 379/93, a PEP Councillor, and the 2nd Respondent, a UNP Councillor.

Between 19.05.93 and 21.05.93, the Petitioners repeatedly asserted, both orally and in writing to the respective Governors, that they were able to command the confidence of the respective Councils; each submitted documentary evidence consisting of a letter dated 19.05.93 signed by the Secretaries of the two parties that their Councillors had decided to work together to form the Provincial Council administration, as well as written declarations and affidavits from all those Councillors manifesting their support for the Petitioners.

The 2nd Respondent, in each case, submitted a letter dated 19.05.93 to the Governor, in which he claimed that he was able to command the support of a majority of the members of the Council, but did not explain how he expected to obtain this majority; however, he orally informed the Governor that he had discussions with (unidentified) Councillors from the other parties and that he was confident of obtaining additional support from a few Councillors; on the morning of 21.05.93 he again met the Governor, and asserted that he was certain of obtaining the necessary additional support, as some Councillors (again unidentified) had assured him of their support that same morning; he gave the Governor a letter referring to these matters, and requested that he be appointed Chief Minister and given the opportunity to prove, in the Council, that he commanded the support of the majority of the Council. On the same day, both Governors appointed the UNP contenders as Chief Ministers of the two Provinces.

Each Petitioner thereupon filed two applications in the Court of Appeal; one for *Quo Warranto* questioning the 2nd Respondent's legal right to hold office as Chief Minister, and the other for *Certiorari* to quash the appointment of the Chief Minister, and *Mandamus* to compel the Governor to appoint the Petitioner as Chief Minister.

The four applications were taken up for hearing together in the Court of Appeal on 21.06.93. On the next day, in response to an inquiry from the Court, Mr. L. C. Seneviratne, P.C., appearing for the Chief Ministers, made his submissions in regard to certain preliminary objections of law. The Court and all Counsel agreed that questions of constitutional interpretation arose, and Counsel were invited to assist Court by framing those questions. At this stage, for the first time and without prior notice to the Respondents, Mr. H. L. de Silva, P.C., appearing for the Petitioners, submitted that he desired to make an application for a reference under Article 126 (3) as well. After a short adjournment, the questions for reference under Article 125, as agreed to by all Counsel, were read out in open court, and then finalised as follows:

> "(1) Whether the exercise of the power vested in the Governor of a Provincial Council [sic] under Article 154F (4) of the Constitution (excluding the proviso) is solely a matter for his subjective assessment and judgment and therefore not subject to review by Court ?

(2) Whether the power exercised by such Governor under Article 154F (4) of the Constitution (excluding the proviso) and any act done in consequence thereof is not justiciable, and is essentially a matter political in nature?

(3) Whether a decision made by such Governor under Article 154F (4) of the Constitution (excluding the proviso) as to the appointment of a Chief Minister of a Provincial Council could be called in question or set aside by any Court by reason of the provisions of Article 154F (2) of the Constitution?

(4) Whether the decision of the Governor under Article 154F (4) of the Constitution (excluding the proviso) is not subject to judicial review on the basis that such decision does not deny or infringe any legal right of the petitioner in each case?

(5) Whether the Court should not exercise such review on the basis that there is an alternative remedy provided by the Constitution whereby the Governor's decision can be tested in the Council?

Thereupon, Mr. de Silva made a formal application for a reference under Article 126(3) stating that the evidence disclosed that the Governors' acts involved an infringement of Article 12 (1) and (2). Mr. Seneviratne pointed out that an allegation of the infringement of a fundamental right under Article 12 had neither been pleaded, nor even referred to in the oral submissions made on 21.06.93; he further submitted that the Court of Appeal should hear all parties before coming to a finding (for the purpose of making a reference under Article 126(3)), that there was *prima facie* evidence of an infringement or imminent infringement of a fundamental right.

Without any such hearing, the Court of Appeal recorded the submissions made on behalf of the Petitioners, and made the following order:

"Having considered the submission of Counsel, we are of the view that there is *prime facie* evidence of an infringement of the fundamental rights of the Petitioners as submitted by learned President's Counsel for the petitioners. We accordingly refer the

infringement for determination by their Lordships of the Supreme Court, in terms of Article 126 (3) of the Constitution."

It is manifest that the Court of Appeal did not refer the four pending applications in their entirety, but only the "question" of the **infringement** of a fundamental right.

1. VALIDITY OF THE REFERENCE UNDER ARTICLE 126(3)

A reference can be made under Article 125 only of a "question" of constitutional interpretation; the Court making the reference retains jurisdiction in respect of the case, and would ultimately decide the case, applying the interpretation given by this Court. However, a reference under Article 126 (3) is not of "question", but of the "matter" in its entirety (see *Chandrasekeram v. A.G.*, [1]). The Court of Appeal did not refer the four pending applications, or "matters", in their entirety. The jurisdiction of this Court is defined by the Constitution. This Court has no original jurisdiction over these four pending writ applications, and could acquire such jurisdiction only if those "matters" were properly referred by the Court of Appeal.

It was suggested that this was only a technical irregularity, and that this Court should proceed as if the Court of Appeal had intended to refer the entire matter. It is clear from the proceedings of 21.06.93 and 22.06.93 that the Court of Appeal was troubled by the preliminary objections, particularly the preclusive clause. It was a reference under Article 125 that the Court was primarily concerned about – and that is consistent with an intention to retain its jurisdiction to hear and determine the four applications. When the question of the infringement of a fundamental right was suddenly raised, the Court seems to have desired the advantage of having that question too finally determined by this Court; but there is nothing to suggest that the Court of Appeal even at that stage wished to divest itself, totally, of its jurisdiction over the pending applications. Such an intention to divest itself of jurisdiction cannot lightly be attributed to the Court of Appeal. We are faced with two inconsistent references. Upon the reference under Article 125, the Court of Appeal retained jurisdiction in respect of the "matter", which this Court could not determine; upon

a proper reference under Article 126 (3) the "matter" would have come for determination to this Court, which would not have had to advise the Court of Appeal upon the questions which troubled them. We have therefore to act on one or the other. We hold, that there was no proper reference of the matter under Article 126 (3), and that only the reference under Article 125 requires our consideration.

Even if this Court did have some discretion to treat the reference under Article 126 (3) as being of the entire "matter", there are good reasons why that discretion should not be exercised. The writ jurisdiction is traditionally available to review the decision-making process, and not the correctness of the decision itself – except, to a limited extent, on the ground of unreasonableness. It may well be, as Article 126 (3) suggests, that today the writ jurisdiction under Article 140 of the Constitution has expanded to permit a direct challenge to the merit of a decision, even on the facts, for infringement of fundamental rights; if so, an allegation that the Governors had exercised their discretion under Article 154F (4) in a manner violative of Article 12 could properly have been included in the applications for *Certiorari*. But the Petitioners did not plead this at the outset, nor did they seek to amend their pleadings, and thus the issues of fact and law arising for determination were not made clear; nor were the Respondents given the opportunity of answering that specific charge. It is true, as submitted on behalf of the Petitioners, that it was the Governors acts that were being impugned as violative of fundamental rights; and that the learned Attorney-General, on their behalf, did not complain of any lack of opportunity to tender additional evidentiary material, and invited this Court to determine the whole matter. But it was not the Governors alone who had an interest in defending their acts, for the Chief Ministers (being parties claiming rights flowing from such acts), were also entitled to be afforded a proper opportunity of justifying those acts. Mr. Seneviratne objected to the reference both in the Court of Appeal and in this Court. We are of the view that when that objection was taken in the Court of Appeal, that Court should at least have inquired whether the Chief Ministers wished to furnish additional affidavits; and being an *inter partes* proceeding, the Court should not have reached a finding that there was *prima facie* evidence of an infringement of a fundamental right without hearing submissions on behalf of the Chief Ministers.

2. REFERENCE UNDER ARTICLE 125

The questions referred to this Court primarily involve two basic issues. Is the exercise of the power vested in the Governor of a Province (and not of the Provincial Council as stated in the reference) under Article 154F(4), excluding the proviso, immune from judicial review, either because it is a purely subjective discretion, or because it is intrinsically of such a (political) nature that it is not fit for judicial review ? In any event, has judicial review been excluded by Article 154F(2) or Article 154F(6)?

It is unfortunate that these questions have not been framed with greater precision, to enable this Court to express its opinions on the real matters which arise in the case. As framed, the answer "No" to questions (1) and (2) will be of little assistance to the Court of Appeal in determining the grounds on which judicial review is permissable. The function of this Court under Article 125 is not to attempt to provide comprehensive answers (to abstract or academic questions) setting out all the available grounds of judicial review, but rather to provide answers for the questions which actually arose in the course of the proceedings in the Court of Appeal. It would have been far more satisfactory if, after hearing parties, the questions had been framed with specific reference to the grounds of challenge relevant to, and arising from the facts of, the pending applications. However, the learned Attorney-General and Mr. de Silva urged that this Court should proceed to elaborate a negative answer by indicating, although not exhaustively, at least some of the relevant grounds of review. To avoid further delay, in a matter of undoubted urgency and public importance to two Provinces, we will endeavour to answer the questions with some degree of elaboration.

3. GOVERNOR'S DISCRETION UNDER ARTICLE 154F(4)

The Petitioners' first contention was that the exercise of the Governor's discretion was subject to review according to the same norms, principles and tests applicable in public law to other discretions; thus, it was reviewable, *inter alia*, for unreasonableness, or if made in bad faith, or in disregard of the relevant evidence, or on

irrelevant considerations, or without evidence. Secondly, the fact that the exercise of that discretion involves political considerations does not make it a "political question", of the kind which in U.S. Constitutional law (cf. *Baker v. Carr* [2]), is sometimes regarded as not justiciable; in any event, that doctrine was evolved in the context of the strict separation of powers in the U.S. Constitution, as a means of ensuring that each organ of government accords a measure of deference to the decisions of the others, within their legitimate spheres of competence. Our Constitution does not embody a separation of powers; judicial power is vested in Parliament, and exercised through the Judiciary; thus there are some matters wherein the judicial power is exercisable directly or exclusively by Parliament. Finally, the Constitution expressly provides for certain matters wherein the Judiciary is required to consider matters with a political flavour (e.g. Articles 38(2)(d), 99(13)(a)), thereby indicating that our law does not recognise any such exclusion or restriction.

On behalf of the Chief Ministers it was submitted that the phrase "in his opinion" conferred on the Governor a purely subjective discretion; whom to appoint as Chief Minister was a matter solely and exclusively for the Governor's subjective assessment and judgment. In any event, the decision was essentially political in nature, and for that reason, too, was not reviewable; it could be tested only by means of a vote in the Provincial Council; and, by virtue of Article 154F(6) that was the only remedy.

The learned Attorney-General submitted that while there was a right of review on the ground of want or excess of jurisdiction (including error of law), there was only a very limited right of review on other grounds. Article 154F(4) conferred on the Governor a purely subjective discretion, which could be challenged on the ground of *Wednesbury* [3] unreasonableness (in a broad sense, including "no evidence", and violation of fundamental rights). Further, this was a political question beyond review (cf *Bhut Nath v. State of West Bengal* [4]) not because of a constitutional taboo, but because of the inadequacy of the Court to decide it; it was a discretion inherently unsuitable for judicial review; it was a restraint not imposed by law, but judicially self-imposed because the judicial process is not

equipped to deal with such issues (Clive Lewis, Judicial Remedies in Public Law, p. 123).

When considering whether the exercise of a statutory power or discretion, especially one conferred by our Constitution, is subject to review by the judiciary, certain fundamental principles can never be overlooked. The first is that our Constitution and system of government are founded on the Rule of Law; and to prevent the erosion of that foundation is the primary function of an independent Judiciary.

> ". . . The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law . . .
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> That is the principle of legality. But the rule of law demands something more, since otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law . . . The secondary meaning of the rule of law, therefore, is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power . . ." (Wade, Administrative Law, 5th ed., p. 22).
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> ". . . If merely because an Act says that a minister may 'make such order as he thinks fit', or may do something 'if he is satisfied' as to some fact, the court were to allow him to act as he liked, a wide door would be opened to abuse of power and the rule of law would cease to operate.
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> It is cardinal axiom, accordingly, that every power has legal limits, however wide the language of the empowering Act. If the court finds that the power has been exercised oppressively or

unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful. Although lawyers appearing for government departments often argue that some Act confers unfettered discretion, they are guilty of constitutional blasphemy. Unfettered discretion, cannot exist where the rule of law reigns. The notion of unlimited power can have no place in the system. The same truth can be expressed by saying that all power is capable of abuse, and that the power to prevent abuse is the acid test if effective judicial control . . ." (Wade, 5th ed., p. 37).

The second principle seems to flow from the first. As Wade observes:

> . . . Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.
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> The powers of public authorities are therefore essentially different from those of private persons. A man making his will may subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon the lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

> . . . It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law." (pp. 353-354).

But *Rooke's case*[5], suggests that, independently of the Rule of Law, discretions are also limited by the "rule of reason":

> ". . . and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections . . ."

In *Roberts v. Hopwood*[6], Lord Wrenbury said:

> "A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the excercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

Justice Douglas of the United States Supreme Court observed, dissenting, in *United States v. Wunderlich*,[7]:

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.

We have no doubt whatsoever as to the purpose for which Article 154F(4) gave the Governor a discretion. By the exercise of the franchise the people of each Province elect their representatives, for the purpose of administering their affairs. The Governor is given a discretion in order to enable him to select as Chief Minister the representative best able to command the confidence of the Council, and thereby to give effect to the wishes of the people of the Province. That discretion is not given for any other purpose, personal or political. On behalf of the Chief Ministers Mr. Seneviratne contended that the phrase "In his opinion" made the Governor's discretion completely subjective and immune from review. He was asked whether the Governor's decision could be questioned if – motivated by bribery, nepotism, or other improper considerations, or influenced by a foreign power – the Governor appointed as Chief Minister a person whom he did not in fact consider to be best able to command the confidence of the Council. His reply was that such an appointment would be no appointment at all, similar to an appointment procured by duress, and could be declared void. But it is a court which must decide such issues, and it is because judicial review is available that a court can so decide. Further, Mr. Seneviratne's reply demonstrates that the exercise of the Governor's discretion **is** subject to Judicial review on the ground that he did not in fact entertain the requisite opinion. This has long been recognised, even in relation to a power which can be exercised merely because of the opinion that it is necessary to exercise it; thus in *Hirdaramani v. Ratnavale* [8] it was held that such a decision could be challenged by showing that the stated opinion was incorrect, untrue or manifestly absurd or perverse (p. 79) or "unreasonable or irrational" (p. 82). And that was before the authority of *Liversidge v. Anderson* [9], was finally swept away by *R. v. I.R.C., ex P. Rossminister Ltd.*[10], precluding undue judicial deference to subjective executive opinion. I am also in agreement with Mr. H. L. de Silva, P.C., that in

this case we are not called upon to consider an intrinsically subjective opinion – such as "the member who, in his opinion, is best suited to be Chief Minister" or "best able to serve the Province"; that might have approached the realm of "pure judgment" *(Secretary of State for Education v. Tameside.*[11]). It is true that the requisite opinion does not relate to past facts, and calls for "judgment", i.e. an assessment of future support; but it is not "pure judgment", for that assessment of support cannot be made in total disregard of existing facts. It necessarily requires a consideration of expressions of support or opposition by Councillors, whether made in the Council or outside (cf. *Adegbenro v. Akintola.*[12]).That opinion thus involves an objective element, and is more readily subject to judicial review than "opinion" of the kind considered in *Hirdaramani v. Ratnavale* [8].

Mr. Seneviratne cited several Indian cases in support of his contention that the Governor's decision was purely subjective. However, there are three significant differences between the Indian and Sri Lankan provisions. Article 154F(4) lays down the criterion which must guide the Governor's decision – the ability to command the support of a majority – but the Indian Article 163 does not specify any guideline; further, under the latter provision "Ministers shall hold office during the pleasure of the Governor"; and Article 361(1) precludes judicial review of the Governor's acts. In any event, none of those cases support the proposition contended for. They dealt with situations in which the Governor acted in his discretion; it was contended that he should have acted on advice (of a Chief Minister who had lost the confidence of the State Assembly); applying Article 163(2) – which corresponds to our Article 154F(2) – it was held that the Governor's act could not be questioned on that ground that he should have acted on advice, because Article 163(2) entrusted that decision to him alone.

Mr. Seneviratne also cited *Dinesh Chandra v. Charan Singh* [13], and *Madan Mural v. Charan Singh*[14], which dealt with the exercise of the President's powers, under Articles 74 and 75 of the Indian Constitution, in respect of the appointment of the Prime Minister. These are of very little assistance for several reasons. The relationship between President and Prime Minister, is not necessarily the same as that between Governor and Chief Minister, especially in

a non-federal system. Further, in those cases there is not even an *obiter dicta* that the Presidents' act was outside review; on the contrary, the propriety of the President's act was examined by reference to conventions and precedents, and upheld. In that respect, the Privy Council decision in *Adegbenro v. Akintola* [12], is similar. Although the Governor was invested with responsibilities that require of him "delicate political judgment", the Privy Council did not, for that or any other reason, hold that judicial review was excluded.

(b). "POLITICAL QUESTIONS"

We have next to consider the submission that the appointment of a Chief Minister was a "political question" and that Article 154F(6) provided the appropriate remedy to test a Governor's decision as to the person best able to command the confidence of a Provincial Council.

We are unable to accept the Petitioners submission that the exclusion of "political questions" from judicial review in the U.S. being a consequence of the separation of powers, there is no similar exclusion under our law because there is no separation of powers under our Constitution. Although Article 4(c) vests judicial power in Parliament, yet there is a functional separation of powers inasmuch as judicial power can only be exercised by courts and other judicial tribunals, subject only to one exception in regard to Parliamentary privilege. And even in that field, when Parliament acts as an institution directly exercising judicial power, there is no express exclusion or exemption from judicial review under Article 140 (cf. *Dissanayake v. Kaleel* [15]). The Superior Courts are thus **functionally** a separate and co-ordinate organ of government; its power of judicial review cannot be less than that of a body to Parliament; it is illogical to contend that "political questions" are excluded from review by the Judiciary if it is an organ of government co-ordinate with the other organs of government, but are reviewable by the Judicary if it is a subordinate organ.

Mr. Seneviratne relied on *Baker v. Carr* [2], where the U.S. Supreme Court laid down certain guidelines for indentifying "political questions" excluded from judicial review:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

With regard to the first and the fourth of these guidelines, we must unhesitatingly reject any suggestion that a Provincial Governor may be regarded as a branch of government "co-ordinate" to either of the Superior Courts, although the position would be different in the case of the President and Parliament. No policy decision of the kind contemplated by the third guidelines arises here: the Governor is to be guided not by any considerations of policy, but solely by an assessment of support in the Council. Certainly there is no "political decision already made" to which "unquestioning adherence" is needed; "multifarious pronouncements" on this matter and consequent embarrassment are not possible; thus the fifth and sixth guidelines are inapplicable. In regard to the second guideline, standards for determining political support are certainly elusive, but that matter for judicial decision here is not whether the Governor's assessment was correct, but only whether his decision-making process was flawed, and there is no "lack of judicially discoverable and manageable standards" for resolving that question. Not only does *Baker v. Carr* not support the contention that the Governor's decision was purely political, but the majority in that case held to be justiciable a question relating to the delimitation of electoral districts, although that was a matter having a long (U.S.) history of political involvement.

All statutory powers have legal limits; "the real question is whether the discretion is wide or narrow, and where the legal line is to be drawn"; and it is the Judiciary which is entrusted with the

responsibility of determining those questions. When it comes to powers and discretions conferred by the Constitution, it is the special responsibility of the Judiciary to uphold the constitution by preventing excess or abuse by the Legislature or the Executive. Any exception to these principles must be clearly and expressly stated. We are in respectful agreement with the observations of Bhagwati, J., as he then was in *State of Rajasthan v. Union of India* [16], in regard to judicial review of "political questions" in the context of constitutional powers and duties:

> ". . . it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political . . . It was pointed out by Mr. Justice Brennan in the Opinion of the Court delivered by him in *Baker v. Carr* [2] an epoch making decision in American Constitutional history, that the mere fact that the suit seeks protection of a political right does not mean that it presents a political question. This was put in more emphatic terms in *Nixon v. Harndon* [17], by saying that such an objection 'is little more than a play upon words . . . Even before *Baker v. Carr,* courts in the United States were dealing with a host of questions 'political' in ordinary comprehension. Even the desegregation decision of the Supreme Court in *Brown v. Board of Education* [18], had a clearly political complexion . . . The Supreme Court in *Baker v. Carr* held that it was within the competence of the Federal Courts to entertain an action challenging a statute apportioning legislative districts as contrary to the equal protection clause. This case clearly decided a controversy which was political in character, namely, apportioning of legislative districts, so because a constitutional question of violation of the equal protection clause

was directly involved and that question was plainly and indubitably within the jurisdiction of the Court to decide. It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'Judicial hands off'. So long as a question arises whether an authority under the Constitution has acted within the limits of its powers or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so . . . No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution, or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining whether it is limited, and if so, what are its limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law . . ."

However, there are matters which undoubtedly do not involve legal or constitutional rights, powers and duties, and which may therefore be regarded as purely "political". Mr. Seneviratne referred to *Council of Civil Service Unions v. Minister for Service* [19].

"Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject-matter are such as not to be amenable to the judicial process."

As observed in that case, the controlling factor is not the source of the power but its subject-matter. The fact that in the U.K. the appointment of ministers by the Queen, in the exercise of the prerogative, is beyond review does not conclude the question under our law: as indeed it did not under the laws of Nigeria and India. In *Adegbenro v. Akintole* [2], the Privy Council did not regard the subject-

matter of the removal of a Prime Minister by the Governor as beyond review, and scrutinized the propriety of that removal. In India, too, the Courts have not declined to review the appointment of the Prime Minister by the President on this ground – *Dinesh Chandra v. Charan Singh* [13].

> "Our Supreme Court has, however, had to decide seemingly political questions since the Constitution or a statute had to be interpreted to answer them, ordinarily a duty which courts will not shun. We are not, therefore, able to decline jurisdiction to consider the questions raised in the present writ petition ...
>
> In *U.N.R. Rao v. Smt. Indira Gandhi* [20], the construction of Article 75(3) came up directly for consideration. The Supreme Court did not indicate any difficulties in its way of regarding the case as justiciable by the court, but straightaway went to decide the issues ..."

In the absence of a written Constitution, defining the jurisdictions and powers of the several organs of government, there may well be reasons why the acts of the Sovereign, particularly in relation to what is historically the "High Court of Parliament", cannot be questioned in the Sovereign's own Courts. In Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is *prima facie* a matter to be remedied by the Judiciary. Further, no judicial deference or self-restraint is owed to subordinate executive or legislative bodies, such as the Governor and the Provincial Council. The appointment of a Chief Minister by a Provincial Governor is not a purely political matter excluded from judicial review by the Court of Appeal. We are not called upon to express any opinion as to the extent to which the Court of Appeal may take these political factors into consideration under and in terms of the law and procedure relating to its writ jurisdiction) in deciding whether or not to exercise its discretion to grant and issue, according to law, orders in the nature of writs of *Quo Warranto, Certiorari,* and *Mandamus.*

Bhut Nath's case [4] cited by the learned Attorney-General, dealt with a question of national security, namely, the proclamation of emergency:

"...It was argued that there was no real emergency and yet the Proclamation remained unretracted with consequential peril to fundamental rights. In our view, this is a political, not justiciable issue and the appeal should be to the polls and not to the courts. The traditional view, sanctified largely by some American decisions, that political questions fall outside the area of judicial review, is not a constitutional taboo but a pragmatic response of the court to the reality of its inadequacy to decide such issues and to the scheme of the Constitution which has assigned to each branch of government in the larger sense a certain jurisdiction. Of course, when a problem – which is essentially and basically constitutional – although dressed up as a political question, is appropriately raised before court, it is within the power of the judges to adjudicate. The rule is one of self-restraint and of subject-matter, practical sense and respect for other branches of government like the legislature and the Executive. Even so, we see no force in the plea. True, an emergency puts a broad blanket blindfolding of the seven liberties of Article 19 and its baseless prolongation may devalue democracy. That is a political matter *de hors our ken*, for the validity of the proclamation turns on the subjective satisfaction of the President that a grave emergency, of the kind mentioned in Part XVIII, or its imminent danger exists. In *R. v. Governor of Wormwood Scrubbs Prison* [21], the Earl of Reading observed, on a similar contention:

... even if it is material to consider whether the military emergency has come to an end, it is not a matter which this court can consider; whether the emergency continues to exist or not is for the executive alone to determine ...

The argument of abuse of power was urged in England but repelled. In *The King v. Halliday* [22], Lord Dunedin, met it thus:

'That is true. But the fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any writen instrument obedience to which may be compelled by some judicial body. The danger of abuse is

theoretically present; practically, as things exist it is in my opinion absent ...'. And Lord Wright in (1942) A. C. 206 added effect to the point in these words:

'The safeguard of British liberty is in the good sense of the people and in the system or representative and responsible government which has evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency.'

Of course, the British have no written constitution, but the argument remains."

The appointment of a Chief Minister does not involve matters comparable to considerations of national security; further, neither the executive nor the legislature have "an absolute power untrammelled by any written instrument obedience to which may be compelled by some judicial body"; and we are not dealing with the acts of the head of the executive, but only concerned with a subordinate executive body.

(c) EXCLUSION OF JUDICIAL REVIEW BY ARTICLE 154F (6)

It was submitted on behalf of the Chief Ministers that the Constitution provided an appropriate alternative remedy because Article 154F (6) made the Board of Ministers collectively responsible and answerable to the Provincial Council; if a Chief Minister was not able to command the support of a majority in the Council, that would be revealed by a vote in the Council; a Chief Minister who lacked the confidence of the Council would have no option but to resign; if he did not, the Governor had the power to remove him (this power of removal being implied from the power of appointment); while this was a discretionary power, it should be presumed that the Governor would act properly; and if the Governor did not, the President could dismiss the Governor. In answer to the Petitioners submission that the Governor might refrain from removing a defeated Chief Minister, Mr. Seneviratne, submitted that since the Governor could not carry out his duties in regard to the administration of the affairs of the Province, with a Chief Minister who had lost the confidence of the Council, he would have no option but to appoint as Chief Minister the

Councillor who enjoyed the support of the majority. It was pointed out on behalf of the Petitioners that the Governor might dissolve the Council instead. I am inclined to agree with Mr. Seneviratne that we should not assume that the Governor would not act properly. However, the question is whether Article 154F (6) assures the Petitioners of an alternative remedy which is effective and expeditious; the procedure of a vote in the Council is not such a remedy. Firstly, there is no certainty that even if the Council immediately expresses a lack of confidence in the Chief Minister, the Petitoner would be appointed to succeed him; litigation may become necessary. Secondly, a more fundamental difficulty is that a vote in the Council is a means of ascertaining whether the Chief Minister has the support of the Council, i.e. whether the Governor's decision was right on the merits. Such a vote does not even attempt in any way to determine the propriety of the Governor's decision-making process, which is what the Petitioners sought to review in the pending applications.

4. EXCLUSION OF JUDICIAL REVIEW BY ARTICLE 154F (2)

Mr. de Silva and the learned Attorney-General submitted that Article 154F (2) does not apply to the appointment of a Chief Minister by the Governor, but Mr. Seneviratne contended that it precluded judicial review of any exercise of discretion by the Governor.

In order to determine whether Article 154F (2) excludes from judicial review the exercise of the Governor's discretion under Article 154F (4), it is necessary to consider Article 154F in its entirety, and in the context of Chapter XVIIA. Article 154F (1) expressly lays down a general rule that the Governor must act in accordance with the advice of the Board of Ministers; but provides that he must act in his discretion where he is required to do so by or under the Constitution. It is not inconceivable that a genuine doubt or difficulty may arise, in regard to a particular function, whether the Governor must act on advice, or in his discretion. Normally any such question of interpretation would have to be judicially determined. Article 154F (2) is found immediately after Article 154F (1); was it intended to exclude judicial review only in that situation? Or was it intended to deal with every exercise of discretion by the Governor ? The phrase "if any question arises whether ... the Governor is by or

under this Constitution required to act in his discretion" clearly indicates that Article 154F (2) applies only to the Governor's decision as to whether he should act on advice or in his discretion. Judicial interpretation is excluded, and instead the Governor is empowered to decide that matter in his discretion; and that decision is made final. Where the Governor having decided such a question (e.g. that it is one where he may act in his discretion) thereafter proceeds to the next step, and exercises his power, by taking some decision or doing some act, there arises the possibility that such (subsequent) decision or act may be challenged (e.g. on the ground that he should have acted on advice). Article 154F (2) precludes such a challenge because "the validity of anything done by the Governor shall not be called in question in any Court **on the ground** that he ought or ought not have acted in his discretion"; plainly it does not preclude a challenge on any other ground. In *Jogendra Nath v. State of Assam* [23], cited by Mr. Seneviratne, the corresponding Indian Article 163 (2) was interpreted to make the Governor "the sole and final Judge whether any function is to be exercised in his discretion or on the advice of the Council of Ministers". Even if there had been some ambiguity, being a preclusive clause it must be given a narrower rather than a wider interpretation.

Chapter XVIIA applies to all Provincial Councils; it would therefore be undesirable that in respect of the same function the Governor of one Province should take the view that he is required to act on advice, while another Governor decides that he must act in his discretion. In the absence of judicial determinations, since one Governor would not be bound by the decision of another, there would be no way of ensuring uniformity. Consistency is achieved by the provision in Article 154F (2) that "the exercise of the Governor's discretion shall be on the President's directions". Taken in isolation, this may suggest that the Governor's discretion must **always** be exercised on the President's directions; taken in the context of Chapter XVIIA, however, this provision is restricted to the exercise of the Governor's discretion in deciding the question specifically referred to in the opening clause of Article 154F (2).

5. CONCLUSION

We therefore answer the questions referred to this Court as follows:

1. The exercise of the powers vested in the Governor of a Province under Article 154F (4), excluding the proviso, is not solely a matter for his subjective assessment and judgment; it is subject to judicial review by the Court of Appeal. In applications for *Quo Warranto, Certiorari* and *Mandamus*, the Court of Appeal has power to review the appointment, *inter alia*, for unreasonableness, or if made in bad faith, or in disregard of the relevant evidence, or on irrelevant considerations, or without evidence.

2. The Governor's selection of a person for appointment as Chief Minister, under Article 154F (4), excluding the proviso, may require the consideration of political factors; nevertheless it is not an act which is purely political in nature; it involves the determination of legal rights, flowing from constitutional provisions, concerning the allocation and exercise of powers (relating to the administration of the affairs of the Province) by the elected representatives of the people of the Province. The appointment of a Chief Minister is justiciable, and there is no self-imposed rule of judicial restraint which inhibits judicial review.

3. Where a question arises as to whether the Governor must act on advice, or in his discretion, Article 154F (2) requires him to decide that question; Article 154F (2) makes his decision on that question final, and precludes anything thereafter done by the Governor being called in question in any Court on the limited ground "that he ought or ought not to have acted in his discretion"; that provision does not apply to the appointment of a Chief Minister under Article 154F (4).

4. The Governor's decision involves a constitutional power and duty of the Governor, and a constitutional right of the Petitioner's (in common with the other Councillors) to the proper exercise of such power and duty; judicial review is not excluded.

5. This does not raise any question relating to the interpretation of the Constitution.

Case sent back to the Court of Appeal with determination of the Supreme Court.