VISUVALINGAM AND OTHERS

v.

LIYANAGE AND OTHERS

SUPREME COURT.
WIMALARATNE, J., COLIN-THOME', J., RANASINGHE, J., ABDUL CADER, J. AND RODRIGO, J.
S.C. APPLICATIONS No. 85/83 AND No. 6/84.
MAY 7, 9, 10, 11, 16, 17, 18 AND 21, 1984.

Fundamental Rights – Articles 12(1), 14 (1) (a) and 126 of the Constitution – Regulation 14 (3) of the Emergency (Miscellaneous Provisions and Powers) Regulations – Banning and printing of Saturday Review by Competent Authority – Violation of fundamental rights of equality and freedom of speech and expression of readers and contributors – Discretion of Competent Authority – Locus Standi of readers and contributors – Article 15 (7) of the Constitution – Sections 5 and 8 of the Public Security Ordinance.

The 1 to 3 and 6 to 8 petitioners in application No. S.C. 85/83 and the petitioners in S.C. 6/84 are readers of the newspaper "Saturday Review" and the 5th petitioner in S.C. 85/83 is a regular contributor to a column in the said paper. On the declaration of a State of Emergency, the Emergency (Miscellaneous Provisions and Powers) Regulations were brought into force and renewed with every monthly renewal of the State of Emergency. The Competent Authority with every such renewal made orders under Regulation 14 (3) sealing the Saturday Review and so banning its printing and publication. The two applications before Court relate to the banning of the printing and publication of this newspaper by orders dated 18.11.1983 and 18.12.1983. The petitioners complain of unfair treatment and discrimination by the Competent Authority and urge that there was no justification for his orders. The Competent Authority merely denied the allegations against him but gave no reasons to justify his orders.

The respondents in opposition contend that the petitioners have no locus standi, that the orders being reasonable are not reviewable by Court and that the burden is on the petitioners to prove they have been unfairly treated and discriminated against.

Held –

(Rodrigo, J. dissenting) As the fundamental right to the freedom of speech and expression includes the freedom of the recipient the petitioners as readers and contributors have a *locus standi* to seek relief under Article 126. But the fundamental right of the recipient is also subject to the restrictions prescribed by law (including Emergency Regulations) in the interests of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society (Article 15 (7)).

Section 8 of the Public Security Ordinance which provides that no emergency regulation and no order, rule or direction made or given thereunder shall be called in question in any court cannot prevent the petitioners from obtaining relief if they succeed in establishing that their fundamental rights guaranteed under Articles 12 (1) and 14 (1) (*a*) have been infringed otherwise than in accordance with the restrictions enumerated in Article 15 (7)

Held further (unanimously) –

(1) In reviewing the exercise of discretion the Court must not substitute its own opinion for that of the Competent Authority. If his decision is within the bounds of reasonableness, it is not the function of the Court to look further into the merits. What is obnoxious during a crisis or state of emergency may not be so in normal times. The necessity for quick action for the preservation of public order which means the prevention of disorder and for the maintenance of peace and tranquility has to be recognised. As long as the Competent Authority has acted in the honest belief that his action was necessary to achieve the object set out in the Regulation the Court will not interfere. Having regard to the material published in the issue of the Saturday Review of May and June 1983 it is not possible to say that the Competent Authority had been unreasonable. The fundamental rights of the publishers of the Saturday Review have been lawfully restricted by the Competent Authority and accordingly the fundamental right of the petitioners as readers and contributors have also been lawfully restricted The petitioners' claim under Article 14 (1) (*a*) thus fails.

(2) Article 12 does not forbid a reasonable classification because all persons are not similarly situate and all situations can never be the same. Discrimination to be violative of Article 12 must be discrimination between equals. In a permissible classification, mathematical nicety and perfect equality are neither possible nor required in the case of newspapers and their readers. The executive, in implementing an administrative scheme is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. The Saturday Review was established in Jaffna where there was considerable disorder and where there was a threat to national security unlike in other parts of the country.

When a person invokes the provisions of Article 126 and complains of a violation of the fundamental right to equality the burden is on him to establish the discrimination by executive or administrative action. A person relying on a plea of unlawful discrimination must set out with sufficient particulars his plea showing how between persons similarly circumscribed, discrimination has been made which is not founded on any intelligible differentia. If the petitioners establish similarity between persons who are subject to differential treatment it is for the State to establish that the differentiation is based on a rational object sought to be achieved by it. But where similarity is not shown, the plea of the infringement under Article 12 must fail. The petitioners have not discharged the burden which was on them to establish discrimination.

Cases referred to :

(1) *Grosjean v. American Press Co. 297 U.S. 233 (1936).*

(2) *Romesh Thapar's case AIR 1950 S.C. 124.*

(3) *B. A. Siriwardena and Others v. D. J. F. Liyanage and Others (Aththa case) S.C. Application No. 120/82 S.C. Minutes of 27.1.83*

(4) *Liversidge v. Anderson (1942) A.C. 206, 239.*

(5) *In Re W. (An infant) [1971] A.C. 682, 700.*

(6) *Secretary of State for Education & Science v. Tameside Metropolitan Borough Council [1976] 3 WLR 652, (1976) 3 All ER 655, [1977] A.C. 1014.*

(7) *Shri Ram Krishna Dalmaia et al v. Justice S. R. Tendolkar et al AIR 1958 S.C. 538.*

(8) *Eleko v. Officer Administering the Government of Nigeria (1931) AC 662.*

(9) *R v. Brixton Prison Governor [1969] 2 All E.R. 347.*

(10) *Probhudas Morarjee v. Union of India AIR 1966 S.C. 1044.*

(11) *Dr. N. R. W. Perera v. The University Grants Commission : S.C. Application No.57/80 S.C. Minutes of 4.8.80.*

(12) *Dr. Neville Fernando and Others v. Liyanage and Others : S.C. Nos. 116/82 and 134/82–S.C. Minutes of 14.12.82 and 7.2.83.*

(13) *Stanley v. Georgia 394 U.S. 557, 564 (1969).*

(14) *Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 QB 455, 493, [1972] 2 All E.R. 949, 967.*

(15) *I.R.C. v. Rossminister [1980] 1 All E.R. 80.*

(16) *A.G. of St. Christopher v. Reynolds [1979] 3 All E.R. 129 (P.C.).*

(17) *Nakkuda Ali v. Jayaratne (1950) 51 NLR 457, [1951] A.C. 66.*

(18) *Narayana v. The State AIR 1973 Kerala (FB) 97.*

S Nadesan Q.C. with *S. Mahenthiran* and *A. R. Surendra* for the petitioners in both Applications.

Sarath N. Silva, Deputy Solicitor General, with *N. Y. Casiechetty, State Counsel* for the respondents in both Applications.

Cur. adv. vult.

June 14, 1984

WIMALARATNE, J.

The "Saturday Review" is an English weekly newspaper published in Jaffna by the New Era Publications Ltd. Its objects are described in a publication brochure as being to establish a two way communication between all persons and nationalities in Sri Lanka, and to stand up against injustices, acts of discrimination and violations of human rights and freedoms. It devotes itself not only to political but also to cultural matters, concentrating mainly on events in the Northern province. The Petitioners in the two Applications Nos. 85/83 and 6/84 claim to be and to have been regular readers of this newspaper from the time it commenced publication in January 1982 whilst the 5th Petitioner in No. 85/83 has also been a regular contributor to a column for which he was paid Rs. 250/= each week. They are all citizens of Sri Lanka and claim to be entitled to the fundamental right of equality with other readers of newspapers, guaranteed by Article 12(1) of the Constitution and to the fundamental right of speech and expression guaranteed by Article 14(1) (*a*). They say that there has been a violation of these fundamental rights as a result of the complete banning of the publication of this newspaper.

On 18.5.83 the Government declared a state of emergency under the Publice Security Ordinance (Cap. 40) Acting under Section 5 of that Ordinance the President made certain Emergency Regulations, known as the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 1983. With the extension of the state of emergency from month to month these regulations were also renewed each month. The 1st Respondent is the Competent Authority appointed for the purpose of the regulations ; the 2nd Respondent is the Inspector General of Police and the 3rd Respondent is the Attorney General.

On 1.7.83 the 1st Respondent, acting in terms of Regulation 14(3) of the said Regulations made order that–

(*a*) no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the "Saturday Review" for a period of one month from the date of that order ;

(*b*) the printing press in which the said newspaper was printed shall for a period of one month from that date not be used for any purpose whatsoever.

This order has been renewed from time to time. The present applications relate to the banning of the printing and publication of the newspaper by subsequent orders dated 18.11.83 and 18.12.83.

The Petitioners state that in the "Saturday Review" at no time has there been publication of matter calculated to be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community. Neither has there been any matter inciting persons to mutiny, riot or civil commotion. The Competent Authority could not therefore have formed the opinion which he says he had prior to acting in terms of Regulation 14(3). The Saturday Review has from its inception been critical of some aspects of Government policy besides publishing views of the manner in which the security forces and the police behaved in exercising their powers. The Competent Authority's order banning the Saturday Review was void and consequently the fundamental rights of the petitioners to the freedom to receive information from and to contribute to that paper have been violated.

Under the Emergency Regulations the Competent Authority had the power to impose censorship under Regulation 14(1) which he has exercised in the case of virtually all other newspapers. Instead of making such an order in respect of the Saturday Review the Competent Authority has prohibited the Saturday Review from being published at all and thereby its readers including the petitioners have been deprived of valuable information from that paper or from contributing to it, their views on public questions. Thereby there has been discrimination between readers of and contributors to the Saturday Review, vis-a-vis readers of and contributors to other newspapers, thus violating the fundamental rights of the petitioners guaranteed under Article 12(1) of the Constitution.

They pray for a declaration that the orders of the Competent Authority are null and void and that the consequent acts of the 2nd respondent and his subordinates are in contravention of the provisions of the Constitution. They ask for damages by way of compensation and costs.

In the affidavits of the Competent Authority he states that the Saturday Review is a political newspaper advocating the cause of dividing the country and the establishment of a State known as Eelam for the Tamils in the North and East of the Country ; many of the

articles and items published suggested that its publishers eschewed democratic processes, negotiations and campaigns based on non-violence as a means of resolving the problems facing the Tamils of Sri Lanka and that they openly encourage the adoption of force and terrorism as the only means ; the newspaper also gave prominent publicity to the acts of the terrorist movements operating in the North, particularly of the organisation calling itself the Tamil Eelam Liberation Front (T.E.L.F) and often eulogised such conduct with a view to encouraging the growth of such movements and the use of force against the lawfully established government ; and the tenor of the articles and news items were blatantly communalistic and constantly highlighted alleged grievances and injustices committed against the Tamil community which was capable of arousing communal feelings among this community and encouraged conduct prejudicial to the maintenance of public order and security.

Immediately prior to the first order of the Competent Authority made on 1.7.83, a hartal organised by the T.E.L.F led to large scale violence in the North resulting in serious loss and damage to property. He was of the view that the sealing of the "Saturday Review" (and another newspaper in Jaffna) was a measure which was necessary to prevent further escalation of violence. The orders made by him were made bona fide and on being satisfied that, upon a consideration of the contents of the Saturday Review newspapers published prior to 1 7.83 (random extracts of articles and news items of which were produced marked 1R1 to 1R14), they contained matter which was prejudicial to the interests of national security, preservation of public order and matters likely to encourage or cause unrest, communal disharmony and civil commotion in the country. The 1st respondent specifically denies that there has been any violation of the fundamental rights of the petitioners guaranteed under Articles 12 (1) or 14 (1) (*a*) of the Constitution.

Locus Standi : At the arguments before us the learned Deputy Solicitor General raised an argument that the petitioners have no locus standi to make these applications under Article 126 of the Constitution, for the reason that the orders of the Competent Authority are directed at the printers, publishers and distributors of the Saturday Review only. If any persons can complain of a violation of the fundamental rights guaranteed under Articles 12 (1) and 14 (1) (*a*) they are the printers, publishers and distributors of that paper, and

certainly not readers and contributors. The printers, publishers and distributors of the Saturday Review have not invoked the provisions of Article 126, may be for the reason, surmises the Deputy Solicitor General, that they are satisfied with the order of this Court made on their applications in respect of the banning of the paper during the four previous months. So how, then, he asks, can readers and contributors complain ? Equal protection should have its bounds and should not be extended to limitless areas. If so extended the flood gates would be open for the dependants of printers, publishers or distributors and even newspaper vendors to claim that their fundamental rights have been violated as a result of closure of a newspaper, and accordingly claim damages for such violation.

Mr. Nadesan's answer to this contention is that within the ambit of the freedom of speech and expression is included the freedom of the recipient of information. In order to give a meaning to the freedom of speech and expression one has of necessity to recognise the freedom of the recipient of information, and of news and of views. The State is pledged to establish in Sri Lanka a Democratic Socialist Society, one of the objects of which includes the full realisation of the fundamental rights and freedoms of all people. How can that object be achieved, he asks, if a restricted interpretation is placed on the fundamental rights to equality and freedon of speech and expression ? The freedom of speech will be a hollow concept if the freedom of the recipient is not recognised. In this connection he has referred us to –

(*a*) The International Bill of Human Rights. Sri Lanka became a signatory to the Covenant on Civil and Political Rights on the full moon day of Vesak, 1980. Article 19 (2) enjoins that "everyone shall have the freedom of expression ; this right shall include the freedom to seek, receive and impart information and ideas of all kinds regardless of all frontiers, either orally or in writing or in print or in the form of art or through any media of his choice".

(b) A booklet published by our present President Mr. J. R. Jayewardene when he was the Leader of the Opposition in the National State Assembly, being the written submissions which he and his lawyers submitted to the then Constitutional Court

which considered the constitutionality of the Press Council Bill. Under the heading *"The freedom of thought and expression and the freedom of the Press"* appear the following paragraphs :

"1.2 It is submitted that there are two priorities involved in the concept of freedom of speech, namely –

(*a*) the source from which the communication issues, and

(*b*) perhaps the more important one, the recipient of the communication.

The freedom to express one's thoughts is confined to a few compared to the wider circle to which freedom of expression is extended in so far as the recipient is concerned, namely the community.

1.3 It is in the freedom of the recipient that public opinion has its birth. The Press provides the data by which such opinions find their fullest expression. Therefore it is man's right as the recipient of information to look to as many sources of information as he likes ; and it is equally the duty of the Press which provides the information to seek it from as many sources as possible. If, however, the sources of information become concentrated in one, or restricted to a few bodies, then the formation of ideas is limited. It is in such circumstances only proper that the sources of information available to the public should be enlarged rather than restricted ; therefore there can be no justification for interference with the freedom of the Press."

(*c*) The decision in *K. Narayana v. State* : (18) where the Court held that the freedom of speech and expression guaranteed by Article 19(1) (*a*) of the Indian Constitution (which corresponds to Article 14(1) (*a*) of our Constitution) included the freedom to acquire knowledge, to read books and periodicals and to read any type of literature, subject only to reasonable restrictions being placed on such right.

(*d*) The decision in *Stanley v. Georgia* (13) where the U.S. Supreme Court held that in the First Amendment freedom of Speech and the Press encompasses "the right to receive information and ideas". These rights are, however, not absolute but subject to important qualifications.

The learned Deputy Solicitor General contended in this connection that what has been restricted is not the right of the recipient of information but the right of the publisher. The right to read flowed from publication. Since the paper was banned there has been no publication. So how can one conceive of a right to read what has not been published ?

One has to bear in mind that the freedom of speech and expression is one of the most cherished of the fundamental rights enshrined in the Constitutions of all civilised countries. Text books and decisions of the highest Courts in the United Kingdom, the United States and India are studded with quotations expressing sentiments such as these–

> "Without freedom of speech the appeal to reason, which is the basis of democracy, cannot be made". *Sir Ivor Jennings in "Cabinet Government" p. 13.*
>
> "A free Press stands as one of the interpreters between the government and the people. To allow it to be fettered is to fetter ourselves" Justice Sutherland in *Grosjean v. American Press Co. (1).*

The freedom of expression is an essential prerequisite for the communication of ideas. When more than one view is possible on a problem which the State is called upon to settle, then it is best that all views be heard, and if the Press is an important medium of communication of the various views how is a contributor to a newspaper which espouses a particular cause able to put forward his case if there is a total ban on the publication of that newspaper ? How will a regular reader of a particular newspaper be able to gather views and form views if that particular newspaper is banned ? It is only a free Press which can, therefore, propagate a diversity of views and ideas and advance the right to a free and general discussion on all matters of public importance within, of course, the limits prescribed by the law. The eloquent sentiments as those quoted above only go to confirm the liberal view propounded by our President that "the victory of persuasion over force could be ensured and achieved only by permitting public discussion". Public discussion is not a one sided affair. Public discussion needs for its full realisation the recognition, respect and advancement, by all organs of government, of the right of the person who is the recipient of information as well. Otherwise the freedom of speech and expression will loose much of its value.

I am of the view that the fundamental right to the freedom of speech and expression includes the freedom of the recipient. Accordingly the Petitioners have a locus standi to seek relief under Article 126. But like all fundamental rights, the fundamental right of the recipient is also subject to the same restrictions. Just as much as the exercise and operation of the fundamental rights declared and recognised by Articles 12 & 14 are subject to such restrictions as may be prescribed by law (including emergency regulations) in the interests of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society, the fundamental rights of the recipients of information are subject to the very same restrictions (Article 15 (7)).

Emergency Regulations which impose the necessary restrictions are made by the President under section 5 of the Public Security Ordinance. Section 8 of the Ordinance provides that no emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any Court. The effect of such finality clauses has best been stated as follows :

"The Courts have made it a rule that such clauses cannot hamper the operation of judicial control. . . . .there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the Courts. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is sound policy, since otherwise administrative authorities would be given uncontrollable power and could violate the law at will"– *Administrative Law by Wade (4th Ed) 566.*

Section 8 of the Public Security Ordinance does not in my view prevent the petitioners from obtaining relief if they succeed in establishing that their fundamental rights guaranteed under Articles 12 (1) & 14(1) (*a*) have been infringed otherwise than in accordance with the restrictions enumerated in Article 15(7).

The freedom of speech and expression, including publication, is guaranteed to every citizen by Article 14 (1) (*a*). In discussing the question of *locus standi* I have taken the view that within this freedom is encompassed the freedom of the recipient of

information, but that just as much as there may be placed restrictions on the freedom of speech and expression, the self same restrictions would apply to the freedom of the recipients. These restrictions contained in Article 15(7) and referred to earlier are much wider than any restrictions on the freedom of speech and expression provided for in the Constitutions of India and the United States. In the U.S. the First Amendment which provides that "Congress shall make no law. . . . .abridging the freedom of speech or of the press" does not permit of any constitutional restrictions. But the Supreme Court has worked out reasonable restrictions for example, that the restriction of this freedom is only justified if there is "a clear and present danger" or on "a balancing of the competing interests" between free speech and the needs of society. The freedom of expression, therefore, depends to a large extent on the philosophy of the Judges.

In India, before the First Amendment to the Constitution was effected in 1951 no restriction could have been placed on the freedom of speech and expression on the ground that such restriction was necessary in the interests of "public order". Soon after in the decision in *Romesh Thapar's Case* (2) restrictions were permitted to be placed on this freedom "in the interests of public order". I have in my judgment in *B. A. Siriwardena and Others v. D. J. F. Liyanage and Others* (also known as the *"Aththa"* case) (3) interpreted the words "for the preservation of public order" in Regulation 14(3) to mean "for the prevention of disorder or the maintenance of peace and tranquillity".

Regulation 14(3) vests a discretion in the Competent Authority. It is a well established rule that in reviewing the exercise of discretion the Court must not substitute its own opinion for that of the Competent Authority. If his decision is within the bounds of reasonableness, it is not the function of the Court to look further into the merits – *Wade p. 348*. The approach of the Courts to this question has been explained in several cases.

In *Liversidge v. Anderson* (4) Lord Atkin said :

"If there are reasonable grounds, the Judge has no further duty of deciding whether he would have formed the same belief"

In *Re W. (An infant)* (5) Lord Hailsham said thus :

"Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. . . . . not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no Court should seek to replace the individual's judgment with his own".

In *Secretary of State for Education & Science v. Tameside Metropolitan Borough Council (6)* Lord Denning said in the Court of Appeal :

"No one can properly be labelled as unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view".

Said Lord Diplock in the House of Lords, in the same case :

"The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred." at p. 681.

These were the principles which influenced this Court in its determination in the *Aththa Case* (above). It is now necessary to see whether there existed material in the publications of the "Saturday Review" on which the Competent Authority could reasonably have formed the opinion which he says he did.

In a consideration of the reasonableness of the orders of the Competent Authority the Court has to bear in mind that they have been made during a period of Emergency. The need for a State of Emergency is a matter to be decided solely by the President. The restrictions on the freedoms enshrined in the Constitution will necessarily be greater during a period of emergency than in periods of peace, and tranquillity. What is obnoxious during a crisis or a State of Emergency may not be so in normal times. The necessity for quick action for the preservation of public order, which means the prevention of disorder, and for the maintenance of peace and tranquillity has to be recognised. Sometimes he may err in his

judgment, sometimes he may be over cautious, but as long as he has acted in the honest belief that this action was necessary to achieve the object set out in the Regulation, then the Court will not interfere.

The State of Emergency was declared at 5 p.m. on the 18th of May 1983, on the day when elections to the local bodies, including local bodies in the Northern and Eastern Provinces were being held. There had admittedly been certain incidents on that day at Kantharamadam in Jaffna. It is alleged that some militant youth had fired at the security forces killing Corporal Jayawardena and injuring several soldiers at the polling station and that in retaliation the security forces had run amok and set fire to no less than 64 houses and a large number of vehicles in Arasady Road. These incidents were given prominence in the Saturday Review of 21.5.83. Another incident involving the shooting of two Air Force personnel in the heart of the Vavuniya town, and retaliation by way of setting fire to the "Gandhiyan Farm" and several shops in Vavuniya were reported in the Saturday Review of 4.6.83. In the Eastern Province violence had erupted on 11.6.83 at a time when a curfew was in force. Bombs were alleged to have been thrown at the house of the M.P. for Trincomalee and the Saturday Review of that day reported that the armed forces or their hired thugs were suspected of this violence. There were two issues of the Saturday Review thereafter ; they were the issues of 18.6.83 and 25.6.83, to which reference will be made later. At about the same time a "hartal" was organised by the T.E.L.F to be staged in Jaffna on some date before the 1st of July 1983. The Competent Authority had thereupon decided to ban the publication of this newspaper which he did by his first order dated 1.7.83.

The material on which the Competent Authority says he formed his opinion is :

(A) *In paragraph 15* of document marked 1R1 (which was the affidavit the Competent Authority filed in the previous application No.47/83 in which his orders dated 1.7.83 and 18.7.83 were challenged) he states that the Saturday Review is a political newspaper advocating the cause of dividing the country and the establishment of a State known as Eelam for the Tamils in the North and East of the Country.

Mr. Nadesan submits that there was nothing illegal in espousing the cause of separatism by peaceful means prior to the enactment of the Sixth Amendment to the Constitution in August 1983. A noteworthy

fact is that during the first six months of its publication (1.1.82 to 30.6.82) the paper had been sent free to all Members of Parliament and to several other persons occupying public positions in Sri Lanka. Subsequently some of these persons have subscribed and obtained copies of the newspaper. But no action had been taken against the paper for the cause it espoused.

In the early editions of the paper there could be no doubt that the Saturday Review lived up to its task of espousing a cause and no exception could therefore have been taken to such a policy prior to the Sixth Amendment.

(B) *In paragraph 16* the Competent Authority says that many of the articles and items published suggested that the publishers eschewed democratic processes, negotiations and campaigns based on non – violence as a means of resolving the problems of the Tamil people and openly encouraged the adoption of force and terrorism as the only means to a solution. Mr. Nadesan denied this allegation and stated that this was far from the truth. He referred us to several articles and editorials where the paper had advocated non-violence, and I have selected just two illustrations.

(i) *Editorial of 20.2.82* under the heading "Why breed more terrorists ?" appears the following passages.

> "Terrorists, whether we like them or not, cannot be equalled with robbers and thieves and thugs and looters and arsonists. The only thing in common between the two is their addiction to violence ; and violence certainly cannot be condoned by any civilised society which believes in the rule of law".

"Military solutions are no answer to political problems"

(ii) *The issue of 14.5.83* published an article by K. Shanmugan Bar-at-Law titled "The cause is just, but guns are not the answer" in which appears the passage "If no satisfactory solution is reached, the Tamil leadership will have no alternative but to devise effective methods to achieve their goal. The one and only practical and effective method is to organise the entire Tamil nation for a non-violent struggle on the lines of the Gandhian campaign in India. Gandhiji defeated the mighty British power not with guns but with his non-violent satyagraha"

On the other hand the learned Deputy Solicitor General indicated that much water had flowed under the bridges of the Aruvi Aru since about April 1983. He referred us to several issues of the paper which

according to him were calculated to exacerbate communal feeling, to ridicule any further negotiations with the Government, to ridicule the T.U.L.F. which was keeping up a dialogue with the Government and to deflate the value of the Parliamentary system. They also published grossly distorted versions of the incidents in the North and East with a view to creating a climate for further violence.

The issue of 21.5.83 contains two letters written by the Eelam Tamil Association of Australia. The first is an open letter addressed to Mr. Amirthalingam, General Secretary of the T.U.L.F. written by Dr. Sundarasingham, President of the Association and it calls upon Mr. Amirthalingam to step down. It says "We strongly point out to you that the Tamil people gave you and your T.U.L.F. Parliamentarians a clear and unequivocal mandate to strive for and achieve an independent sovereign State of Tamil Eelam and not to compromise for anything short of this. You were most certainly not given any right to conduct back door dialogues asking for D.D.Cs and other petty concessions . . . . . You are most definitely not capable of leading Eelam Tamils to freedom. Therefore please step down"

The other is "A call to all Eelam Tamils at home and abroad to stand up and be counted". It states that every Eelam Tamil, no matter where he lives today is part and parcel of the struggle. It eulogises the "soul-stirring acts of heroisms of Kuttimani, Jegan, Thangathurai and others in the face of death . . . . . the martyrdom of Sivakumaran, Inbam, Selvam and countless numbers of other Tamil youth for the cause", which is something of a Tamil 'miracle' in modern times.

The issue of 11.6.83 contains an Article "Taking a close look at Non Violence" by Kumar. It says "It is clear that the Tamil people in Sri Lanka will not be given their right to self-determination without a struggle"

"The satyagraha strategy is for another lot to try again and be met with more violence. This cannot go on for ever and we are back in square 1. There is not a single country in the world which has liberated itself through non-violence"

"Freedom fighters must carry on their struggle in the territory of their choosing with weapons of their choosing :– non-co-operation, strikes, boycott etc. Each area will have to work out ways best suited to itself. In the final stages, if and when necessary, guns will have to be used. By then the freedom fighters would have so integrated with the people that they would move among the people like fish in the ocean"

"Non-violence should not be allowed to be the sacred cow before which we must all kneel. National liberation struggles deal with matters of life and death for millions of people and every care must be taken to see that the weapons used are effective. To announce at the outset of a struggle that it is completely non-violent is to give great comfort and cheer to an opponent fully armed. He will use his weapons with abandon knowing that no physical harm will happen to him".

Also in the same issue was a news item about new posters signed by the Peoples Liberation Organisation of Tamil Eelam appearing on the walls of Jaffna calling upon the people to take up arms against the repression of the State.

The issue of 18.6.83 contains an Article "Freedom's Journey" by S. D. A. Ariyadurai. He states that after the Moses of the Tamils (Mr. Chelvanayagam) had marched with the Tamil people for 25 long years, always confining his strategies to Gandhian principles, the mantle of leadership fell on the present leader of the T.U.L.F. who, according to the author is looked upon as Joshua of the Tamils. "Either he would prove his hilt or fall by the way for Gandhian style of leadership seems to have taken a back seat as especially proved during the local Government Elections (18.5.83) – and Subas Chandra Boses and Baghat Singhs have emerged to the fore". Again : "Perhaps the Tamil Nation has lost its faith in Gandhian politics particularly when the forces of evil stationed in Tamil areas have not even spared Gandhiyam itself, which is only a social service organisation".

In the issue of 25.6.83 is published a letter to the Editor by Miss Niranjana Sellathurei of Sandilipay under the heading "what Gandhi's assassin said in his own defence". After observing that Gandhi's inner voice, spiritual power and doctrine of non-violence crumbled before Mr. Jinnah's iron will, the assassin is alleged to have said "I felt that Indian Politics in the absence of Gandhiji would surely be practicable to retaliate and would be powerful with armed forces". The writer says that it is a strange irony that satyagrahis and peace lovers like Gandhiji, Martin Luther King and Anvar Sadat met with their end by violence.

The same issue reported a draft plan for a form of Regional Autonomy as an alternative to Tamil Eelam being drafted by three Ministers of the Government, in consultation with a member of the T.U.L.F. The following passage, Deputy Solicitor General contends is indicative of the attitude of the paper to these negotiations :

> "Militant Tamil Youth have yet to make known their stand on these peace plans and regional autonomy moves. So far the only reaction has been from the Tamil Eelam Liberation Army. This group believed to be aligned to Kuttimani and Thangathurai distributed a 4-page pamphlet on Thursday (23rd June) categorically declaring its opposition to any peace talks which rule out Tamil Eelam".

The learned Deputy Solicitor General contends that these articles were calculated to instigate and incite the Tamil Youth to violence. These and similar articles have debunked non-violence and the Gandhian principles, they have ridiculed the elected representatives of the Tamil people who were seeking to achieve a settlement to their problems by peaceful means, and have if not explicitly, certainly implicitly eulogised the activities of the terrorists in no uncertain terms. The Competent Authority was therefore well justified in the opinion he formed prior to the banning of the paper.

Mr. Nadesan has addressed us at length on the purpose for which these articles were published and the reasonable interpretation that is capable of being placed on each of them. Some were intended to make people think and form their own views on the present situation, others like "Freedom's Journey" are inspiring studies whilst still others like the posters were news items to enable the authorities to know the thinking of the Tamil People. He claimed that the paper had an intelligent readership representing the elite of society who could not have been incited by such articles.

(C) *In paragraph 17* the Competent Authority states that prominent publicity was given by this paper to the terrorists in the North and it often eulogised their conduct with a view to encouraging the growth of terrorist movements and the use of force against the Government. Besides the material referred to in the discussion under paragraph 16 the Deputy Solicitor General referred also to news items appearing in the first page of the issue of 21.5.83 where under the heading "Army Run Amok" is an account of the happenings at the Saiva Prakasa Vidyalayam polling booth on 18.5.83. It says that "about eight youth

had come there at 4 p.m. and exchanged fire for about 25 minutes. Later they coolly wheeled away on their bicycles leaving behind Corporal Jayawardena dead and soldier Bandara, P.C. Tillekeratne and Premadasa badly injured. Eye witnesses said that the youth had spoken to the public as they cycled along Adiyapatham Road, Tinnevelly, introducing themselves as Prabaharan group". This, according to Mr. Nadesan, was a news item which appeared in other newspapers as well. The Deputy Solicitor General submits that no reasonable newspaper should have referred to this "cool" attitude of the terrorists. Instead of condemnation the paper has indulged in eulogising.

(D) *In paragraph 18* the Competent Authority states that the paper has given undue prominent coverage to so called excesses committed by the armed forces and the police in an effort to arouse communal passions. In support of this allegation the Deputy Solicitor General referred us to the following issues :

The issue of 21.5.83 where the headline of the first page reads –

"ARSON, THEFTS, ASSAULTS : ARMY RUN AMOK"

Mr. Nadesan says that this is a correct account of what happened on polling day at Kantharmadan. If the newspapers did not give publicity to such excesses of the law enforcement and military officers how was the Government to know and to take preventive action. He referred us to the news items of the "Island" paper of 20.5.83 and the "Sun" paper of 19.5.83 which referred to the same incidents. It was as a result of such publicity that the Commander of the Army was able to take certain disciplinary action against certain officers.

The issue of 28.5.83 contains several photographs of the destruction under the caption "Army Orgy at Kantharmadam" on Election night 18.5.83. One of the pictures is that of the wooden chariot of a Hindu temple at Palam road which is alleged to have been set on fire and partially burnt.

This issue carries also an eye witness account of certain incidents said to have taken place in the Yal Devi train on the morning of 19.5.83 under the heading "Police Rowdyism in Jaffna-Colombo Train."

There are also eye witness accounts of how the Army prevented the Police from dousing the fire when the house of the Chief Manager of the Bank of Ceylon at Kantharmadam was set on fire by the Army soon after the elections on 18.5.83.

The issue of 4.6.83 has a headline "Armed Forces attack Gandhiyan farm ; Vavuniya shops burnt". Mr. Nadesan says that this is a news item and nothing said there is an exaggeration.

Also in the same issue are accounts of the deaths of Navaratnarajah and of Sriskandarajah, both of whom had died whilst in Army custody. The judicial verdicts were verdicts of homicide.

The issue of 18.6.83 carries a letter to the editor from one Samudran written from Tokyo under the heading "State terrorism and T.U.L.F. opportunism". The army attack on Kantharamadam is compared to the horrors of the American occupation of Vietnam and the Pakistani occupation of Bangaladesh which according to the writer "are not remote imaginations any more to the children of Jaffna". "State terrorism as most blatant manifestation of national oppression has produced its inevitable dialectical opposite ie. resistance from the oppressed". The growing consciousness of the Tamil masses to State terrorism is seen as "the negation of the T.U.L.F. as an inimical anarchronism". The T.U.L.F. is branded as being fathered by liberals and nurtured in parliamentary opportunism with "Amir as the tragic figure of this historic transition".

(E) *In paragraph 19* the Competent Authority states –

(i) that the tenor of the articles and news items were blatantly communalistic and constantly highlighted alleged grievances and injustices committed against the Tamil community capable of arousing communal feelings among that community ;

(ii) that the editorial policy in the context of the circumstances prevailing in the country at that time, was extremely prejudicial to the security and safety of the country and its citizens.

(I) As illustrating the communalisitic policy of the paper reference has been made to the following among other articles –

In the issue of 28.5.83 there has been published an anonymous postcard. It purports to be an ultimatum issued by the Sinhala United Liberation Front of the U.N.P. from its headquarters at Siri Kotha. It enjoins the Tamils to leave Sri Lanka and go back to Tamil Nadu, their traditional homeland. It alleges that "you bloody Tamils invaded our Sinhala homeland and grabbed our lands, property, jobs etc.". The Deputy Solicitor-General asks why, even if some fanatic Sinhalese wrote such a letter, a responsible newspaper considered it desirable to publish it ? Would not the publication of this type of anonymous letter naturally rouse the feelings of the Tamil People ?

In the issue of 18.6.83 there is reproduced a letter by a 'Hindu' reader writing from Ooty bearing the heading "Appearances are dangerously deceptive in Sri Lanka". It refers to the several acts of discrimination perpetrated against the Tamils and observes that "What is at stake is the identity of the Tamils as a separate ethnic, cultural and linguistic minority and the right to live in the land of their birth with dignity and self respect as equal citizens with the Sinhalese. It is this right that is attacked by the Chauvinist philosophy which informs and guides the Enoch Powells of the Sinhalese ruling clique".

A sinister and calculated move is on, the writer says, to deprive the Tamils of their soul by depriving them of their language, denying them their fundamental rights and destroying their culture. As an illustration there is a reference to the famous 'muruga' at Kataragama being converted into a Sinhalese deity.

Also in the same issue is an Article titled "Cultural Racism in Vavuniya". It is an attack on the architecture of the recently built Archaeological Museum in Vavuniya, alleging that it symbolises Sinhala Buddhist arrogance and oppression rather than tolerance and maitriya. It calls upon the Tamil people as a mark of protest not to participate in the opening ceremony of the Museum erected behind the "enigmatic Buddha Statue".

(II) Mr. Nadesan denies that the editorial policy was calculated to endanger the safety of the country or to be prejudicial to national security. The Saturday Review, he claimed, had always stood for national interest. It was, however, bold and forthright and expressed views on all matters of public interest. The primary function of a newspaper is to convey information to the public and in the performance of that function the Saturday Review published articles and letters from readers expressing various shades of opinion. The ideas contained in them in no way reflected the editorial policy of the Saturday Review.

If the Army ran amok, for instance, a newspaper must report it so that preventive steps could be taken. Also such news stories as well as activities of the terrorists, be they from the North or the South would arouse tremendous public interest ; so why should such stories be suppressed, he asks, because they had nothing to do with public security.

He referred us in particular to the earlier editions of the paper published in the year 1982 where there was nothing to indicate anything prejudicial to the national interest. On the other hand the views expressed resulted in rectifying some of the injustices perpetrated by the Government on the Tamil people. As an illustraiton he referred us to the editorial in the issue of 6.2.82 which criticised the proposal of the Government to decentralise the issuing of passports by opening passport offices in Kandy & Galle but leaving out Jaffna. The substance of the editorial was that by such conduct the Government was making the Tamils feel that they did not belong to the same family. The editorial yielded results as the Government soon thereafter opened a passport office in Jaffna as well.

It was factually wrong, he contended, for the Competent Authority to have thought that Saturday Review had conducted itself in a manner prejudicial to the national interest for the reason that it had been critical and outspoken. That is what a newspaper has to be. If not for newspapers the Watergate scandal would never have been exposed nor would Tanaka the former Prime Minister of Japan been jailed for bribery.

He therefore invited us to examine all the material published in the paper and come to the conclusion whether the Competent Authority has made a correct assessment and acted fairly in dealing with the paper. We have examined the material as fully as is relevant for the purpose of these cases. It appears to me, as it did appear to Wanasundera, J. who observed in his judgment in S.C. Application No. 47/83 that "the publishers have tried to be as objective as possible, and have sought to produce a weekly newspaper which appears to be a cut above the average newspaper judged by journalistic standards" ; but that "unfortunately there has also crept into this publication material that must necessarily attract the attention of the authorities at a time when there were unsettled conditions in the country". The evaluation of the material which has been referred to by me is not the function of the Court but the function of the Competent Authority. All that the law permits the Court to decide is whether the Competent Authority can possibly be labelled as unreasonable on his evaluation of this material. He cannot be labelled as unreasonable unless, in the words of Lord Denning (above) "he is not only wrong, but unreasonably wrong, so wrong that no reasonable person could

sensibly take that view". It is not possible for me to say that the Competent Authority was unreasonable, having regard to the material contained in the issues of May and June 1983.

I am therefore of the view that the fundamental right of the publishers of the Saturday Review has been lawfully restricted by the Competent Authority and accordingly the fundamental right of the Petitioners as readers and contributors have also been lawfully restricted. The Petitioner's claim under Article 14(1) (*a*) thus fails.

The Fundamental Right guaranteed by Article 12 (1) :

"All persons are equal before the law and are entitled to the equal protection of the law". Mr. Nadesan's contention is that readers of all newspapers are entitled to equal treatment by the law without discrimination. The object of this Article is to ensure that arbitrary discrimination shall not be made by the State or its organs between person A and person B who answer to the same description.

Equality before the law does not mean that the same set of laws or the same set of administrative orders, shall apply to all persons under every circumstance, ignoring differences between men and situations. Article 12 does not, therefore, forbid a reasonable classification because all persons are not similarly situate, and all situations can never be the same. Discrimination to be violative of Article 12 must be discrimination between equals. There can be no infringement of this Article where unequals are treated differently.

In the operation or implementation of an administrative scheme, such as the imposition of a censorship or the prohibition of the publication of a newspaper, the State is permitted to take unequal administrative action in its dealings with individuals or groups whose circumstances or situations are different. Newspapers differ in their respective policies, opinions and tastes. No two newspapers, as in the case of individuals, are alike. Each newspaper caters to a different readership, and so among the readership too there is a difference. In a permissible classification, mathematical nicety and perfect equality are not possible and are not required in the case of newspapers and their readers. The executive, in implementing an administrative scheme is free to recognise degrees of harm, and may confine its restrictions to those cases where the need is deemed to be the clearest. *Shri Ram Krishna Dalmaia et al v. Justice S. R. Tendolkar et al* (7).

Mr. Nadesan's complaint is that the Competent Authority has not, in his affidavits in reply to the Petitioner's averment of discrimination, specified the reason as to why he imposed a total ban on the publication of the Saturday Review whilst imposing only a censorship in the case of other publications. The answer of the Competent Authority to this allegation of discrimination is a bare denial. No reasons have been given for such differentiation. In the absence of valid reasons for such discrimination learned Counsel invites us to draw the inference that there is no intelligible differentia on which the orders of the Competent Authority are based.

This raises the question 'on whom is the burden of proof of infringement of the fundamental right guaranteed by Article 12(1) ?' Mr. Nadesan has emphasised Articles 3 and 4 of the Constitution, and in particular Article 4 (*d*) which ordains that the fundamental rights that are declared and recognised by the Constitution shall be respected, secured and advanced by all organs of government, and shall not be abridged, restricted or denied save as provided in the Constitution. He drew our attention to the fact that provision similar to Article 4(d) is not incorporated in the Indian Constitution and that decisions of the Indian Courts on the burden of proof may not be appropriate in interpreting Article 12 of our Constitution.

In this connection Counsel referred us to *Eleko v. Officer Administering the Government of Nigeria* (8) and *R. v. Brixton Prison Governor* (9) both cases of illegal detention, where Lord Atkin in the former case, and Chief Justice Lord Parker in the latter, stated the cardinal principle of English Law that no member of the executive can interfere with the liberty of a British subject except on the condition that he can support the legality of his action before a Court of Justice, and that at the end of the day it was for the members of the executive to satisfy the Court as to the validity of the order.

What was challenged in *Eleko's case* was an order made by the Government of Nigeria providing that the appellant who was the applicant for the writ of habeas corpus shall leave a specified area and on his failing to comply, ordered his deportation to another place in the colony. The Governor could only make that order validly if the applicant was a native chief ; if he had been deposed ; and there was a native law or custom which required him to leave the area. These were the conditions precedent to a valid order of deportation and there could be no doubt that the executive had to establish that these conditions existed.

In the latter case under the Commonwealth Immigration Act, 1962, an immigration officer had a discretion to admit or refuse admission to the U.K. of a Commonwealth immigrant after an examination provided for in a schedule to the Act, the relevant portion of which stated that a person shall not be required to submit to examination under this para after the expiration of the period of 24 hours from the time he lands in the U.K. Lord Parker took the view that it was for the immigration officer and not for the immigrant, to establish the time at which the immigrant had landed in the U.K.

But we are in the arena of fundamental rights, and I think different principles are applicable. It seems to me that where a person invokes the provisions of Article 126 and complains of a violation of the fundamental right to equality the burden is on him to establish the discrimination by executive or administrative action. The principle finds support from the decision in *Probhudas Morarjee v. Union of India* (10) "To make out a case of denial of equal protection, a plea of differential treatment is by itself not sufficient. The petitioner pleading that Article 14 (corresponding to our Article 12(1)) has been violated must make out that not only had he been treated differently from others, but that he has been so treated from persons similarly circumscribed without any reasonable basis, and that such differential treatment is unjustifiable".

This principle was affirmed by the Court in the case of *Dr. N. R. W. Perera v. The University Grants Commission* (11) "A person relying on a plea of unlawful discrimination must set out with sufficient particulars his plea showing how between persons similarly circumscribed, discrimination has been made, which discrimination is founded on no intelligible differentia. If the petitioner established similarity between persons who are subject to differential treatment it is for the State to establish that the differention is based on a rational object sought to be achieved by it. But where similarity is not shown, the plea as to infringement of Article 12 must fail" per Sharvananda, J. at p.13.

The petitioners have not discharged the burden which was on them to establish discrimination. Their claim that their fundamental right to equality has been violated must also fail for the reason that the Saturday Review was published in Jaffna where there was considerable disorder, and where there was a threat to national

security unlike in other parts of the country. The publications in Jaffna could not therefore be said to be "similarly circumscribed" as the publications in other parts of the Country at the same time.

For these reasons these Applications are dismissed, but without costs.

COLIN-THOME', J.–I agree.

RANASINGHE, J. – I agree.

ABDUL CADER, J.–I agree.

RODRIGO, J.

I have come to the same conclusion. The 'Saturday Review' keeps knocking at the door of this Court with each monthly renewal of the ban on the paper following each extension of the Emergency. The dirge it sings is the same. But the choir changes. The company owning the paper and its share-holders had on different occasions separately petitioned this Court against the ban without success. The present applications are by some alleged readers of the paper. Counsel for the Competent Authority argues that the application is misconceived. He says that the ban is on the printers, publishers and distributers of the papers and not on the readers. This point is resisted with the argument that the right of publication granted to one person carries with it of necessity the right to another to read the publication. That is to say that Art. 14 (1) (*a*) of the Constitution enacts that every citizen is entitled to the freedom of speech and expression including by implication the right to receive information. So, the argument runs that if the ban on publication is invalid giving rise to a cause for complaint by the publisher so does it give a cause for complaint to the reader. Publication in the Roman Dutch Law of defamation can be understood, it is said, in ten different senses. It means basically in that law "to put the matter in the way of being read and understood by someone. . . . . " (Salmond p.353 – 13th Ed.) This word read in the context of Art. 19 of the Universal Declaration of Human Rights simply means imparting information and ideas through any media. To impart information there must be a recipient to receive it. So a reader or hearer is inseparably linked to the concept of publication. One does not exist without the other. Likewise if one ceases to exist, so does the other. Where a publisher is free to publish any matter he is also free to discontinue the publication and a reader has no vested right to have

the matter published. This freedom to publish is granted as a fundamental freedom to a citizen by the Article referred to in the Constitution. Where the publisher is not a citizen he has no fundamental freedom of publication. Where the right of a person other than a citizen to publish is lost through whatever cause he cannot complain against it as the loss of a fundamental right. The proprietor of this paper is not a citizen, it being an incorporated company. A reader of the contents of this paper published as it is by a non-citizen cannot be in a better position than the company itself, in regard to the fundamental right of publication. The company cannot do indirectly what it cannot do directly. See *Dr. Neville Fernando and Others v. Liyanage and Others* (12). If it cannot complain against the ban as it has no fundamental right how can a reader raise a cry on its behalf since in effect that is what he is doing when he complains that he is not getting his usual paper ? It is conceded that where the paper voluntarily discontinues publication the reader has no ground of complaint. Likewise, it is conceded that the reader and the publisher are bound alike by restrictions imposed on publication by the law of defamation, sedition and so on. This applies where the publisher is a citizen or otherwise, and likewise where the reader is a citizen or otherwise. Inasmuch as the relief sought here is in relation to violation by administrative action of a fundamental right of publication the petitioners must establish that the fundamental right violated is that of a citizen. Where no citizenship is claimed for the publisher there is no bottom to hold the complaint by any person such as a reader of it on its behalf. Just as a reader cannot meaningfully seek to compel a publication by a person who has voluntarily ceased to publish any matter so a reader cannot effectively seek to have recourse to law to lift a ban on a publication the right to publish which the publisher has no fundamental right, it being remembered that relief is being sought under provisions relating to enforcement of fundamental rights.

The Deputy Solicitor-General (D.S.G.) nevertheless started from a more advanced starting-block, namely, lack of protest by the publisher himself and a lack of an order directed at the readers. He was content to do so as it was presumably unnecessary for him to burrow into questions of legal incapacity in the publisher to complain and follow the consequences to the readers. I have, however, examined it as it is staring in the face from the immediate background. Be that as it might. The fact of the matter is that the publishers protested twice earlier in

different capacities and on each occasion this Court was obliged by law to refuse a locus standi to the publishers To grant one to the present petitioners who are alleged to be readers of the paper is to close one's eyes to the mask behind it. All the petitioners barring the 5th petitioner in the application No. 85/83 are the self same petitioners in application No. 47/83 that was dismissed for want of legal capacity in the petitioners in that they as shareholders of the incorporated company were held incapacitated from maintaining the petition where the company itself – 7th petitioner – could not maintain it. They did not claim the present alleged capacity in that application. In application No. 6/84 the petitioners are new still claiming to be readers. The subterfuge is all too transparent. To legally shut the front door to the publishers and to say that they are entitled to come through the back door is sophistry. Every member of the literate public is a potential reader of every newspaper and to recognise the right in an alleged actual reader and not recognise it in every other member of the literate public which in fact means a vast and amorphous public does not seem right. To hold otherwise is a self-evident fallacy. Anyway, in case I am wrong in this view, I shall address myself to the contention that the fundamental right implied in Art. 14 (1) (*a*) of receiving information that every citizen is entitled to has been infringed by the closure of the paper. Notwithstanding the Universal Declaration of Human Rights and the Covenant on the Civil and Political Rights to the latter of which Sri Lanka has become a signatory and the submissions contained in a booklet made by the President as Leader of the Opposition to the Constitutional Court then against the Press Council Bill which recognised a fundamental right to receive information, I do not think it necessary to reach a conclusion on this alleged right in this application. It is perhaps significant that it finds no place specifically in the present Constitution. There is no pronouncement by the Supreme Court of India on it though there is a provision in the Indian Constitution corresponding to our Art. 14 (1) (*a*). The U.S. Supreme Court decision in *Stanley v. Georgia* (18) deals with the First Amendment relating to Freedom of the Press and not to a provision corresponding to our Art. 14 (1) (*a*). The subject is too vast and uncertain to make a pronouncement where it is unnecessary to do so in considering an application that can be disposed of otherwise. It is safer to approach this application from an angle of the validity or otherwise of the banning order. If the order banning the paper is valid

under Emergency Orders then the petitioners too are bound by its validity. I shall therefore consider the validity of the order complained of.

In the judgments delivered previously in connected applications I have repeatedly addressed myself to the limited role that this Court can play when considering orders made by the Competent Authority under Emergency Regulations that empower him to make this kind of order merely if in his opinion it is required by the exigencies of national security and public order. References have been given in those judgments to the view expressed by Courts here and abroad as to the judicial approach to the consideration of these orders made in times of Emergency.

"In times of grave Emergency it is unlikely that a theoretical judicial control will be able to come to play as the ingredient of policy is so much by comparison with the ingredient of ascertainable and relevant facts." *Wade* pp. 375-6. The fact that issues of the paper and affidavits by the petitioners have been placed before us does not remove the ingredient of policy that underlies the opinion of the Competent Authority when he made the order banning the publication.

In regard to the exercise of a discretion in an Emergency situation Lord Denning, M. R. expressed himself in *Secretary of State for Employment v. ASLEF (No. 2)* (14). as follows :

> "But . . . . . when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong. After all, this is an emergency procedure. It has to be set in motion quickly, when there is no time for minute analysis of facts or of law. The whole process will be made of no effect if the Minister's decision was afterwards to be coined word by word. letter by letter, to see if he has in any way misdirected himself. That cannot be right. Take this very case. He had made a mistake in . . . . . but, that, in my opinion, was not sufficient to invalidate the application on the basis on which he acts."

As late as in 1980 Lord Diplock in *I.R.C. v. Rossminister* (15) observed :

> "The decision-making power is conferred by the statute on the officer of the Board. He is not required to give any reasons for his decision and the public interest eminently provides justification for any refusal to do so. Since he does not disclose his reasons there

can be no question of setting aside this decision for any error of law on the face of the record and the only ground on which it can be attacked on a judicial review is that it was ultra vires because the condition precedent to his forming the belief which the statute prescribes namely that it should be based on reasonable grounds was not satisfied. Where Parliament has designated a public officer as decision-maker for a particular class of decision, the High Court acting as the reviewing Court . . . . . is not a Court of Appeal. It must proceed on the presumption omnia praesumuntur rite esse acta until that presumption can be displaced by the applicant for review on whom the onus lies of doing so. Since no reasons have been given by the decision-maker and no unfavourable inference can be drawn from this fact because there is obvious justification for his failure to do so, the presumption that he acted intra vires can only be displaced by evidence of facts which cannot be reconciled with there having been reasonable cause for his belief."

The Competent Authority in his order merely states why he made the order but he does not seek therein to give his reasons for forming his opinion. When in the last case referred to the statute required reasonable grounds for the exercise of a discretion by an officer, Lord Diplock was satisfied with the application of the presumption attaching to official acts. The vires of the order or the bona fides of the Competent Authority in a personal sense are not challenged. What is argued is that the Competent Authority has not been reasonable in banning this publication apart from the allegation of discrimination. When the officer concerned is empowered by statute to act in a particular way if in his opinion it is right to do so then I think following Lord Diplock's view we are all the more restricted in scrutinising the sustainability of the Competent Authority's order. In fact, the Privy Council in the case of *A.G. of St. Christopher v. Reynolds* (16) per Lord Simon, has stated :

"The facts and background of the *Tameside case* (6), *Liversidge v. Anderson.* (4) *Nakkuda Ali case* (17) and the present case are of course all very different from each other. This is why their Lordships have reached their conclusions as to the true construction of Reg. 3(1) of the Emergency powers Regulations 1967, in reliance chiefly on the light shed by the Constitution rather than on such light as may be thrown on that regulation by the authorities to which references have been made."

It would, therefore, seem, the opening allowed to a Court to look at a Competent Authority's order is narrow. This is because there cannot be two masters in conditions of Emergency to control the same threat. If there are, the miscreants will exploit it. It is not the Constitutional task of the Supreme Court to be a 'generallissimo' over the authorities empowered to combat an Emergency. Given good faith and legal competence it must be, in the nature of things, on the rarest of occasions that we may set aside an Emergency order and uneasily hope that the authorities will respect it and not bring out two other orders in its place the next day.

Even so, the issues of the paper from its inception have been supplied to us and we were invited to read them and judge for ourselves whether the order of the Competent Authority (C.A.) banning the paper outright was reasonably required by the exigencies of national security and preservation of public order and so on. Though this Court on two previous occasions had unanimously declined to intervene after consideration of the self same issues of the paper and the material supplied in the affidavits furnished in relation to those applications, we indicated to Counsel that we will consider ourselves not technically bound by the conclusions reached in those judgments. In an affidavit filed by the 4th petitioner in these proceedings there is a paragraph (para 28) averring facts not supplied to us in the earlier proceedings. Having considered the averments in that paragraph for the first time and reconsidered the rest of the material all over again I see no reason to reach a different conclusion. For a detailed examination, see the judgment of Wimalaratne, J.

There is, however, the submission that the order of the C.A. is in contravention of Art. 12(1) which guarantees equal protection and equality for all persons before the law. Emergency Orders in their nature are unequal in imposition as they deal with individual persons or individual situations in circumstances that vary from each other. One paper may be banned altogether and another only censored depending on the degree of harm that the contents in the respective papers may cause to the security situation. That is not discrimination. See *Shri Ram Krishna Dalmaia et al v. Justice S.R. Ten dolker et al.* (7) Counsel says that if the ban was imposed in that kind of circumstances the C.A. should have said so in his affidavit. The C.A. has merely denied discrimination. One can understand the reason for the bareness of the affidavit. During Emergencies public officers entrusted

with grave assignments should not fritter away their energy and time in meeting complaints against them in Court. In fact, that is the rationale behind section 8 of the Public Security Ordinance that no order, rule or direction etc., can be called in question in any Court. Though the Courts, just the same, exercise a limited supervisory jurisdiction, it must not give a platform to litigants to demand exacting pleadings and proceedings from public officers whose orders they are challenging. Any way the burden is on the petitioners to establish discrimination. See *Dr. N. R. W. Perera v. The University Grants Commission* (11) and *Probhudas Morarjee v. Union of India* (10). The two cases cited by Counsel namely *Eleko v. The Officer Administering the Government of Nigeria* (8), *R. v. Brixton Prison Governor* (9) do not deal with emergencies. The petitioners have proved nothing beyond making a plea of differential treatment. In any case in relation to steps dealing with exigencies of national security and public order taken by a public officer, I cannot imagine a situation ever arising in which this Article can be applied. Even if it does arise, the instant case is definitely not one.

Applications dismissed.