WIJESEKERA AND OTHERS
v
ATTORNEY GENERAL

SUPREME COURT
SARATH N. SILVA, C.J
JAYASINGHE, J.
UDALAGAMA, J.
FERNANDO, J.
AMARATUNGA, J.
SC FR 243/06
SC FR 244/06
SC FR 245/06
SEPTEMBER 15, 2006

Fundamental Right – Constitution 13th Amendment – Art 4(c) Art 12(1) Art 35(1), Art 80(3), Art 105(1), Art 154 A(2) – Art 152(3) & Art 155(2) – Proclamation resulting in merger of two provinces flawed Non-observance of mandatory conditions – Amendment of condition done by Emergency Regulations Ultra vires? – Provincial Councils Act 42 of 1987 S37(1) 37(2)a, 37(2)b – Amendment 27 of 1990 – S5A – Public Security Ordinance S5 – Time bar – continuing violation.

The petitioners residents of Trincomalee and in the Digamadulla Districts within the Eastern Province complained that – the proclamation declaring the provisions of S37(1) of the Provincial Councils Act shall apply to the Northern and Eastern Provinces, which resulted in these two provinces forming one administrative unit-merger-deny the petitioners equal protection of the law guaranteed by Art 12(1).

Held:

(1) The Constitution reserves the power of affecting a merger strictly within the legislative power of the Parliament to be done by or under any law.

(2) An exception to the bar on abdication of legislative power is the empowerment of a person or body to make subordinate legislation for prescribed purposes as contained in Article 76 (B).

(3) The power reposed in the President is in the nature of a delegate legislative power and the proclamation issued has to be characterized as subordinate legislature.

(4) S37 (1) (b) confers a specific condition to be satisfied prior to the making of a Proclamation declaring that the provisions of sub section (1) should apply to the Northern and Eastern Provinces, which would have the effect of the two provinces being merged as one administrative unit until a poll is held on the question or merger in each of the provinces not later that 31.12.1988. The specific conditions to be satisfied in S 37 (1) (b) are the surrender of weapons and cessation of hostilities contained in clause 2.9 of the Indo Sri Lanka Accord.

(5) The President himself had stated that there had been only a formal handing over of arms and the LTTE has violated the agreement. It is beyond any doubt that the two conditions for the merger as stated in S37 (1)(b) had not been met.

(6) The amendment of S37 (1) (b) by providing an alternative to the two conditions by the President by an Emergency Regulations made under the Public Security Ordinance 6 days prior to, the order effecting the merger is not within the meaning of Art 170 setting out an alternative condition to what was already stated in the law S37 (1) (b). It is inconsistent with Art 154 A(3) and is invalid.

(7) In terms of Art 154 A (3) only the Parliament could by or under any law provide for two and three adjoining provinces to form one administrative unit ....." The Parliament exercising power reposed in sub Art (3) provided by law – S37 (1) (b) that two special conditions shall apply in respect of the merger, hence a further alternative condition could, if at all be provided only by law.

Per S.N. Silva. CJ.

"An Emergency Regulation made by the President would be written law. The term law in Art 154 (A) (3) should in my view be restricted to the meaning in Art 170, considering the context in which it occurs in relation to Parliament. Therefore any provision for the merger could be made in terms of Art 154 (A) (3) which is in itself an exception to the general rule in Art 154 A (1) and (2) that a separate Council be established and constituted for each province only by a law enacted by Parliament."

(8) Power reposed in the President by S5 of the Public Security Ordinance to make Emergency Regulation amending any law has to be read subject to the provisions of Art 155(2) and an Emergency Regulation cannot have the effect of amending or overriding the provisions of the Constitution. The purported amendment of S37(1) (b) effected by the Emergency Regulation in effect overrides the provisions of Art 154(A)(3) which only empowers the Parliament to provide by law for the merger of two or three provinces.

(9) The impugned Emergency Regulations cannot be reasonably related to any of the purposes provided in S5(1) of the Ordinance, manifestly it has been made for the collateral purpose of amending another and unrelated law by means of which the President purported to empower himself to act contravention of specific conditions laid down in the law.

(10) The preclusive clause contained in Art 80(3) which bars judicial review of a Bill that has become law upon certification does not extend to Emergency Regulations being in the nature of delegated legislation.

(11) The impugned Emergency Regulation is ultra vires and made in excess of the power reposed in the President – it is invalid and of no effect or avail in law.

(12) The Proclamation made by the then President declaring the merger has been made when neither of the conditions specified in S37(1)(b) were satisfied. The order is therefore invalid.

Held further:

(13) The right to have a Provincial Council constituted by an election of the members of such Council pertains to the franchise being part of the sovereignty of the people and its denial is a continuing infringement of the right to the equal protection guaranteed under Art 12(1). The objection of the time bar is rejected.

AN APPLICATION under Art 126 of the Constitution.

Cases referred to

(1) *Wickremabandu* v *Herath* – 1990 2 Sri LR 348

(2) *Joseph Perera* v *Attorney-General* – 1992 1 Sri LR 199

(3) *Karunatilake* v *Dissanayake* – 1991 – Sri LR 157

H. L. de Silva PC with *S.L Gunasekera, Gomin Dayasiri* and *Manoli Jinadasa* instructed by *Paul Ratnayake Associate* for the petitioner in S.C. (F/R) 243/2006

Gomin Dayasiri with *Manoli Jinadasa* for the petitioner instructed by *Paul Ratnayake Associates* in S.C. (F/R) 244/2006

S.L. Gunasekera for the petitioner instructed by *Paul Ratnayake Associates* in S.C. (F/R) 245/2006

P.A Ratnayake PC, Addi. Solicitor General, *Anil Gunaratne*, DSG, *A. Gnanathasan* DSG, *Indika Demuni de Silva* SSC, *Janak de Silva* SSC, *Milinda Gunatilaka* SSC and *Nerin Pulle* SSC for the respondents.

K. Kanag-Iswaran PC with *M.A. Sumanthiran* and – *L. Jeyakumar* for intervenient petitioners

Batty Weerakoon with *Percy Wickramasekera* and *Lal Wijenaike* for intervenient petitioners.

October 16, 2006

SARATH N. SILVA, C.J.

The three petitioners being residents of the Trincomalee and the Digamadulla Districts, within the Eastern Province, have been granted leave to proceed on the alleged infringement of their fundamental rights to the equal protection of the law, guaranteed by Article 12(1) of the Constitution.

The executive action impugned as denying to the petitioners equal protection of the law relates to the Proclamation declaring that the provisions of section 37(1) of the Provincial Councils Act No. 42 of 1987 shall apply to the Northern and Eastern Provinces, which resulted in these two Provinces forming one administrative unit, a process commonly described as the merger of the two Provinces. The case for the petitioners articulated by Mr. H.L de Silva, is that the Proclamation (P2) resulting in the merger is "fatally flawed" due to the non-observance of the mandatory conditions as contained in section 37(1)(b). That, the amendment of the condition as laid down in section 37(1)(b), purportedly done by an Emergency Regulation (P1), rendering the conditions ineffective, is *ultra vires* section 5 of the Public Security Ordinance which empowers the President to make Emergency Regulations and is therefore null and void. And, although there was no valid merger the poll required to be held in terms of section 37(2)(a), not later

than 31.12.1988, to enable the electors of each Province to decide whether or not the respective Provinces should remain linked as one administrative unit, has been purportedly postponed from time to time by successive Presidents, the last being Order P5 made by the former President by which the poll in the Eastern Province is postponed to 17.11.2006 and in the Northern Province to 1.12.2006. Thereby, the petitioners and similarly circumstanced voters of the Eastern Province have been continuously denied their rights to have a lawfully elected Provincial Council constituted for the Eastern Province as required by Article 154 A(2) of the 13th Amendment to the Constitution.

The petitioners submitted that the election for the purportedly merged North-East Provincial Council held in terms of notice dated 19.9.1988 (3R2) published under section 10 of the Provincial Councils Election Act No. 2 of 1988 was a sham, since candidates of only one political party, the E.P.R.L.F, submitted nomination papers for the 3 Districts (Jaffna, Mannar and Vavuniya), in the Northern Province, resulting in these candidates being returned uncontested and in the Eastern Province, in Ampara, being the only predominantly Sinhala Polling Division out of 94,068 only 5617 voted (less than 6%) vide 3R3. The petitioners rely on P3 a contemporary publication which states that the Chief Minister appointed for the North-East Provincial Council being the leader of the E.P.R.L.F, made several demands on the Government of Sri Lanka, proclaimed a "unilateral declaration of independence" and finally surreptitiously left the country with about 250 of his supporters in March 1990. According to paragraph 17 of affidavit 2R3, thereupon the Governor of the North-East Provincial Council made a communication in terms of section 5A of the Provincial Council (Amendment) Act No. 27 of 1990, that "more than one half of the membership of the Council expressly repudiated or manifestly disavowed obedience to the Constitution." In terms of section 5A introduced by the Amendment certified on 6.7.1990, a few months after the events referred to above, which appears to have been made especially to provide for the situation that had arisen, upon such communication by the Governor the Council stands dissolved. Section 4 of the Amendment provides that where a

Council stands dissolved in terms of section 5A referred to above, the Commissioner of Elections is deemed to have complied with section 10 of the Provincial Council Election Act No. 2 of 1998 (being the notice calling for nominations for an election to the Council) if he publishes a notice referred to in that section within a period of one week.

The Legislative and Executive action referred above, which worked in combination, seemingly set the stage for a new election to the merged North-East Provincial Council. I used the word seemingly because although it appeared to be thus, it was never intended to be so, as revealed by the immediately succeeding events. The Commissioner of Elections by notice dated 11.7.1990 (P4) under section 10 of the Provincial Councils Elections Act specified the nomination period for the election as being from 25.7.1990 to 1.8.1990. Thereupon the then President on 12.7.1990 (the very next day) made Emergency Regulation under section 5 of the Public Security Ordinance (Document "D" annexed to affidavit 2R3) which stated that the notice published by the Commissioner of Elections fixing the date and time of nominations "shall be deemed for all purposes to be of no effect." The electoral process stopped there and has remained ever since as it were frozen, upto date. There has been no election for either the North-East Provincial Council or separately for the Northern Provincial Council or the Eastern Provincial Council. Whereas in respect of the Councils for the other seven Provinces in the country elections have been held on the due dates in 1988, 1993, 1998 and 2004.

Reverting to the merger referred to above, it is to be noted that the poll required to be held under section 37(2)(a) of the Provincial Councils Act not later than 31.12.1988 to enable the electors of the Northern and Eastern Provinces to decide whether or not such Provinces should remain linked as one administrative unit, has been postponed from time to time under section 37(2)(b), the last being the Order P5 referred to above. The respondents produced the relevant order of postponement marked 3R7A to 3R7Z the particulars of which are set are set out below in sequence.

Document	Gazette No. and Date	Postponed Date of Poll for Northern Province	Postponed Date of Poll for Eastern Province
3R7A	538/8 dated 28.12.1988	31st December 1988	31st December 1988
3R7B	538/9 dated 29.12.1988	5th July, 1989	5th July, 1989
3R7C	564/3 dated 28.6.1989	29th January, 1990	29th January, 1990
3R7D	593/19 dated 19.1.1990	14th June, 1990	14th June, 1990
3R7E	614/5 dated 11.6.1990	19th January, 1991	19th January, 1991
3R7Z	Gazette not produced	22nd August, 1991	22nd August, 1991
3R7F	674/7 dated 7.8.1991	24th February, 1992	24th February, 1992
3R7G	698/6 dated 22.1.1992	28th August, 1992	28th August, 1992
3R7H	725/15 dated 28.7.1992	5th March, 1993	5th March, 1993
3R7I	18.2.1993	23rd August, 1993	23rd August, 1993
3R7J	780/20 dated 20.8.1993	28th April, 1994	18th February, 1994
3R7K	805/10 dated 9.2.1994	19th May, 1994	31st March, 1994
3R7L	812/09 dated 29.3.1994	14th July, 1994	26th May, 1994
3R7M	818/12 dated 11.5.1994	25th May, 1995	23rd February, 1995
3R7N	856/19 dated 3.2.1995	15th February, 1996	16th November, 1995
3R7O	893/13 dated 19.10.1995	1st December, 1996	16th November, 1996
3R7P	3.10.1996	1st December, 1997	14th November, 1997
3R7Q	996/12 dated 9.10.1997	1st December, 1998	16th November, 1998
3R7R	1050/15 dated 22.10.1998	1st December, 1999	16th November, 1999
3R7S	1102/31 dated 21.10.1999	1st December, 2000	16th November, 2000
3R7T	1156/18 dated 31.10.2000	1st December, 2001	16th November, 2001
3R7U	1209/13 dated 7.11.2001	1st December, 2002	16th November, 2002
3R7V	1254/7 dated 18.9.2002	1st December, 2003	17th November, 2003
3R7W	1314/1 dated 10.11.2003	1st December, 2004	17th November, 2004
3R7X	1365/17 dated 3.11.2004	1st December, 2005	17th November, 2005
3R7Y	1420/27 dated 23.11.2005	5th December, 2006	16th November, 2006

Thus the electoral and consultative processes being the vital concomitants of Democracy ingrained in the name of the Republic in Article 1 of the Constitution, have been effectively stymied.

The infringement pleaded is the failure to constitute a Provincial Council for the Eastern Province as required by Article 154A(2) of the 13th Amendment to the Constitution and the continued denial to the electors of the Eastern Province including the petitioners the right to vote at an election for the members of such Council which stems from the invalid merger effected by P1 and P2 made in derogation of the mandatory conditions in section 37 (1) (b) of the Provincial Council Act.

Additional Solicitor General appearing for the respondents submitted that the condition as contained in Section 37(1)(b) have been validly amended by the Emergency Regulation P1 and in any event the petitioners cannot seek a declaration of nullity in respect of P1 and P2 due to time bar and/or the immunity enjoyed by the President in terms of Article 35(1) of the Constitution. He submitted that the poll required to be held in terms of section 37(2)(a) to enable the electors to decide whether or not the two Provinces should remain linked as one administrative unit has been validly postponed from time to time by orders under section 37 (2)(b) produce marked 3R7 (a) to (z) and as such the petitioners do not have a right to secure an order from Court that a Provincial Council be constituted by election as required by Article 154(2) of the Constitution for the Eastern Province.

Mr. Kanag-Iswaran for the intervenients, who according to his submission are three Tamil persons from the Trincomalee District and Ampara District, claimed that the merger is based on the Indo-Sri Lanka Accord of 29.7.1987 (P6) which in clause1.4 recognized that "the Northern and Eastern Provinces have been areas of historical habitation of Sri Lankan Tamil speaking people who have hitherto lived together in this territory with other ethnic groups." He supported the submission of the Additional Solicitor General that the condition in section 37(1)(b) has been validly amended by P1 and that petitioners are not entitled to relief sought. Mr. Batty Weerakoon submitted that the Court should be slow to declare P2 invalid since the merger was effected pursuant to the Indo-Sri Lanka Accord.

The material adduced by the intervenients represented by Mr. Kanag-Isvaran as to areas of "historical habitation" resulted in the petitioners producing volumes of material to establish the divisions that existed in historic times and that the Eastern Province was a part of the Kandyan Kingdom at the time of British conquest. Mr. Gomin Dayasiri representing the Muslim petitioner adduced material in support of 'ethnic cleansing' resorted to by Tamil militants in the Jaffna District resulting over 90,000 Muslims bring driven away from the District in 1990. It was submitted that the process of 'ethnic cleansing' is yet being perpetrated by the Tamil militants against the Muslims in the Eastern Province. It was submitted by Mr. H. L. de Silva, that the 'forced merger' would result in a destabilization of the ethnic balance in the Eastern Province. Both Mr. de Silva and Mr. Dayasiri relying on the material produced submitted that according to the 1981 census the demographic composition of the Eastern Province was:

Tamil	-	40%
Muslims	-	32%
Sinhala	-	26%

Whereas in a merged North-East Province the demographic composition would be

Tamil	-	60%
Muslims	-	18%
Sinhala	-	13%

It was submitted that the merger would result in the Muslim and Sinhala communities in the Eastern Province being permanently subjugated to a minority which situation would be exacerbated by the process of "ethnic cleansing" carried out by the Tamil militants as referred to above. On the other hand Mr. Kanag-Iswaran submitted that the 'merger' sets right the imbalance brought about by the high increase of the Sinhala population in the Eastern Province in the period 1947 to 1918. He submitted that whereas the national increase of the Sinhala population in country was during the period was 238%, the increase in the Eastern Province was 883%.

Taking note of the volatile and ethnically incendiary material produced and trend of submissions based thereon, reminiscent of the ethnic mistrust that led to terrorism, violence, death and devastating destruction that has characterized our body-politic, the

Court indicated to Counsel that the case would be considered only from the perspective of securing to every person the equal protection of the law guaranteed by Article 12(1) of the Constitution. The essential corollary of the equal protection of the law is the freedom from discrimination, based "on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds" guaranteed by Article 12(2). The elements of race, religion and language characterize ethnicity that tend to divide people. Caste, sex, political opinion and place of birth are sub-elements of further divisions between people. In contrast the equal protection of the law unifies people on the basis of the Rule of Law and the peaceful resolution of disputes that characterizes the exercise of judicial power in terms of Article 4(C) read with Article 105(1) of the Constitution. From this perspective the physical identification of a unit of devolution of legislative and executive power, being the bone of contention, diminishes in significance. Whilst ethnic criteria would be relevant to define the territory of a unit of devolution since a homogeneous unit could be better managed and served, the overriding consideration would be current criteria (not historic material or speculative assumptions for the future) that contribute to the functional effectiveness and efficiency of a unit from the perspective of service to the people, being the sole objective of representative Government.

The 13th Amendment to the Constitution was certified on 14.11.1987, being the date on which the Provincial Councils Act No. 42 of 1987 was also certified. The Amendment introduced a new chapter XV11A to the Constitution providing for extensive devolution of legislative and executive power to Provincial Councils in respect of the subjects and functions as contained in List 1 of the 9th schedule. The legislative competence of Parliament was restricted to the subjects and functions in List II (Reserved List). There could be "joint action" in respect of the subjects and functions in List III (Concurrent List) exercised in the manner specifically provided in the Amendment. These Lists are based on the context of from Article 246 and the seventh schedule of the Constitution of India.

Article 154A (1) of the 13th Amendment to the Constitution empowers the President to establish a Provincial Council for each of the Provinces in the Eighth Schedule. Accordingly, by Order 3 R 1 the then President established Provincial Councils for each of the nine

Provinces, including the North and East, separately, with effect from 3.2.1988. Steps were taken to constitute a Provincial Council by election for each of the 7 Provinces in terms of Article 154(2), excluding the Northern and Eastern Provinces. In respect of the Northern and Eastern Provinces action was taken as provided in Article 154 A (3) by the process impugned in these cases. Sub Article 3 reads as follows:

> *"Notwithstanding anything in the preceding provisions of this Article, Parliament may by, or under, any law provide for two or three adjoining Provinces to form one administrative unit with one elected Provincial Council, one Governor, one Chief Minister and one Board of Ministers and for the manner of determining whether such Provinces should continue to be administered as one administrative unit or whether each such Province should constitute a separate administrative unit with its own Provincial Council, and separate Governor, Chief Minister and Board of Ministers."*

An analysis of the provision reveals that the law to be enacted by Parliament thereunder should have two components providing for-

i) the formation of one administrative unit consisting of two or three adjoining Provinces; and

ii) when the Provinces are so brought together as one administrative unit, the manner of determining where such Provinces should continue to be administered as one unit.

As noted above, the law enacted by Parliament in terms of sub-Article 3 for the merger of two or three Provincial Councils as one administrative unit and for the manner of determining the continuance of such merger is contained in section 37 of the Provincial Councils Act. The material provisions of which read as follows:

> *"37(1)(a) The President may by Proclamation declare that the provisions of this subsection shall apply to any two or three adjoining Provinces specified in such Proclamation (hereinafter referred to as "the specified Provinces"), and thereupon such Provinces shall form one administrative unit, having one elected Provincial Council, one Governor, one Chief Minister and one Board of Ministers, for the period*

commencing from the date of the first election to such Provincial Council and ending on the date of the poll referred to in subsection (2) of this section, or if there is more than one date fixed for such poll, the last such dates.

(b) The President shall not make a Proclamation declaring that the provisions of subsection 1(a) shall apply to the Northern and Eastern Provinces unless he is satisfied that arms, ammunition, weapons, explosives and other military equipment, which on 29th July, 1987, were held or under the control of terrorist militant or other groups having as their objective the establishment of a separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it, and that there has been a cessation of hostilities and other acts of violence by such groups in the said Provinces.

(2)(a) Where a Proclamation is made under the provisions of subsection (1)(a), the President shall by Order published in the Gazette, require a poll, to be held in each of the specified Provinces, and fix a date or dates, not later than 31st day of December 1988, for such poll, to enable to the electors of each such specified Province to decide whether-

(i) such Province should remain linked with the other specified Province or Provinces as one administrative unit, and continue to be administered together with such Province or Provinces ; or

(ii) such Province should constitute a separate administrative unit, having its own distinct Provincial Council, with a separate Governor, Chief Minister and Board of Ministers."

The arguments of Counsel narrow down to the exercise of power reposed in the President under section 37 (1). Whilst sub-paragraph (a) empowers the President to make a Proclamation declaring that two or three adjoining Provinces would form one administrative unit, sub-paragraph (b) contains as exception in respect of the Northern and Eastern Provinces where special conditions have to be satisfied as to surrender of weapons and cessation of hostilities before an order of merger is made. The provisions of sections 37(2) as to a poll being held prior to 31.12.1988 to enable electors of each Province merged to decide on

the continuance of the merger is common to a Proclamation for the merger of any two or more Provinces.

The first matter to be considered in the light of the submissions made is whether the President in making a Proclamation under section 37(1) (a) exercises executive power or delegated legislative power. This aspect has to be considered by examining the provisions of Article 154A(3) of the Constitution cited above which provides for the merger of two or three adjoining Provinces to form one administrative unit as an exception to the general rule in Article 154 A(1) and (2) that there should be a separate Council for each of the nine Provinces. A plain reading of sub-Article (3) shows that there is not even a reference to the President contained therein. Thus the Constitution reserves the power of effecting a merger strictly within the legislative power of Parliament, to be done "by or under, any law".

Articles 76 (1) of the Constitution states as follows:

> "*Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power*"

An exception to the bar on abdication of legislative power is the empowerment of a person or body to make subordinate legislation for prescribed purposes as contained in Article 76 (3) which states as follows:

> "It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes, including the power .....
>
> a) to appoint a date on which any law or any part thereof shall come into effect or cease to have effect;
>
> b) to make by order any law or part thereof applicable to any locality or to any class of persons; and
>
> c) to create a legal person, by an order or an act"

It is plain to see that the power reposed in the President to specify the Provinces in respect of which section 37(1) will apply comes fairly and squarely within sub-paragraph (b) of Article 76 (3).

Hence the power reposed in the President is in the nature of a delegated legislative power and the Proclamation issued has to be characterized as subordinate legislation.

Section 37 (1)(b)contains a specific condition to be satisfied prior to the making of a Proclamation declaring that the provisions of sub-section (1) (a) shall apply to the Northern and Eastern Provinces, which would have the effect of the two Provinces being merged as one administrative unit until a poll is held on the question of merger in each of the Provinces not later than 31.12.1988. They are:

i) that arms, ammunition, weapons, explosive and other military equipment which on 29.7.1987 were held or under the control of terrorist militants of other groups having as their objective the establishment of a separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it, and;

ii) that there has been a cessation of hostilities and other acts of violence by such groups in the Province.

It is a common ground that, the date specified in (i) above, 29.7.1987 is the date of the Indo-Sri Lanka Accord (P6) which in clause 2.1 to 2.6 contains provisions for the interim merger of the Northern and Eastern Provinces as a single administrative unit. The conditions contained in section 37 (1)(b), as to the surrender of weapons and the cessation of hostilities are contained in clause 2.9 of the Accord which states as follows:

"The emergency will be lifted in the Eastern and Northern Provinces by August 15. 1987. A cessation of hostilities will come into effect all over the island within 48 hours of the signing of the agreement. All arms presently held by militants groups will be surrendered in accordance with an agreed procedure to authorities to be designated by the Government of Sri Lanka. Consequent to the cessation of hostilities and the surrender of arms by militant groups, the Army and other security personnel will be confined to barracks in camps as on May 25.1987. The process of surrendering of arms and the confining of security personnel moving back to barracks shall be completed within 72 hours of the cessation of hostilities coming into effect."

A copy of the Accord was tabled in Parliament by the then President when he addressed the House on 25.2.1988 (Document "A" annexed to 2R3). In the address in reference to the surrender of weapons and the cessation of hostilities the President stated as follows:

> *"Peace prevailed in the North and the East for a few weeks after the agreement was signed. A formal handing over of arms took place in Palaly, Jaffna, on 5th August 1987, and the process continued in the two provinces with the terrorist groups handing over arms. This process was not completed as one group, the LTTE, violated the Agreement and publicly said they were doing so in early October. Since then violence has continued in these areas and the Indian Peace Keeping Force was compelled to take firm action to recover arms and explosives and had therefore to increase their number in the North and East. This has gone on for almost six months and I hope that very soon the Indian Forces with such help as the Sri Lanka forces can give, both on land and sea, will be able to ensure that the LTTE gives up arms and violence and accepts the Agreement. They will then be entitled to the amnesty mentioned in the agreement and could enter the main stream of democratic politics and seek election to the Provincial Councils."*

Thus in the words of the President himself there had been only a "formal handing over of arms" as submitted by Counsel for the petitioners. The LTTE had violated the Agreement and publicly said so in October 1987 within 3 months of the Accord and violence had continued in these areas for the past 6 months, that is upto the date the address was made in Parliament. There could be no better evidence to establish that the conditions contained in section 37(1)(b) had not been satisfied as at 25.2.1988 (being the date of the address), although in terms of the Accord there should have been a cessation of hostilities within 48 hours and a surrender of weapons within further 72 hours of the Agreement being signed on 29.07.1987. Nevertheless in the very same address the President stated as follows:

> *"I will be holding elections to these Councils in April and I hope to constitute the newly elected Councils for the Provinces, including the temporary North/East Province in May 1988."*

On the basis of this Address Mr. de Silva submitted that the President very clearly intended to make an order of merger in respect of the Northern and Eastern Provinces whether or not the conditions as to the surrender of weapons and cessation of hostilities was satisfied.

The Address to Parliament by the President was on 25.2.1988 and the impugned order of merger (P2) was made on 8.9.1988. Hence it is necessary to ascertain from the material before Court whether the situation described by the President continued upto 28.9.1988. Throughout this period the President issued monthly Proclamations under Public Security Ordinance to extend the State of Emergency. Every month these Proclamations were presented to Parliament for approval and a statement was made by a Minister on behalf of the Government specifying the terrorist activities in the North and the East with reference to the number of murders committed, attacks on Police stations and so on and a summary of incidents in the other parts of the country. In the year 1988 Proclamation had been made by the President every month, the first being on 17.1.1988 and the last for the year was on 13.12.1988. The Hansards containing the statements made by the respective Ministers seeking approval of Parliament for the Proclamations have been produced marked B1 to B12 annexed to the affidavit 2R3. The statements establish that far from the LTTE surrendering weapons and there being a cessation of hostilities, there were intensified attacks now on the Indian Peace Keeping Force (IPKF). As regards the specific period in which the order P2 was made that is from 16.8.1988 to 15.9.1988, the situation that existed could be gathered from the following extract of the speech made by the Minister (B9).

> "*The terrorists have concentrated their campaign of violence in Jaffna, Vavuniya, Batticaloa, Ampara and Trincomalee during the period 16th August 1988 to 15th September 1988, 62 civilians and 19 security personnel were killed during this period. In every instance when the terrorists carried out mass attacks, security forces repulsed the attacks. Considerable amounts of arms and explosives have been captured by security forces.*"

Thus it is beyond any doubt that the two conditions for the merger as stated in section 37(1)(b) referred above as to weapons being surrendered by 'terrorist militants' and a cessation of hostilities had not been met.

Neither the Additional S.G. nor Mr. Kanag-Isvaran sought to justify the order P2 on the basis that the factual conditions as stated in section 37(1)(b) were met at the time the President made such order. They sought to support the order on the basis that the provisions of section 37(1)(b) had at that time been amended by the President by an Emergency Regulation (P1) made under the Public Security Ordinance 6 days prior to Order P2 effecting the merger. The petitioners have sought a declaration of nullity in respect of P1 as well on the basis that the Regulation is *ultra vires* since it cannot be rationally related to any of the purposes for which Emergency Regulations could be validly made in terms of section 5 of the Public Security Ordinance.

It is necessary at this stage to advert to the contents of P1. It has been made under section 5 of the Public Security Ordinance and states that section 37(1)(b) referred to above shall have effect as if the words:

> *"Or that operation have been commenced to secure complete surrender of arms, ammunition, weapons, explosives or other military equipment by such groups"* are included at the end of the provisions.

The purpose of P2 appears to be to include an alternative to the two conditions contained in section 37(1)(b) as to the surrender of weapons and a cessation of hostilities. In terms of Articles 154A (3) only Parliament could "*by or under any law provide for two or three adjoining Provinces to form one administrative unit .....*" The Parliament exercising the power reposed in sub-Article (3) provided by law (i.e. section 37(1)(b)) that two special conditions shall apply in respect of the merger of the Northern and Eastern Provinces. Hence further alternative condition could, if at all, be provided only by law.

Article 170 of the Constitution defines the term "law" as follows:

> *"law" means any Act of Parliament, and any law enacted by any legislature at ant time prior to the commencement of the Constitution and includes an Order in Council".*

The term 'written law' has a wider meaning and is defined as follows:

"written law" means any law and subordinate legislation and includes Orders, Proclamations, Rules, By-laws and Regulations made or issued by any body or person having power or authority under any law to make or issue the same."

An Emergency Regulation made by the President would be written law. The term 'law' in Article 154A (3) should in my view be restricted to the meaning in Article 170, considering the contest in which it occurs in relation to Parliament. Therefore any provision for the merger of two or three Provinces could be made in terms of Article 154A(3), which is in itself an exception to the general rule in Article 154A(1) and (2) that a separate Provincial Council be established and constituted for each Province, only by a law enacted by Parliament. The provision purportedly made by the President by Emergency Regulation P1 which is not law within the meaning of Article 170, setting out an alternative condition to what was already stated in the law (i.e. section 37(1)(b)) is inconsistent with Article 154A(3) of the Constitution and is invalid as correctly submitted by Counsel for petitioners.

Additional Solicitor-General and Mr. Kanag-Isvaran relied on section 5(2)(d) of the Public Security Ordinance which empowers the President to make an Emergency Regulation amending any law.

In terms of Article 155(1) of the Constitution the Public Security Ordinance, being existing legislation, is deemed to be a law enacted by Parliament.

Article 155(2) reads as follows:

"The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution."

Hence the power reposed in the President by Section 5 of Public Security Ordinance to make an Emergency Regulation amending any law has to be read subject to the provisions of Article 155(2) of the Constitution and an Emergency Regulation cannot

have the effect of amending or over-riding a provision of the Constitution. The purported amendment of section 37(1)(b) effected by regulation P1 in effect over-rides the provisions of Article 154A(3) which only empowers the Parliament to provide by law for the merger of two or three Provinces.

Mr. de Silva assailed the validity of P1 on the ground that it cannot reasonably come within any of the purposes provided in section 5(1) of the Ordinance. This section empowers the President to make emergency regulations for- 54C

(1) Public security and the preservation of public order;

(2) the suppression, mutiny, riot or civil commotion;

(3) for the maintenance of supplies and service essential to the life of the community;

The impugned regulation cannot be reasonably related to any of the aforesaid purposes. Manifestly, it has made for the collateral purpose of amending another and unrelated law by means of which the President purported to empower himself to act in contravention of specific conditions laid down in the law.

The preclusive clause contained in Article 80(3) of the 55(Constitution which bars judicial review of a Bill that has become law upon certification does not extend to Emergency Regulations, being in the nature of delegated legislation. In England Judicial review of "administrative legislation" (a Broad label for delegated legislation) is governed by the same principles that govern judicial review of administrative action.(Administrative Law by Wade and Forsyth 9th ed. P.858).

This Court has in the cases of *Wickremabandu* v *Herath*[1], *Joseph Perera* v *Attorney General*[2] and *Karunatilake* v *Dissanayake*[3], entertained and decided questions regarding the validity 560 of Emergency Regulations and of executive action taken thereunder, which was held to be not precluded by the immunity from suit enjoyed by an incumbent President in terms of Article 35(1) of the Constitution. Such review pertains to two levels. They are:

(1) whether the impugned regulation is *per se ultra vires* in excess of the power reposed in the President;

(2) if the regulation *per se* is valid whether the impugned act done under the Regulation is a proper exercise of power;

I hold that both grounds urged by Mr. de Silva, as to the inconsistency with Article 154A(3) of the Constitution and being in any event outside the scope of section 5 of the Public Security Ordinance establish that Regulation P1 is *ultra vires* and made in excess of the power reposed in the President. Accordingly, the purported amendment of the provisions of section 37(1)(b) of the Provincial Councils Act by the President is invalid and of no effect or avail in law.

The next question to be decided is in relation to the validity of Order P2 effecting a merger of the Northern Provinces. Section 37(1)(b) contains two mandatory conditions that have to be satisfied before a Proclamation effecting a merger is issued. The address made by the President to Parliament and the statements made as to the security situation seeking an approval of the Proclamations of the State of Emergency in the year 1988 referred to in the preceding analysis clearly establish that the President could not have been possibly satisfied as to either of these mandatory conditions. The endeavour to amend the mandatory conditions by recourse to the Emergency Regulations demonstrates that the President in his own mind knew that the two mandatory conditions have not been satisfied. An axiomatic principle of Administrative Law is thus formulated by Wade and Forsyth early in the treatise as follows:

> *"Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. And the court will invalidate it, a fortiori, if it infringes the limits which Parliament itself has ordained." (9th Edition page 5)*

The Proclamation P2 made by the then President declaring that the Northern and Eastern Provinces shall form one administrative unit has been made when neither of the conditions specified in section 37(1)(b) of the Provincial Council Act No. 42 of 1987 as to the surrender of weapons and the cessation of hostilities, were satisfied. Therefore the order must necessarily be declared invalid since it infringes the limits which Parliament itself has ordained.

Finally, I have to address the objection of time bar raised by the Additional Solicitor General. The impugned orders P1 and P2 were made in September 1988 and the poll to be held in terms of section 37(2)(a) has been postponed over past 17 years by the documents 3R7A to 3R7Z, The last postponement was made on 610
23.11.2005 fixing the date of poll on 16.11.2006 and 5.12.2006 for the Eastern and Northern Provinces respectively. The petitioners have failed to invoke the jurisdiction of this Court within one month of any of the impugned orders as required by Article 126(2). It is therefore submitted that the petitioners are precluded from obtaining relief.

The counter submission of Mr. de Silva is that the rights of the petitioners and those similarly circumstanced in the Eastern Province to have a Provincial Council constituted in terms of Article 154A(2) by election of members is a continuing right and 620
its denial by the *ultra vires* orders P1 and P2 is a continuing denial to the petitioner and those similarly circumstanced the equal protection of the law guaranteed by Article 12(1) of the Constitution. He further submitted that the purported postponement of the poll by 3R7A to 3R7Z are no force or effect in law since they seek to derive validity from P1 and P2.

As noted above the 13th Amendment which introduced a new Chapter XVIIA to the Constitution provides for extensive devolution of legislative and executive power to Provincial Councils. Although the Amendment was certified on 14.11.1987 630
and a Provincial Council was established for the Eastern Province and each of the other 8 Provinces by Order dated 3.2.1988 (3R1) made in terms of Article 154A(1) of the Constitution a Provincial Council has not been constituted for the Eastern Province by an election of members as required by Article 154A(2) due to the impugned order of merger P2. The right to have a Provincial constituted by an election of the members of such Council pertains to the franchise being part of the sovereignty of the People and its denial is a continuing infringement of the right to the equal protection of law guaranteed by law Article 12(1) of the 640
Constitution, as correctly submitted by Mr. de Silva. Therefore the objection of time bar raised by the Additional Solicitor General is rejected.

For the reasons stated above I allow the applications and grant to the petitioners the relief prayed for in prayers (c) and (e) of the respective petitions. No costs.

JAYASINGHE, J. – I agree.
UDALAGAMA, J. – I agree.
FERNANDO, J. – I agree.
AMARATUNGA, J. – I agree.

Relief granted.