IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. (F/R) No. 362/2000

In the matter of an Application under Article 126 of the Constitution.

Leader Publications (Pvt) Limited

PETITIONER

Vs.

Ariya Rubasinghe, Director of Information and the Competent Authority, *et al.*

RESPONDENTS

WRITTEN COMMENTS SUBMITTED BY ARTICLE 19, GLOBAL CAMPAIGN FOR FREE EXPRESSION

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1. Introduction

This brief reviews national security and public order restrictions on freedom of expression and how such restrictions have been dealt with under both international and comparative law. In particular, this brief assesses Regulation 14 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000 – and its application to Leader Publications (Pvt) Limited, as a result of a front page article in *The Sunday Leader* of 21 May 2000 headed "War in fantasy land - Palaly is not under attack" – in light of these international and comparative standards.

Sri Lanka is formally bound to respect the guarantee of freedom of expression found at Article 19 of the *International Covenant on Civil and Political Rights*, which Sri Lanka ratified in 1980. This brief analyses the implications of this guarantee in relation to national security and public order. The Constitution of Sri Lanka also guarantees freedom of expression at Article 14. The way superior courts in other States have struck a balance between the guarantee of freedom of expression, on the one hand, and national security and public order concerns, on the other, may assist the Supreme Court of Sri Lanka in interpreting Article 14 of the Constitution of Sri Lanka. This brief therefore reviews relevant decisions from a number of other States.

Every country imposes restrictions on freedom of expression to safeguard national security and public order. However, such restrictions are only legitimate if they are clearly and narrowly drawn, if they are applied by bodies which are independent of governmental or political influence, and if there is a sufficient nexus between the proscribed expression and the risk of harm to national security or public order. In addition, the guarantee of freedom of expression means that sanctions for breach of these restrictions may not be disproportionate to the harm caused. This brief argues that Regulation 14 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000, both in general and as applied to Leader Publications, breaches these standards and that it is not, as a result, a legitimate restriction on freedom of expression.

2. Interest of ARTICLE 19

ARTICLE 19, Global Campaign for Free Expression, is an established and well-recognised international human rights organisation, based in London. It is a registered charity, independent of all ideologies and governments. ARTICLE 19 has frequently submitted written comments to the European Court of Human Rights and superior courts in national jurisdictions in cases which raise issues touching on the international guarantee of freedom of expression.

ARTICLE 19 campaigns against censorship in all its forms and works to promote greater freedom of expression and access to information. ARTICLE 19 takes its name and mandate from the nineteenth article of the *Universal Declaration of Human Rights* which guarantees

the right to freedom of opinion and expression. ARTICLE 19 promotes freedom of expression and access to information in a variety of ways including through reporting and publishing, dissemination, education, legal assistance, standard-setting exercises and assisting international human rights bodies and courts.

3. Brief Statement of Facts and Law

On 3 May 2000, the President of Sri Lanka, acting under section 5 of the Public Security Ordinance (Chapter 40), promulgated the Emergency (Miscellaneous Provisions and Powers) Regulation (No. 1 of 2000). Regulation 14 imposes a number of restrictions on publishing and broadcasting, including for the protection of national security and public order. Regulation 14 also provides for the appointment of a Competent Authority and gives him the power to implement these restrictions, including by requiring the media to submit material in advance of dissemination (prior censorship), as well as the power to ban publications which breach the Regulation and to place a sealing order on their premises. Subsequent to the promulgation of Regulation No.1 of 2000, Mr. Ariya Rubasinghe, Director of Information in the Government Information Department was appointed as Competent Authority.

On 8 May 2000, the Competent Authority informed *The Sunday Leader*, an English weekly magazine, of his appointment and drew their attention to his directive that they should submit all relevant material to him in advance of publication for approval. On 9 May 2000, the Competent Authority issued a warning to Mr. Wickrematunge, Editor of *The Sunday Leader*, on the basis that a photograph of an opposition rally and "other news items" published in their 7 May 2000 edition contravened Regulation 14. The same day, Mr. Wickrematunge wrote to the Competent Authority asking for clarification regarding the scope of Regulation 14, and asking whether articles highlighting corruption and mismanagement would be covered. The Competent Authority did not respond to this letter.

On 14 May 2000, *The Sunday Leader* published two almost identical cartoons and stories, the only difference being that one targeted the opposition UNP party while the other targeted the governing PA party. The former had been approved by the Competent Authority but the latter, although in essence identical, had been completely censored. The piece was entitled "Censor Exposed" and, since it included the censored cartoon and story relating to the PA, had not formally been approved for publication. On 19 May 2000, the Competent Authority sent a second warning to Mr. Wickrematunge and Leader Publications (Pvt) Ltd, on the basis that the piece "Censor Exposed" was in contravention of Regulation 14.

On 21 May 2000, *The Sunday Leader* published a front-page article titled "War in fantasy land – Palaly is not under attack". The article was essentially a spoof on the censorship regime, purporting to be about the fighting in the Northern Jaffna peninsula between government forces and Tiger rebels but including a negative in every sentence as in the following example: "Heavy fighting was not raging in northern Jaffna peninsula". The

article made reference to a number of recent developments in the war, in each case in the negative as noted above, and provided various reliable sources for its information.

On 22 May 2000, the Competent Authority wrote to Leader Publications stating that the 21 May 2000 article was published in breach of Regulation 14 because it dealt with the operations of the security forces but had not been submitted for prior approval. Furthermore, the article was "prejudicial to the interest of national security and the preservation of public order". As a result, the Competent Authority ordered the closure of the newspaper and the sealing of its premises for six months. *The Sunday Leader* appealed against this decision to the Advisory Committee established under the Regulation but the appeal was rejected. *The Sunday Leader* is now appealing to the Supreme Court of Sri Lanka for a ruling, *inter alia*, that their fundamental rights under the Constitution of Sri Lanka to freedom of expression have been infringed.

Regulation 14(1), as amended and published in *Gazette Extraordinary* No. 1,130/8 of 3 May 2000 and *Gazette Extraordinary* No. 1,131/20 of 10 May 2000, permits the Competent Authority, among other things, to "take such measures or such directions as he may consider necessary for preventing or restricting the publication or broadcast … of matters which would or might be prejudicial to the interests of national security or the preservation of public order". It also grants the Competent Authority the power to issue directions requiring the prior submission to him of material which may be covered by this prohibition. Regulation 14(2)(b)(i) gives the Competent Authority the power to order that no person shall print or be in any way concerned with the printing of a given newspaper, for such period as may be specified in the order. Regulation 14(2)(b)(ii) allows the Competent Authority to effectively seal the premises of a newspaper to ensure that its equipment is not used for any purpose during the period of the order. Other paragraphs extend the prohibition to any newspaper which is a continuation of the banned newspaper and grant various other powers to the Competent Authority.

Article 14(1)(a) of the Constitution of Sri Lanka guarantees every citizen the right to freedom of expression.

4. Freedom of Expression and Human Rights

4.1 International Guarantees

Article 19 of the *Universal Declaration of Human Rights*, binding on all States as a matter of customary international law, proclaims the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Sri Lanka's international legal obligations to respect freedom of expression are also spelt out in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 19 of the ICCPR states:

> (1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

All three regional human rights treaties – the *African Charter on Human and Peoples' Rights*, the *American Convention on Human Rights*, and the European *Convention for the Protection of Human Rights and Fundamental Freedoms* – guarantee freedom of expression in similar terms.[1]

4.2 The Fundamental Nature of Freedom of Expression

The overriding importance of freedom of expression – including the right to information – as a human right has been widely recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[2]

These views have been reiterated by all three regional judicial bodies dealing with human rights. The African Commission on Human and Peoples' Rights noted, in respect of Article 9 of the African Convention:

> This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.[3]

Similarly, the Inter-American Court of Human Rights stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[4]

The European Court of Human Rights (ECHR) has also recognised the key role of freedom of expression:

> [F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable

[1] At Articles 9, 13 and 10 respectively.
[2] Resolution 59(1), 14 December 1946.
[3] Decision on Communications 105/93, 130/94, 128/94 and 152/96, para. 52.
[4] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

> not only to "information" or "ideas" that are favourably received … but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[5]

These views have been reiterated by numerous national courts around the world, including the Supreme Court of Sri Lanka.[6]

The guarantee of freedom of expression applies with particular force to the media. The Inter-American Court of Human Rights, for example, has stated: "It is the mass media that make the exercise of freedom of expression a reality."[7] The European Court of Human Rights has referred to "the pre-eminent role of the press in a State governed by the rule of law."[8]

The media as a whole merit special protection under freedom of expression in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[9] Inherent in the comments noted above is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[10] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[11]

It has been observed by the Supreme Court of Ghana that:

> In political theory, the media serves as a vehicle for self-expression, as a reflection of public opinion, as an informer of the public, as a participant in the formation of public opinion, and as a watchdog of the government. These roles do not necessarily complement each other and are not all even compatible with one another, yet each is vital for democratic system of government.
>
> Indeed the media is the medium and actor in the process of forming public opinion. For if the citizen is called upon to make a decision on a national issue, he must be fully informed, he has to know and weigh controversial opinions which others have formed. It is the media which promotes this discussion, comments on information, gives orientations, and critically sums up the constantly new formed opinions and demands of society and different groups, makes them the object of public discussion and brings them to the attention of government, so that they have a measuring stick for their actions.[12]

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[5] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.
[6] See *Athukoral and Ors v. Attorney-General*, 5 May 1997, SD Nos. 1-15/97.
[7] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[8] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.
[9] European Court of Human Rights, *Thorgeirson*, note 8, para. 63.
[10] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.
[11] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* note 7*,* para. 34.
[12] *The National Media Commission v. The Attorney-General*, 20 January 2000, Writ No. 2/96, p. 10.

4.3 Restrictions on Freedom of Expression

4.3.1 International Standards

Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression to take into account the values of individual dignity and democracy. Under international human rights law, national laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Restrictions must meet a strict three-part test.[13] First, the restriction must be provided by law. The law must be accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[14] Second, the restriction must pursue one of the legitimate aims listed in Article 19(3); this list is exhaustive. Third, the restriction must be necessary to secure that aim, in the sense that it does not go beyond what is necessary to secure the aim, that the reasons given to justify it are relevant and sufficient, and that it is proportionate to the aim.[15] International jurisprudence makes it clear that this is a strict test, presenting a high standard which any interference must overcome. This is apparent from the following quotation, cited repeatedly by the ECHR:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[16]

4.3.2 National Standards

National constitutions commonly require that any restriction on freedom of expression must be "provided by law" and must, in addition, be "reasonably justifiable in a democratic society". National courts have elaborated on how to assess whether a restriction is reasonably justifiable. The precise nature of the assessment varies slightly from jurisdiction to jurisdiction, but its main elements are relatively constant. A

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[13] This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, views adopted 21 July 1994, No. 458/1991, para. 9.7. The same test is applied by the ECHR. See *The Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 45.

[14] *The Sunday Times*, *op cit.*, para. 49.

[15] See *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40 (ECHR).

[16] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

representative, and perhaps somewhat authoritative test was established by the Canadian Supreme Court in 1986, and has come to be known as the 'Oakes Test', the accepted standard since that time:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high …. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial …. Second …. the party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. … There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".[17]

This test has been followed in substance in a number of other jurisdictions.[18] The similarity between this test and the test under international law may be noted. Both require that any restrictions are set out clearly in law, that they pursue objectives or aims of sufficient importance to warrant limiting a fundamental right and that they meet a test of necessity and proportionality.

5. Issues

The prohibition on publishing or broadcasting matters prejudicial to national security or public order, found in Regulation 14 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000, as well as the system established in the Regulation for implementing this prohibition, represent a substantial limitation on freedom of expression. This brief assesses that limitation in light of relevant international and comparative constitutional law, concluding that Regulation 14 goes beyond the scope of legitimate restrictions on freedom of expression.

Specifically, this brief addresses the following issues:

1. Does Regulation 14 meet the requirement that restrictions on freedom of expression be "provided by law"? In particular, is it excessively vague or does it allocate too much discretion to implementing authorities?

[17] *R. v. Oakes* [1986] 1 SCR 103, p. 138-9.
[18] See, for example, *Nyambirai v. National Social Security Authority and Anor*, 1995 (9) BCLR 1221 (Zimbabwean SC), p. 1231.

2. Does Regulation 14 impair the right to freedom of expression as little as possible? In particular, does it respect the rule that restrictions on freedom of expression may only be applied by bodies which are independent of governmental or political control?
3. Is Regulation 14 overbroad? In particular, does it require a sufficient nexus with the risk of harm to national security or public order before a given expression may be prohibited?
4. Is the harm to freedom of expression from Regulation 14 proportionate to the objective sought to be achieved? In particular, are the sanctions for breach of Regulation 14, including the possibility of a publication being banned and its premises sealed, proportionate to the risk of harm to national security and public order?

6. Analysis

6.1 Provided by Law

6.1.1 International and Comparative Standards

International law and most constitutions permit only restrictions on freedom of expression that are provided by law.[19] This implies not only that the restriction is based on a legal provision, but also that the law meet certain standards of clarity and accessibility, sometimes referred to as the 'void for vagueness' doctrine. Vague provisions are susceptible of wide interpretation, by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as citizens steer well clear of the potential zone of application to avoid censure.

The ECHR has elaborated on this requirement in the case of *Olsson v. Sweden*:

> Requirements which the Court has identified as flowing from the phrase "in accordance with the law" include the following.
>
> (a) A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – 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; however, experience shows that absolute precision is unattainable and the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, para. 49).
> (b) The phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus

[19] In the Constitution of Sri Lanka, the term is "prescribed by law". See Article 15.

implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by, inter alia, paragraph 1 of Article 8 (see the Malone judgment of 2 August 1984, Series A no. 82, p. 32, para. 67).

(c) A law which confers 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 of the measure in question, to give the individual adequate protection against arbitrary interference (see the Gillow judgment of 24 November 1986, Series A no. 109, p. 21, para. 51).[20]

Inherent in these statements are two key ideas, namely that the law must meet minimum standards of clarity and accessibility and that the law should clearly delimit the discretion of any administrative authorities who are given the power to restrict fundamental rights. It is clearly impossible for law to attain absolute precision, and this goal needs to balanced against pragmatic considerations. However, it is also incumbent upon the authorities to minimise this problem wherever they can. One way of doing this is where the bodies which interpret laws restricting freedom of expression develop a body of jurisprudence which can provide guidance to individuals as to the scope of the prohibition. The European Court has noted the benefits of this approach, in *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, where it stated:

> The Court has already acknowledged the fact that frequently laws are framed in a manner that is not absolutely precise... In this instance, there was consistent case-law on the matter from the Federal Court of Justice... This case-law, which was clear and abundant and had been the subject of extensive commentary, was such as to enable commercial operators and their advisers to regulate their conduct in the relevant sphere.[21]

The second key idea implicit in the requirement of "provided by law", the need to structure administrative discretion, is inherent in the rule of law, which by definition is antithetical to subjective and arbitrary government. The European Court developed this idea further in *Silver and Others v. United Kingdom*, a case involving a claim of invasion of privacy, as follows: "One of the principles underlying the Convention is the rule of law, which implies that an interference by the authorities with an individual's rights should be subject to effective control."[22]

The unconstitutionality of vague restrictions on fundamental human rights has been recognised by many national courts. For example, the Canadian Supreme Court has ruled that, "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate."[23] Recently, the Supreme Court of Zimbabwe struck down a provision that prohibited the publication of false news, holding: "[T]he section is too widely expressed, too unclear as to its limitations, and too intimidating (because no-one can be sure whether what he says or writes will or will not attract prosecution and imprisonment). That is why it cannot stand."[24]

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[20] 24 March 1988, 11 EHRR 259, para. 61.
[21] 20 November 1989, 12 EHRR 161, para. 30.
[22] 25 March 1983, 5 EHRR 347, para. 90.
[23] *Canadian Pacific Ltd. v. R.*, [1996] 1 LRC 78, p. 103.
[24] *Chavunduka & Choto v. Minister of Home Affairs & Ors.*, 22 May 2000, Judgment No. S.C. 36/2000, p. 15.

This principle has also been recognised by the Supreme Court of Sri Lanka when it stated that, "Vague provisions cannot be permitted, for they undermine the basic principles of fair notice and warning: people must be clearly and simply told what they are not supposed to do, so that they may so adjust their lives and work."[25]

A problem with vague or excessively discretionary statutory formulations is that they exert a chilling effect on freedom of expression which goes beyond the intended scope of the restriction. The Canadian Supreme Court has referred to this, stating that, "in weighing the intrusiveness of a limitation on freedom of expression our consideration cannot be confined to those who may ultimately be convicted under the limit, but must extend to those who may be deterred from legitimate expression by uncertainty as to whether they might be convicted."[26]

National courts have stressed that laws which grant administrative authorities excessively broad discretionary powers to limit expression are constitutionally suspect. Vague statutory and other legal formulations can lead to a *de facto* broadening of the remit of implementing bodies and to interpretative inconsistencies.

In *Re Ontario Film & Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

> The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as 'law'. … Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[27]

This has also been recognised by the Indian Supreme Court:

> [A]ll Governmental policies, rules and regulations, orders and directions, must conform so that there is "Government of laws and not of men", or, in other words, a Government whose policies are based on democratic principles and not on human caprice or arbitrariness.[28]

Similarly, the US Supreme Court has held that, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of

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[25] *Athukorale & Ors v. Attorney-General*, 5 May 1997, SD No. 1/97-15/97, pp. 31-32.
[26] *R. v. Keegstra*, [1991] LRC (Const) 333, p. 419.
[27] *Re Ontario Film & Video Appreciation Society v Ontario Board of Censors*, 25 March 1983, 41 O.R. (2d), p. 592.
[28] *Bennett Coleman and Co. Ltd. & Others v. Union of India & Others*, AIR 1973 SC 106, p. 150.

arbitrary and discriminatory application."[29] These views have also been articulated by courts in Zambia[30] and Tanzania.[31]

The Supreme Court of Sri Lanka has similarly adverted to the dangers of arbitrariness where the law grants too great a degree of discretion to administrative authorities to restrict freedom of expression. In *Athukorale & Ors v. Attorney-General*, the Court held that a broadcasting bill was unconstitutional, in part because it granted too much discretion to implementing bodies. The Court held that, "Without clear guidelines prescribed by law, the Minister and/or the Authority have discretion to act on an irrational selective basis, including a selective basis referable to race, religion, language, caste, gender, or political opinion".[32]

It may be noted that the constitutionality of a measure conferring legal or administrative discretion on an authority is not dependent on an actual abuse of power by that authority. A law which is sufficiently permissive to create a likelihood or serious possibility of an abuse of power will not pass constitutional scrutiny. As the US Supreme Court has noted, "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."[33] In an analogous fashion the Canadian Supreme Court has held that, "to justify an invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the [Canadian Charter of Rights and Freedoms] is predicated."[34]

6.1.2 Application of These Standards to Regulation 14

It is submitted that Regulation 14 falls short of the international and comparative standards outlined above. Several key terms used in the Regulation, such as 'national security' and 'public order', are themselves inherently vague. More seriously, no attempt to clarify their scope has been made either in the Regulation or by the Competent Authority. Indeed, the Competent Authority has failed to respond to a specific request by Leader Publications for clarification of the scope of these terms. As noted above, it is incumbent upon public authorities, including law-makers, to do their best to clarify the scope of any restriction on freedom of expression.

This problem is compounded by the low threshold of tolerance set out by the relevant provisions. Thus, Regulation 14(1) refers to "matters which would or might be prejudicial to the interests of national security". One can only assume that the "interests of national security" are somehow broader than "national security" *tout court*.

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[29] *Grayned v. City of Rockford*, 408 US 104 (1972), pp. 108-9.
[30] *Banda v. Attorney-General*, 4 September 1992, 92/HP/1005, (unreported), p. 18.
[31] *Pumbun v. Attorney-General*, [1993] 2 LRC 317, p. 323.
[32] 5 May 1997, SD No. 1/97-15/97, p. 32. See also *Perera v. The Attorney-General & Others*, 19 March 1987, [1992] 1 SLR 199, p. 215.
[33] *Thornhill v. Alabama*, 310 US 88 (1940), p. 97.
[34] *R. v. Zundel*, [1992] 2 SCR 731, p. 773.

Regulation 14(3) is even more problematical, allowing the Competent Authority to sanction "any matter … which is, in his opinion, calculated to be prejudicial to the interests of national security or the preservation of public order …." Speculation as to the *mens rea* of third parties by a government official is a thoroughly unsatisfactory mechanism for dealing with the assessment of the limited circumstances in which restrictions on freedom of expression should be contemplated. Such speculation is necessarily highly subjective and hence antithetical to the rule of law.

6.2 Independence of Implementing Bodies

6.2.1 International and Comparative Standards

It is a well-established principle of international and comparative human rights law that public bodies discharging regulatory or restrictive functions in relation to the media must have a maximum amount of independence from governmental and political influence. Indeed, any public bodies vested with the power to restrict freedom of expression must be independent, as well as impartial and accountable. Decisions by such bodies must also be subject to review by an independent body, normally the courts. It is submitted that the Competent Authority and other decision-makers under Regulation 14 do not possess the requisite level of independence from government, and that this renders them constitutionally suspect. It should be stressed that this argument is independent from the question of the overall legitimacy of these bodies, and their role, and that ARTICLE 19 has consistently argued against all forms of prior censorship, regardless of how they are implemented.

The principle of independence of implementing bodies has been most clearly developed in relation to the broadcast media, due to the prevalence of broadcast authorities which exercise general regulatory functions over broadcasters. While the need for such bodies is clear, if only to ensure orderly use of the airwaves, the guarantee of freedom of expression governs their operations, including licensing procedures, which may not, as a result, be used as a vehicle for government control. The same principles apply, *a fortiori*, to bodies which exercise other powers over the media, such as censorship and banning functions, although the case law in this area is more limited due to the paucity of censorship regimes in democratic countries.

The need for independence of broadcast regulators follows from a decision of the European Court of Human Rights, which held that any restriction on freedom of expression through broadcast licensing was subject to the strict test for such restrictions established under international law.[35] The principle is even more clearly reflected in comments by the Ghanaian Supreme Court that, "the state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the

[35] *Groppera Radio AG and Ors v. Switzerland*, 28 March 1990, 12 EHRR 321, para. 61.

mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."[36]

An important implication of these guarantees is that bodies which have the power to limit freedom of expression of the media, such as broadcast authorities or boards of state-funded broadcasters, must be independent. This is reflected in a case decided by the Supreme Court of Sri Lanka, which held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted that, "the Authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[37] Similarly, the Supreme Court of Ghana noted that it was the role of the National Media Commission "to breathe the air of independence into the state media to ensure that they are insulated from Governmental control."[38] The same view is reflected in the preamble to the European Convention on Transfrontier Television in which States: "[Reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters."[39]

Although the decisions and documents noted above refer primarily to the area of broadcast regulation, the very same principles apply in the same way to other bodies with the power to restrict freedom of expression, particularly in such extreme ways as through prior censorship and banning of newspapers. The central thrust of these cases is that if the government can directly restrict freedom of the media, it will, or at least may, do so in ways that are politically partisan. This is an unacceptable restriction on freedom of expression, particularly when it can so easily be avoided through the use of independent bodies.

The above reasoning is implicit in Thomas Gibbons outline of the ideal terms of reference of bodies which regulate or limit the freedom of expression of the media. One of the key features he enumerates is that of independence from government and from governmental influence. This is of cardinal importance for safeguarding the media's role as public watchdog, or bloodhound, monitoring and helping to check the excesses of government and public bodies.[40]

6.2.2 Application of These Standards to Regulation 14

The Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000, makes no provision whatsoever for the independence of the Competent Authority. Pursuant to Regulation 2, the President simply appoints the Competent Authority. This is

[36] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.
[37] *Athukorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97, p. 23.
[38] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 13.
[39] 5 May 1989, European Treaty Series No. 132.
[40] Gibbons, T., *Regulating the Media, 2nd Edition* (1998, London, Sweet & Maxwell), pp. 12-13.

highlighted by the fact that the present Competent Authority is also the Director of Information in the Government Information Department. Fears of political bias on the part of the present Competent Authority are far from theoretical. Indeed, the piece which was the subject of the second warning to Leader Publications, entitled "Censor Exposed" would appear to highlight this point.

The lack of independence of the Competent Authority is compounded by the direct role allocated to the President in decision-making under Regulation 14. The President has, in effect, ultimate power to reconsider any orders made by the Competent Authority. Regulation 14(6) vests the President with the power to suspend or revoke orders of the Competent Authority "as the President thinks fit" and "at any time". These powers appear not to be subject to any form of check or control.

Similarly, pursuant to Regulation 14(8), the President simply appoints the Advisory Committee, which serves as a form of appeal body from decisions of the Competent Authority. Pursuant to Regulation 14(10), the President has full power to nominate the Chairman of the Advisory Committee. As with the Competent Authority, the issue of independence from government is not merely theoretical as the specific members appointed to the Advisory Committee all hold posts or positions with close links to government. Perhaps even more significant is the fact that the role of the Advisory Committee, nominally an appeal body, is simply to make recommendations to the President, pursuant to Regulation 14(11). It is the President who then decides whether to revoke or vary the order. The President thus exercises direct control over the decisions of both the Competent Authority and the Advisory Committee.

It is submitted that Regulation No. 1 of 2000, at least in the application of Regulation 14 thereof, represents an unjustifiable restriction on freedom of expression and of the media inasmuch as it is implemented by individuals with direct connection to the governing authorities.

6.3 Overbreadth

6.3.1 General Principles

Perhaps the most serious problem with Regulation 14 is its overbreadth. Even when restrictions are otherwise legitimate, they must impair the right to freedom of expression as little as possible. In essence, this requirement places an obligation on the State, when pursuing legitimate aims, to have due regard for constitutional rights by tailoring restrictions as narrowly as possible. The US Supreme Court has emphasised the problem of overbreadth:

> Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.[41]

Similarly, the Indian Supreme Court has stated:

> Permissible restrictions on any fundamental rights, even where they are imposed by duly enacted law, must not be excessive, or, in other words, they must not go beyond what is necessary to achieve the objects of the law under which they are sought to be imposed.[42]

The problem of overbreadth has also been recognised by the Supreme Court of Sri Lanka:

> Laws that trench on the area of speech and expression must be narrowly and precisely drawn to deal with precise ends. Over-breadth in the area has a peculiar evil, the evil of creating chilling effects which deter the exercise of that freedom.[43]

There is often an ongoing tension between national security and public order, on the one hand, and freedom of expression and information, on the other. At one level, national security and public order underpin democracy and basic human rights. On the other hand, the tendency of the governing elites to confuse "the life of the nation" with their own survival has often resulted in excessive restrictions on expression and information, as well as other fundamental rights.

A number of courts have stressed that fundamentally, stability and order depend on open democratic debate as a way of solving social problems so that to apply national security and public order restrictions too broadly in fact threatens stability. For example, a case from South West Africa involved a Cabinet decision to impose a high registration fee on a newspaper on the basis that the editor had written articles tending to endanger State security. The Supreme Court set aside the decision, noting:

> Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the State or to the maintenance of public order. In fact, to stifle just criticism could as likely lead to these undesirable situations.[44]

In a case involving a challenge to the law of sedition, the Nigerian High Court, Enugu, held:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech ... to the end that government may be responsible to the will of the people and that changes, if desired, may be obtained by peaceful means.[45]

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[41] *Shelton v. Tucker*, 364 US 479 (1960), p. 488.
[42] *Bennett Coleman and Co. Ltd. v. Union of India*, AIR 1973 SC 106, p. 150.
[43] *Perera v. Attorney General*, [1992] 1 SLR 199, p. 215.
[44] *Free Press of Namibia Pty Ltd. v. Cabinet for the Interim Government of South West Africa*, [1987](1) SA 614, p. 624.
[45] *Nwankwo v. The State,* [1983] 1 NCR 336, p. 748.

Freedom of expression and access to information, by enabling public scrutiny of government action, serve as safeguards against government abuse and thereby form a crucial component of genuine, long-term security and order. In a landmark decision, the US Supreme Court proclaimed:

> [T]he framers of the Constitution recognised the risks to which all human institutions are subject. But they knew that order can not 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 is its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[46]

In *Hector v. Attorney General of Antigua and Barbuda*, the Judicial Committee of the Privy Council considered the compatibility of a public order provision with the Constitutional guarantee of free expression. The provision at issue made it an offence to publish statements "likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs." The Privy Council struck down the law, holding:

> [I]n a free and democratic society it is almost too obvious to need stating that those who hold public office in government and who are responsible for the public administration must always be open to criticism. Any attempt to stifle such criticism amounts to political censorship of the most insidious and objectionable kind.[47]

6.3.2 The Requirement of a Close Nexus between the Risk of Harm and the Expression

The problem of over-breadth is apparent in the jurisprudence regarding order and security restrictions on freedom of expression. On the one hand, as has been noted, public order and national security are important societal interests which may, in appropriate circumstances, be legitimate grounds for restricting expression. On the other hand, these are very elastic notions and could, on a broad reading, be construed as comprising most speech of a political nature. As a result, they must be interpreted restrictively if they are not to seriously inhibit political debate.

National security has, over the decades, been recognised as one of the legitimate grounds for restricting freedom of expression in India. But in a 1976 judgement, the Bombay High Court which ruled that the censor had been wrong in preventing *Freedom First*, a liberal monthly, from publishing several articles critical of the government, on national security grounds. The Court noted:

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[46] *New York Times v. Sullivan*, 376 U.S. 254 (1964), p. 270.
[47] (1990), 2 AC 312, p.315.

> [I]t is not the function of the Censor acting under the Censorship Order to make all newspapers and periodicals trim their sails to one wind or to tow along in a single file or speak in chorus with one voice. It is not for him to exercise his statutory powers to force public opinion into a single mould or to turn the press into an instrument for brainwashing the public. Under the Censorship Order the Censor is appointed the nurse-maid of democracy and not its grave digger.[48]

The Gujarat High Court was no less scathing in its condemnation of censorship. In *C. Vaidya v. H.D'Penha*, the Court reviewed an order of the Censor to close down a journal which contained voices of dissent against the emergency, on the ground that they were prejudicial to national security. The court stated:

> [T]o peacefully protest against any governmental action with the immediate object of educating public opinion and the ultimate object of getting the ruling party voted out of power at the next general elections is not a prejudicial report at all. Such a public education is the primary need of every democracy.[49]

For the reasons articulated by these Indian courts, in many jurisdictions prosecutions for public order offences are effectively a thing of the past. No criminal prosecution has ever been reported under the Australian race hate provisions and there have been no prosecutions for sedition in Australia for over 50 years. A 1986 amendment to the law of sedition means that prosecutions now require "an intention of causing violence or creating public disorder or a public disturbance."[50] These provisions have never been used.

There has been no prosecution for sedition in the United Kingdom since 1947. An attempt was made to bring a private prosecution against Salman Rushdie for his book, *The Satanic Verses*, but the magistrate refused to commit the case for trial for two principal reasons. First, the book was not directed at the government or the State. More importantly, there was no intention to incite to violence or to create a public disturbance.[51]

A Canadian sedition case in 1951, before the *Charter of Rights and Freedoms* came into effect, defined the offence so restrictively that it has never been applied since. In that case, the accused, a Jehovah's Witness, had distributed leaflets which were titled "Quebec's Burning Hate for God and Christ and Freedom Is the Shame of all Canada."[52] The leaflet recounted a detailed narrative of the persecution endured by members of the faith and called upon the people of Quebec to protest against the regime of oppression. Although the leaflet was very passionate, it did not advocate violence or disorder. The Supreme Court struck down the lower courts' conviction for sedition, holding:

> An intention to bring the administration of justice into hatred and contempt or exert disaffection against it is not sedition unless there is also the intention to incite people to violence against it.[53]

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[48] *Binod Rao v. M.R. Masani*, 78 Bom. L.R. 125 (1976), p. 169.
[49] Special Civil Application No. 141 of 1976, 22 March 1976 (unreported), cited in Soli J. Sorabjee, *The Law of Press Censorship in India*, (1976, Tripathi), pp. 181-200, at p. 193.
[50] *Intelligence and Security Act*, No. 102, 1986, sections 12-13.
[51] *R.. v. Chief Metropolitan Magistrate ex parte Choudhury*, [1991] 1 QB 429.
[52] *Boucher v. The King*, [1951] SCR 265, p. 286.
[53] *Ibid*, p. 283.

Courts have sought to address the problem of the inherent vagueness of the terms national security and public order by limiting the application of laws restricting freedom of expression to cases where there is a close nexus between a given expression and a purported public order or national security harm. In assessing the degree of nexus, courts have focused on a number of factors, including the seriousness of risk of harm, the presence of a causal and imminent link between the expression and the risk of harm, the seriousness of the harm itself and, where criminal sanctions are involved, the presence of some sort of intention to cause harm.

The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* provide a good indication of the degree of nexus required. These Principles were drafted in October 1995, when ARTICLE 19 convened a group of experts in international law, national security and human rights which drafted what have become known as the *Johannesburg Principles*. These principles have repeatedly been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression[54] and noted by the UN Commission on Human Rights.[55] Principle 6 is of particular relevance here:

> Subject to Principles 15 and 16 [which further limit restrictions], expression may be punished as a threat to national security only if a government can demonstrate that:
>
> (a) the expression is intended to incite imminent violence;
> (b) it is likely to incite such violence; and
> (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7 states:

> (a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:
>
> (i) advocates non-violent change of government policy or the government itself;
> (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials,[56] or a foreign nation, state or its symbols, government, agencies or public officials;
> (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
> (iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.
>
> (b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.

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[54] See *Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression*, 29 January 1999, para. 23.
[55] For example, see Resolution 1999/36, preamble.
[56] "Public officials", for the purpose of these Principles, include the Head of State; the Head of Government; all government officials including Ministers; all officers of the military, security forces and police; and all people who hold elected office.

The risk of harm

The actual threat to national security or public order must be high, not remote or conjectural. Mere condemnation of a ruling elite or revelation of important information, without which reasoned public opinion can not be formulated, does not pose any threat to national security.

A good example of this is a 1953 case from Israel, in which the Supreme Court restricted the power of the Minister of Interior, under section 19 of the Press Ordinance, to suspend the publication of a newspaper if he thinks it is likely to endanger public peace. At issue in that case was a blatant critique by a newspaper of an alleged statement by Israel's Foreign Minister committing Israel to send troops to Korea. The newspaper urged its readers to refuse to obey such an order to go to Korea, if it were given. The Court held that the power to suspend a newspaper could not be used where there was only a tendency to endanger the public peace; rather the risk must be probable:

> [T]he Minister of Interior must be convinced beforehand that there has been created, having regard to the circumstances in which it takes place, a link between the publication and the possibility of one of the said consequences occurring, which must lead to the inference that the occurrence of that consequence is probable.[57]

In that case, the relevant condition was not met. In 1988, the Israeli Supreme Court held that the level and scope of judicial review in relation to national security matters was no different than for other administrative decisions. The case involved a refusal by the military censor to permit a publication of the outgoing head of the security services, claiming that publication would threaten both him and the service as a whole. The Court overrode the decision of the censor.[58]

The causal relationship

Courts around the world have established the principle that expression may only be restricted in the name of national security or public order where the risk of harm to these interests flows directly from the expression. The Supreme Court of India has held that there must be a very close link between an expression and the threat of disturbance:

> Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous to the public

[57] "*Kol Ha'am" Co. Ltd & "Al-Ittihad" Newspaper v. Minister of the Interior*, (1953) in *Selected Judgments of the Israeli Supreme Court*, Vol. I (1948-53), p. 102.
[58] HC 680/88 Shnitzer v. Military Censor, PD 42 (4) 617. The Court decided that the *Kol-Ha-am* ruling, requiring that limitations of free speech are allowed only if there is probable danger of substantial damage to State security, should be applied to voluntary censorship agreements between the media and the security forces as well.

> interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.[59]

The United States Supreme Court has laid out a clear test for assessing public order restrictions on freedom of expression which requires both direct advocacy of disorder and a likelihood of imminent lawless action. In *Brandenburg v. Ohio*, the issue was the constitutional validity of a conviction for stating at a rally that if the government "continues to suppress the white, Caucasian race, it's possible that there may have to be some revengeance [sic] taken."[60] Notwithstanding what appeared to be a clear call to illegal action, the Court held that the risk of illegal behaviour was too remote to warrant a conviction:

> [T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[61]

US courts have stressed the need for imminent lawless action. In *Whitney v. California*, the Supreme Court held that "no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for discussion. If there be time to expose through discussion the falsehoods and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."[62]

One of the implications of this requirement of nexus between the risk of harm and the expression is that it is not legitimate to restrict expression where the risk already exists because information is already available.

The European Court of Human Rights has dealt with this issue in *Observer and Guardian v. United Kingdom*, commonly known as the 'Spycatcher' case because it involved publication of material from former MI5 agent Peter Wright's book, *Spycatcher*. In that case, the Court had to determine whether an injunction in the UK against publication of excerpts from the book was a legitimate restriction on freedom of expression. It held that the injunction against publication, a much milder form of prior restraint than a requirement of prior submission of material to a censor, was no longer legitimate once the material in question had been published in the United States. The Court noted that once published in the United States, the material had lost its secret character:

> By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps.

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[59] S. *Rangarajan v. P.J. Ram*, [1989](2) SCR 204, p. 226.
[60] 395 U.S. 444 (1969), p. 446.
[61] *Ibid.*, p. 447.
[62] 274 U.S. 357, 377 (1931).

> The Court does not regard these objectives as sufficient to justify the continuation of the interference complained of. … Above all, continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.[63]

Crucial in this case was the lack of a causal link between the impugned publication and the threatened harm.[64]

Similarly, it is not legitimate to restrict expression simply because of tense or violent underlying social circumstances. This was established in South Africa even as long ago as 1936. In *R. v. Roux*, the accused had been convicted of printing "scandalous and dishonouring words" against the King, which included reference to the King as an imperialist and oppressor. In overturning the conviction, the Appeal Court held that the words could not be construed as "an incitement to taking up arms against the King or as inducing a mutiny or insurrection whereby the welfare of the King and the state (*res publica*) is placed in jeopardy."[65] The same case is significant because it also established that governments cannot rely on a generally tense situation – particularly where they have cut off other, perhaps less inflammatory, avenues for promoting change – to proscribe speech. The Court noted:

> [I]f the language is unnecessarily strong, we must remember that the natives of Durban have no voice or vote in the passing of those laws or in the government of the country, and that they can only protest against what may be regarded by them as grievances.[66]

In *S. v. Nathie*, the appellant was charged with inciting offences against the Group Areas Act in the context of protests against the removal of Indians from certain areas. The appellant stated, *inter alia*: "I want to declare that to remain silent in the face of persecution is an act of supreme cowardice. Basic laws of human behaviour require us to stand and fight against injustice and inhumanity."[67] The Court rejected the state's claim of incitement to crime, holding that since the passage in question did not contain "any unequivocal direction to the listeners to refuse to obey removal orders" it did not contravene the law.[68]

The seriousness of the harm

Minor or insignificant harm cannot justify restrictions on a fundamental right. The risk must be of serious harm, that is actual violence or other serious unlawful action. In *Zana v. Turkey*, a town mayor had expressed strong support for the PKK, a terrorist organisation waging a war of independence in the eastern part of Turkey, and had been convicted by the Turkish courts for promoting terrorism. The European Court upheld the conviction but placed great reliance on the fact that incidents of terrorism had escalated in direct and

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[63] *Ibid.*, para. 69.
[64] 26 November 1991, 14 EHRR 153.
[65] [1936] AD 271, p. 280.
[66] *Ibid.*, pp. 283-4.
[67] [1964](3) SA 588 (A), p. 595.
[68] *Ibid.*

immediate response to the mayor's comments.[69] In *Vereniging Weekblad Bluf v. Netherlands*, the military authorities had prevented a conscript from distributing a magazine to soldiers calling for the abolition of the army. The European Court held that this breached his right to freedom of expression as the material contained a legitimate viewpoint and did not constitute a sufficiently serious threat to national security.[70] In a recent case, the issue was the legitimacy of binding over orders imposed on a number of demonstrators. It is significant that the Court allowed the orders only in those cases where the demonstrators had physically obstructed legal activities; where demonstrators had engaged in peaceful protest, binding over orders were not appropriate.[71]

6.3.3 Application of These Standards to Regulation 14

Regulation 14 makes no attempt in its language to require a close nexus between material which may be proscribed and the underlying justification for that proscription, either national security or public order. It specifically does not require that there be a serious or even real risk of harm to these interests, referring instead to material which "might be" prejudicial. Similarly, Regulation 14 does not require there to be any causal link between the expression and the risk of harm. In particular, there is no requirement of imminence, an important element of causality in situations where many factors may contribute to insecurity. Finally, Regulation 14 does not require there to be a risk of serious harm to national security or public order. The term "prejudicial" is not defined but it would appear in practice to include highly general matters such as undermining morale.

It is readily apparent that the Competent Authority has in practice adopted a very low threshold of risk in his application of Regulation 14. Indeed, it is difficult to conceive what risk the 21 May 2000 article, "War in fantasy land - Palaly is not under attack" could pose to national security, let alone public order. The information in the article was readily available to those who wished to access it, including the LTTE. Concealing this type of information from the general public can only contribute to misunderstanding, rumours and, in the longer term, instability, that is to say, the very opposite of what the Regulation is supposed to achieve.

6.4 Proportionality of Sanction

6.4.1 International and Comparative Standards

It is well established that even where a restriction on freedom of expression is legitimate, the application of an excessive sanction for breach of the restriction may itself offend the guarantee. In *Tolstoy Miloslavsky v. United Kingdom*, the sole issue before the European Court of Human Rights was whether an award of £1.5 million for an admittedly highly

[69] 25 November 1997.
[70] 9 February 1995, 20 EHRR 189.
[71] *Steel and Others v. United Kingdom*, 23 September 1998.

defamatory statement was legitimate. In holding that the level of damages was itself a breach of the guarantee of freedom of expression, the Court noted that, "an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered."[72] This same principle is clearly applicable to other speech-related sanctions.

Prior restraint, whereby material is prevented from being published or broadcast, is an extreme form of restriction on freedom of expression which has always been regarded with great suspicion by courts and international bodies. The *American Convention on Human Rights* prohibits prior censorship altogether, Article 13(2) stating:

> The exercise of the right provided for in the foregoing paragraph [freedom of thought and expression] shall not be subject to prior censorship but shall be subject to subsequent imposition of liability ….

Even where international instruments do not go so far as to forbid prior restraint outright, it is clear that it may be legitimate only in extremely limited circumstances, where an overwhelming public interest is at stake. In the European Court of Human Rights case, *Observer and Guardian v. United Kingdom*, the Court had to determine whether an injunction in the UK against publication of excerpts from the book was a legitimate restriction on freedom of expression. In the course of its deliberations, the Court stated:

> [H]aving in mind the written comments that were submitted in this case by "Article 19", the Court [notes that the guarantee of freedom of expression does] not in terms prohibit the imposition of prior restraints on publication, as such. … On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay it publication, even for a short period, may well deprive it of all its value and interest.[73]

The application of very strict standards to cases of prior restraint has been followed by national courts as well. A Paris court refused to order the seizure of an issue of a weekly newspaper which carried details of a conversation between a reporter from *Le Monde* and the lawyer of one Dr. Garretta, a physician who had recently been sentenced to four years' imprisonment for involvement in a blood transfusion scandal. Although Dr. Garretta's rights to privacy, a fair trial and to solicitor-client confidentiality had been breached, these did not have the "intolerable" aspect necessary to justify so extreme a measure as seizure. Instead, Dr. Garretta could sue in damages after publication.[74]

The US Supreme Court has also expressed grave reservations about the use of prior restraint. In *Near v. State of Minnesota*, the Supreme Court struck down a statute which allowed for the banning of a newspaper which was malicious, scandalous and defamatory. The Court did not go so far as to hold that prior restraint would never be legitimate, but noted that "the limitation has been recognised only in exceptional cases." Examples might include, when a nation was at war, prevention of "actual obstruction to

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[72] 13 July 1995, 20 EHRR 442, para. 49.
[73] *The Observer and Guardian v. United Kingdom* (Spycatcher case), 26 November 1991, 14 EHRR 153, para. 60.
[74] Paris Civil Court, Decision of 4 November 1992, reported in *Le Monde*, 6 November 1992.

its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[75] The Court went on to add that the "fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."[76]

In *New York Times Co. v. United States* (the '*Pentagon Papers*' case), the US Supreme Court had to consider an injunction against publication during the Vietnam war of material classified as top secret which dealt with decision-making in relation to the war. The Court rejected the government's claim that material which 'could', 'might' or 'may' prejudice the national interest might be enjoined, holding that, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."[77] Elaborating on the idea advanced in *Near* that a war-time situation might justify prior restraint, the Court noted:

> [O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient ….[78]

In 1953, the Supreme Court of Israel held that the suspension, for 10 and 15 days respectively, of two newspapers by the Minister of the Interior on grounds of public order was not a legitimate exercise of his discretion, despite the fact that the country was under a state of emergency at the time. The Court stressed the dangers of prior restraint in the following terms:

> What endows the use of a measure of the preventive kind with its powerful and drastic character is the general acknowledgement "that no official yet born on this earth is wise enough or generous enough to separate good ideas from bad ideas, good beliefs from bad beliefs".[79]

Even if the Minister was convinced that the public peace is likely to be endangered, he must consider whether the danger is sufficiently grave to justify the use of so drastic a power.

6.4.2 Application of These Standards to Regulation 14

It is submitted that the sanctions and powers envisaged by Regulation 14 are not proportionate to the goal sought to be achieved, particularly as these powers have been applied to Leader Publications. Regulation 14 provides for the most restrictive form of

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[75] 283 US 697 (1931), p. 716.
[76] *Ibid.*, p. 718.
[77] 403 US 713 (1971), pp. 725-6.
[78] *Ibid.*, pp. 726-7.
[79] "*Kol Ha'am" Co. Ltd & "Al-Ittihad" Newspaper v. Minister of the Interior*, (1953) in *Selected Judgments of the Israeli Supreme Court*, Vol. I (1948-53), p. 106, quoting Chafee, *Freedom of Speech in the USA* (1942 Edition, p. 61).

prior restraint imaginable. It goes well beyond the forms of prior restraint considered in the French and US cases noted above, where what was sought was an injunction against publication of specific material. Regulation 14, along with the directives of the Competent Authority, is not even limited to prior censorship, that is a requirement of prior approval of material to be published, along with the application of a subsequent sanction for breach. By allowing for banning and sealing orders, Regulation 14 gives the Competent Authority the power to completely silence a newspaper for a period of time in the future, that is, in advance of any material even having been written. These orders, in effect, are an extreme form of sanction applied by the Competent Authority when he considers a newspaper to be in breach of Regulation 14.

Regulation 14 supplements these banning and sealing orders in a number of ways. Regulation 14(1) grants the Competent Authority to take such measures "as he may consider necessary for preventing" a breach of its prohibitions, apparently without limiation. Regulation 14(2) allows the President to order any individual convicted of an offence under the Regulation to refrain from publishing a newspaper or operating a broadcasting station. Regulation 14(3) allows similar measures to be taken in relation to material "calculated to be prejudicial" to various interests, regardless of whether they are in fact prejudicial. Regulation 14(4) extends any prohibition in force to other newspapers which are, in any respect, a continuation of a banned newspaper. Finally, Regulation 14(12) extends liability for breach of the Regulation to the proprietor, manager, editor and publisher of the offending newspaper.

In banning and sealing the premises of Leader Publications for six months, the Competent Authority has applied a very drastic sanction to this newspaper group. It may be noted that these orders apply not only to the offending publication, *The Sunday Leader*, but also to its companion newspaper, *Irida Peramuna*. This extreme sanction has been applied for the publication, respectively, of a photo of a demonstration, an effective exposé of the bias of the Competent Authority and an article which spoofs the powers of the Competent Authority using information already available through other sources.

It is submitted that the extreme powers of sanction, and in particular the power to ban and seal newspapers, given to the Competent Authority by Regulation 14, offend the guarantee of freedom of expression. It is further submitted that the specific application of these powers to Leader Publications is a breach of the freedom of expression of their staff.

7. Conclusion

A close analysis of Regulation 14 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000 – and its application to Leader Publications (Pvt) Limited – shows that it breaches several elements of the test for restrictions on freedom of expression. It does not meet the "provided by law" standard, both because its vague terms have nowhere been clarified and because it grants an almost unlimited discretion to

the administrative authorities who implement it. Those authorities signally fail to meet the requirement that bodies which impose restrictions on freedom of the media be independent of governmental and political control. Indeed, the President is given a key role in the implementation of this Regulation. Regulation 14 is also overbroad, proscribing material even where there is effectively little or no risk to national security, or where the risk bears no causal relationship to the material.

The application of Regulation 14 to Leader Publications for the 21 May 2000 article in *The Sunday Leader*, "War in fantasy land - Palaly is not under attack", highlights all of these shortcomings of Regulation 14. It is clear from the Editor's response to the first warning, on 8 May 2000, that he was concerned about the undefined scope of the Regulation. The evidence also suggests that the Competent Authority is not, in fact, free of bias in the use of his very broad discretion under the Regulation to censor material and warn publications. Finally, the application of these proscriptions to the 21 May article clearly demonstrates its massive overbreadth.

Perhaps the most surprising aspect of Regulation 14 is that it allows newspapers to be banned and their premises to be sealed. No newspaper has been banned in Sri Lanka for nearly thirty years and this period is at least that long in most democratic countries. This is an extreme sanction which can only throw a long chilling shadow on the media in Sri Lanka.

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