SUNILA ABEYSEKERA

v.

ARIYA RUBASINGHE, COMPETENT AUTHORITY AND OTHERS

SUPREME COURT
AMERASINGHE, J.
WADUGODAPITIYA, J. AND
WEERASEKERA, J.
S. C. APPLICATION No. 994/99
25TH FEBRUARY AND
23RD MARCH, 2000

Fundamental Rights - Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1998 as amended - Articles 1, 12(1), 14(1)(a) and 15(7) of the Constitution - Public Security Ordinance, section 5 (Cap. 40) - Pre censorship.

The Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1998 published in Gazette Extraordinary No. 1030/28 of 5th June 1998 as amended on 6th June 1999 prohibited the publication, inter alia, of "any publication pertaining to official conduct, morale, the performance of the Head or any member of the Armed Forces or the Police Force or of any person authorised by the Commander - in - Chief of the Armed Forces for the purpose of rendering assistance in the preservation of national security."

The regulation empowered the Competent Authority to prohibit the use of any press or equipment and to seize the same where there has been a contravention of the regulation through such media.

The said regulations were made by the President under section 5 of the Public Security Ordinance. (Cap. 40).

The petitioner who was actively engaged in furthering Interracial Justice and Equality and free and fair elections and interested in the resolution of the "ethnic conflict and the war in the North" complained that the restriction imposed by the aforesaid regulation deprived her of receiving information regarding the war and the ethnic conflict in breach of her rights under Article 10 of the Constitution, the said regulation was unwarranted, discriminatory and arbitrary and violative of Article 12(1); and that it was overbroad and vague and therefore not necessary in a democratic State; hence it was violative of her rights under Article 14(1)(a) of the Constitution. The petitioner alleged that the aim of the

impugned regulation was to prohibit the publication of information that was embarrassing to the Government, rather, than to protect national security.

At the hearing of the application counsel for the petitioner did not press the alleged infringement in respect of Article 10 of the Constitution.

Held :

1. The petitioner has failed to show that the genuine purpose or demonstrable effect of the regulation was to protect the government from embarrassment or wrongdoing. Nor has she shown that the protection of national security was a "pretext".

2. The impugned regulations were framed in reasonably precise terms and confined in their application to defined circumstances. As such there was no violation of the petitioner's rights under Article 12(1) of the Constitution.

3. a *Per* Amerasinghe, J.

"Freedom of speech necessarily protects the right to receive information, regardless of the social worth of such information."

b Article 15(7) of the Constitution provides that the exercise of the rights under Article 14(1)(a) shall be subject to such restrictions as may be prescribed by "Law" (which expression includes emergency regulations) in the interest of, inter alia, national security.

c The burden of establishing restrictions imposed under Article 15(7) is heavy.

Per Amerasinghe, J.

"Exceptions [to Article 14(1)(a)] must be narrowly and strictly construed for the reason that the freedom of speech constitutes one of the essential foundations of a democratic society, which, as we have seen, the Constitution, in no uncertain terms, declares Sri Lanka to be"

d While the preservation of morale of the Armed Forces is an important matter, yet, in a democracy, freedom of speech performs a vital role in keeping in check persons holding public office. Hence, even if the restriction is not expressly related to the conduct of such persons in the North and East, the regulations must be interpreted

restrictively to limit it to information concerning such persons in the North and East.

4. A restriction on the freedom guaranteed by Article 14(1)(a) will be unconstitutionally overbroad and violative of Article 155(2) of the Constitution if there is no proximate or rational nexus between the restrictions imposed and the object sought to be achieved namely, the interest of national security. Regulations which vest arbitrary powers of censorship in administrative officials may be struck down as being overbroad.

Per Amerasinghe, J.

"..... if the court is satisfied that the restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Article 15(7)"

5. a The impugned restrictions had a basis in law, and that as far as the quality of the law was concerned, it was formulated with sufficient precision to enable the petitioner to foresee, to a degree that was reasonable in the circumstances, consequences which a given action may entail; and even though the discretion of the Competent Authority was wide, the scope of the discretion and the manner of its exercise were indicated with sufficient clarity to enable the discretion to be reviewable and to give the petitioner adequate protection against arbitrary interference.

b The restrictions imposed were not disproportionate to the legitimate aim of the regulations, namely the furtherance of the interest of national security in terms of Article 15(7).

6. In the circumstances, the petitioner's fundamental rights under Article 14(1)(a) have not been infringed.

Cases referred to :

1. *Joseph Perera alias Bruten Perera v. The Attorney-General and Others*, (1992) 1 Sri L. R. 199.
2. *Re Compulsory membership of journalists association*, (1986) 8 E. H. R. R. 165.
3. *Channa Pieris and Others v. The Attorney-General and Others*, (1994) 1 Sri L. R. 1.

4. *Palko v. Connecticut*, 302 U. S. 319, 327; 658 S. Ct. 149, 152; 82 L. Ed. 288 (1937).
5. *Fernando v. The S. L. B. C. and Others* (1996) 1 Sri L. R. 157.
6. *Sumith-Jayantha Dias v. Reggie Ranatunge, Deputy Minister of Transport and Others*, (1999) 2 Sri L. R. 8.
7. *Stanley v. State of Georgia*, 394 U. S. 557; 89 S. Ct. 1243; 22 L. Ed. 2d 542 (1969).
8. *Whitney v. California*, 274 U. S. 357; 47 S. Ct. 641, 71 L. Ed. 1095 (1927).
9. *Handyside v. The United Kingdom*, (1976) 1 E. H. R. R. 737.
10. *The Sunday Times v. The United Kindgom*, (1979) 2 E. H. R. R. 245.
11. *Barthold v. Germany*, (1985) 7 E. H. R. R. 383.
12. *Hodgson, Woolf Productions and National Union of Journalists and Channel Four Television v. United Kindgom*, (1988) 10 E. H. R. R. 503.
13. *App. No. 11508/85 v. Denmark*, (1989) 11 E. H. R. R. 543.
14. *Muller v. Switzerland*, (1991) 13 E. H. R. R. 212.
15. *The Observer and the Guardian v. United Kindgom*, (1992) 14 E. H. R. R. 153.
16. *The Sunday Times v. United Kingdom (No. 2)*, (1992) 14 E. H. R. R. 229.
17. *Castells v. Spain*, (1992) 14 E. H. R. R. 445.
18. *Thorgeirson v. Iceland*, (1992) 14 E. H. R. R. 843.
19. *Brind and Others v. United Kingdom*, (1994) 18 E. H. R. R. C. D. 76.
20. *Jerslid v. Denmark*, (1995) 19 E. H. R. R. 1.
21. *Otto Preminger Institute v. Austria*, (1995) 19 E. H. R. R. 34.
22. *Oberschlick v. Austria*, (1995) 19 E. H. R. R. 389.
23. *Piermont v. France*, (1995) 20 E. H. R. R. 301.
24. *Goodwin v. United Kingdom*, (1996) 22 E. H. R. R. 123.
25. *Adams and Benn v. United Kingdom*, (1997) 23 E. H. R. R. C. D. 160.
26. *Wingrove v. United Kingdom*, (1997) 24 E. H. R. R. 1.

27. *Visuvalingam and Others v. Liyanage and Others* (1983) 2 Sri L. R. 311.

28. *Visuvalingam and Others v. Liyanage* (1984) 2 Sri L. R. 123.

29. *Ratnasara Thero v. Udugampola*, (1983) 1 Sri L. R. 461.

30. *Mohottige and Others v. Gunatillake and Others*, (1992) 2 Sri L. R. 246.

31. *Amaratunga v. Sirimal and Others* (1993) 1 Sri L. R. 264.

32. *Deshapriya and Another v. Municipal Council, Nuwara Eliya and Others*, (1995) 1 Sri L. R. 362.

33. *Dejonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

34. *Marian and Another v. Upasena*, (1998) 3 Sri L. R. 177.

35. *Gunawardena and Another v. Pathirana, O. I. C., Police Station, Elpitiya and Others*, (1997) 1 Sri L. R. 265.

36. *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others*, (1994) 1 Sri L. R. 157.

37. *Open Door Counselling and Dublin Well Woman v. Ireland*, (1993) 15 E. H. R. R. 244.

38. *Informationsverein Lentia v. Austria*, (1994) 17 E. H. R. R. 93.

39. *Martin v. City of Struthers*, 319 U. S. 141; 63 S. Ct. 862; 87 L. Ed. 1313 (1943).

40. *Winters v. New York*, 333 U. S. 507; 68 S. Ct. 665; 92 L. Ed. 840 (1948).

41. *Griswold v. Connecticut*, 381 U. S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 510 (1965).

42. *Lamont v. Postmaster General*, 381 U. S. 301; 85 S. Ct. 1493; 14 L. Ed. 2d. 398 (1965).

43. *Pierce v. Society of Sisters*, 268 U. S. 510; 45 S. Ct. 571; 69 L. Ed. 1070 (1925).

44. *Casado Coca v. Spain*, (1994) 18 E. H. R. R. 1.

45. *Abeyratne v. Gunatilake and Others*, (1994) 2 Sri L. R. 294.

46. *Prager and Obserschlik v. Austria*, (1996) 21 E. H. R. R. 1.

47. *Lingens v. Austria*, (1986) 8 E. H. R. R. 407.

48. *Worm v. Austria*, (1996) 22 E. H. R. R. C. D. 7.

49. *McLaughlin v. United Kingdom*, (1994) 18 E. H. R. R. 84.

50. *Vereinigung Democratischer Soldaten Osterreichs and Gubi v. Austria*, (1995) 20 E. H. R. R. 56.

51. *Vereniging Radio 100 et al. v. Netherlands*, (1996) 22 E. H. R. R. C. D. 198.

52. *Abrams v. United States*, 250 U. S. 616; 40 S. Ct. 17; 63 L. Ed. 1173, (1919).

53. *Red Lion Broadcasting Co. v. F. C. C.*, 395 U. S. 376, 89 S. Ct. 1794; 23 L. Ed. 2d. 371, (1961).

54. *West Virginia Board of Education v. Barnette*, 319 U. S. 624; 633 S. Ct. 1178; 87 L. Ed. 1173, (1943).

55. *Shantha Wijeratne v. Vijitha Perera and Others*, S. C. Application 379/93, S. C. Minutes of 03.02.94.

56. *Gitlow v. New York*, 268 U. S. 652; 45 S. Ct. 625; 69 L. Ed. 1138, (1925).

57. *Dissanayaka v. Sri Jayewardenapura University*, (1986) 2 Sri L. R. 254.

58. *Gaskin v. United Kingdom*, (1987) 9 E. H. R. R. 279.

59. *Gaskin v. United Kingdom*, (1989) 11 E. H. R. R. 402.

60. *Leander v. Sweden*, (1987) 9 E. H. R. R. 433.

61. *Wallen v. Sweden* (1986) 8 E. H. R. R. 320.

62. *Chaplinsky v. New Hampshire*, 315 U. S. 568, (1942).

63. *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

64. *Schenck v. United States*, 249 U. S. 47; S. Ct. 247; 63 L. Ed. 470, (1919).

65. *Mallawaarachchi v. Seneviratne*, S. C. Application 212/88, S. C. Minutes of 28.09.1989.

66. *Bernard Soysa and Two Others v. The A. G. and Two Others*, (1991) 2 Sri L. R. 56.

67. *Saranapala v. Solanga Arachchi, Senior Superintendent of Police, and Others*, (1999) 2 Sri L. R. 166.

68. *Mahinda Rajapakse v. Kudahetti and Others*, (1992) 2 Sri L. R. 223.

69. *Walker v. City of Birmingham*, 388 U. S. 307; 87 S. Ct. 1824; 18 L. Ed. 2d 1210, (1967).

70. *Markt Intern Verlag and Beeman v. Germany*, (1990) 12 E. H. R. R. 161.

71. *Dennis v. United States*, 341 U. S. 495; 71 S. Ct. 857; 95 L. Ed. 1157, (1951).

72. *New York Times Co. v. U. S., and United States v. The Washington Post Company et al.*, 403 U. S. 713; 91 S. Ct. 2140, (1971).

73. *Travancore-Cochin v. Bombay Co. Ltd.*, (152) S. C. R. 1112.

74. *Bombay v. R. M. D. Chamarabagawalla*, (157) S. C. R. 874.

75. *Express Newspapers (Private) Ltd. v. Union*, (1959) S. C. R. 12.

76. *Kingsley International Pictures Corporation v. Regents of the University of New York*, 360 U. S. 684; 79 S. Ct. 1362; 3 L. Ed. 2d 1512 (1959).

77. *United States v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778; 82 L. Ed. 1234, (1938).

78. *Brandenberg v. Ohio*, 395 U. S. 444; 89 S. Ct. 1827; 23 L. Ed. 2d. 430, (1969).

79. *Hess v. Indiana*, 414 U. S. 105; 94 S. Ct. 326; L. Ed. 303, (1973).

80. *Frohwerk v. United States*, 249 U. S. 204 (1919).

81. *United States v. David Paul O'Brien*, 391 U. S. 367; 88 S. Ct. 1673, (1968).

82. *Hins and Hugenholtz v. Netherlands*, (1996) 21 E. H. R. R. C. D. 124.

83. *Gay News v. United Kingdom*, (1983) 5 E. H. R. R. 123.

84. *G. V. Germany*, (1984) 6 E. H. R. R. 467.

85. *Markt Intern and Beerman v. Germany*, (1989) 11 E. H. R. R. 212.

86. *Times Newspapers Ltd. and Neil v. United Kingdom*, (1993) 15 E. H. R. R. C. D. 49.

87. *Groppera Radio AG v. Switzerland*, (1990) 12 E. H. R. R. 321.

88. *Arrowsmith v. United Kingdom*, (1982) 3 E. H. R. R. 218.

89. *Tolstoy Miloslavsky v. United Kingdom*, (1995) 20 E. H. R. R. 442.

90. *Near v. Minnesota*, 283 U. S. 697; 51 S. Ct. 625; 75 L. Ed. 1357, (1931).

91. *Wickremasinghe v. Edmund Jayasinghe*, (1995) 1 Sri L. R. 300.

92. *Debs v. United States*, 249 U. S. 211, (1919).

93. *Ekanayake v. Herath Banda*, S. C. App. 25/91 (F. R.), S. C. Minutes of 11.10.91.

94. *Amaratunga v. Sirimal*, S. C. App. 468/92, S. C. Minutes of 08.03.93.

95. *McCray v. United States*, 195 U. S. 27, 56; 24 S. Ct. 769, 776; 49 L. Ed. 78, (1904).

96. *State of Arizona v. State of California*, 283 U. S. 423; 455; 51 S. Ct. 522; 75 L. Ed., 1154, (1931).

97. *Malalgoda v. A. G. and Another*, (1982) 2 Sri L. R. 777.

98. *Lingens and Leitgens v. Austria*, (1982) 4 E. H. R. R. 373.

99. *App. No. 12230/86 v. Germany*, (1989) 11 E. H. R. R. 101.

100. *Barfod v. Denmark*, (1991) 13 E. H. R. R. 493.

101. *Wickremabandu v. Herath and Others*, (1990) 2 Sri L. R. 348.

102. *Rohr v. Switzerland*, (1989) 11 E. H. R. R. 81.

103. *Bowman v. U. K.*, (1996) 22 E. H. R. R. C. D. 13.

104. *Autronic AG v. Switzerland*, (1990) 12 E. H. R. R. 485.

105. *Weber v. Switzerland*, (1990) 12 E. H. R. R. 508.

106. *Shelton v. Tucker* 364 U. S. 479, 81 S. Ct. 247, (1960).

107. *Siriwardene and Others v. Liyanage*, (1983) 2 Sri L. R. 164.

108. *Klass and Others v. Federal Republic of Germany*, (1979-80) 2 E. H. R. R. 214.

109. *App. No. 10628/83 v. Switzerland*, (1987) 9 E. H. R. R. 107.

110. *App. No. 11508 v. Denmark*, (1989) 111 E. H. R. R. 543.

111. *Lovell v. Griffin*, 303 U. S. 444; 58 S. Ct. 666; 82 L. Ed. 949, (1938).

112. *Cantwell v. Connecticut*, 310 U. S. 296; S. Ct. 900; 84 L. Ed. 1213, (1940).

113. *Saia v. New York*, 334 U. S. 558; 68 S. Ct. 1148; 92 L. Ed. 1574, (1948).

114. *Kunz v. New York*, 340 U. S. 290; 71 S. Ct. 312; 95 L. Ed. 280, (1951).

115. *Yasapala v. Wickramasinghe*, (1980) 1 F. R. D. 143.

116. *Verenînging Weekblad Bluf v. Netherlands*, (1995) 20 E. H. R. R. 189.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonesekera with *S. H. Hewamanne, J. C. Weliamuna and Kishali Pinto Jayawardena* for the petitioner.

Saleem Marsoof, P. C., A. S. G. with *U. Egalahewa, S. C.* for the respondent

Cur. adv. vult.

May 15, 2000
AMERASINGHE, J.

THE IMPUGNED EMERGENCY REGULATIONS AND THEIR PRECURSORS

On 21 September 1995, the President of Sri Lanka (hereinafter referred to as the President) made the following regulations under section 5 of the Public Security Ordinance.

"1. These Regulations may be cited as the Emergency (Restriction on Publication and Transmission of Sensitive Military Information) Regulations, No. 1 of 1995.

2. The President may for the purpose of these regulations, appoint, by name or by office, any person or body of persons to be the Competent Authority.

3. No Editor or Publisher of a Newspaper or any person authorized by or under law, to establish and operate a Broadcasting Station or Television Station shall, whether in or outside Sri Lanka, print, publish or distribute or transmit, whether by means of electronic devices or otherwise, or cause to be printed, published, distributed or transmitted whether by electronic means or otherwise, any material containing any matter which pertains to any operations carried out, or proposed to be carried out, by the Armed Forces or the Police Force (including the Special Task Force), the procurement or proposed procurement of arms or supplies by any such Forces, the deployment of troops or personnel, or the deployment or use of equipment, including aircraft or naval vessels, by any such Forces.

4. Where any person prints, publishes, distributes or transmits, or causes to be printed, published, distributed or transmitted, whether by electronic means or otherwise, any matter in contravention of the provisions of regulation 3, the Competent Authority may, after issuing such directions, as he considers necessary to effect compliance with the provisions of such regulation, make order that the press or equipment used for such printing, publication, distribution or transmission shall, for such period as is specified in that order not be used for the purpose of printing, publication, distribution or transmission of any matter referred to in regulation 3 and the Competent Authority may by the same order authorise any person specified therein to take such steps as appears to the person so authorised to be necessary, for preventing the printing, publication, distribution or transmission of any such material.

5. Any person who prints, publishes, distributes or transmits, any material in contravention of the provisions of regulation 3, shall be guilty of an offence."

On October 02, 1995, (*Gazette Extraordinary* No. 891/3) the President amended the regulations made on 21 September 1995 by adding, "any statement pertaining to the official conduct or the performance of the Head or any member of any of the Armed Forces or the Police Force", to the list of restricted subjects.

On December 20, 1995, the President, acting under section 5 of the Public Security Ordinance, rescinded the Emergency (Restriction on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1995, as amended by the regulation of October 2, 1995.

On 19 April 1996, the President made the following regulations under section 5 of the Public Security Ordinance.

"1. These Regulations may be cited as the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No. 1 of 1996.

2. No Editor or Publisher of a Newspaper or any person authorised by or under law to establish and operate a Broadcasting Station or a Television Station shall, whether in or outside Sri Lanka, print, publish, distribute or transmit, whether by means of electronic devices or otherwise, or cause to be printed, published, distributed or transmitted whether by electronic means or otherwise, any material containing any matter which pertains to any operations carried out or proposed to be carried out, by the Armed Forces or the Police Force (including the Special Task Force), the procurement or proposed procurement of arms or supplies by any such Forces, the deployment of troops or personnel, or the deployment or use of equipment, including aircraft or naval vessels, by any such Forces, or any statement pertaining to the official conduct or the performance of the Head or any member of any of the Armed Forces or the Police Force.

3. Where any person prints, publishes, distributes or transmits, or causes to be printed, published, distributed or transmitted, whether by electronic means or otherwise, any matter in contravention of the provisions of regulation 2, the Competent Authority may, after issuing such directions as he considers necessary to effect compliance with the provisions of such regulation, make order that the press or equipment used for such printing, publication, distribution or transmission shall for such period as is specified in that order not be used for the purpose of printing, publication, distribution or transmission of any matter referred to in regulation 2 and the Competent Authority may by the same order authorise any person specified therein to take such steps as appears to the person so authorised to be necessary, for preventing the printing, publication, distribution or transmission of any such material.

4. The President may for the purpose of these regulations, appoint, by name or by office, any person or body of persons to be the Competent Authority.

5. Any person who prints, publishes, distributes or transmits, any material in contravention of regulation 2 shall be guilty of an offence."

On 8 October 1996, the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No. 1 of 1996 were rescinded by a regulation made by the President under section 5 of the Public Security Ordinance.

On 5 June 1998, the President made the following regulations under section 5 of the Public Security Ordinance:

"1. These Regulations may be cited as the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No. 1 of 1998.

2. No Editor or Publisher of a Newspaper or any person authorised by or under law, to establish and operate a Broadcasting Station or a Television Station shall whether in or outside Sri Lanka, print, publish, distribute or transmit whether by means of electronic devices or otherwise, or cause to be printed, published, distributed or transmitted whether by electronic means or otherwise, any material containing any matter which pertains to any operations carried out or proposed to be carried out, by the Armed Forces or the Police Force (including the Special Task Force), the deployment of troops or personnel, or the deployment or use of equipment, including aircraft or naval vessels, by any such forces, or any statement pertaining to the official conduct or the performance of the Head or any member of the Armed Forces or the Police Force.

3. Where any person prints, publishes, distributes or transmits, or causes to be printed, published, distributed or

transmitted, whether by electronic means or otherwise, any matter in contravention of the provisions of Regulation 2, the Competent Authority may, after issuing such directions as he considers necessary to effect compliance with the provisions of such regulation, make order that the press or equipment used for such printing, publication distribution or transmission shall for such period as is specified in that order not be used for such printing, publication, distribution or transmission of any matter referred to in Regulation 2 and the Competent Authority may by the same order authorise any person specified therein to take such steps as appears to the person so authorised to be necessary for preventing the printing, publication, distribution or transmission of any such material.

4. The President may for the purpose of these regulations, appoint by name or office, any person or body of persons to be the Competent Authority.

5. Any person who prints, publishes, distributes or transmits any material in contravention of the provisions of Regulation 2 shall be guilty of an offence."

On 6 November 1999, the President made the following regulations, hereinafter referred to as the 'impugned regulations', under section 5 of the Public Security Ordinance:

"1. The Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation 01 of 1998 published in *Gazette Extraordinary* No. 1030/28 of 05th June, 1998 and deemed to be in force by virtue of Section 2A of the Public Security Ordinance, is hereby amended by the substitution for Regulation 2 thereof, of the following new Regulation:-

2. No Editor or Publisher of a newspaper or any person authorised by or under law to establish and operate a Broadcasting Station or a Television Station shall, except

with the permission of the Competent Authority, print, publish, distribute or transmit whether by means of electronic devices or otherwise cause to be printed, published, distributed or transmitted any material (inclusive of documents, pictorial representations, photographs or cinematograph films) containing any matter pertaining to military operations in the Northern and Eastern Province (sic.) including any operation carried out or being carried out or proposed to be carried out by the Armed Forces or by the Police Force (including the Special Task Force), the deployment of troops or personnel or the deployment or use of equipment including aircraft or Naval vessel by any such forces or any statement pertaining to the official conduct, moral[e], the performance of the Head or any member of the Armed Forces or the Police Force or of any person authorised by the Commander-in-Chief of the Armed Forces for the purpose of rendering assistance in the preservation of national security."

THE PETITIONER AND HER COMPLAINT

The petitioner is the President of the Movement for Interracial Justice and Equality (MIRJE) and a member of the Executive Committee of the Movement for Free and Fair Elections (MFFE). The petitioner stated that during the Presidential election campaign of 1999, any citizen or political party had the right to "seek, receive and impart information on the ethnic conflict and the war and" had "the concomitant right to seek and receive and impart information on the military strategies and drawbacks in the conduct of the military operations in the North and East." The petitioner went on to state that she is "a registered voter in the country and a public spirited citizen concerned about the integrity of the democratic process and the people's franchise guaranteed by Article 3 of the Constitution. As a social/human rights activist concerned about the ethnic conflict and the war in the North and East", she said she had "actively taken part in debate to resolve the said conflict and hence she is required to know the correct position with regard to the long drawn out war between the

Armed Forces and the LTTE", The petitioner said that her "opinion on all activities relating to the ethnic conflict in the country in general and in relation to the (1999 Presidential) election is based on information received by her on the said war and hence any prior restraints on information as aforesaid is contrary to the rights guaranteed to the petitioner under Article 10 of the Constitution".

The petitioner states that the amended regulation made by the President on 6 November 1999 had "been imposed by Presidential Order in a manner that is unwarranted, discriminatory, and arbitrary and violative of Article 12(1) of the Constitution".

The petitioner further states that "as a result of the said amended Regulation. . . she is constrained from forming (sic.) and communicating information on matters of public debate and which are of vital concern to the nation and which task she had been hitherto responsibly engaged in as an Executive Director of INFORM." Consequently, it is alleged, that the petitioner's fundamental rights guaranteed by Article 14(1)(a) of the Constitution have been violated.

Article 10 of the Constitution states: "Every person is entitled to freedom of thought, conscience and religion, including the freedom to adopt a religion or belief of his choice."

Article 12(1) states: "All persons are equal before the law and are entitled to the equal protection of the law."

Article 14(1)(a) states: "Every citizen is entitled to the freedom of speech and expression including publication."

On the face of it, the impugned regulations apply to all persons and they have not been shown to have been applied in a discriminating manner. In *Joseph Perera alias Bruten Perera v. The Attorney-General and Others,* (1) especially at p. 230, the Court held that the impugned regulation in that case violated Article 12 of the Constitution since it had vested

the Police with "naked" "unguided" and "arbitrary" power "enabling them to discriminate". In the instant case, however, as we shall see, the impugned regulations were framed in reasonably precise terms and confined in their application to defined circumstances. Therefore, I fail to see how the impugned regulations violate the petitioner's rights under Article 12(1) of the Constitution and I declare that there has been no violation of that Article. With regard to Article 10, the gravamen of the petitioner's complaint was that she was deprived of the opportunity of forming her own judgment as well as influencing others by being able, freely and openly without restraint, to have access to and receive and disseminate information on what the petitioner describes in her petition as the "ethnic conflict and the war in the North and East." The petitioner's substantial complaint is that the impugned regulations interfered with her freedom of speech and expression guaranteed by Article 14(1)(a) of the Constitution.

Freedom of speech and expression represents the means that enable the community, when exercising its options to be sufficiently informed. Cf. *Re Compulsory membership of journalists' association*, (2) at p. 184 para. 70. Links between free speech and some of the other rights and freedoms recognized by our Constitution, including freedom of thought and conscience, do exist. This hardly comes as a surprise when we consider the words of the First Amendment of the American Constitution, described in *Channa Pieris and Others v. The Attorney-General and Others*, (3) at p. 137, as "the progenitor of Article 14(1)(a) (freedom of speech), 14(1)(b) (freedom of peaceful assembly), and 14(1)(c) (freedom of association) of the Constitution." The First Amendment states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Justice Cardozo observed that free speech is "the matrix, the indispensable condition of nearly every other form of freedom." *Palko*

v. Connecticut, (4) cited in *Channa Pieris and Others v. Attorney-General and Others*, (3) at p. 143.

The submissions of learned counsel for the petitioner concentrated on the question of interference with the petitioner's freedom of speech and expression, including her right to receive and impart information. The complaint, it seems, related to the deprivation of food for thought by reason of interference with her right to receive information which she could process and transmit by speech and expression, rather than to an interference with her freedom of thought and beliefs: Access to information made her right of freedom of speech fully meaningful. Cf. the observations of Fernando, J. in *Fernando v. The S. L. B. C. and Others* (5) at p. 179. Cf. also *Sumith Jayantha Dias v. Reggie Ranatunge, Deputy Minister of Transport and Others*, (6) at pp. 21 - 22. In the instant case the complaint was not that the Government was exercising control over the mind of the petitioner by dictating to her, while she sat down in her own house, what she may read or what audio-visual information she may gather. Cf. *Stanley v. State of Georgia*, (7). Understandably, learned Counsel for the petitioner did not press the matter of the alleged violation of the petitioner's right to freedom of thought, although leave to proceed in respect of the alleged violation of Article 10 had been granted. In the circumstances, it is unnecessary to deal separately with the question whether there has been a violation of Article 10.

FREEDOM OF SPEECH IN A REPRESENTATIVE DEMOCRACY

Freedom of speech is vitally important in the discovery of truth in the market place of ideas so that the wishes of the people safely can be carried out; in serving the need of every man and woman to achieve personal fulfilment; and in meeting the demands of a democratic regime. I had, at some length, endeavoured to discuss these three intrinsic bases of the right to freedom of expression in *Channa Pieris*, (3), at pp. 131-137 and feel reluctant to repeat what I said. However, Thomas Emerson *(Toward a General Theory of the First*

Amendment, 1963, 72 Yale L. J. 877, 894) observed: "The theory of freedom of expression is a sophisticated and even complex one. It does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation, but for each new situation." In relation to the issues before this Court, where the Constitutional validity of the impugned regulations is being challenged, principally on the ground that it is overbroad and therefore not necessary in a democratic state, I should like to reiterate the following:

The preamble to the Constitution states that the people of Sri Lanka empowered their representatives by a mandate to "draft, adopt and operate" a new Constitution "in order to achieve the goals of the DEMOCRATIC SOCIALIST REPUBLIC, and having solemnly resolved by the grant of such mandate . . . to constitute Sri Lanka into a DEMOCRATIC SOCIALIST REPUBLIC, whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY, and assuring to all peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well-being of the succeeding generations of the People of SRI LANKA and of all the people of the World, who come to share with those generations the effort of working for the creation and preservation of a JUST AND FREE SOCIETY:

WE, THE FREELY ELECTED REPRESENTATIVES OF THE PEOPLE OF SRI LANKA, in pursuance of such mandate . . . do hereby adopt and enact this Constitution as the Supreme Law of the Democratic Socialist Republic of Sri Lanka."

The words in capital letters so appear in the Constitution.

Article 1 of the Constitution states, "Sri Lanka (Ceylon) is a Free, Sovereign, Independent and Democratic Socialist Republic and shall be known as the Democratic Socialist Republic of Sri Lanka." Article 27(2) states that "The State

is pledged to establish in Sri Lanka a democratic socialist society . . ."

Article 27(2) states that "The State is pledged to establish in Sri Lanka a democratic socialist republic . . ."

"Democratic" is derived from the Greek words *demos* (the people) and *Kratos* (rule). Democracy is the rule of the people. Although at a time when the Greek States had small populations and limited franchise it was possible for the people - at any rate those who were empowered at the time - to directly decide every important issue, today, with large populations, universal suffrage, infinitely more complex organizations of societies and the costs involved in holding elections or referrenda, the people of most countries, including Sri Lanka, cannot directly participate in deciding every important issue, although Article 3 of the Constitution does state that "In the Republic of Sri Lanka sovereignty is in the people and is inalienable", and that "sovereignty includes the powers of government . . ."

For practical reasons, people must act in a modern democracy through their elected representatives. And so, Article 4 states:

"The sovereignty of the People shall be exercised and enjoyed in the following manner:-

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a referendum;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution, or created and established by law, except in regard to matters relating to

the privileges, immunities and powers of Parliament and of its members, wherein the judicial power of the People may be exercised directly by Parliament according to law . . ."

The value of free speech in a democracy has been recognized by the Courts of many democratic countries around the world. In *Whitney v. California*, (8) quoted in *Channa Pieris*, (3), at p. 137, explaining why the framers of the American Constitution, who in 1787 had felt no need to include in the original document a general theory of freedom of speech, in 1791, by the First Amendment, did introduce the concept, Justice Brandeis, said:

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you wish and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognizing the occasional tyrannies of governing

majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

The European Commission of Human Rights and the European Court of Human Rights have repeatedly stressed that freedom of expression, in particular freedom of political and public debate, constitutes one of the essential foundations of a democratic society, in addition to being one of the basic conditions for its progress, and for individual self-fulfilment and development of every man and woman. *Handyside v. The United Kingdom*, (9) at p. 754; *The Sunday Times v. The United Kingdom*, (10) at p. 280; *Barthold v. Germany*, (11) at p. 403; *Hodgson, Woolf Productions and National Union of Journalists and Channel Four Television v. United Kingdom*, (12) at p. 507; App. No. 11508/85 *v. Denmark*, (13); *Muller v. Switzerland*, (14) at p. 228; *The Observer and the Guardian v. United Kingdom*, (15) p. 178, and p. 191; *The Sunday Times v. United Kingdom (No. 2)* (16) at p. 235 and p. 241; *Castells v. Spain*, (17) at p. 476; *Thorgeirson v. Iceland*, (18) at p. 865; *Brind and Others v. United Kingdom*, (19) at p. C. D. 82; *Jersild v. Denmark*, (20) at p. 25; *Otto Preminger Institute v. Austria*, (21) at p. 57; *Oberschlick v. Austria*, (22) at p. 421; *Piermont v. France*, (23) at p. 341; *Goodwin v. United Kingdom*, (24) at p. 143; *Adams and Benn v. United Kingdom*, (25) at p. C. D. 164; *Wingrove v. United Kingdom*, (26) at p. 52.

The Inter-American Court of Human Rights in *Re compulsory membership of journalists' association*, (2) at pp. 183-184, has expressed similar views. It stated: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."

Various important international bodies have, from time to time, also endorsed the value of free speech and expression in a democracy. For instance, on the 29th of April 1982, the Committee of Ministers of the Member States of the Council of Europe, in their *Declaration on the Freedom of Expression and Information*", among other things, reiterated "their firm attachment to the principles of freedom of expression and information as a basic element of democratic and pluralist society." (1983) 5 E. H. R. R. 311.

The Supreme Court of Sri Lanka too has stated that "freedom of speech and expression is not only a valuable freedom in itself but is basic to a democratic form of Government." *Joseph Perera's case*, (1), at p. 223. The Supreme Court stated in *Channa Pieris's* case, (3), at p. 132: "Freedom of thought and expression is an indispensable condition if Sri Lanka is to be more than a nominally representative democracy."

In *Visuvalingam and Others v. Liyanage and Others* (27) at pp. 320-323, Wanasundera, J. referred to the submissions made to the Constitutional Court on the Sri Lanka Press Council Bill which, *inter alia*, provided "the background for the drafting of the present constitutional provisions relating to fundamental rights," and at p. 548 said: "I am in agreement with Mr. Nadesan when he says that the freedom of the press embraces the freedom to propagate a diversity of views and ideas and the right of free and general discussions of all public matters . . ." See also the observations of Wimalaratne, J. accepted by Colin Thome, J., Ranasinghe, J., Abdul Cader, J. and in a separate judgment by Rodrigo, J., in *Visuvalingam and Others v. Liyanage* (28) at p. 131.

In *Ratnasara Thero v. Udugampola* (29), the Court held that the seizure by the Police of copies of pamphlets that had been printed on a question of interest to voters violated the petitioner's freedom of speech and expression including publication and awarded him compensation and costs. In *Mohottige and Others v. Gunatillake and Others* (30), at p. 255,

a prohibition imposed by the Police on persons seeking to criticize the government and its activities was said to "nullify democratic government as is understood in this country". In *Amaratunga v. Sirimal and Others*, (31), at p. 271, and in *Deshapriya and Another v. Municipal Council, Nuwara Eliya and Others*, (32), at p. 370, Fernando, J. said: "The right to support or to criticize Governments and political parties, policies and programmes, is fundamental to the democratic way of life, and the freedom of speech and expression is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions. *Dejonge v. Oregon* (23)." Cf. *Marian and Another v. Upasena*, (34). In awarding compensation for the violation of freedom of speech, the Court has taken account of its numerous decisions stressing the importance of that fundamental right. *Gunawardena and Another v. Pathirana, O. I. C., Police Station, Elpitiya and Others*, (35), at p. 274. And if has been held that the Constitutional guarantee of free speech must be interpreted in the light of the "fundamental principles of democracy and the Rule of Law which are the bedrock of the Constitution.": *Karunathilake and Another v. Dayananda Dissanayake, Commissioner of Elections and Others*, (36) at p. 173.

Speech concerning public affairs is more than self-expression; it is the essence of self-government. To make an informed and educated decision in choosing his or her elected representative, in deciding to vote for one group of persons rather than another, a voter must necessarily have the opportunity of being informed with regard to proposed policies. The election of representatives is based on an appeal to reason and not to emotions; a system of government based on representative democracy assumes it to be so. In the formation of opinions and the mobilization of such ideas offered for acceptance in the competition for the right to represent the people, there can be no appeal to reason without the freedom to express and propagate and discuss ideas, based on adequate and reliable information.

In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his or her own views to others, as well as the right to receive opinions and information from others. *Open Door Counselling and Dublin Well Woman v. Ireland*, (37) at p. 261; *Informationsverein Lentia v. Austria* (38), at p. 113. Freedom of speech necessarily protects the right to receive information, regardless of the social worth of such information. The right is fundamental to a free society. *Martin v. City of Struthers*, (39); *Winters v. New York*, (40); *Griswold v. Connecticut*, (41); *Lamont v. Postmaster-General*, (42); *Stanley v. Georgia*, (7); Cf. *Pierce v. Society of Sisters*, (43). For the average citizen, it is just as important to know the opinions of others or to have access to information generally as the very right to impart his or her opinions. *Re Compulsory membership of journalists' association*, (2) at pp. 171-172.

In this connection the "dual aspect" of freedom of expression needs to be stressed. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his or her own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, in general, implies a collective right to receive information and have access to the thoughts expressed by others. The right to receive information is an important aspect of free speech and expression. *Visuvalingam and Others v. Liyanage and Others*, (28) at pp. 131-133.

Since the petitioners's complaint is concerned with political matters and freedom to use the print media, I have focussed attention on those aspects. However, the impugned regulations extend to all forms of expression and communication. Therefore it must be stressed that the principles relating to freedom of speech and expression do not apply solely to certain types of information or ideas or forms of expression. Freedom of speech and expression protects not only the substance of the ideas and information expressed, but also the *form* in

which they are conveyed. *Oberschlick v. Austria*, (22) at p. 422. In its individual dimension, although formulated primarily with regard to speech and the print media, freedom of speech and expression includes "all forms of freedom of speech and expression", *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others*, (36) at p. 173, including the right to use audio-visual media, *Jersild v. Denmark*, (20) at p. 26, and indeed whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible, and it includes artistic expression. See Article 19(2) of the International Covenant on Civil and Political Rights; *Muller v. Switzerland, (supra)*, (14) at p. 225. It also encompasses information of a commercial nature and even music, and commercials transmitted by cable. *Casado Coca v. Spain*, (44) at p. 20.

In *Amaratunga v. Sirimal and Others*, (31), disapproval of the policies and actions of government on a range of issues was expressed by a fifteen minute, noisy cacophany of public protests - *Jana Ghosha* - which included the ringing of bells, tooting of motor vehicle horns, the banging of saucepans and the beating of drums. It was held at p. 270, citing several opinions of the U. S. Supreme Court, that "speech and expression" extended to forms of symbolic speech and expression and that *Jana Ghosha* could be regarded as "speech and expression". In *Abeyratne v. Gunatilake and Others*, (45) at p. 295 it was held that the guarantee of freedom of speech and expression and freedom of peaceful assembly "could be rendered meaningless if permission for the use of amplifying mechanical devices in furtherance of free speech is unreasonably withheld."

It is only by informed discussion that proposals adduced can be modified so that the political, social and economic measures desired by voters can be brought about. And, in between elections, it is only through free and informed debate and exchange of ideas that the elected majority can be made to remain responsive to and reflect the will of the people.

The fact that people have elected representatives does not imply that such representatives may always do as they will; members of the public must, in matters affecting them, be free to influence intelligently the decisions of those persons for the time being empowered to act for them. Every legitimate interest of the people or a section of them should have the opportunity of being made known and felt in the political process. Moreover, in a representative democracy there must be a continuing public interest in the workings of government which should be open to scrutiny and well-founded constructive criticism. Indeed, a central value of free speech, and the concomitant rights of freedom of association and assembly, lies in checking the abuse of power by those in authority. The free press has a legitimate interest in reporting on and drawing the public's attention to deficiencies in the operation of Government services, including possible illegal activities. It is incumbent on the press to impart information and ideas about such matters and the public has a right to receive them. *The Observer and the Guardian v. United Kingdom*, (15) at p. 178; *The Sunday Times v. United Kingdom, (No. 2)*, (16) at p. 235.

Journalism, it has been held, "is the primary and principal manifestation of freedom of expression of thought." *Re Compulsory membership of journalists' association*, (2) at p. 184. With regard to the press, it has been stated that it has a pre-eminent role in a State governed by the rule of law and, that whilst it must not overstep the bounds set, it is nevertheless incumbent on the press, in a way consistent with its duties and responsibilities, to disseminate information and ideas and stimulate debate on political issues and on other matters of public interest. *Castells v. Spain*, (17) at 476; *Prager and Obserschlick v. Austria*, (46) at p. 19-20. Not only does the press have the task of imparting such information and ideas, the public also have a right to receive them. *Sunday Times v. U. K.*, (10) at p. 280; *Lingens v. Austria*, (47) at p. 418; *Worm v. Austria*, (48) at p. C. D. 39. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'. *The*

Observer and the Guardian, v. U. K., (15) at p. 191; *Thorgeirson v. Iceland*, (18), at p. 865; *Brind and Others v. U. K.*, (19) at p. 82; *Jersild v. Denmark*, (20) at p. 14; *Goodwin v. U. K.*, (24) at p. 136. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in political debate which is at the very core of the concept of a democratic society. *Lingens v. Austria*, (47) at pp. 418-419; *Castells v. Spain*, (17) at p. 476; *Brind and Others v. U. K.*, (19) at p. 82; *McLaughlin v. United Kingdom*, (49) at p. C. D. 92; *Oberschlick v. Austria*, (22) at p. 422.

Freedom of speech and expression protects not only information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. See *Channa Pieris*, (3) at p. 134, cited in *Gunawardena and Another v. Pathirana, O. I. C., Police Station Elpitiya and Others*, (35) at p. 278. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. *Handyside v. U. K.*, (9) at p. 754; *The Sunday Times v. U. K.*, (10) at p. 280; *Appl No. 11508/85 v. Denmark*, (13) at pp. 560-561; *Lingens v. Austria* (47), at p. 418; *Muller v. Switzerland*, (14) at p. 228; *Castells v. Spain* (17) at p. 476; *Thorgeirson v. Iceland*, (18) at p. 865; *Brind and Others v. U. K.*, (19) at p. 82; *Jersild v. Denmark*, (20) at p. 14; *Otto Preminger Institute v. Austria*, (21) at p. 57; *Obserschlick v. Austria*, (22) at p. 421; *Vereinigung Democratischer Soldaten Osterreichs and Gubi v. Austria*, (50) at p. 83; *Piermont v. France*, (23) at p. 341; *Goodwin v. U. K.* (24) at p. 136; *Vereniging Radio 100 et al. v. Netherlands*, (51) at p. C. D. 204.

Justice Holmes in *Abrams v. United States*, (52) quoted in *Channa Pieris*, (3) at p. 136, said:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our Constitution . . ."

There is a vital societal interest in preserving an uninhibited market place of ideas in which truth will ultimately prevail. *Red Lion Broadcasting Co. v. FCC*, (53). We are committed to the principle that debate on public issues should be uninhibited, robust and wide open. *Channa Pieris*, (3) at p. 36. An assumption underlying Article 14(1)(a) of the Constitution is that speech can rebut speech, propaganda will answer propaganda and that free debate of ideas will result in the wisest policies, at least for the time being. *Channa Pieris*, (3) at p. 135.

Attempts to secure uniformity of ideas is fraught with danger. "Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite that [the Constitutional guarantee of freedom of expression] was designed to avoid these ends by avoiding beginnings." *West Virginia Board of Education v. Barnette*, (54), followed in *Shantha Wijeratne v. Vijitha Perera and Others*, (55), *Channa Pieris*, (3) at pp. 42-43, and in *Gunawardena and Another v. Pathirana, O. I. C., Police Station*,

Elpitiya and Others, (35) at p. 277. As we have seen, Justice Brandeis pointed out in *Whitney v. California*, (8) repression breeds hate and hate menaces stable government. Nowak, Rotunda and Young, *Constitutional Law*, pp. 836-7), cited with approval in *Channa Pieris*, (3) at p. 43, pointed out:

"Just as the ancient Roman eventually learned that executing Christians did not suppress Christianity, modern governments should realize that forbidding people to talk about certain topics does not encourage public stability. It only creates martyrs. Punishing people for speech does not discourage speech; it only drives it underground and encourages conspiracy. In the battle for public order, free speech is the ally, not the enemy."

RESTRICTIONS ON FREEDOM OF SPEECH IN GENERAL

Although one may think what one may wish, no intelligent person articulates or ought to articulate every thought that happens to pass through his or her mind, anywhere at any time.

In the exercise and operation of a person's freedom of thought, conscience and beliefs, and the right to impart opinions, one might be restrained by the Buddha's advice to be watchful of one's speech, recalling the fate of the everhungry spirit *(peta)*, with the head of a pig and the body of a human being, with its mouth swarming with maggots, who ignored the Buddha's admonition. *Dhammathha Vagga*, xx. 6.

Those who cannot restrain themselves for moral reasons are in many ways *prevented by law* from speaking as they think, for the societal value of speech must on occasion be subordinate to other values and considerations. Article 28(e) of the Constitution draws our attention to the fact that - "the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations" and reminds us that "accordingly it is the duty of every person in Sri Lanka

to respect the rights and freedoms of other." Article 15(2) states that "the exercise and operation of the fundamental right declared and recognized by Article 14(1)(a)", namely, freedom of speech and expression, including publication, "shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to Parliamentary privilege, contempt of court, defamation or incitement to an offence." Article 15(7) states that the exercise and operation of the fundamental rights declared and recognized by Article 14 "shall be subject to such restrictions as may be prescribed by law 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 requirements of the general welfare of a democratic society . . ."

Laws restraining speech to ensure that the rights of others are safeguarded and that people shall exercise their right of free speech with responsibility are commonplace. Laws relating to official secrets, defamation, obscenity, contempt of court, perjury, fraud, extortion, and licensing of radio and television broadcasters, readily come to mind. As Justice Sanford, delivering the opinion of the United States Supreme Court, observed in *Gitlow v. New York*, (56), cited in *Channa Pieris and Others v. Attorney-General and Others*, (3) at pp. 137-138, "It is a fundamental principle, long established, that freedom of speech and the press which is secured by the Constitution, does not confer an absolute right to speak or publish without responsibility, whatever one may choose." See also the observations of Sharvananda, C. J. in *Dissanayake v. Sri Jayawardenapura University*, (57) at pp. 263-264 and at p. 270. Nor is there an absolute right to receive information as an element of the right of free speech and expression. *Gaskin v. United Kingdom*, (58) at p. 285; *Gaskin v. United Kingdom*, (59) at p. 411; *Leander v. Sweden*, (60) at p. 452 and p. 456; *Wallen v. Sweden*, (61) at p. 322.

The Constitutional provision relating to free speech, as Meikljohn observed in his work *Free Speech and its Relation to Self Government*, "is not the guardian of unregulated talkativeness." Geoffrey Robertson, Q. C., and Andrew Nicol, *Media Law*, 3rd ed., p. 1., observed: "By and large, Parliament and the judiciary have taken the view that free speech is a very good thing so long as it does not cause trouble. Then it may become expensive speech - speech . . . with costly court actions, fines, damages and occasionally imprisonment. 'Free speech', in fact, means no more than speech from which illegal utterances are subtracted."

In addition to restrictions prescribed by law, there may be utterances that are no essential part of any exposure of ideas and are of such social value as a step in truth that any benefit that may be derived from them is outweighed by the social interest in order and morality. *Chaplinsky v. New Hampshire*, (62). Thus, it has been said that resort to rude epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution. *Cantwell v. Connecticut*, (63).

Likewise, although, as Lord Denning in an address before the High Court Journalists' Association observed in 1964 (*The Times*, 03 December 1964), "Justice has no place in darkness and secrecy. When a judge sits on a case, he himself is on trial . . . If there is any misconduct on his part, any bias or prejudice, there is a reporter to keep an eye on him," and although justice is not a "cloistered virtue", yet, wanton and irresponsible criticism of democratic institutions like the judiciary, can hardly claim to be an use of freedom of speech that deserves constitutional protection. Thus in *Prager and Oberschlick v. Austria* (46), at p. 20, the European Court of Human Rights stated that it is incumbent on the press in a way consistent with its duties and responsibilities to impart information and ideas on matters of public interest including "questions concerning the functioning of the system of justice, an institution that is essential for any democratic society.

The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them." The Court added: "Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying."

Free speech has its limits. In his famous aphorism in *Schenck v. United States*, (64) cited with approval in several cases including *Mallawarachchi v. Seneviratne*, (65) *Bernard Soysa and Two Others v. The A. G. and Two Others*, (66) at p. 58 and in *Channa Pieris*, (3) at p. 138, Justice Holmes said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic." Moreover, as Fernando, J. observed in *Bernard Soysa* (66) at p. 58, "What may be said or done in the exercise of the freedom of speech, expression or peaceful assembly would also depend on the place." See also *Saranapala v. Solanga Arachchi*, (67) at pp. 172-173, on the use of public places. Moreover, the right to speak must be tailored to the occasion. *Mahinda Rajapakse v. Kudahetti and Others*, (68), at p. 229. See also the observations of Sharvananda, C. J. in *Joseph Perera v. A. G.* (1) at p. 226 - p. 227.

Referring to 'other countries', extravagant claims are sometimes made by journalists. Even the Republic of Iceland, which in Artice 72 of its Constitution states that "Every person has the right to express his thoughts in print . . . *Censorship or other limitations on the freedom of the press may never be imposed.*" (The emphasis is mine,) provides in that very same Article that a person expressing his thoughts "may be held

responsible for them in courts." An author, or if the publication is not in his or her name, then the publisher, editor, seller or distributor may, under section 15 of the Right of Publication Act 1956 of Iceland, be held both criminally and civilly liable. Moreover, a defamatory publication constitutes a criminal offence under the Penal Code of Iceland. *Thorgeirson v. Iceland*, (18), at p. 857. Admittedly, in the law relating to defamation in Iceland, there is no prior restraint on the exercise of free speech, Yet, where the governing instrument, be it a Constitution or international convention, does not prohibit prior restraints on publication, the imposition of such restraints, e. g. by injunctions obtained under a prescribed law, is not *per se* impermissible. In Sri Lanka, pre-censorship is not necessarily unconstitutional and can be justified, if brought within the ambit of Article 15. *Joseph Perera's* case, (1) at p. 229. *Dissanayake v. Sri Jayewardenepura University*, (57) at p. 270. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of a Court that is called upon to consider the validity of such restraints. *Wingrove v. U. K.*, (26) at p. 31. But that is another matter.

As far as prior restraints are concerned, a person may seek judicial review of a censor's acts. Yet, if a person must pursue his or her judicial remedy before he or she may exercise his or her right of freedom of speech, the occasion might have become history and later speech may be futile or pointless. See *per* Justice Douglas in *Walker v. City of Birmingham*, (69). This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, for instance, while the Competent Authority makes up his mind under the impugned regulations, may well deprive it of all its value and interest. Cf. *The Observer and the Guardian v. U. K.*, (15) at p. 191; *The Sunday Times v. U. K.*, (16) at p. 242. See also *Markt Intern Verlag and Beemann v. Germany* (70) at p. 175. On the other hand if prior restraint was not possible, irreparable harm could be caused in certain instances. As Justice Douglas observed in *Dennis v. United*

States, (71) see also *Channa Pieris*, (3) at pp. 47-48: "There comes a time when even free speech loses its constitutional immunity . . . When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to cry a halt. Otherwise free speech which is the strength of the nation will be the cause of its destruction."

In *Abrams v. United States*, (52) even Holmes J., despite his off-quoted words in support of free speech in the opinion he expressed in that case, recognized the danger of waiting before taking action against a person exercising the right of free speech, although he did stress the need to limit restraint. He said: "I think that we should be eternally vigilant against attempts to check the expression of opinions we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. [Only] the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, Congress shall make no law abridging the freedom of speech."

THE RELEVANCE OF OTHER LAW, INCLUDING DECISIONS OF OTHER COURTS AND TRIBUNALS

Learned Counsel for the petitioner, relied on *dicta* in the opinions of the United States Supreme Court in *Schenck v. U. S.*, (51); *Abrams v. U. S.*, (52) *Gitlow v. New York*, (47), *New York Times Company v. U. S.*, and *United States v. The Washington Post Company* et al., (72), usually referred to as *New York Times v. U. S.*, and particularly on the decisions of the European Court of Human Rights in *The Observer and Guardian v. U. K.*, (15) and *The Sunday Times v. U. K. (No. 2)* (16), in submitting that the conditions for the imposition of restrictions stated in Article 15(7) had not been satisfied in the making of the impugned regulations and that such regulations were therefore unconstitutional.

The Additional Solicitor-General submitted that the *dicta* in the American opinions were unhelpful, since the First Amendment of the American Constitution did not provide for restrictions and that the restrictions had been judge-made. On the other hand, he submitted, the restrictions in the Sri Lanka Constitution are to be found in the Constitution itself, as it was the case with the Indian Constitution, which provided for restrictions in Article 19(2).

The relevant words of Article 19 of the Indian Constitution are as follows:

"(1) All citizens shall have the right (a) to freedom of speech and expression . . . (2) Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

The learned Additional Solicitor General cited H. M. Seervai who, in *Constitutional Law of India*, 4th Ed., p. 710, drew attention to the warning given by the Indian Supreme Court in *Travancore-cochin v. Bombay Co. Ltd.*, (73) at p. 1120, and in *Bombay v. R. M. D. Chamarabagawalla*, (74) at p. 918, about the use of American decisions, and stated as follows:

"In *Express Newspapers (Private) Ltd. v. Union*, (75) [pp. 121-122], Bhagwati J. said that there was a paucity of authority in India on the nature, scope and extent of the fundamental right to the freedom of speech and expression and he added: ". . . the fundamental right to the freedom of speech and expression enshrined in . . . our Constitution is based on the provisions in Amendment I of the Constitution of the United States . . . and it would be therefore legitimate and

proper to refer to those decisions of the U. S. Supreme Court to appreciate the true nature, scope and extent of this right in spite of the warning administered by this Court against the use of American and other cases."

It is submitted that the provisions of the two Constitutions as to freedom of speech and expression are essentially different, the difference being accentuated by provisions in our Constitution for preventive detention which have no counterpart in the U. S. Constitution. The First Amendment enacts an absolute prohibition, so that a heavy burden lies on anyone transgressing it to justify such a transgression. Again, since the Amendment contains no exceptions, it is not surprising that exceptions have had to be evolved by judicial decisions which have limited the scope of such exceptions with increasing stringency. The position in India is different. The right to the freedom of speech and expression, and the limitations on that right are contained in Article 19(1)(a) read with sub-Art. (2). Laws which fall under sub-Art. (2) are expressly permitted by our Constitution and the problem in India is to determine whether an impugned law falls within Article 19(2), and that is essentially a problem of construction. No doubt Article 19(2) authorises the imposition of "reasonable restrictions", and in the end, the question of reasonableness is a question for the Court to decide. However, a law made in respect of the matters referred to in Article 19(2) must *prima facie* be presumed to be constitutionally valid and due weight must be given to the legislative judgment on the question of reasonableness, though that judgment is subject to judicial review. It is difficult, if not impossible, to read into the words "reasonable restrictions" the test of "clear and present danger" evolved by the U. S. Supreme Court in dealing with the freedom of speech and the press. The difference between the First Amendment and Article 19(1)(a) was noted by Douglas J. in *Kingsley [International Pictures] Corporation v. Regents of the University of New York*, (76). In holding that all pre-censorship of cinema films was constitutionally void, he said: "If we had a provision in our Constitution for "reasonable"

regulation of the press, such as India has included in hers, there would be room for argument that censorship in the interest of morality would be permissible."

The above submission is reinforced by the fact that preventive detention for reasons connected with the security of a State, the maintenance of public order and the maintenance of supplies and services essential to the community is a subject of concurrent legislative power . . . and Article 22(3) . . . provides safeguards of a very limited nature in respect of such detention . . ."

Admittedly, no restrictions on the exercise of the freedom of speech were specified in the First Amendment. However, the U. S. Supreme Court, from the now famous "footnote 4" of the opinion of Chief Justice Stone in *United States v. Carolene Products Co.*, (77) through *Brandenberg v. Ohio*, (78), and *Hess v. Indiana*, (79) has interpreted the First Amendment in numerous cases and evolved guidelines, on the one hand, to protect free speech, and, on the other, to ensure the safety of the State and protect other interests. Admittedly, due regard must be had to the fact that an inquiry as to the exercise of the permissible restrictions under the law of Sri Lanka involves essentially a matter of construction by our own courts. Nevertheless, although we are not bound by the opinions of the U. S. Supreme Court, yet in the interpretation of our own Constitutional provisions, especially those that impinge and impact on the value of free speech in a democratic State, and concepts relating to matters expressly referred to in our own Constitution, e. g. "national security", "public order", "the protection of public health or morality", "securing due recognition for the rights and freedoms of others", and "meeting the just requirements and the general welfare of a democratic society", some of the opinions expressed by the U. S. Supreme Court are of great usefulness and of persuasive authority, for they are concepts essentially developed over many years by the U. S. Supreme Court, although more recently, and not less importantly, by other domestic courts,

including the Supreme Courts of Sri Lanka and India, and by international bodies like the European Commission for Human Rights and Courts like the European Court for Human Rights. Divergent approaches must be expected, and we should proceed with caution, although, in my view, that is not a good ground for looking at one's own Constitution wearing blinkers.

Jeremy McBride, *Widening Case Law Horizons*, Vol. I No. 4, *Interights Bulletin*, 1986, at pp. 8 - 10, dealt with the question of the use of precedents from other systems in the interpretation of international instruments. However, his observations with regard to interpretation deserve repetition even with regard to the interpretation of Constitutional provisions and domestic legislation. McBride said,

"Differences of this kind are not necessarily undesirable or impermissible even though the treaties involved seek to protect many of the same basic rights and freedoms and subject them to similar restrictions. After all the framework, language and political background of the various instruments is not the same. The universality of human rights is, therefore, out of the question, at least as far as the detailed understanding of individual rights and freedoms is concerned. However, although uniformity in interpretation may be precluded by the terms of the treaties themselves, this cannot be true of the major concepts underlying them since all share a common acknowledged lineage back to the Universal Declaration. While therefore the autonomous meaning of each instrument can be insisted upon, it does not follow that the case law emanating from one system should be regarded as irrelevant to another."

I agree that the universality of human rights is "out of the question, at least as far as the detailed understanding of individual rights and freedoms is concerned." Universality is aspirational. However, we might cooperate in the ongoing effort to make universality a reality, although we ought to be

vigilant in preserving our own values, despite attempts by specious promises or plain bullying to jetisson those things we in our communities hold to be of intrinsic worth. We might, if we proceed cautiously, derive assistance from the decisions of other Courts elsewhere, in appropriate cases, the Court being circumspect and attentive to all the circumstances affecting its decision.

I should like to make reference to *some* of the *Bangalore Principles* declared by Commonwealth Jurists on 26 February 1988, at the end of a colloquium on *The Domestic Application of Human Rights Norms. Interights Bulletin*, Vol. 3, 1988, No. 1 p. 2.

I must emphatically state that I do not subscribe to any of the other views stated in the *Bangalore Principles*.

"2. . . . international human rights instruments provide important guidance in cases concerning fundamental rights and freedoms.

3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance to judges and lawyers generally.

4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is incomplete.

6. While it is desireable for the norms contained in the international human rights instruments to be still more widely recognized and applied by national courts, this

process must take into full account local laws, traditions, circumstances and needs.

7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainly from national constitutions, regulation or common law.

8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries, the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

9. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms."

Decisions from elsewhere are, in my view, of most value where the right or freedom or limiting concept is expressed in broadly similar terms. Even when a formulation is different, the omissions, additions and drafting may shed light on the result to be reached. To take account of the case law of another system should, however, never be a back-door attempt to achieve universality at the expense of the will of States parties to a convention, or the will of Sovereign Peoples in the case of domestic Constitutions.

Despite his submissions against the usefulness of looking at the opinions of the U. S. Supreme Court, the learned Additional Solicitor-General himself placed reliance on the following decisions of the U. S. Supreme Court: *New York*

Times Company v. United States, (72); *Schenck v. United States*, (64); *Frohwerk v. United States*, (80); *United States v. David Paul O'Brien*, (81); and *Kingsley International Pictures Corporation v. Regents of the University of the State of New York*, (76).

Learned Counsel for the respondents submitted that the *dicta* in two judgments of the European Court of Human Rights cited by learned Counsel for the petitioner were inapplicable, since they were concerned with the interpretation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which was not in terms identical with Article 15(2) and Article 15(7) of the Sri Lanka Constitution.

Article 10 of the European Convention states as follows:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Admittedly, there are differences in the manner of expression, and we should, therefore, be cautious in applying decisions concerned with the interpretation of Article 10 of

the European Convention. At the same time, as we shall see, there is much assistance to be derived from them in deciding whether the impugned regulations were in contravention of the Constitution, for some of the differences, in my view, relate more to form than substance.

ALLEGED UNCONSTITUTIONALITY OF THE IMPUGNED REGULATIONS

There was no dispute that the impugned regulation caused an interference with the petitioner's ability to receive and impart information, and therefore, *ex facie*, there was a transgression of her freedom of speech and expression guaranteed by Article 14(1) of the Constitution. However, the respondents maintained that the petitioner's rights were not absolute, and that the exercise and operation of the petitioner's rights were subject to restrictions imposed in terms of Article 15(7) of the Constitution, and therefore there was no violation of Article 14(1)(a) of the Constitution.

In paragraph 14 of her petition, the petitioner admits that the right of free speech could be restricted, but submitted that in the circumstances of this case the regulations of 6 November 1999 were unconstitutional, having regard to the provisions of Article 15(7) read with Article 155(2), and should be struck down.

Learned Counsel for the petitioner submitted that the burden of justifying restrictions imposed under Article 15(7) is heavy. I find myself in agreement with him. Seervai, as we have seen, said, "The First Amendment enacts an absolute prohibition, so that a heavy burden lies on anyone transgressing it to justify such transgression." The burden, in my view, continues to be heavy even where freedom of speech is expressed in more or less absolute terms, as it is in Article 14(1)(a), but where specific provision is made elsewhere for exceptions. Exceptions must be narrowly and strictly construed for the reason that freedom of speech constitutes one of the

essential foundations of a democratic society which, as we have seen, the Constitution, in no uncertain terms, declares Sri Lanka to be.

PRESCRIBED BY LAW

In order to justify the imposition of restrictions on the operation and exercise of a citizen's freedom of speech, Article 15(7), like Article 15(2), requires that such restrictions shall be "prescribed by law". I will be referring to some of the decisions of the European Commission of Human Rights, and the European Court of Human Rights because I consider them to be apposite, for Article 10(2) of the European Convention also has the requirement that restrictions must be "prescribed by law". It has been held that "prescribed by law" in Article 10(2) must be given the same interpretation as the phrase "in accordance with law", and that accessibility and foreseeability are two of the requirements inherent in the phrase "prescribed by law" and relate to the quality of law. *Brind and Others v. United Kingdom*, (19) at p. C. D. 81; *Hins and Hugenholtz v. Netherlands*, (82) at p. 126; *Vereniging Radio 100 et al. v. Netherlands*, (51) at p. C. D. 203.

The impugned "emergency" regulations were made by the President under section 5 of the Public Security Ordinance. Section 5(1), enables the President to make such regulations as appear to the President "to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the community." Section 5(2)(d) enables the President to make emergency regulations that appear to the President to be "necessary or expedient", *inter alia*, in the interests of public security, "amending any law, for suspending the operation of any law and for applying any law with or without modification." The phrase "any law" does not empower the President in terms of section 5 of the Public Security Ordinance to amend or suspend a provision of the Constitution, such as the guarantee

under Article 14(1)(a) relating to freedom of speech, on the ground of public security. This is evident from Article 155(2). The power to do so is derived from Article 15(7) of the Constitution which enables the President to impose restrictions on the operation and exercise of the fundamental right of freedom of speech by regulations made under the law relating to public security.

The restrictions complained of were set out in a regulation made by the President of the Republic under section 5 of the Public Security Ordinance, Cap. 51 of the Legislative Enactments. The Ordinance was enacted prior to the Constitution. Article 170 of the Constitution states that "law" means any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council." Article 168(1) of the Constitution states that "Unless Parliament otherwise provides, all written laws and unwritten laws in force immediately before the commencement of the Constitution, shall, *mutatis mutandis*, and except as otherwise expressly provided in the Constitution, continue in force." Article 155 of the Constitution states that "The Public Security Ordinance as amended and in force, immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament." Article 155 further provides that "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." Freedom of speech is protected by Article 14(1)(a) of the Constitution. However, the Constitution provides in Article 15(7) that the exercise and operation of that Article "shall be subject to such restrictions as may be prescribed by law in the interests of national security . . ." Article 15(7) states that "For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."

Ex facie, the restrictions complained of which were contained in regulations made under section 5 of the Public Security Ordinance, had a basis in law and were in accordance with law.

The petititoner, however, maintained that the impugned regulations were imprecise and vague. She stated in her petition that "any law which confers unguided and unfettered discretion without narrow objectives and definite standards to guide such authority is unconstitutional." She added that "it is of fundamental importance that such a law should not be incomplete and should contain within itself all the vital and necessary components relating to its operation, including precise restrictions that it seeks to impose." The impugned regulations, the petitioner stated, were "not subject to any rational guidelines and hence permits the authorities to apply the said regulations arbitrarily and discriminately". There was, she said, a discrepancy between the Sinhala and English versions, "thus facilitating an arbitrary and incoherent application of the said regulations."

In *The Sunday Times v. The United Kingdom*, (10) at p. 271, (see also *Gay News v. United Kingdom*, (83) at pp. 127-128; *G v. Germany*, (84) at p. 503; *Markt Intern and Beerman v. Germany*, (85) at p. 231; *Times Newspapers Ltd. and Neil v. United Kingdom*, (86) at p. C. D. 55; *Hinz and Hugenholtz v. Netherlands*, (82) at p. (26), the European Court of Human Rights stated as follows:

"In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be accesible: the citizen must be able to have an indication in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances,

the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

The European Court of Human Rights has had occasion to recognize the difficulty or impossibility of attaining absolute precision in the framing of laws, especially in spheres in which the situation governed by the law in question is constantly changing. *Barthold v. Germany,* (11) at p. 399; *Markt Intern and Beerman v. Germany,* (70) at p. 173; *Muller v. Switzerland,* (14) at p. 226. Indeed, in certain areas flexibility might be desirable. *Goodwin v. United Kingdom,* (24) at p. 140. The provisions in question should afford sufficient protection against arbitrariness and make it possible for the persons concerned to foresee the consequences of their actions. However, the level of precision depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. *Groppera Radio AG v. Switzerland,* (87) at p. 341; *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v. Austria,* (50) at p. 81.

It appears from the words of the regulations that the impugned regulations were primarily intended for editors, publishers of newspapers and persons authorised to establish and operate Broadcasting or Television Stations. It could be expected that such persons, if necessary, with the help of legal advisers, could inform themselves about the regulations applicable to them. The regulations imposed restrictions on the publication and transmission of certain specified sensitive information relating to what the petitioner described as "the

ethnic conflict and the war . . . in the North and East." The need for regulations of the sort in question to be framed without excessive rigidity to take account of changing circumstances is, in my view, inevitable. Indeed, as experience has shown, it has been necessary to amend even broadly framed regulations, such as the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations, from time to time to take account of changing circumstances. The regulations in question were not so vague as to exclude any predicability, if need be with appropriate advice, as to what act on the petitioner's part might give rise to the adverse consequences referred to in paragraphs 3 and 5 of the Emergency (Prohibition on Publication of Sensitive Military Information) Regulations 1 of 1996. Cf. *Arrowsmith v. United Kingdom*, (88) at p. 231. Moreover, the impugned regulations were accessible, for they were published in the Government *Gazette* No. 1104/28 of 06 November, 1999, and, as the petitioner states, they were "announced publicly in the government media." She submitted a newspaper article in support of the averment that the law had received publicity in the press.

The petitioner complained that the authority was clothed with wide powers of discretion by reason of the formulation of the regulation and by differences in the English and Sinhala versions. The broadly worded nature of the impugned regulations and the differences in the Sinhala and English versions might have caused difficulties in interpretation. However, the mere fact that a provision may give rise to problems of interpretation does not mean it is so vague and imprecise as to lack the quality of 'law'. *Hodgson, Woolf Productions and National Union of Journalists and Channel Four Television v. United Kingdom*, (12) at p. 508. Nor is the quality of law necessarily diminished by the conferment of discretion. A law conferring a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise

are indicated with sufficient clarity, having regard to the legitimate aim in question, so as to give the individual adequate protection against arbitrary interference. *Brind and Others v. United Kingdom*, (19) at p. C. D. 81; *Tolstoy Miloslavsky v. United Kingdom*, (89) at p. 468; *Hins and Hugenholtz v. Netherlands*, (82) at p. C. D. 126; Goodwin v. U. K. (24) at p. 140; *Vereniging Radio 100 et al. v. Netherlands*, (51) at p. C. D. 203; *Wingrove v. U. K.* (26) at pp. 26-27.

Against the foregoing background, I hold that the impugned restrictions had a basis in law, and that as far as the quality of law was concerned, it was accessible to the petitioner and formulated with sufficient precision to enable her - if need be, with appropriate legal advice - to foresee, to a degree that was reasonable in the circumstances, the consequences which a given action may entail. Admittedly, the first respondent, the 'Competent Authority' was given a wide discretion; yet, as we shall see later in considering the question of necessity, the scope of the discretion and the manner of its exercise were indicated with sufficient clarity, having regard to the purported aim in question, to make the decisions of the Competent Authority reviewable and to give her adequate protection against arbitrary interference. I therefore conclude that the impugned restrictions were "prescribed by law" for the purposes of Article 15(7) of the Constitution.

LEGITIMATE AIM

In addition to being "prescribed by law", restrictions on the Constitutional right of freedom of speech, in order to be valid, must have a legitimate aim recognized by the Constitution. No doubt after balancing interests, albeit at a very general, wholesale level, the makers of our Constitution have in Article 15 made a threshold categorization, *inter alia*, of the varieties of speech that are not protected absolutely, but which may be limited by law. *Channa Pieris*, (3), at p. 140. Speech and expression concerning "the interests of national security" is one of them. (Article 15(7)).

The petitioner suggested that the aim of the President in making the impugned regulations was not the interests of national security. In paragraphs 15, 16, 17 of her affidavit, she stated that, although censorship had been relaxed at a certain time and "media personnel were also taken on conducted tours of the Northern and Eastern provinces on the initiative of the 1st Respondent on every occasion that the Government claimed to have won a significant military victory in those areas", yet the impugned regulations "tightening the censorship" were made "following renewed fighting in the Wanni area leading to heavy loss of life, loss of territorial gains previously held by the Army and State military equipment." The petitioner's submission was that the aim of the impugned regulations was to prohibit the publication of information that was embarrassing to the Government, rather than to protect national security. As such, the regulations offended "the established principle in international law that restrictions on freedom of expression based on national security interests would not be legitimate if their genuine purpose or demonstrable effect is to protect interests unrelated to national security, such as to protect a Government from embarrassment or wrongdoing or to entrench a particular ideology." (Vide paragraph 24 of the petitioner's affidavit.) In paragraph 10 of her petition, the petitioner stated that "it is of extreme importance that the pretext of national security is not used to place unjustified restrictions on the exercise of these freedoms."

Learned counsel for the petitioner cited the following *dicta* from *New York Times v. U. S.* (72): ". . . the Founding fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors . . . only a free and unrestrained press can effectively expose deception in government." (Justice Black). "The dominant purpose of the 1st Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information . . . secrecy in government is fundamentally anti democratic, perpetuating

bureaucratic errors. Open debate and discussion of public issues are vital to our national security." (Justice Douglas)

Justices Black and Douglas argued that no system of prior restraint was ever justified. Yet, the fragmented Court, which decided the case in nine separate opinions by a six to three majority, agreed on only two general themes - any system of prior restraint of expression bears a heavy presumption against its constitutional validity, and the Government carries a "heavy burden" to justify enforcing any system of prior restraint. As we have seen, prior restraint is not *per se* impermissible. Even *Near v. Minnesota*, (90), which firmly embedded the prior restraint doctrine in American jurisprudence, did recognize three "exceptional cases" justifying prior restraint.

The Times case was considered by this Court in *Wickremasinghe v. Edmund Jayasinghe*, (91). In that case, the petitioner, the Chief Editor and publisher of a newspaper, alleged that his fundamental rights guaranteed by Articles 12 and 14(1) (1) had been infringed by the application of the Emergency (Restriction of Publication of and Transmission of Sensitive Military Information) Regulation No. 1 of 1995. I have already resproduced those regulations in my judgment. Justice Kulatunga (with whom G. P. S. de Silva, C. J., and Ramanathan, J. agreed) at pp. 307-308 said that the *New York Times* case:

". . . involved a restraint on newspapers against a publication which appears to relate to a war situation . . . That case is clearly distinguishable for the reason that the policy under discussion there was the involvement of the United States of America in the affairs of a foreign state.

In the instant case, it cannot be said that the occasion and manner of pre-censorship is arbitrary. The Government is faced with a serious civil war. The matters in respect of which censorship is imposed are specified. The restriction is

against the publication of matters which could be classified as 'sensitive information'. All such matters relate to the prosecution of the war. Hence, the impugned censorship cannot be described as a blanket censorship; clearer guidelines may not be demanded in the present circumstances."

Learned counsel for the petitioner was critical of the judgment in *Wickremasinghe's* case. He said, "The Court was clearly influenced by the assumption that there was a 'war situation' and there must be some curtailment of the freedom to publish . . . Kulatunga, J. only saw that the situation was different without considering the underlying reasons which consequently apply even when a "Government is faced with a serious civil war", as the learned judge put it. It is respectfully submitted that pre-censorship by the Emergency Regulations was not properly addressed for over-breadth and vagueness by the intrusion of "serious civil war" into the picture."

I am unable to agree with the submissions of learned counsel for the petitioner. I shall later in my judgment deal with the question of over-breadth, but for the present I should like to observe that the question of over-breadth was not overlooked by Kulatunga, J. At p. 304, His Lordship did say that "The Court will no doubt consider whether the regulations are bad for over-breadth." His Lordship also, at p. 308, rejected the demand for "clearer guidelines" and therefore had addressed his mind to the question of "vagueness". I have in this judgment dealt with the question of vagueness at some length, and hold that the authorities amply justify the conclusion reached by Kulatunga, J. Yes, indeed Kulatunga, J. was clearly influenced not only by "the assumption" that there was a "war situation" but, as acknowledged by the petitioner herself, that there *was* indeed such a situation. It was a matter of central importance.

The importance of freedom of speech in a democracy cannot be overstated. Nevertheless, there are occasions where that importance must give way to other considerations.

National security is one such consideration. Notwithstanding the *dicta* of Justices Black and Douglas in the *New York Times* case (72), cited by learned counsel for the petitioner, there is, as we shall see, abundant judicial support in the opinions of the United States Supreme Court and internationally for the proposition that when a nation's security and integrity is at stake, all else, including the cherished, constitutionally assured, freedom of speech must take second place. We must not lose sight of priorities. Indeed, at paragraph 04 of the written submissions of learned counsel for the petitioner, citing Donna Gomien, David Harris and Leo Zwak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, it is quite properly acknowledged that international human rights jurisprudence permits "derogations from human/fundamental rights in times of war or public emergency." This is the case not only where national constitutions or international conventions permit such derogations, but even in countries, such as the United States, where no express constitutional provision is made for the imposition of restrictions in times of war or national emergency. E. g. see *Schenck v. United States*, (64); *Frohwerk v. United States*, (80); *Debs v. United States*, (92).

It has never been doubted that when a government is in the throes of a struggle for the very existence of the state, the security of the community may be protected. Justice Brandeis observed in *Whitney v. California*, (8), (followed in *Ekanayake v. Herath Banda*, (93), *Amaratunga v. Sirimal*, (94) and *Channa Pieris v. Attorney-General*, (3) at p. (138), ". . . But although the rights of free speech and assembly are fundamental, they are not absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious

injury, political, economic or moral." In *Dennis v. United States*, (71), Chief Justice Vinson said, ". . . Overthrow of the government by force and violence is certainly a substantial enough interest for the government to limit speech". In *Schenck v. United States*, (64), Holmes, J. - one of the most eloquent and enthusiastic advocates of free speech - said, "When a nation is at war many things that may be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any Constitutional right."

The petitioner furnished the Court with a copy of a document entitled "The Johannesburg Principles on National Security, Freedom of Expression and Access to Information," and placed great reliance on that document. According to the "Introduction" to that document, the "Principles were adopted on 1st October 1995 by a group of experts in international law, national security, and human rights convened by **Article 19**, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg." The preamble to the document, *inter alia*, states that the 'principles' are meant to "discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of "freedom of speech and expression". While recognizing that restrictions may be placed in the interests of national security, the 'principles' state that they should be prescribed by law, and have "the genuine purpose and demonstrable effect of protecting" "a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force". "A restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including for example, to protect a

government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology or to suppress industrial unrest."

In paragraphs 28 and 29 of the petition, it is stated that any citizen or political party was entitled to seek, receive and impart information on the "policy of the Government on the ethnic conflict and the war and has the concomitant right to seek, receive and impart information on the military strategies and drawbacks in the conduct of the military operations in the North and East." In paragraph 29, the petitioner states that "as a social/human rights activist concerned about the ethnic conflict and the war in the North and East, she has actively taken part in debates to resolve the said conflict and hence she is required to know the correct position with regard to the long drawn out war between the Armed Forces and the LTTE . . ."

There is an acknowledgment by the petitioner of the existence of a violent conflict in the North and East between the Armed Forces and the LTTE. The regulations are called the "Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) regulations." The text of the impugned regulations makes it abundantly clear that the material that has to be published with the approval of the Competent Authority relates to matters pertaining to the Forces engaged in the Northern and Eastern provinces and their operations in those areas. Admittedly, the impugned regulation followed soon after what the petitioner described as "renewed fighting in the Wanni area leading to heavy loss of life, loss of territorial gains previously held by the Army and State military equipment." The petitioner submitted newspaper reports of what was described as "a humiliating

debacle", and suggesting that it was caused, by the negligence of "the top brass." The petitioner pointed to the fact that, whereas the earlier regulation contained the words "or any statement pertaining to the official conduct or the performance of the Head or any member of any of the Armed Forces or the Police Force", the impugned regulations had the words, "or any statement pertaining to the official conduct, morale or the performance of the Head or of any member of the Armed Forces or the Police Force or of any person authorised by the Commander - in - Chief of the Armed Forces for the rendering of assistance in the preservation of national security." The reasons for the changes were explained by the Competent Authority in a statement published in the press and submitted to us by the petitioner. He said that "some media institutions distorted news relating to the war in the North-East (sic.) which has led to pain of mind to the soldiers and their parents and the morale of the troops." The petitioner does not dispute that. Her irrelevant response was that the Competent Authority failed to identify the "irresponsible media institutions."

The petitioner, in my view, has failed to show, in terms of Principle 2(b) of the "Johannesburg Principles" that "the genuine purpose or demonstrable effect" of the regulation was "to protect [the] government from embarrassment or exposure or wrongdoing". Nor has she shown that the protection of national security was a "pretext". It was observed in *United States v. O'Brien*, (81) at para. 15, that

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: "The decisions of this Court

from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. "*McCray v. United States*, (95). This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected for the Court in *State of Arizona v. State of California*, 283 U. S. 423, 455, 51 S. Ct. 522, 526, 75 L. Ed. 1154 (1931)."

NECESSARY IN A DEMOCRATIC STATE

Mr. Goonesekera submitted that the regulation had to be shown to be necessary in a democratic state. On the other hand, Mr. Marsoof argued that, although the phrase "necessary in a democratic state" was found in Article 10(2) of the European Convention, it was not a requirement stipulated in Article 15 of our Constitution, and therefore ought not to be read into the Constitution.

On this matter, I find the submission of the Addititonal Solicitor-General to be unpersuasive. Admittedly, the phrase "necessary in a democratic society" is not to be found in Article 15 of the Constitution. Nevertheless the ideas encapsulated in that phrase, and therefore the opinions of the European Commission and the judgments of the European Court in construing that phrase, are relevant as sustaining the logic of our own Constitution with regard to the imposition of restrictions on the operation and exercise of the fundamental right of freedom of speech and expression guaranteed by Article 14(1)(a).

Sri Lanka, as we have seen is a representative democracy in which freedom of speech and expression is a cornerstone.

That is the defining context for the interpretation of restrictions imposed by Article 15 on the fundamental right of freedom of speech guaranteed to citizens in our representative democracy by Article 14(1)(a). Cf. per Fernando J., in *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others*, (36) at p. 173; *Re Compulsory membership of journalists' association*, (2) at p. 174.

In *Malalgoda v. A. G. & Another*, (97) at pp. 784-785 Soza, J., having referred to the observations of Seervai on the differences between the Indian and American Constitutions, and noting that the 'clear and present danger' test had been rejected by the Indian Supreme Court, since the Indian Constitution had provided instead for the test of 'reasonableness', went on to state that "the limitations to the right of freedom of speech are in Sri Lanka prescribed in more absolute terms than in India. In Sri Lanka, the operation and exercise of the right to freedom of speech are made subject to restrictions of law not qualified by any test of reasonableness. Neither the validity nor the reasonableness of the law imposing restrictions is open to question unlike in America or India. This is not to say of course that the Court should not be reasonable in applying the law imposing restrictions. Freedom of speech in Sri Lanka therefore is *subject to* such restrictions as the law may impose under the heads mentioned in Article 15(2)." In that case, the petitioner had complained that the Police had seized a book published by him. It was defamatory, but the petitioner contended that his fundamental right of freeedom of speech and expression had been violated. The court held that "so far as concerns the case before us freedom of publication means that the applicant may publish whatever will not expose him to a prosecution or a civil action for defamation. In exercising his fundamental

right of freedom of publication he cannot shake off the constraints imposed by law. The freedom of publication does not include the licence to defame and vilify others."

Article 28(e) states that the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to respect the rights and freedoms of others. Article 15(2) states that the exercise and operation of the fundamental right of freedom of speech and expression declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law, *inter alia*, in relation to defamation. In terms of Article 15(7) the exercise and operation of the right of freedom of speech is "subject to such restrictions as may be prescribed by law . . . for the purpose of securing due recognition and respect for the rights and freedoms of others." However, with great respect, "subject to" not only means subject to a restriction set out in Articles 15(2) and 15(7) but includes, in my view, an assessment of a restriction purported to be imposed under Article 15(2) or 15(7) from the point of view of necessity, *unless the law is an "existing law" within the meaning of Article 16(1) of the Constitution.* In the case of defamation, this would require an examination of the law imposing the interference with a person's freedom of speech, if it is not an "existing law", as well as the application of the law in the particular circumstances of a case. Cf. *Lingens and Leitgens v. Austria*, (98) at pp. 393-394. In some cases, it may be found that the law of defamation or conviction for defamation or some measure taken to protect the reputation of others may be disproportionate to the aim pursued, and therefore an unnecessary interference with freedom of speech. E. g. see *App. No. 11508/85 v. Denmark*, (13); *Thorgeirson v. Iceland*,

(18); *Oberschlick v. Austria*, (22); *Tolstoy Miloslavsky v. U. K.*, (89); Cf. *Castells v. Spain*, (17) at p. 478 where the prosecution was for insulting the government. In others, it may be found that the measures taken were necessary to protect the reputations of others. E. g. see *App. No. 12230/86 v. Germany*, (99); *Barfod v. Denmark*, (100); *Praeger and Oberschlick v. Austria*, (46). However, in deciding on the constitutional validity of a restriction imposed on freedom of expression, otherwise than by an "existing law", there must be an examination of its need.

"Necessity" is inherent in Article 15(7) read with Article 155(2). The Supreme Court has already recognized the concept of necessity in deciding whether regulations restricting freedom of speech and expression are Constitutionally valid. In *Joseph Perera v. The Attorney General and Others*,(1), at pp. 216-217 Sharvananda, C. J. said:

"The Regulation to be valid must satisfy the objective test. Though the Court may give due weight to the opinion of the President that the regulation is necessary or expedient in the interests of public security and order, it is competent to the Court to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by emergency regulation and the object sought to be achieved by the regulation. If the Court does not find any such nexus or finds the activities which are not pernicious have been included within the sweep of the restriction, the Court is not barred from declaring such regulation void as infringing Article 155(2) of the Constitution."

It was held that the impugned Emergency Regulation in that case, requiring police permission for publication,

imposed a form of prior restraint abridging the freedom of expression that was invalid and incapable of forming the basis of any law. See especially the observations of Sharvananda, C. J. at pp. 216-217. The Court's reasoning was that the power to make emergency regulations did not include the power to over-ride, amend or suspend the operation of the provisions of the Constitution, except in accordance with the provisions of the Constitution. Constitutionally valid restrictions on the fundamental right of freedom of speech and expression in the interests of national security and public order could only be imposed in terms of Article 15(7). Since, in its view, there was no proximate or rational nexus between the restriction imposed and the object sought to be achieved by the regulation namely, the interests of national security and public order, and since the regulation conferred an unfettered discretion on a public authority in enforcing the regulation, the regulation was, as the Chief Justice said at p. 230, "unconstitutionally over-broad". The regulation was held to be unconstitutional, since it violated Article 155(2) of the Constitution which prohibited the amendment or suspension of the operation of Article 14(1)(a) except in accordance with the provisions of Article 15(7).

In *Wickramasinghe v. Edmund Jayasinghe*, (91), Kulatunga, J. at p. 304, after stating that regulations made by the President under the Public Security Ordinance will not be struck down by the Court "unless there are good grounds for doing so", added: "The Court will no doubt consider whether the regulations are bad for over-breadth and impinge upon fundamental rights."

In *The Sunday Times v. U. K.*, (10) the European Court of Human Rights observed at p. 268 that the applicants complained of continuing restraints "as a result of over-breadth

and lack of precision of the law of contempt of court. In *Open Door Counselling and Dublin Well Woman v. Ireland*, (10) at p. 266, that Court, in considering the question of proportionality, held that "the sweeping nature of the restriction" made it "over-broad and disproportionate."

In *Wickremabandu v. Herath and Others*, (101) at p. 358, H. A. G. de Silva, J. (Fernando J. agreeing) said: "Article 15(7) permits, *inter alia*, restrictions in the interests of national security and public order. The learned Attorney-General contends that the Court could not interpolate "reasonable" into that provision, and hence could not inquire into the reasonableness of a restriction. It is not a matter of interpolation, but of interpretation: can we assume that the power conferred by the Constitution was intended to be used unreasonably, by imposing the reasonable restrictions on fundamental rights? The State may not have any burden of establishing the reasonableness of the restrictions placed by law or Emergency Regulations, but if the Court is satisfied that the restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Article 15(7)."

It has been held that "necessary", while not synonymous with 'indispensable', implies a 'pressing social need', *Re Compulsory membership of journalists' association*, (2) at p. 176; *Lingens v. Austria*, (47) at p. 418; *Leander v. Sweden*, (60) at p. 452; *Hodgson and Others v. U. K.*, (12) at p. 508; *Markt Intern and Beerman v. Germany*, (85) at p. 232; *Muller v. Switzerland*, (14) at p. 227; *The Sunday Times v. U. K. (No. 2)*, (16) at p. 234; *Castells v. Spain*, (17) at p. 461; *Jersild v. Denmark*, (20) at p. 14; *Hins and Hugenholtz v. Netherlands*, (82) at p. C. D. 126; *Goodwin v. U. K.*, (24) at p. 143; *Bowman v. U. K.* (103) at p. C. D. 17; and, therefore, for a restriction

to be 'necessary' it is not enough to show that a restriction was 'useful' 'reasonable' or 'desirable'. *The Sunday Times v. U. K.*, (1979 (10) at p. 275; *G. v. Germany*, (84) at p. 504; *Barthold v. Germany*, (11) at p. 402. Necessity must be convincingly established. *Thorgeirson v. Iceland* (18) at p. 865; *Brind and Others v. U. K.*, (19) at p. C. D. 82; *Autronic AG v. Switzerland*, (104) at p. 503; *Weber v. Switzerland*, (105) at p. 523; *Hins and Hugenholtz v. Netherlands*, (82) at p. C. D. 126; *Goodwin v. U. K.*, (103) at p. C. D. 17; *Adams and Benn v. U. K.* (25) at p. C. D. 164.

The 'necessity' requirement involves a review of whether the restrictions are proportionate to the legitimate aim pursued. *G. v. Germany*, (84) at p. 504; *Leander v. Sweden*, (60) at p. 452; *Rohr v. Switzerland*, (102); *The Sunday Times v. U. K. (No. 2)*, (16) at 234. Proportionality is, in my view, inherent in Article 15(7) read with Article 155(2) of the Constitution. Cf. *Joseph Perera*, (1) at pp. 215-217; and *Wickramasinghe* (91) at p. 304, just as it is inherent in Article 10(2) of the European Convention. *Gay News U. K.*, (83) at p. 130. A restriction, even if justified by compelling governmental interests, such as the interests of national security, must be so framed as not to limit the right protected by Article 14(1)(a) more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. *Re Compulsory membership of journalists' association*, (2) at p. 176.

"Necessity" and, hence, the legality of restrictions imposed under Article 15(7) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. If there are various options to achieve this objective, that which least restricts the right protected

must be selected. Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties of citizens when that end can be narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker,* (106) (U. S.) at p. 488 (S. Ct.) at p. 252. Given this standard, it is not enough to demonstrate, for example, that a regulation performs a useful or desirable purpose; to be compatible with the Constitution, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 14(1)(a) guarantees. Cf. *Re Compulsory membership of journalists' association,* (2) at p. 176.

In *Joseph Perera's* case, (1) at pp. 228-229, Sharvananda, C. J. stressed the need for regulations restricting freedom of speech to be drawn with "narrow specificity". His Lordship said: "There can be no doubt of the Government's interest in protecting the State from subversion. But 'even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker,* (106) at p. 488." The difficulty, however, is striking a fair balance when making such regulations. Thus in *Brind and Others v. U. K.,* (19) at pp. C. D. 83-84, the European Court of Human Rights had adverted to the special problems involved in combatting terrorism, and observed that "the Commission has no doubt as to the difficulties involved in striking a fair balance between the requirements of freedom of information - especially the free flow of information from the media - and the need to protect the State and the public against armed conspiracies seeking

to overthrow the democratic order which guarantees this freedom and other human rights." In the instant case, attention should be drawn to the fact that the regulations have been amended from time to time. The petitioner points out that this may have been in response to public and international criticism. On the other hand, the respondents maintain that the regulations have been amended from time to time to take account of changing circumstances and as a response to the needs of the time. In the instant case, given the difficulties involved, I am of the view that the impugned regulation succeeded in striking a fair balance between the free flow of information and the legitimate aim of protecting national security and that the restrictions were proportionate and tailored with sufficient closeness to the accomplishment of the governmental aim necesitating them.

The Court is not required to deal with the question of necessity in a general and abstract manner, but only in so far as the facts in a particular case are concerned. *Markt Intern and Beerman v. Germany*, (85) at p. 232. The criterion of "necessity" cannot be applied in absolute terms but calls for the assessment of various factors. These include the nature of the right in question, the degree of interference, the nature of the public interest and the extent to which it needed to be protected in the particular circumstances. *App. No. 12230/86 v. Germany*, (99) at p. 102.

I have explained the importance of the right in question: In sum, freedom of speech and expression is the cornerstone of our representative democracy.

At the same time, due account must be taken of the fact that the aim of the regulation was the protection of national

security within the meaning of Article 15(7). In order to verify that the interference was not excessive in the instant case, a fair balance between competing interests must be struck: the requirement of protecting national security must be weighed against the petitioner's right of free speech and expression. Cf. *Groppera Radio AG v. Switzerland*, (87) at p. 343; *Barfod v. Denmark* (100) at p. 499. In matters of this nature, the interests of society as a whole must be considered. *Otto Preminger Institute v. Austria*, (21) at p. 59. The notion "necessary", as we have seen, implies" a pressing social need". This may include the "clear and present danger" test, as developed by the American Supreme Court, *pace* Seervai, and the question "pressing social need", must be addressed in the light of the circumstances of a given case. *Arrowsmith v. U. K.*, (88) at p. 233. On the three phases in the development of the 'clear and present danger' doctrine, see Nowak, Rotunda and Young, *Constitutional Law*, 3rd Ed., pp. 853-874.

In the instant case, there is, as the petitioner herself states a "war" between the LTTE and the Government Forces. Judicial notice of the fact that "the Government is faced with a serious civil war" was taken by this Court in *Wickramasinghe v. Edmund Jayasinghe*, (91) at p. 307. Terrorism is a tactic that is resorted to by the LTTE in that "war". That is a matter that is well and widely known, and of which judges of this Court have taken cognizance. See *Visuvalingam & Others v. Liyanage*, (28) at p. 333. Terrorism not only hurts, but tends to destroy democracy and democratic institutions. There are imminent dangers threatening the free, democratic constitutional order of the Republic of Sri Lanka. In such a situation, national security must take precedence over the right of free speech, for, as Chief Justice Vinson observed in *Dennis v. U. S.*, (71), the safety of the nation is "the ultimate value of society. For if

a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

In *Visuvalingam & Others v. Liyanage,* (27) at p. 375, Soza, J. said:

"The Government, too, undoubtedly values the freedom of the Press and believes that democracy will sustain itself best, as it has been said, in the free market of ideas . . . But at times of national crisis, the safety of the nation becomes paramount and some inroads have of necessity to be made into the freedom of the Press . . ." In *Siriwardene and Others v. Liyanage* (107) at p. 187 Wimalaratne, J. (Ratwatte, Colin-Thome, Abdul Cader, Rodrigo, JJ., agreeing) said: "In a word, there are essential limits on the rights to publish. The limitations are greater when a nation is at war or under a state of emergency . . ."

In *Klass and Others v. Federal Republic of Germany,* (108) the complaint to the European Court of Human Rights related to legislation granting powers of secret surveillance. The Court, at p. 232, said that it could not "but take judicial notice of two important facts. The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order to effectively counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and like

communications, is under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime." The Court, having examined the contested legislation and the manner of its application concluded at p. 237 that the interference resulting from that legislation was "necessary in a democratic society in the interests of national security and for the prevention of disorder". The decision was followed in *G. v. Germany* (84) at p. 504; and in *App. No. 10628/83 v. Switzerland,* (109) at p. 109.

The impugned regulations were stated to be "Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations. They applied to information pertaining to specified matters, namely, "military operations in the North and East, including any operation carried out or being carried out or proposed to be carried out by the Armed Forces or by the Police Force (including the Special Task Force), the deployment of troops or personnel or the deployment or use of equipment including aircraft in naval vessel by any such forces, *or any statement pertaining to the official conduct, morale or the performance of the Head or of any member of the Armed Forces or the Police Force or of any person authorised by the Commander-in-Chief of the Armed Forces for the purpose of rendering assistance in the preservation of national security."*

The emphasis is mine. One of the petitioner's principal concerns was with the provision protecting the conduct and performance of the persons referred to in the words emphasised. As we have seen, the explanation given for the protection of the persons designated was to prevent a recurrence of attacks of the nature that had been made leading to the demoralization of the Armed Forces. While the preservation of

the morale of the Armed Forces is an important matter, yet, as we have seen, in a democracy, freedom of speech performs a vital role in keeping in check persons holding public office. For a citizen to keep a critical control of the exercise of public power, it is essential that particularly strict limits be imposed on the publication of information which refers to the activities of public authorities. *App., No. 11508/85 v. Denmark*, (110) at p. 561. Relying on the decision of this Court in *Joseph Perera's* case, (1), and particularly on the *dicta* of Sharvananda, C. J. at p. 217 and p. 230, learned counsel for the petitioner submitted that the impugned regulation was "over-broad" and "disproportionate" for two reasons. First, if the aim of the regulation was, as explained by the first respondent in his affidavit, *inter alia*, to ensure that the morale of government forces in the North and East was sustained, the manner in which the regulation was framed did not confine the restrictions to the conduct of the persons in the North and East. The restrictions were applicable to the conduct of the persons in the other parts of the State as well and there was therefore no nexus between the stated aim and the regulation framed. Secondly, citing examples from newspapers, learned counsel submitted that the Competent Authority in practice arbitrarily censored information that was not covered by the terms of the regulations.

With regard to the first matter, I agree there was ambiguity. However, where there is ambiguity, such provisions, since they impinge on Constitutionally guaranteed rights, must be interpreted restrictively. Therefore, the meaning to be ascribed to the words objected to must be that they applied to information concerning such persons with regard to their activities in the North and the East. This interpretation is reinforced by the Sinhala version which

leaves no doubt as to the intention of the maker of the regulations.

I agree that where laws, including regulations, vest in administrative officials a power of censorship over communications not confined within standards designed to curb the dangers of arbitrary or discriminatory action, such laws, being unnecessary to achieve even a legitimate aim may be struck down as being over-broad. *Lovell v. Griffin*, (111); *Cantwell v. Connecticut*, (112), *Saia v. New York*, (113); *Kunz v. New York*, (114). The "breadth" with which those cases were concerned was the breadth of unrestricted discretion left to a censor, which permitted him to make his own subjective opinions the practically unreviewable measure of permissible speech. That is not so in the instant case. Unlike in *Joseph Perera's* case (1) at p. 230, the authority was not given a "naked and arbitrary power . . . without any guiding principle to regulate the exercise of" the Competent Authority's discretion. There was no mention in the impugned regulation in that case of the reasons for which an application to publish may have been refused. In the instant case, however, the matters falling within the Competent Authority's purview are, in my view, set out with sufficient clarity to make the decisions reviewable.

The petitioner's case is that the examples cited from the newspaper articles showed that there had been an improper exercise of the powers of the Competent Authority. H. A. G. de Silva, J. (Fernando J. agreeing) observed in *Wickramabandu v. Herath and Others*, (101) at p. 358, that the fact that 'a power may be abused does not render the regulation invalid; such abuse of power is by no means beyond challenge." In the same case Kulatunga, J. at p. 378 (Ramanathan, J. agreeing) said:

"I cannot agree that the possibility of abuse is a ground for declaring [the regulation] *ultra vires*: the remedy against abuse is judicial review." The observations of the European Court of Human Rights in *Klass and Others v. Federal Republic of Germany* (108) at p. 237, are also worth recalling: "While the possibility of improper action by a dishonest, negligent or overzealous official can never be ruled out, whatever the system, the considerations that matter for the Court's present review are the likelihood of such action and the safeguards provided to protect against it."

If it turns out that the regulations are abused, we would have a different kind of case than that presently before us. All that is now here is the validity of the regulations *ex-facie*, not the review of particular actions of the Competent Authority, and I am unable to agree that in this posture of things the regulations can be said to be unconstitutional. *Shelton v. Tucker*, (106) at (U. S.) p. 499 and (S. Ct.) p. 258.

Moreover, in matters of this nature, although this Court has the power to decide whether a regulation made under section 5 of the Public Security Ordinance is "necessary", see *Channa Pieris's* case, (3) at pp. 140-141; *Siriwardene v. Liyanage*, (107) at p. 329; or 'expedient' in the sense of being a timely measure, neither too early nor too late, having regard to prevailing circumstances, yet "due weight" ought to be given to "the opinion of the President that the regulation is necessary or expedient in the interests of public security and order." Per Sharvananda, C. J., in *Joseph Perera's* case, (1) at pp. 216-217.

Although the Government in *Brind's* case, (19) did not contend that the interference with the applicant's rights

was a prime element in the struggle against terrorism, the European Commission of Human Rights found that it could be regarded as "one aspect of a very important area of domestic policy." Vide pp. C. D. 83-84. Having regard to the extensive experience of the executive and legislature on terrorist matters, and "bearing in mind the margin of appreciation permitted to States," the limited extent of the interference with the applicant's rights and the "importance of measures to combat terrorism", the Commission found that it could not be said that the interference with the applicant's freedom of expression was disproportionate to the aim sought to be pursued. Vide p. C. D. 84. Similar views were expressed by the Commission in *McLaughlin v. U. K.*, (49) at p. C. D. 92. The margin of appreciation in assessing the pressing social need, and in choosing the means, and fixing the conditions for achieving the legitimate aim of protecting national security is a wide one. *Klass and Others v. Federal Republic of Germany*, (108) at p. 232; *Leander v. Sweden*, (60) at p. 453; *The Observer and the Guardian v. U. K.*, (15) at p. 178. See also *Yasapala v. Wickramasinghe*, (115). In *Visuvalingam & Others v. Liyanage*, (27) at p. 375, Soza, J. said: "It would be difficult for anyone but the repository of power to form an opinion as to the occasion for its exercise. He is entrusted with the maintenance of public security. He has a better "feel" of the crisis with the intelligence services at his command than anyone else . . ."

The petitioner contended that "the imposing of censorship in this manner has, in any event, been rendered an obsolete exercise by the advent of the communication revolution with its laptop publishing facilities, satellite telephones, portable scanners and TV transmission equipment that

transmit news at the speed of light." I agree that if information has been already made public or had ceased to be confidential, it would be unnecessary to prevent disclosure. *Weber v. Switzerland*, (105) at p. 524; *The Observer and the Guardian v. U. K.*, (15) paras 67-70; *The Sunday Times v. U. K.*, (16) at pp. 243-244; *Vereninging Weekblad Bluf v. The Netherlands*, (116) at p. 203. However, there was no evidence in the instant case that information that had in fact been disclosed or ceased to be confidential was being suppressed by the regulations. The possibility that prohibited information may be transmitted always exists; but that does not carry with it the corollary that such information should not, in the interests of national security, be classified as confidential.

Having regard to all the circumstances, I am of the view that the restrictions imposed were not disproportionate to the legitimate aim of the regulation, namely, the furtherance of the interests of national security within the meaning of Article 15(7) of the Constitution, and that a fair balance between competing interests has been struck. The restrictions complained of correspond to a countervailing social need sufficiently pressing to outweigh and overbear the petitioner's, (and having regard to the societal value of Article 14(1)(a), as well as the public's) interest in freedom of speech and expression, within the meaning of the Constitution.

ORDER

For the reasons set out in my judgment, I declare that the petitioner's fundamental rights guaranteed by Articles 10, 12(1) and 14(1)(a) have not been violated, and dismiss the petition.

In all the circumstances, I make no order as to costs.

WADUGODAPITIYA, J. - I agree.

WEERASEKERA, J. - I agree.

Application dismissed.