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Editor's note .....

In this joint issue of the *LST Review* we publish the proceedings of a discussion organised by the Trust on the recent amendments to the Bail Act of 1997. Included are the amendments to the Bail Act, the presentations made by Dr B. Buvanasundaram and Mr N. Dissanayake as well as an article by Ms Priyadharshini Dias on the law relating to bail where she looks at the developments in relation to the law on bail. Here she traces the developments in this area from the provisions in the Criminal Procedure Code to the Bail Act of 1997. The general consensus of the speakers seemed to be that there was no need to amend the Bail Act and what is urgently required is to ensure that delays in the criminal justice system are minimised. We regret that we are unable to publish the presentation made at this discussion by Mr Dharmadasa, former Commissioner of Prisons due to some problems encountered in transcribing the tapes of the discussion.

We also publish an article by Mr M.C.M. Iqbal on the Prevention of Human Rights Violations and the role of the police. Here he refers to a circular issued under the hand of the IGP where police officers who had been implicated in human rights violations are allowed to be reinstated in their positions, whereas the provisions in the Establishment Code are clear in stating that such officers should be suspended pending inquiry. He queries whether this circular would further entrench the already worsening situation of impunity in the country.

We also publish an article by Mr Shantha Jayawardena on freedom of expression where he looks at the Supreme Court judgment in *Prasanna Withanage* v. *Sarath Amunugama and Others* which involved the suspension of the release of the petitioner's film, *Purahanda Kaluwara,* on the ground that it would be prejudicial to national security. Delivering judgment in favour of the petitioner, the Court had occasion to deal with the issue of the right of artistic expression and the grounds on which such right can be restricted. The writer also compares this case with two other cases on freedom of expression – *Joseph Perera* v. *Attorney-General* and *Sunila Abeysekera* v. *Ariya Rubasinghe* and refers to the discrepancies in the judgments. The text of the judgment in Prasanna Withanage's case is also reproduced in this issue.

On a different note, 11th of September witnessed the biggest terrorist attack in the history of mankind that took place in New York and Washington DC which killed thousands of people. This event highlighted the need to combat terrorism which does not respect international boundaries. Those of us living in Sri Lanka are only too well familiar with the ugly face of terrorism which has claimed thousands of lives over a period of twenty years. It is hoped that the international community would get together to eradicate terrorism within the framework of international law and co-operation.

THE GAZETTE OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Part II of July 13, 2001
SUPPLEMENT
(Issued on 16.07.2001)

BAIL (AMENDMENT)
A
BILL

To amend the Bail Act, No. 30 of 1997

Ordered to be published by the Minister of Justice[*]

L.D. – O 2/2001

AN ACT TO AMEND THE BAIL ACT, NO. 30 OF 1997

Be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:

Short Title.

1. This Act may be cited as the Bail (Amendment) Act, No. 2001.

Amendment of section 3 of Act No. 30 of 1997.

2. Section 3 of the Bail Act, No. 30 of 1997 (hereinafter referred to as "the principal enactment") is hereby amended by the repeal of subsection (1) of that section, and the substitution of the following subsection therefor:-

"(1) Nothing in this Act shall apply to any person suspected or accused of having committed, or been convicted of an offence under –

[*]Editor's note: This amendment, passed hours before the dissolution of the last Parliament, has not received the signature of the speaker.

(a) the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979; or
(b) regulations made under the Public Security Ordinance; or
(c) any other written law whatsoever which makes express provision in respect of the release on bail of persons suspected or accused of having committed, or been convicted of, offences under such other written law."

Replacement of section 5 of the principal enactment.

3. Section 5 of the principal enactment is hereby repealed and the following section substituted therefor:-

"Procedure on production of suspect in the case of certain non-bailable offences.

5. (1) Where a person suspected or accused of being concerned in committing or of having committed a non-bailable offence, other than a non-bailable offence set out in the Schedule to this Act, is brought before or surrenders to a Magistrate, the Magistrate may if he is satisfied for reasons to be recorded that it is expedient to detain such person is custody pending further investigation, by warrant addressed to the Superintendent of any prison, order the detention of that person for a period of fifteen days and no more.

(2) Where at the end of the period of fifteen days referred to in subsection (1) proceedings are not instituted against the person for that offence, the Magistrate shall subject to the provisions of section 13, release that person on bail, where he is satisfied that there are no reasons to refuse the release of such person on bail under section 14."

Insertion of section 5A in the principal enactment

4. The following new section is hereby inserted immediately after section 5, and shall have effect as section 5A of the principal enactment:

"Suspect to be remanded in the case of certain non-bailable offences.

5A. (1) Where a person suspected or accused of being concerned in committing or having committed a non-bailable offence set out in the Schedule to this Act, is brought before or surrenders to a Magistrate, the Magistrate shall

by warrant addressed to the Superintendent of any prison, order the detention of that person until the conclusion of the trial of that person for that offence;

Provided that where proceedings are not instituted against that person for that offence at the end of a period of three months from the date on which he surrendered to court or was arrested, the Magistrate shall subject to the provisions of section 13, release such person on bail, where he is satisfied that there are no reasons to refuse the release of such person on bail under section 14, unless the Magistrate, on application made therefore and for good and sufficient reasons that shall be recorded, orders otherwise;

Provided further, that the duration of an order made by a Magistrate refusing bail, shall not in any case exceed three months at a time."

Repeal of sections 21, 22, 23, 24, 25 and 26 of the principal enactment.

5. Sections 21, 22, 23, 24, 25 and 26 of the principal enactment are hereby repealed.

SCHEDULE [Section 5]

Offences punishable under the following sections of the Penal Code

Section 108	- Abetment of an offence punishable with death.
Section 114-126	- All non-bailable offences set out in Chapter VI (offences against the State)
Section 128-137	- All non-bailable offences set out in Chapter VII (offences relating to the Army, Navy and Air Force).
Section 217	- Failure by public servant to intentionally apprehended etc. (person under sentence of death).
Section 297	- Culpable homicide not amounting to murder.
Section 300	- Attempt to murder (if hurt is caused).

Section 304 - Causing miscarriage without woman's consent.

Section 308A - Cruelty to children.

Section 317 - Voluntarily causing grievous hurt by dangerous weapons or means.

Section 320 - Voluntarily causing grievous hurt to extort property or to constrain to do an illegal act.

Section 354 - Kidnapping.

Section 355 - Kidnapping or abducting in order to murder.

Section 357 - Kidnapping or abducting a woman to compel her marriage, &c.

Section 360A - Procuration.

Section 360B - Sexual exploitation of children.

Section 360C - Trafficking

Section 364 - Rape.

Section 365B - Grave sexual abuse.

Section 377 - Extortion by threat of accusation of an offence punishable with death or 10 years imprisonment (where the offence is an unnatural offence).

Section 395 - Habitually dealing in stolen property.

Section 435 - House-trespass to commit an offence punishable with death.

Sinhala text to prevail in case of inconsistency.

6. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

The Law relating to Bail in Sri Lanka

Dr. Buvanasundari Buvanasundaram[*]

The foundation of bail is based on the legal principle that an accused is presumed to be innocent until proven guilty. Bail provides a conditional freedom whereby the accused is permitted to be free and has the opportunity to properly defend himself than if he were in custody. It also keeps suspects out of prison and away from all the indignities therein.

In a bailable offence, bail is a right and not a favour. Bail should not be excessive and should be fixed with the suspects ability to pay in mind. This is embodied in section 404 of the Code of Criminal Procedure of 1979.

In non-bailable offences the court exercises discretion in granting bail. The factors that the court looks to in granting or refusing bail is the probability or improbability of a conviction, the gravity of the charge, the severity of the punishment, the danger of the accused absconding if he is released on bail, the danger of intimidation of witnesses, the protracted nature of the trial, the opportunity of the accused for preparation of his defence and access to his counsel, the age and health of the accused, and the character of the accused.

Section 14 of the Bail Act of 1997 deals with the factors considered in the exercise of such discretion. They are the belief that the accused will not appear to stand his trial, interfere with witnesses or the evidence against him or obstruct the course of justice, or commit an offence while on bail, or that the particular gravity of, and public reaction to the alleged offence may give rise to public disquiet. It is preferable to leave discretion in the hands of the judge rather than enumerate in statutory form the factors to be considered and thus feter judicial discretion, for a judge would not be able to use his discretion outside what has been laid down in section 14. This is especially so as there is a need for liberal interpretation of the law in areas of social justice.

As the Indian Supreme Court observed in *State of Rajasthan* v *Balchand*[1] "The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the court."

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[1]1978 Cr.L.J. 195.

The Bail Act of 1997 substituted provisions in the Code of Criminal Procedure 1979 (CPC), which dealt with bail during investigations and bail during trail. The Bail Act also brought in the concept of anticipatory bail, which is bail for non bailable offences in anticipation of arrest. This concept known to the Indian law was intended to protect citizens from frivolous arrests by the police. It was unfortunate that we in Sri Lanka thought it necessary to introduce the concept in 1997. Abuse of police powers should be checked by the judiciary and the executive and not through provisions of anticipatory bail. As the Minister of Justice observed in Parliament in the debate on the 2001 amendment, anticipatory bail is not used by the common man, the Simon and the John Singho but by political opponents.

Under section 2 of the 1997 Act the grant of bail shall be regarded as the rule and the refusal to grant bail the exception. This is satisfactory. Under section 7 bail can be either personal bail or surety bail. There does not seem to be a preference of one over the other. Under the CPC the preference was for personal bail and this could deter those who do not have the means to furnish such personal bail.

Section 6 of the principal amendment provides for the police to release a person suspected of a bailable offence within 24 hours, without recourse to a magistrate. This is unfortunate; under the CPC the police were bound to take the accused to the Magistrate within 24 hours. This intervention of a judicial officer soon after arrest acted as a temper on police powers and has been removed by the Act. The police are given the power to release on bail and this could be abused by the officer in charge of the station, as such power can be subject to corruption.

Section 15 states that the court shall give reasons for refusing bail. Section 17 states that a person shall not be detained for a period exceeding 12 months from the date of arrest, but section 17 provides that the High Court can order an extension of this period. The detention is to be for a period of 3 months at a time and twelve months in the aggregate.

Section 19 provides that where there is an appeal against an acquittal by a Magistrate's court the court may issue a warrant of arrest and commit him to prison pending the determination of the appeal or release him on bail. Section 20 deals with appeals from the High Court. Subsection 4 contains a surprising clause. Under this subsection the time spend in remand pending an appeal is not considered as imprisonment, and no allowance is made for it; his sentence begins from the date the judgment by the appeal court is delivered. This is grossly unfair and would unnecessarily increase his time spent in prison. We are dependant on the appellate court to direct that his time served in prison be taken into account.

Under the principal Act, section 5 conferred discretion when dealing with non-bailable offences. This has been repealed and a new section substituted. Section 5 and 5A state that for offences other than those in the schedule the Magistrate shall, pending investigation, detain such person for 15 days after which he can release such person on bail, unless proceedings have been instituted. Where a person commits an offence listed in the schedule he shall be released on bail where proceedings are not instituted by the police in three months; if they are instituted he can be detained until the conclusion of the trial. Clearly, the offences in the schedule are designed to be grave criminal offences, by an oversight it appears that murder has been excluded. This provision seems to contradict section 2, which states that granting of bail is the rule and refusal the exception. An effort to mitigate the harshness of 5A is 5B which enables the High Court to release any person on bail.

There is also concern that grievous bodily hurt which is an offence in the Schedule is an offence for which mediation is possible under the Mediation Boards Act. This is contradictory as bail would then be refused for an offence which could be settled out of court.

Denying judicial discretion to grant bail would clearly increase the number of prisoners in remand. Remand should not be used as punishment, that is not its intent. Considering the protracted nature of litigation in Sri Lanka section 5A would keep suspects within prison walls for an inordinate length of time. This is clearly unsatisfactory considering the conditions in prisons. Prisons are over-crowded; they are introduced to drug habits, and are subjected to sexual assaults. We are compelling suspects who have not yet been declared guilty under the law to live in conditions that are sub human and expect them on release to be law abiding contributing members of society; when inevitably the prison experience will leave them hardened and bitter. Crime is bred in these conditions and increasing incarceration in remand prisons is indefensible, especially because cases take up to an average of five years to be concluded and also because of the danger that the suspect would serve his term in remand prison before trial. The CPC has served us well since 1979. There was little reason to change the provisions relating to bail. Reform is needed on the ground where cases in court take an inordinate length of time.

Remand prisons should be only used for violent dangerous offenders, not for those who have been brewing kassipu, possessing a few grams of drugs or travelling ticketless by bus. The remand prisons more than any other aspect of our legal system endorse the grim reality that law is a tool in the hands of the rich and powerful, against the poor and vulnerable. Those in prison do not have the means to secure legal representation leave alone post bail.

Corruption in the police force, unaccountability of the police and protracted litigation has helped breed crime. We need to work on change at that level rather than deny bail and crowd our remand prisons.

Amendment to the Bail Act

Nuwan Dissanayake[*]

The concept of bail relates directly to the golden thread that runs through our justice system which is "innocent until proven guilty." Until such time a person is convicted by a competent court that person is, for all intents and purposes, innocent. Thus, what is the justification for incarcerating such a person? Before coming to the more serious offences such as murder, attempted murder and so on I would like to dwell a little on the latest additions to the list scheduled offences which are, misappropriation, criminal breach of trust and cheating. These are, if I may use the term "border line offences." A stopped cheque is sufficient to bring forward an allegation of cheating, for example, where two people are in a business transaction, the goods have been delivered, the cheque has been handed over, but the goods are not up to standard and the purchaser stops payment on the cheque. This is a situation that we see everyday.

When going into the merits it is very clear that these are necessarily civil transactions. But at the time of making the complaint the police are not required to decide whether or not it is a civil transaction. Nor is the Attorney General (AG) called upon to decide. The decision is made by the court. That is an inflexible rule. Only a court can sit in judgment of whether a person is guilty or not. Depriving a person of his personal liberty is to say the least draconian. Aren't we pre-judging a person? Is it up to us to do so? Can the legislature pre-judge a suspect? No. Neither the police nor the AG can pre judge a suspect. It is my personal experience that on many occasions where it appears that the evidence is marginal and it could go either way, the decision is taken that it is a matter that should be decided by court. That is the final deciding authority.

What this piece of legislation has done is to impose a mandatory sentence of three months on any person against whom there is a complaint. As it is, prisons and particularly remand prisons are seriously overcrowded and according to the statistics, the facilities meant for one person are used by 43 people. In such circumstances, what is the purpose of bringing forth an amendment of this nature? A similar situation arose pre-1992. The power to sanction bail for murder was exclusively vested in the AG, I have personally spoken to a remand prisoner who had been in prison for five long years. Is this fair? Is this not the same result that will come out of this piece of legislation? There are certain instances where bail as a rule is necessarily desirable. The earlier Act, which provides for certain instances in which the Magistrate can refuse bail, is a good piece of legislation because it is the Magistrate who can decide. The Magistrate is the person closest to the public. He can see the congestion

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and the unbearable conditions of prisoners in the cell in the court house. There is no tap to drink water from, no toilet or no place to change. This is degrading treatment. It is my firm belief that bail is something that necessarily must be decided on by a judge on the merits of each individual case. Crimes or allegations of crimes cannot be generalised. Allegations are made for various purposes and that is why the concept of anticipatory bail was borrowed from India. Anticipatory bail can be a very useful tool if it were put to proper use, and is granted subject to conditions. The person's passport is impounded, substantial cash bail is required, and the immigration authorities are informed. The basic idea of bail is to ensure that the suspect is present to face his trial.

When you talk about a statute it is necessary to question the intention of the legislature. I would like to refer to the Minister's speech reported in the Hansard, particularly his rely at page 333: "Sir, it is very necessary. My honourable friends want these matters immediately investigated. What will happen if you retain the anticipatory bail provision? You know what happened to Yasodha Kasturiarachchi - he is on anticipatory bail ..." Yasodha Kasturiarachchi or whatever arachchi escaped the hook through this anticipatory bail provision." I am unable to associate myself with the statement of the Hon. Minister. Bail does not let a criminal off the hook. What lets a criminal off the hook is politicising the police, improper training, corruption among the authorities and lack of evidence. I like to pose a question to you on which you might like to dwell in your own time. Is this the intention of the legislature in passing this piece of legislation that the "Ronnie Peirises and the Kasturiarachchis do not run this country"? If that is the intention of the legislature in passing this Bill in such an indecent hurry, the very purpose of the concept of bail is defeated.

Even with regard to the three kinds of offences which I mentioned earlier – criminal misappropriation, criminal breach of trust and cheating - the Hon. Minister says thus: "I want to bring criminal misappropriation, criminal breach of trust and cheating also into the schedule. Most of these persons have cheated the banks." Thus, who is the legislature targeting here? Obviously, we are aware of substantial discrepancies and irregularities in banking practices particularly with regard to the State banks over the last few years. If that is the category the legislature is targeting, should the rest of society be penalised or victimised in order to trap a few? A person is entitled to bail as of right. Until such time he is convicted by a competent court he cannot be deprived of his personal liberty. But unfortunately this piece of legislation does that. As far as the practitioners are concerned, it would broaden the horizons of some practitioners particularly those whom we call resident counsel who are restricted to a particular Magistrate's court. They would want to venture

out of their domain and go into the High Court, make bail applications and perhaps widen their horizons. But at what cost? It is my opinion that this legislation imposes an unnecessary burden on the litigant. Further, other than the selected few particularly those involved in white collar crimes like cheating and criminal misappropriation, the majority of suspects or accused come from a particular social strata. It is also a fact that this is a low income social strata. As it is, it is difficult enough to obtain bail. I have not seen any cause to complain about the way the courts or individual judges have conducted themselves in granting or refusing bail. The rising crime wave cannot be curtailed by legislation.

Another category of criminals targeted by this amendment is the "contract killers". (The term was used specifically). We all know that contract killers (a) are not brought to justice; (b) even if they are, there is seldom any evidence against them. But the fact remains that the so-called king pins of the underworld, the master killers, the cold-blooded assassins, are in remand custody today. They have been refused bail for good reason. It is not that they have not filed bail applications. They have been filed, objections and counter objections have been filed, matters discussed at length and the judge has decided that at that particular moment in time it is not appropriate to release these people back into society. Thus, judiciary is playing its role very competently. Even in cases which have given rise to much public outcry courts have repeatedly refused bail. They have taken into consideration public reaction to granting bail and the possible implications or impact it might have in the case. Up to date no one has found fault with the way courts have acted. So is this piece of legislation a statement that the executive and the legislature have no faith in the judiciary? If that be the case, instead of imposing unnecessary burdens on the general public would it not be more appropriate to educate the judges? Finally, it is the responsibility of the judge to decide whether or not bail should be granted.

Another stark reality we have to face as a country is corruption. This country is corrupt to the extent that someone going to a government institution to get something done goes there prepared to bribe someone. This has become part and parcel of our culture. But this type of draconian legislation does not remove that corruption. A classic example is the stringent amendments made to the Immigration Act. Even before immigration offences became non-bailable there was a certain amount of corruption. Those who could afford to "retain" the CID so to speak, were allowed out. But even more so when they are faced with the prospect of being in remand up to one year and sometimes more, people are prepared to pay large sums of money. As long as there are people to accept these large sums of money in exchange for favours no amount of legislation is going to help. By this amendment the rot that has set into the immigration process and is also present in the regular law enforcement

authorities. It is going to multiply. In my opinion this amendment was not called for and does not fulfill any requirement of present day society.

The only area in which some complaints arose with regard to the Bail Act itself was in section 3 where there is certain ambiguity in the wording. The English text was very clear but there was a certain amount of ambiguity in the Sinhala text which gave rise to an argument that other than the laws specifically mentioned in section 3, all other laws are governed by the Bail Act. Section 3(1) reads as follows:

> *Nothing in this Act shall apply to any person accused or suspected of having committed or convicted of an offence under the Prevention of Terrorism Act, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under such other written law.*

This section is very clear – any other written law – we are talking of the Immigration Act, and particularly the Offences Against Public Property Act which provides for the release of persons in custody. Even in the Emergency Regulations there is this particular article which provides for the Magistrate to enlarge a suspect on bail with the sanction of the AG. That was an area where there was some ambiguity but other than that in my opinion the Bail Act was very sound. The only person who can decide whether a person should be allowed to roam free is the judge. Thus, instead of bringing forth meaningless legislation the intention of which is, in my opinion, questionable what should be done is to pass legislation to expedite the judicial process. That legislation is already there. The Minister has commented on the non-summary process - the Criminal Procedure Code has had a provision since its inception that all non-summary cases be concluded within a period of three months. That does not happen. There has been only one occasion that I am personally aware of where a non-summary inquiry was concluded within a week, for the simple reason that there was a conscientious judge and defence counsel. Counsel fall sick, they are not retained properly and they do not get their instructions and sometimes for reasons best known to them, counsel do not appear in court. So instead of trying to expedite the process of law what is the purpose of bringing in legislation that imposes punishment on society at large? Therefore, in conclusion I would like to say that this piece of legislation will only give rise to undesirable results in society.

The Legal Provisions relating to Bail

Priyadharshini Dias*

The concept of bail has been discussed in the publication on "Programme in Criminal Justice Reform"[1] as follows:

> *The concept of bail has a long history and deep roots in English and American law. In medieval England, the custom grew out of the need to free untried prisoners from disease-ridden jails while they were waiting for the delayed trials conducted by travelling justices. Prisoners were bailed, or delivered, to reputable third parties of their own choosing who accepted responsibility for assuring their appearance at trial. If the accused did not appeal, his bailor would stand trial in his place.*
>
> *Eventually it became a practice for property owners who accepted responsibility for accused persons to forfeit money when their charges failed to appear for trial. From this grew the modern practice of posting a money bond through a commercial bondsman who receives a cash premium for his service, and usually demands some collateral as well. In the event of nonappearance the bond is forfeited after a grace period of a number of days during which the bondsman may produce the accused in courts.*

In Sri Lanka the law relating to bail was principally contained in the Code of Criminal Procedure Act No. 15 of 1979. There are also other statutes under which special provisions regarding bail apply:

(i) Prevention of Terrorism Act No. 48 of 1979 as amended by Act No. 10 of 1982
(ii) Offensive Weapons Act No. 18 of 1966
(iii) Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984
(iv) Customs Amendment Act No. 24 of 1991
(v) Offences against Public Property Act No 12 of 1982 as amended by Act No. 76 of 1988 and Act No. 28 of 1999

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* Attorney-at-Law.

[1] Quoted in *Motiram and others* v. *State of Madhya Pradesh* (1979) 1 SCR 335.

(vi) Immigration and Emigration Act as amended by Act No. 16 of 1993 and Act No. 42 of 1998.
(vii) Firearms Amendment Act No. 22 of 1996
(viii) Antiquities Ordinance
(ix) Prohibition of Ragging and other Forms of Violence in Educational Institutions Act No. 20 of 1998
(x) Bribery Amendment Act No.9 of 1980
(xi) Release of Remand Prisoners Act No. 8 of 1991.

In 1997 a special statute relating to bail was enacted. Section 3(2) of this Act replaced the law relating to bail in the Code of Criminal Procedure Act. The preamble to this Act reads "An to provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offence, to provide for the granting of anticipatory bail and for matters connected therewith or incidental thereto."

Section 2 of the Act contains a golden opportunity for the reduction of the congestion in the number of remand prisoners in our country. According to this Act, "the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception." Section 21 also provides for a new concept of 'anticipatory bail.'

The Bail Act also did away with the watertight compartments of 'bailable' and 'non-bailable' offences and it rationalised the concept of bail to give the discretion to court to consider the facts of a particular case on its merits regardless of whether a category of an offence was termed 'bailable' or not.[2]

In terms of section 5 even persons who are arrested for a 'non bailable offence' may at any time be released at the discretion of court subject to the provisions of section 13.[3] Section 13 states that no bail shall be given for a person who has been arrested for an offence punishable with death or with life imprisonment except by a judge of the High Court. Similarly, in terms of section 14 the court is given the discretion to refuse bail to a person arrested in a non-bailable offence or cancel a subsisting order releasing such person on bail if he comes under the provisions specified in that section.[4]

[2] Sections 4 and 5 of the Bail Act.
[3] Formerly, Code of Criminal Procedure, section 403.
[4] Formerly, Administrative of Justice Law, section 103(5).

Section 14 stipulates the reasons for which a court may refuse bail or cancel a subsisting order for release as follows:

(a) that such person would -
  (i) not appear to stand his inquiry or trial;
  (ii) interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice: or
  (iii) commit an offence while on bail: or

(b) that the particular gravity of, and public reaction to the alleged offence may give rise to public disquiet.

Section 15 mandatorily requires reasons to be given in writing for refusing to release a person on bail or for cancelling, rescinding or varying a subsisting order of bail. Section 16 states that subject to section 17, "unless a person has been convicted and sentenced by a court, no person shall be detained in custody for a period exceeding 12 months from the date of his arrest."

Section 18 also incorporates the earlier provisions in section 408 of the Code of Criminal Procedure Code which deals with the procedure relating to the discharge of sureties.

Section 7(1) gives the conditions under which a person may be released on bail as follows:

(a) on an undertaking given by him to appear when required;
(b) on his own recognizance;
(c) on his executing a bond with one or more sureties;
(d) on his depositing a reasonable sum of money as determined by court; or
(e) on his furnishing reasonable certified bail of the description ordered by court.

The proviso to this section stipulates that when a person appears before court on summons "he shall be enlarged on his own recognizance or on his giving an undertaking to appear when required, unless for reasons to be recorded the court orders otherwise." Hence, if a person appeared on summons, obeyed the process of court and showed no inclination to abscond he should be permitted to continue to come to court on his own undertaking.

Therefore, it is clear that the law has specifically given the guidelines to be followed the conditions that a person should be granted on bail. The court should take into account not

only the gravity of the offence but the financial capabilities of the prisoner and release the suspect on a personal bond where necessary. The quantum of money and certified bail should be "reasonable" from the point of view of man according to the current law.[5] The said reasonable sum of money should also be ordered if the court thinks that the person would not be released under the conditions stated in section 7(1)(a-c).

According to prison statistics 77.4% of the total prison population in Sri Lanka are remandees.[6] This is largely due to the fact that Magistrates order excessive cash bail or give strict conditions for bail. Cash bail ordered must be affordable. The whole purpose of granting bail as laid down in section 2 would be in vain if the Magistrate orders strict conditions for bail. Therefore, the conditions of releasing a prisoner on bail as set out in section 7(1) of the Bail Act must be strictly observed. Applications for bail made by lawyers appearing for the Legal Aid Commission must be decided leniently as the remandees in such cases are not in a position to retain a lawyer or take the initiative to make the relevant bail applications to court. It was revealed that some of these remandees were even unable to provide the required sureties due to their inability to contact their families.

As has been held in *Pathirana* v *State*[7] the entire purpose of bail will be negated if the bail ordered is beyond the capacity of the suspect. Bail should be reasonably sufficient. Two factors are indicated in the term "reasonably sufficient."

(i) it must be reasonable bail in the circumstances.
(ii) The bail must not be excessive so as to prevent the suspect from furnishing bail - the bail order should not be a punitive order.

In the words of President Lyndon B. Johnson:[8] *The principle purpose of bail is to ensure that an accused person will return for trial if he is released after arrest... How is that purpose met under the present system? The defendant with means can afford to pay the bill. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail for weeks, months and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only - because he is poor...*

[5] See also section 404 of the Code of Criminal Procedure Act.
[6] Department of Prisons, statistics for 1999.
[7] (1985) 2 Sri LR 75.
[8] Observations made at the signing ceremony of the Bail Reforms Act 1966, USA.

It has also being pointed out that only about 25% of the remandees finally get convicted. Therefore, the majority of 75% of the remandees serving their term in jail are persons who will not be punished for the crime alleged. The statistics also indicate that 75.4% of the remandees are in prison for an average period of less than 6 months.[9] Therefore, one of the grave consequences of pretrial detention is that a suspect gets exposed to the prison culture and the psychological effects of it on him and his family. It has been pointed out that short term imprisonment causes more harm than good to the prisoner as well as the community.

Sections 8,[10] 9,[11] 10[12] and 11[13] deal with the determinations relating to the execution of a bond and the determination as to who a surety should be. Section 3(1) of the Release of Remand Prisoners Act No 8 of 1991 also states that when a person who has been granted bail finds it difficult to furnish bail, the Superintendent of the Prison is bound to apply to the court which ordered bail to release the said person on his executing a bond at the expiration of one month from the date of order of remand.

Section 19(2) of the Bail Act[14] provides that when an appeal has been preferred from a conviction in a Magistrate's Court, the court may take into consideration the gravity of the offence and the antecedents of the accused, refuse to release him on bail. The provision which deals with the release by the High Court of an appellant pending the determination of his appeal is section 20(2). Section 20 of the Bail Act deals with the provisions relating to an appeal against an acquittal or conviction from an order of a High Court.[15]

Section 21 of the Bail Act provided for the first time the grant of anticipatory bail. In terms of this section if a person has reason to believe that he may be arrested on account of being suspected of having committed, or being concerned in committing, a non-bailable offence, he may with notice to the officer in charge of the area apply to the Magistrate having jurisdiction in the area in which the offence is alleged to have been committed, for a direction that he be released in the event of his being arrested. Sections 21 to 26 deals with the procedure in granting anticipatory bail.

Indeed, the provisions relating to the grant of anticipatory bail in Sri Lanka does not seem to be utilised effectively by the mass of the population. One of the reasons for this could be the

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[9] *Supra* n 6.
[10] Formerly section 406 of the Code of Criminal Procedure Act.
[11] Formerly section 407 of the Code of Criminal Procedure Act.
[12] Formerly, section 404 (1) of the Administrative of Justice Law.
[13] Formerly, section 403 (7) of the Administrative of Justice Law.
[14] Formerly, section 323 of the Code of Criminal Procedure Act.
[15] Formerly, section 333 of the Code of Criminal Procedure Act.

procedural delays in filing affidavits and giving notice to the parties before court takes up the matter for hearing.

In this connection it is pertinent to note the observations of the Indian Law Commission in recommending the inclusion of a provision empowering the court to grant anticipatory bail.[16]

> *The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for several days. In recent times with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and the apply for bail.*

Although the intention of this legislation seems to be in the lines of the above thinking the applications of the grant of anticipatory bail must be encouraged. This provision will enable a person not to be subjected to the prison culture by taking precautions to secure his release before arrest.

[16] The corresponding provision to section 21 of our Bail Act is section 438 of the Indian Criminal Procedure Code.

Prevention of Human Rights Violations: Are the Police Sincere?

M.C.M. Iqbal[*]

Anarchy has been defined as a condition in a country where there is political and social confusion and an absence of law and order. It follows that the maintenance of law and order is one of the principal functions of a State. While the security forces have the responsibility of ensuring the security of the State from internal or external threats to it, the police are primarily responsible to maintain law and order within the State. This calls for the necessary mechanisms to be put in place to ensure that swift and effective action is taken against violators of the law to prevent the proliferation of violence. The testing time for the efficiency of the systems is when extensive violations of the law take place as during elections. Experience shows that pre and post election periods are just the time when such situations invariably occur. With the sudden dissolution of Parliament the country is now going through what one could describe as one of the bitterly contested elections Sri Lanka has ever seen. However, one notes with dismay the daily escalation of election violence including abductions and killings of candidates` taking place while the police are pathetically ineffective in stemming the trend. The newspapers are keeping track of these violations and giving the number of complaints like giving the scores in a thrilling, keenly fought cricket match! However, reports of effective action being taken on these complaints are rare and few.

It would be interesting to check in how many of the nearly 1000 complaints of election violence made so far, that the police have taken prompt action according to the law and taken the suspects to courts where necessary and moved for remand if known criminals are involved to prevent further breaches of the peace. The impotence of the police in situations of this nature is well illustrated in the recent case of a candidate for the elections in the Puttalam District waylaying the opposing candidate and his supporters who were on the way for an election rally. The incident is reported to have taken place not very far from where three police officers were on duty and they are said to have been passive witnesses to the affray. Perhaps the police did not want to intervene because the assailants were said to be from the party in power and they would have had to encounter undesirable consequences if they had intervened.

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Be that as it may, if one takes a look at the past record of the police it would be clear that they themselves were in some way or other responsible for the disintegration of the image and effectiveness of the police force. Leaving political interference aside, in the recent past has any IGP shown a genuine interest in cleansing the police force of undisciplined and corrupt officers? Was any sustained effort made in all earnest to improve the respect people have for the police force? Even most of the recommendations made by the Hema Basnayake Police Commission to reform the police have yet to be implemented. Consequently, the undesirable elements in the police force continue to tarnish its image and earn more and more disrepute. Take, for instance, the practice of torture.

Even though torture has been declared a crime following the ratification of the UN Convention Against Torture in 1994, hardly any person taken into custody by the police escapes some kind of torture or other. This is in spite of the provision in the 1978 Constitution which states that, no person shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.[1] In fact, at a seminar on 'Torture in Sri Lanka' conducted by a well known NGO sometime ago, a senior police officer who was a participant, had the audacity to say to a shocked audience "without torturing, how else does anybody expect evidence needed to convict a person in a court of law to be unearthed?" This statement only helped to expose the ineffectiveness of the police investigation techniques and the scant regard the police have for the laws of the land. It must be noted that the Constitution also specifically states that, "every person shall be presumed innocent until he is proved guilty."[2] The police deliberately ignore these provisions of the Constitution when dealing with persons taken into custody.

This brings us to the question of the violation of the rights of individuals taken into custody, which was at its peak in the early 90's. Those were the days when disappearances of persons both in the North and the South of the country were at its highest and violations of the rights of people were at optimum levels. During that time persons had been taken into custody from their homes, at checkpoints or round-ups and often confined *incommunicado* and tortured. Sadly many of them are no more. Several Presidential Commissions were appointed to inquire into these disappearances. Consequent to the findings of these Commissions, the Attorney General had framed charges against more than 450 police and security force personnel against whom there is adequate evidence to prosecute them in courts. Ordinarily any officer of State, be it the police or otherwise, against whom a criminal case has been instituted has to be interdicted from service until the conclusion of

[1] The Constitution of Sri Lanka (1978), Chapter III, Article 11.
[2] *Ibid*, Article 13(5).

the case and dismissed if he is convicted. This is done in terms of provisions in the Establishment Code,[3] which, *inter alia*, deals with disciplinary procedures against state officers. Some, and only some, of the police officers against which cases were filed had been interdicted. To the consternation of human rights activists, a circular had been issued to all DIGG and SSPP by the DIG Personnel and Training of the Police Headquarters bearing letter No: DIG/PS/71/2001 of 5th January, 2001 directing, among other things, as follows:

> *Inspector General of Police has approved the re-instatement of all officers who have been interdicted following the inquiries conducted by the* ***Disappearances Investigation Unit*** *and charged in courts but subsequently bailed out in connection with cases of disappearances of persons.*

This raises the question whether the IGP can issue a directive contravening the provisions of the Establishment Code. The other question is, can the IGP direct the reinstating of a gazetted officer interdicted by the Public Service Commission, which is the disciplinary authority of officers of that category. Be that as it may, the issue of this circular goes to prove the degree of concern the police have to clean up the police service by ridding itself of perpetrators of human rights violations. Is it not indicative of the fact that the Police Department condones violations of the rights of individuals and is not happy to see their brother officers being dealt with for misconducts of this nature.

The reports of the Disappearances Commissions also revealed the existence of several torture chambers some of which were maintained by the police during the early 1990. However, the mandate of these Commissions did not authorise further investigations into those torture chambers. Mention is only made of the location of such chambers and the Police Officers who are alleged to have been in charge of them. The names of some such places are given hereunder.[4]

1. St. Sylvester's College, Kandy
2. Y.M.C.A. at Welimada
3. Hali Ela Motors at Badulla
4. Paddy Marketing Stores at Walapane.

[3] Establishment Code of the Government of Sri Lanka, Vol. II Cap.XLVIII, Section 21.
[4] This excludes the torture chambers said,to have been maintained by the military.

Referring to these torture chambers it is stated in the report[5] states as follows:

> *The terms of the reference of this Commission do not warrant investigations into matters pertaining to such "torture chambers." Several persons are alleged to have been done to death in such places and the bodies had been disposed of.*
>
> *It is recommended that separate investigations be conducted through an appropriate authority..... to bring to book those responsible for the incidents.....*

Yet no action has been taken on this recommendation and the perpetrators continue to get their promotions and hold responsible positions in the police service. It is true that initiating court proceedings against those responsible is laborious and time consuming. But initiating disciplinary inquiry against them need not wait for legal proceedings to be concluded. The degree of proof necessary in a disciplinary proceeding is not as stringent as in a court of law. Action not being taken against these violators in their midst sets a bad example to the others in the service.

The Final Report of the Commission of Inquiry into Disappearances in the Western, Southern and Sabaragamuwa Provinces speaks of mass graves.[6]

> *All these Mass Graves .....are matters of knowledge shared by the people of the area where the Mass Graves are located, even though unknown nationally and unacknowledged by the authorities.*
>
> *The Police either do not record or record the report (of the Mass Graves) as merely that of a disappearance.*
>
> *I did so on superiors orders, admitted a recording officer of the CID, which was investigating the Hokandara Mass Grave – Colombo South.*[7]

The Report gives a list of twenty such graves that had been reported to the Commission.

All those incidents have taken place because the police either connived with the rights violators or they themselves violated the rights of individuals. But no disciplinary action

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[5] Final Report of the Presidential Commission on Disappearances, Sessional Paper No.III of 1997, p.20.
[6] Sessional Paper No. V of 1997, p.117.
[7] *Ibid* at p. 118.

has been taken against these violators in spite of the Report bringing them to light. Those involved continue to be in service with impunity.

The consequences of the circular issued on 5th January 2001 is going to have far reaching effects. These re-instated officers, some of whom may be posted to the districts in which the complainants and the witnesses reside and are most likely to use their positions to intimidate or otherwise harass them. They would take every effort possible to make the cases against them fail. Perhaps this circular was intended to facilitate these accused officers to abort their cases and escape conviction. Besides it would not be possible for the IGP in the future to interdict any police officer charged with a criminal offence because such officer could cite this circular and file a fundamental rights application for unequal treatment.

This also reduces to naught all the efforts taken by the Presidential Commissions of Inquiry to unearth evidence indicative of the person responsible for the disappearances and the efforts of the Disappearances Investigation Unit of the CID and the Missing Persons Unit of the Attorney General's Department which had laboured to put the evidence together to enable a conviction to be obtained in courts of law. Since court procedures are long and time consuming it is imperative that disciplinary action be taken against them for the violation of departmental rules and procedures which paved the way for the criminal offence to be committed. The re-instatement of these officers indicates that they may not have to face even a disciplinary inquiry.

Human rights activists are concerned that this trend does not augur well for the human rights situation in Sri Lanka. It may even enable the climate of impunity to gather more vigour. One wonders what the aftermath of the elections holds for the cause of the rule of law and the human rights situation in Sri Lanka as the past performance of the leading contenders at the elections do not speak well of their concern for human rights.

Freedom of Expression: Wining on Points

Shantha Jayawardena[*]

1. Introduction

The Sri Lankan Supreme Court decision in *Prasanna Withnage* v. *Sarath Amunugama and Others*[1] is the latest in a series of decisions on freedom of expression. Whilst most of the earlier decisions related to political expression, the present decision related, *inter alia,* to artistic expression. Here the petitioner was a director who had been regarded as the most outstanding film director to emerge in 1990s in Sri Lanka.[2] His fourth film "*Purahanda Kaluwara*" ("Death on a Full Moon Day") which had received several international awards was refused permission to screen by the Minister in charge of the film industry.

The first part of this article virtually paraphrases the Supreme Court decision in *Prasanna Withanage* v. *Sarath Amunugama*. The postscript contains some impressionistic remarks on two earlier decisions of the Supreme Court namely, *Joseph Perera* v. *Attorney General*[3] and *Sunila Abeysekera* v. *Ariya Rubasinghe*[4] relating to restriction of freedom of expression in the interest of national security and the alleged threat of the film.

2. Prasanna Withanage v. Sarath Amunugama and Others

2.1 Relevant Facts

The facts leading to the alleged violation of the petitioner's rights could be set out in a chronological order as follows:

- On 17.03.1999 the Acting Chairman of the Film Corporation (2nd respondent) wrote to the petitioner that the corporation would schedule the petitioner's film for early release under its special scheme for films, which had won several international awards.

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[1] SC Application No 516/2000, S.C Minutes 02.08.2001.

[2] Dissanayake W. and Rathnavibhushana A., *Profiling Sri Lankan Cinema*, Asian Film Centre (2000) at p. 64.

[3] [1992] 1 Sri L.R 199.

[4] [2000] 1 Sri L.R. 314.

- On 06.03.2000 the Public Performance Board certified the film as suitable for unrestricted public exhibition.

- By letters dated 16.03.2000 and 11.04.2000 the 5th and 6th respondents (the Assistant General Manger, Exhibition and the Assistant General Manager, Production, of the Film Corporation) required the petitioner to provide 14 copies of the film and advertising material. After that the petitioner obtained a loan of Rs.1.5 million from the Film Corporation (2nd respondent) for making the required number of copies of the film.

- On 03.05.2000 a Cabinet decision was taken to place the country on a war footing. On the same day Emergency (Miscellaneous Provisions and Powers) Regulations No 1 of 2000 were promulgated.

- On 22.05.2000 the 4th respondent (the Competent Authority) informed the petitioner that the theme of the film and several scenes therein could not be approved under the above-mentioned emergency regulations.

- On 30.06.2000 the Supreme Court held in *Leader Publications (Pvt) Ltd* v. *Rubasinghe* that the 4th respondent was not the duly appointed Competent Authority.

- On 01.07.2000 new emergency regulations were promulgated for the appointment of a Competent Authority.

- On 03.07.2000 the petitioner wrote to the 3rd respondent (Chairman of the National Film Corporation) that by virtue of the Supreme Court decision in *Leader Publications (Pvt) Ltd* v. *Rubasinghe* the 4th respondent's decision dated 22.05. 2000 was invalid.

- By letter dated 07.07.2000 the 6th respondent informed the petitioner that his film would be released for exhibition on 21.08.2000 and wanted him to provide the required number of copies of the film.

- By letter dated 21.07.2000 the 1st respondent wrote to the 3rd respondent as follows:

In terms of the powers vested in me under section 6 of the National Film Corporation Act, I hereby direct the National Film Corporation to defer the exhibition of the film "Purahanda Kaluwara."

I am sending this directive in view of the fact that the country is now on a war footing and the applicant may be informed that this film will be examined as, soon as the security situation improves. [5]

- On the same day (21.07.2000) the 3rd respondent sent a copy of the 1st respondent's letter to the Petitioner stating that he is compelled to suspend the release of the petitioner's film. As a result the release of the petitioner's film was indefinitely postponed.

The petitioner alleged that by refusing permission to screen his film, his fundamental rights to equal protection of law, the freedom of expression and the freedom to engage in any lawful occupation, profession, trade, business or enterprise, guaranteed respectively by Articles 12(1), 14(1)(a) and 14(1)(g) of the Constitution have been violated.

2.2 The Decision of the Court

Three issues arose for decision by the Court. They were, the applicability of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2000 to the petitioner who was a film director, the validity of the 1st respondent Minister's directive and whether or not the petitioner should have been heard before the decision was made to suspend the release of his film.

I. Applicability of Emergency Regulation 14 to the Petitioner and Cinema Owners

Emergency Regulation 14(2) reads as follows:

The 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 not, whether in or outside Sri Lanka, print, publish, distribute, transmit or broadcast whether by means of electronic devices or otherwise, cause to be printed, published, distributed, transmitted, or broadcast whether by electronic devices or otherwise-

[5] *Supra* n 1, p. 3.

(a) *any material containing any matter which pertains to any operations carried out or proposed to be carried out, by the Armed Forces or 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 the Armed Forces or the Police Force, which affect [sic] the morale of the members of such forces, or*

(b) *any material which would or might* ***in the opinion of the Competent Authority*** *be prejudicial to national security or the preservation of the public order or the maintenance of supplies and services essential to the life of the community or inciting or encouraging persons to mutiny, riot or civil commotion, or to commit the breach of any law for the time being in force. (Emphasis added)*

The counsel for the respondents contended, based on the definition given to *"material"* in Regulation 14(11), that Emergency Regulation 14(2) applies to the petitioner who was a film director.

Regulation 14(11) defines "*material*" to include:

(a) *a "cinematograph film" which includes a sound track and any other article on which sounds have been recorded for the purpose of their being reproduced in connection with the exhibition of such a film;*

(b) *a "publication" which means, in relation to a cinematograph film, the exhibition of the film to the public and includes the mechanical or electrical reproduction of any sounds in connection with the exhibition of the film as aforesaid; and*

(c) *a "newspaper" which includes any journal, magazine, pamphlet or other publication.*

The Supreme Court held that regulation 14(11) does not widen the categories of the **persons** to whom it is applicable. It applies only to the editors or publishers of newspapers, persons authorised by law or under the law to establish and operate broadcasting stations or television stations. It only purports to widen the categories of **acts** falling under Regulation 14(2). Therefore, it was held that Regulation 14(2) does not prevent the petitioner and the cinema owners exhibiting films but it prevents persons operating television stations from exhibiting films prejudicial to national security.

It was contended further on behalf of the respondents that Regualtions 14(3) and 14(4) have the effect of widening the category persons to whom Regulation 14(2) applies. Rejecting this contention the Supreme Court held that the provisions in Regulations 14(3) and 14(4) merely give teeth to Regulation 14(2) by making contravention of Regulation 14(2) an offence and empowering the Competent Authority to prohibit and prevent future publications, broadcast, etc., by those who contravene Regulation 14(2).

Since Regulation 14(2) was found to be inapplicable to the petitioner, the Court held that there is no necessity to decide whether or not the alleged scenes in the film are prejudicial to the national security.

II. The Minister's Directive

Section 6 of the National Film Corporation Act, which confers the power on the Minister in charge of the film industry to issue directions, reads:

> *In the exercise of its powers and carrying out of its objects under this Act, the Corporation shall comply with the general policy of the Government with respect to the film industry and with any general or special directions issued by the Minister* ***in relation to such policy*** *(emphasis added).*

The Supreme Court held that the Minister's directive refusing permission to release the film is unlawful for four reasons:

- Under section 6 of the National Film Corporation Act the Minister has the power only to issue directions in relation to the government's general policy on film industry. The respondent Minister's directive refusing permission to release film was an implementation of a policy and it was more related to national security. Therefore, the directive is *ultra vires.*

- As the power to certify a film for public exhibition is with the Public Performance Board the Minister's direction is a usurpation of the functions of the Public Performance Board established under the Public Performances Ordinance, and, therefore, it is unlawful.

- According to Articles 15(2) and 15(7) of the Constitution, the restrictions on freedom of expression guaranteed by the Article 14(1)(a) of the Constitution can be imposed only by law. The Minister's directive is not a law but only an executive action. Therefore, the Minister could not, by way of a directive, impose restrictions on the constitutionally recognised right to freedom of expression.

III. Legitimate Expectations of the Petitioner

The 2nd respondent had informed the petitioner that his film would be released earlier under its special scheme for films, which have received international awards. It was with the knowledge of the emergency regulations that the 2nd respondent had fixed the film to be released on 21.08.2000. Moreover, the petitioner had been asked to provide 14 copies of the film for which the petitioner had obtained a loan of 1.5 million rupees from the 2nd respondent – the National Film Corporation.

Therefore, the Supreme Court held that the petitioner's legitimate expectation that his film would be released had matured to a legal right and, therefore, the failure on the part of the respondents to give the petitioner to any notice or hearing prior to the decision to suspend the release of his film was violative of the *audi alteram partem* principle.[6] The denial of such a hearing amounted to a violation of the petitioner's right to equal protection of the law guaranteed by Article 12(1) of the Constitution.

IV. Freedom to Engage in any Lawful Occupation, Profession, Trade, Business or Enterprise

The suspense of the release of the film prevented the petitioner from recouping the investment he had made for the film. As a result, the Supreme Court held that the petitioner's right to engage in any lawful occupation, profession, trade, business or enterprise has been violated.

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[6] That a person must be given an opportunity to be heard before a decision affecting his rights is taken.

3. Postscript

In *Prasanna Withanage* v. *Sarath Amunugama* the Supreme Court did not decide upon the validity or the constitutionality of Regulation 14(2)(b) for three reasons: They are, as Justice Mark Fernando stated: that question was not fully argued; the emergency itself had lapsed; and the case can be disposed of on other grounds.[7]

However, Justice Fernando observed in passing that the test laid down in Emergency Regulation 14(2)(b) is subjective. Therefore, if the emergency had not lapsed the Supreme Court would have had to decide two issues. Firstly, the validity or the constitutionality of Regulation 14(2)(b) and secondly, if Regulation 14(2(b) was valid and applicable to the petitioner whether or not the alleged scenes in the film is prejudicial to the interests of national security.

Sri Lanka has been under emergency rule for almost three decades. The main reason for imposing a state of emergency has being the ongoing civil war. The present lapse of emergency was due to the Government's failure to obtain the support of the majority in the Parliament. The cause for emergency rule is in existence and, therefore, there is a high probability that a government with a majority in Parliament would re-impose emergency rule as the first priority.

I. Restriction of Fundamental in the Interests of National Security in Sri Lanka

In times of emergencies threatening national security, the State is faced with a dilemma. On the one hand, the State has the duty to suppress the threat to national security and, on the other, such suppression inevitably involves the curtailment of citizens' rights which the State is bound to uphold. In such circumstances, the duty of the State is to strike a balance between the two conflicting interests. The means available to the State to do so is the law.

Article 15(7) of the Constitution of Sri Lanka[7] recognises the necessity to restrict the rights of the citizens for securing national security;

> *The exercise and operation of all the fundamental rights declared and recognised by Articles12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law* ***in the interests*** *of national security, public order and the*

[7] *Supra* n 1, p. 12.
[7] Hereinafter referred to as Article 15(7).

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 just requirements of the general welfare of a democratic society. For the purpose of this paragraph law includes regulations made under the law for the time being relating to public security (emphasis added).

A close observation of the Article 15(7) Constitution reveals that it specifies only the "interests" in relation to which the restriction of fundamental rights is permitted. It does not provide the **extent to which the restrictions are permitted**.

This is evident from the following observation made by Justice Sharvananda in *Joseph Perera* v. *Attorney General*:

*...But under Article 15(7) of the Constitution it is not all regulations, which appear to the President to be necessary or expedient in the interests of public security and preservation of public order, made under section 5 of the Public Security Act which can impose restrictions on the exercise and operation of fundamental rights. It is only regulations, **which survive the test of being in the interest of national security, public order ...** in terms of Article 15(7)*[8].

Article 155(2) of the Constitution[9] recognises the extent of restriction:

*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.* (Emphasis added).

According to Article 155(2), as long as the provisions of the Constitution are not over-ridden, amended or suspended, the emergency regulations made by the President under the Public Security Ordinance[10] are valid. In other words, if any emergency regulation over-rides, amends or suspends the operation of the provisions of the Constitution, it amounts to a contravention of Article 155(2) and, is therefore, unconstitutional.

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[8] *Supra* n 3, p.216 (emphasis added).

[9] Hereinafter referred to as Article 155(2).

[10] Section 5(1) of the Public Security Ordinance which confers the President the power to promulgate emergency regulations reads, *"The President may make such regulations as appear to him 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 life of the community."*

What is meant by "overriding" the provisions of the Constitution? Blacks' Law Dictionary defines the term "override" as *"to prevail over; to nullify or set aside".*[11] Do not the restrictions imposed in the interests of national security and the other grounds specified in Article 15(7) of the Constitution "prevail over" the provisions of the Constitution, which recognise the fundamental rights?

It is submitted that unless there is a category of restrictions, which do not "override" i.e. "prevail over" the provisions recognising the restricted rights, Articles 15(7) and 155(2), contradict each other. In other words, Articles 15(7) and 155(7) should be harmoniously interpreted so as to identify restrictions on fundamental rights, which do not " prevail over" the constitutional provisions recognising the rights.

The discrepancy between the Articles 15(7) and 155(2) is reflected in two incompatible decisions of the Supreme Court. In both, emergency regulations promulgated by the President under the Public Security Ordinance were challenged.

The first was *Joseph Perera* v. *Attorney General*[12] where the test of "rational nexus between restrictions imposed on the right and the object sought to be achieved," was read into Article 155(2). Justice Sharvanda stated:

> *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 for 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 that acts 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.***[13] (Emphasis added).

Consequently, the Supreme Court found that the alleged emergency regulation contravened Article 155(2) of the Constitution.

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[11] 7th Ed. at p. 1129.
[12] *Supra* n 3.
[13] *Ibid* at p 217.

The other was *Sunila Abeysekara* v. *Ariya Rubasinghe*[14] where again an emergency regulation was challenged alleging that the regulation was over-broad and allows arbitrary exercise of power. Here the Supreme Court observed:

> *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).*[15] (Emphasis added).

In *Sunila Abeysekara* v. *Ariya Rubasinghe* the Supreme Court went on to observe its decision in *Joseph Perera* v. *Attorney General*:

> *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) the Constitution.***[16] (Emphasis added).

Here the finding of the Supreme Court was that the alleged emergency regulation does not contravene any provision of the Constitution.

It is submitted with great respect, that the Supreme Court failed in *Sunila Abeysekara's case* to interpret harmoniously[17] the two conflicting provisions of Articles 15(7) and 155(2). Instead, the Supreme Court has amended Article 155(2) of the Constitution, to harmonise it with Article 15(7) by omitting the word "over-ride" from Article 155(2) and adding to the end the words "except in accordance with the provisions of Article 15(7) of the Constitution."

The test of "rational nexus between the restriction imposed and the object sought to be achieved" was read into the Article 155(2) in the case of *Joseph Perera* for the purpose of deciding whether or not any restriction imposed by way of emergency regulation "overrides, amends or suspends the operation of" any provision of the Constitution.

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[14] *Supra* n 4.
[15] *Ibid.*
[16] *Ibid* at p 373.
[17] According to the rules of harmonious interpretation when two provisions of an Act or Constitution are conflicting, one provision should not be rendered nugatory. See; *Interpretation of Statutes*, Bindra N.S. 8th ed. at pp 506, 560-561.

In *Sunila Abeysekara's* case, the test of "rational nexus between the restriction imposed and the object sought to be achieved" was not applied as in *Joseph Perera's* case. The Supreme Court was carried away by the tests laid down by and the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights. The Supreme Court observed:

> *Admittedly, the phrase "necessary in a democratic society" is not being 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 Constitution with regard to the imposition of restrictions on the operation and exercise of the fundamental right of freedom of expression guaranteed by Article 14(1)(a).*[18]

The persuasive relevance of the jurisprudence under the European Convention on Human Rights is acceptable. But the adaptation of the same test under the Sri Lankan Constitution is problematic. Under the Sri Lankan Constitution mere satisfying of the "interests" or "necessity" in terms of Article 15(7) does not render a restriction valid. In addition, Article 155(2) requires that the restriction should not "override, amend or suspend the operation of" any provision of the Constitution.[19]

The test of "necessary in a democratic society" as applied in *Sunila Abeysekera's* case does not give due weight to Article155(2). Instead, it prioritises Article 15(7) at the cost of Article 155(2). If Article 155(2) is not given due weight any emergency regulation imposing restriction on fundamental rights will be valid as long as it is in the interests of national security. What Article 155(2) does is that, it lays down the extent to which the restriction of rights is permitted in times of emergency, whilst Article 15(7) specifies the grounds such as national security on which restrictions can be imposed.

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[18] *Supra* n 4, p.367

[19] Article 10(2) of the European Convention reads: *"The exercise of these freedoms (i.e. freedom of expression), 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 reputation or rights of others, for the preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

II. The Threat of *"Purahanda Kaluwara"*

It was contended on behalf of the respondents that the scene in the film where a banana trunk is substituted for a dead soldier's body in a coffin would adversely affect the recruitment drive of the Government and the morale of the armed forces and, therefore, is prejudicial to the interests of national security. Since Regulation 14(2) was found to be inapplicable to the petitioner, the Court held that there was no necessity to decide whether or not the alleged scenes in the film were prejudicial to national security.

Although the Supreme Court stated that every statement affecting the morale of the members of the armed forces does not affect national security, as the emergency itself had lapsed the Supreme Court did not decide whether or not the alleged scene in the film is prejudicial to national security.

It is a fact that sometimes the coffins of dead soldiers' are not allowed to be opened. The simple logical conclusion to be drawn here is either the body of the dead soldier is not in the coffin or that it is so badly damaged that it could not be shown to the relatives. In such circumstances, any reasonable person's conclusion would be that the body of the dead soldier might have been substituted with some material. Moreover, it was common knowledge that wherever a coffin of a dead soldier was not allowed to be opened, the body is substituted with banana trunks or some other material. Therefore, it is speculative to assume that people would have joined the armed forces but for the alleged scenes in the film.

It has been recognised by the European Court of Human Rights that where an item of information had already been made public and is in the public domain, the prohibition of dissemination of such information is violative of freedom of expression.[20]

Moreover, the Principle 17 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information[21] recognizes that " Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know."

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[20] *Vereniging Weekbold Bluf* v. *the Netherlands, Judgment of 9th Feb.1999, Series A.no.306-A. Also Weber* v. *Switzerland Judgement of 24th May 1999, Series A-no 177, The Observer and Guardian* v. *United Kingdom and the Sunday Times* v. *United Kingdom , Judgments of 26th November 1991, Series A nos. 216 and 217.*

[21] These principles have been adopted on 1st October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE XIX. These principles have no binding force upon states.

Therefore, even if the alleged scene in the film were prejudicial to the interests of national security, as the message conveyed by the alleged scene was already known to the public, there is no rational nexus between the prohibition of the film and the object sought to be achieved.

Supreme Court of the Democratic Socialist Republic of Sri Lanka
Colombo 12

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

SC Application
No. 516/2000

Udaya Prasanna Withanage,
No. 3, Silvan Lane,
Panadura.
Petitioner

- vs -

1. Sarath Amunugama,
   Minister of Rehabilitation,
   Reconstruction and Development
   of the Northern region,
   No.14, 4th floor, Sir Baron Jayathilaka Mawatha,
   Colombo 1.

2. The National Film Corporation of Sri Lanka,
   No. 224, Bauddhaloka Mawatha, Colombo 7.

3. Tissa Abeysekera,
   Chairman, National Film Corporation.

4. Ariya Rubasinghe
   Competent Authority,
   Government Information Department,
   163, Kirulapone Avenue, Colombo 5.

5. M.H. Hemananda,
   Assistant General Manager, 'Exhibition',
   National Film Corporation.

6. K.P.D. Kodippili,
   Assistant General Manager (Production),
   National Film Corporation.

7. Prof. Somaratne Balasuriya,
Chairman, Public Performances Board,
Government Film Unit Building,
Polhengoda, Narahenpita.

8. The Attorney-General,
Attorney-General's Department, Colombo 12.

Respondents

BEFORE : Fernando, J, Amerasinghe, J, Edussuriya, J.

COUNSEL : Upul Jayasuriya with P. Radhakrishnan for the Petitioner;
Saleem Marsoof, PC, ASG, with Mrs. I.D. de Silva, SSC,
for the Respondents.

ARGUED ON : 28th May 2001.

DECIDED ON : 2nd August 2001.

FERNANDO, J:

The Petitioner is a film producer. In 1997 he directed and produced his fourth film, 'Purahanda Kaluwara' ('Death on a Full Moon Day').

The 4th Respondent was the Competent Authority appointed under Emergency Regulation 14 ("ER 14") of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2000 as amended on 1.7.2000. In response to an inquiry from the 3rd Respondent (the Chairman of the National Film Corporation), the 4th Respondent informed the 3rd Respondent by letter dated 17.7.2000 that:

> "... you may take an appropriate decision with regard to exhibition of the above film. However, I wish to point out that in my opinion certain sections of this film, which describe the conduct of the soldiers [are?] likely to affect the morale of the security forces. (Especially the exhumation of the coffin and its follow-up scenes)..."

Section 57 of the National Film Corporation of Sri Lanka Act, No.47 of 1971 ("the NFC Act"), grants the National Film Corporation (the 2nd Respondent) the exclusive right to sell, supply and distribute films within Sri Lanka.

The 1st Respondent was the Minister of Rehabilitation, Reconstruction and Development of the Northern Region. The subjects and functions of the National Film Corporation had been assigned to him. By letter dated 21.7.2000 he wrote to the 3rd Respondent as follows:

> "In terms of the powers vested in me under section 6 of the [NFC Act], I hereby direct the National Film Corporation to defer the exhibition of the film 'Pura Sanda Kaluwara'.
>
> 02.I am sending this directive in view of the fact that the country is now on a war footing. The producer may be informed that this film will be exhibited, as soon as the security situation improves."

The same day the 3rd Respondent sent the Petitioner a copy of that letter, stating that the 2nd Respondent was 'compelled to suspend the release of 'Purahanda Kaluwara' until such time a directive is received from the Ministry to the effect that the security situation has improved."

In consequence, the exhibition of 'Purahanda Kaluwara' (which the 2nd Respondent had previously scheduled for release on 21.8.2000) was indefinitely suspended. The Petitioner complains that his fundamental rights under Articles 12(1), 14(1)(a), and 14(1)(g) were thereby infringed.

FACTS

'Purahanda Kaluwara' had been exhibited at several International Film Festivals, and won several international awards, including the prize for the best film at the 19th Amiens International Film Festival (the Grand Prix) and at the 13th Frebourg International Film Festival (the International Film Critics Award). The film was also awarded the "Vishwa Keerthi Sammanaya" at the Sri Lanka Presidential Film Awards on 11.2.2000 for having won the most number of international awards.

On 17.3.99 the acting Chairman of the 2nd Respondent had written to the Petitioner warmly congratulating him, and stating that the 2nd Respondent would schedule his film for early release under its special scheme for films which had won international recognition.

The film was submitted to the Public Performances Board under the Public Performances Ordinance (cap 176). The members of that Board are appointed by the Minister in charge of the subject of Defence. The Board issued its certificate dated 6.3.2000 under section 6, certifying the film as suitable for unrestricted public exhibition. That certificate was never revoked.

By letters dated 16.3.2000 and 11.4.2000, the 5th and 6th Respondents – respectively, the Assistant General Manager (Exhibition) and the Assistant General Manager (Production) about various matters connected with the release of the film, told him that the date of release would be informed in due course, and asked him to provide 14 copies of the film and advertising material.

The Petitioner stated, and the Respondents did not deny, that he then took steps to get the required number of copies of the film made in India, and to procure advertising material, at a cost of over two million rupees; and that he obtained a loan of Rs. 1.5 million from the 2nd Respondent for this purpose.

The release of the film was delayed due to events in May and June. In view of the security situation which prevailed after the LTTE attacks at Elephant Pass, a Cabinet decision was taken on 3.5.2000: "to place the country on a war footing and take measures to create awareness and participation of the people, especially in matters of civil defence."

Immediately thereafter the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2000, were promulgated on 3.5.2000 (and amended on 10.5.2000).

The petitioner sought the approval of the 4th Respondent (who was functioning as the Competent Authority under those Regulations) for the release and exhibition of his film. By letter dated 22.5.2000 the 4th Respondent stated that the theme as well as several scenes could not be approved under those Regulations.

Those Regulations were considered by this Court in *Leader Publications (Pvt) Ltd.* v. *Rubasinghe,* SC 362/2000; SCM 30.6.2000. This Court held that (those Emergency Regulations did not make provision for the appointment of a Competent Authority, and that

accordingly) the 4th Respondent was not the duly appointed Competent Authority. In consequence, a new ER 14 was introduced on 1.7.2000 (which I quote below in full). The Petitioner thereupon wrote to the 3rd Respondent on 3.7.2000 asserting that the 4th Respondent's decision dated 22.5.2000 was invalid, and requesting the 2nd Respondent to release his film. After a discussion between the Petitioner and the 3rd Respondent, the 5th Respondent informed the Petitioner by letter dated 7.7.2000 that his film would be released for exhibition on 21.8.2000 and asked him to obtain and hand over the necessary copies.

Then followed the letters of 17.7.2000 and 21.7.2000 embodying the decisions which the Petitioner impugns. I must note that the 4th Respondent only expressed his opinion, and that, too, about morale, and not about national security [under ER 14(2)(b)]; and that he made no order under ER 14(3).

Although the 1st Respondent had originally mentioned only the fact that Cabinet had decided to place the country on a war footing as the justification for his 'directive', in his affidavit he gave rather different and more detailed reasons. He referred to the 4th Respondent's ruling under the repealed Regulations, as well as a discussion he had had with the 4th Respondent and Major General Sarath Munasinghe, both members of the State Media Information Centre. He averred that after viewing the film, he was convinced that exhibiting it would be in violation of ER 14; and would adversely affect the war effort and the prevailing recruitment drive. He claimed that as a Minister he was duty bound to prevent any situation which may affect the morale of the security forces, the war effort of the Government, the recruitment drive launched by the Armed Forces and the Police, and any violation of the laws of the country by the distribution and release of the film.

THE LEGAL PROVISIONS

ER 14 provides:

> 14(1) The President may appoint, by name or by office, a person or body of persons, to be the Competent Authority, for the purposes of this regulation.
>
> (2) The 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 not, whether in or outside Sri Lanka, print, publish, distribute, transmit or broadcast whether by means of electronic devices or otherwise, or cause to be printed,

published, distributed, transmitted, or broadcast whether by electronic devices or otherwise –

(a) 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, which affect [sic] the morale of the members of such forces; or

(b) any material which would or might in the opinion of the Competent Authority be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or inciting or encouraging persons to mutiny, riot or civil commotion, or to commit the breach of any law for the time being in force.

(3) Without prejudice to the provisions of paragraph (4), where any person prints [etc] .... or causes to be posted [etc] .... whether by electronic means or otherwise, any matter in contravention of the provisions of paragraph (2) of this regulation, the Competent Authority may for reasons stated therein, make all or any of the following orders:-

(a) that the person named in such order shall not print [etc] ... or in any way be concerned in the printing [etc] of any material for such period as is specified in such order or until the date on which this regulation ceases to be in force.

(b) that the press or equipment used for such printing [etc] ... shall for such period as is specified in such order or until the date on which this regulation ceases to be in force, not be used for the purpose of printing [etc] ... of any material referred to in paragraph (2) of this regulation, 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 [etc] of any such material.

(4) Any person who prints [etc] ... any material in contravention of paragraph (2) of this regulation or who causes the printing [etc] ... of any such material shall be guilty of an offence.

(5) At any time after an order has been made under this regulation, the President may direct that the operation of this order be suspended, subject to such conditions as the President thinks fit, and may at any time revoke such direction.

(6) For the purpose of this regulation, there shall be one or more Advisory Committees consisting of person appointed by the President and any person dissatisfied with any order made under this regulation may make his objections in respect thereof, to the appropriate Advisory Committee.

(7) It shall be the duty of the Competent Authority to secure that in any case where an order is made under this regulation, the 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 as the case may be, affected thereby is informed that he may make representations to the President in writing with respect to that order and that he may whether or not such other representations are made, make objections to the appropriate Advisory Committee.

[(8) and (9) made provisions in respect of the proceedings and report of the Advisory Committee.]

(10) The Competent Authority may from time to time, issue guidelines which he will take into consideration in the exercise and discharge of his powers and function under this regulation.

(11) In this regulation – 'material' includes –

(a) a 'cinematograph film' which includes a sound track and any other article on which sounds have been recorded for the purpose of their being reproduced in connection with the exhibition of such a film;

(b) a 'publication' which means, in relation to a cinematograph film, the exhibition of the film to the public and includes the mechanical or electrical production of any sounds in connection with the exhibition of the film as aforesaid; and

(c) a 'newspaper' which includes any journal, magazine, pamphlet or other publication; and

'printing press' includes any machinery, apparatus or plant capable of being used for printing, lithography, photography, or other mode of representing or reproducing words in a visible form, or any type or other article belonging to such machinery, apparatus or plant.'

Section 6 of the NFC Act provides:

"In the exercise of its powers and the carrying out of its objects under this Act, the Corporation shall comply with the general policy of the Government with respect to the film industry and with any general or special directions issued by the Minister in relation to such policy."

THE FILM

We did not view the film. It was agreed that the synopsis of the film, set out in the citation for the Amiens Grand Prix, was accurate and sufficient for the purpose of this case. According to that citation:

... the story is set in the dry zone in the region of Anuradhapura, at a time when the farmers have been suffering from a severe drought. A sealed coffin, said to contain the remains of a young soldier killed in action has been brought back to the village. A letter has come too, belatedly, a letter of hope in which the young man promises that he will use the money he has earned as a soldier to build a small house and pay the expenses for his sister's wedding. The father, a blind old man chooses to believe the letter rather than the evidence of the coffin and, as he denies that his son is dead, he also logically refuses to accept the compensation money that is allocated to each family which has lost an enlisted son.

Pressure builds up as his family and various representatives of the village social hierarchy try to persuade him to sign the form by which he would lay claim to the compensation money and thus assent to his son's death.

> His quiet obstinacy finally forces them to dig up and open the sealed coffin which proves to be empty. The film ends on the serene image of the old man sitting by a tank while children play in the shallow water and the long awaited rain starts to fall.
>
> His stubborn refusal to bow to what others too easily regard as fate has momentarily shattered the myths and certainties to which the villagers cling in order to survive. His hope, which others deem absurd and mad has revealed where the real absurdity lies: in a wartime society which accepts that young men should risk and lose their lives in order to earn a living. The emptiness of the coffin echoes the hollow emptiness of the words by which we try to disguise the stark reality of death and of wasted life. "Missing in action", the administration says, "Patriotic sacrifice", says a monk who comes to visit the bereaved family.
>
> Money will not be given. And therefore it will not be spent on alms-giving rituals, which have become meaningless. It will not go to avid creditors. The mechanism has been momentarily stalled. There is no meaning in a young man's death; there is no compensation for the loss of a son.

In his written submissions, Mr. Marsoof, PC, ASG, on behalf of the Respondents, elaborated on the "objectionable" aspects of the film:

> "The film which portrays the absurdity of a war-time society which accepts that young men should risk and lose their lives in order to earn a living and contains a scene where a banana trunk is substituted for a dead soldier in a coffin sent by the army to his parents would have not only had an adverse effect on the recruitment drive, but also on the morale of the armed forces and the kith and kin of a large number of soldiers who were either deceased or engaged in the ongoing civil war ... this completely false depiction of the stark reality of death and waste of life as presented in the film ... without any disclaimer that it does not refer to any persons living or dead and is entirely fictitious would have had an adverse impact on the audience ... the motion picture is able to stir up emotions more deeply than any other form of art and its impact on a nation that has experienced and is still experiencing a war situation of the dimensions which is presently raging could be counter-productive to the efforts of the Government."

I must observe, in passing, that at no stage was the Petitioner told that the addition of a disclaimer as suggested above would have enabled the release of the film. As the

submission has been made that the central incident was false or fictitious, it becomes necessary to refer to the Petitioner's contention to the contrary. With his counter-affidavit the Petitioner annexed an extract from a publication entitled "A Soldier's Version" by the same Major General Sarath Munasinghe referred to in the 1st Respondent's affidavit:

> On 13 October 1986 terrorists attacked `troops ... Nine soldiers were killed and some were reported missing. Lt [S.C.], a volunteer artillery officer too was reported killed during this attack. Two days later I visited the funeral house ... The coffin was sealed. Family members were screaming at us requesting permission to open the sealed coffin to get a last glimpse of their loved one. Following day, the sealed coffin was buried.
>
> A few years later Lt.[S.C.] and I had lunch together ... By that time all of us knew what exactly had happened. Immediately after the attack, Lt. [S.C.] and another soldier were captured by the LTTE. [Lt S.C.] managed to conceal his identity ... Much later, when Mr. Vijaya Kumaratunge visited Jaffna, the LTTE allowed Vijaya Kumaratunge to talk to the Army prisoners held by the LTTE. It was Mr. Kumaratunge's effort that saved the lives of [Lt S.C. and other captives]. The LTTE agreed to release these personnel to Vijaya Kumaratunge."

The Petitioner alleged that the Competent Authority had allowed that publication in July 2000. That was not denied by the Respondents.

In his counter-affidavit, the Petitioner explained his reasons for making the film:

> "...I felt it was necessary to portray the difficult human struggle of people in a country facing a civil war and their strong spirit for survival, a story of hope. The main theme of my film is, the great hope a father has that his son will never break a promise to him. In my film, the son, who is a soldier at the war-front, promises his father that he will return home and complete the house which is being built and conclude preparations for his sister's wedding. So when the sealed coffin arrives the father refuses to believe that his son is dead, the father insists that his son is alive and will return home. He refuses to sign the forms which will entitle the family to the compensation payment. He digs up the coffin to prove his belief. I have focused on the indomitable human sprit of a father throughout this film. It is a spirit of hope, not of despair – something which I believe is vital for all of us in Sri Lanka to hold on to in these difficult times."

THE ISSUES

Prima facie, the indefinite suspension of the release of the Petitioner's film was an infringement of his freedom of speech and expression under Article 14(1)(a).

The Constitution permits restrictions to be imposed on the freedom of speech and expression. That can be done even by means of Emergency Regulations, but only under icle 15(7), and – in so far as this case is concerned – such restrictions must be "in the interests of national security." In *Abeysekera* v. *Rubasinghe*, - [2000] 1 Sri LR 314, Amerasinghe, J. considered similar provisions contained in the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1998. I respectfully agree with him that exceptions to Article 14(1)(a) must be narrowly construed (at p 381); that the burden of justifying restrictions imposed under Article 15(7) is heavy (at p 355); and that decisions taken in abuse of the powers conferred by Emergency Regulations are subject to judicial review (at pp 361, 383).

Was the suspension a lawful restriction, by virtue of ER 14 and/or section 6 of the NFC Act (or any order or decision thereunder)? This involves several questions:

(1) Was ER 14(2) a permissible restriction on freedom of speech;

(2) Even if ER 14(2) was a permissible restriction.

> (a) was ER 14(2) inapplicable to producers of films intended for exhibition at cinemas, distributors of films for exhibition at cinemas, and exhibitors of films at cinemas;
>
> (b) was the exhibition of the film prohibited by reason of either (i) its contents (under ER 14(2)(a)), or (ii) the opinion of the Competent Authority (under ER 14(2)(b));

(3) Was the "directive given by the 1st Respondent and/or the decision dated 21.7.2000 of the 3rd Respondent, lawful and valid under section 6 of the NFC Act;

(4) Was the aforesaid "directive" and decision of the 1st and 3rd Respondents in breach of the *audi alteram partem* rule.

1. VALIDITY OF ER 14(2)

The petitioner in *Abeysekera* v. *Rubasinghe* submitted that the purpose of the regulation impugned in that case was to protect the government from embarrassment, exposure or wrongdoing, and was "over-broad" and "disproportionate". While agreeing that there was some ambiguity in that regulation, Amerasinghe, J. – taking into consideration the title ("Prohibition on Publication and Transmission of Sensitive Military Information") and a portion of its text (which made it clear that what was prohibited was material pertaining to the Forces engaged in the Northern and Eastern Provinces and their operations in those areas) – interpreted the provisions restrictively (see pp 367, 381). Upon that restrictive interpretation, he rejected the petitioner's submission that the regulation was over-broad.

There is a similar ambiguity in the provisions now under consideration, but the factors, which led Amerasinghe, J, to give that regulation a narrow interpretation are not present in this case.

There are two other relevant matters.

It was not alleged that the film contained any matter pertaining to the operations of the Forces, the procurement of arms and supplies for the Forces, or the deployment or use of troops, personnel and equipment. The Respondents' case was that the film contained material (equivalent to a "statement"?) pertaining to the conduct or performance of any members of the Forces, which would affect the morale of the members of the Forces.

Since Emergency Regulations can only be made in the interests of national security, the preservation of public order, the maintenance of essential supplies and services, etc, the question arises whether ER 14(2)(a) prohibits all statements which affect the morale of servicemen, regardless of their effect on national security (etc), or whether ER 14(2)(a) should be restrictively interpreted (of *Abeysekera* v. *Rubasinghe*) so as to include only statements prejudicial to national security (etc)?

Every statement about the conduct or performance of the Head or a member of the Forces, which might affect the morale of members of the Forces, does not necessarily prejudice national security. On the contrary, some such statements may actually promote national security. Thus statements, which disclose misconduct or negligence of members of the Forces, for instance in regard to the conduct of security operations, the procurement of arms and supplies, or the deployment of troops, may adversely affect the morale of members of

the Forces. But the concealment of such matters may much more seriously prejudice national security. To take a hypothetical example, if unknown to them, soldiers were being issued sub-standard weapons, ammunition or equipment, purchased at inflated prices, disclosure would most certainly affect their morale. On the other hand, non-disclosure would endanger their lives, and the security of the nation. Disclosure and exposure may be the most effective and expeditious means of remedying a situation enormously prejudicial to national security.

Further, ER 14(2)(b) lays down a wholly uncertain and subjective standard: what purports to be prohibited is material, which in the opinion of the Competent Authority would (or even might) be prejudicial to national security, or the preservation of public order, etc. It is arguable that the Regulations have failed to prescribe with sufficient clarity what acts and omissions are prohibited, but have instead delegated that function to the Competent Authority [perhaps by means of "guidelines" issued under ER 14(10)].

It is arguable, therefore, that *Abeysekera* v. *Rubasinghe* is distinguishable, and that ER 14(2) is "over-broad" and uncertain. However, that question was not fully argued; the Emergency itself has now lapsed; and this case can be disposed of on other grounds. It is unnecessary to decide whether ER 14(2) was a permissible restriction on the freedom of speech and expression.

2. APPLICABILITY OF ER 14

(a) Ex facie, ER 14`(2) is applicable only to two categories of persons: editors and publishers of newspapers, and persons operating broadcasting or television stations. Producers of films, distributors of film for exhibition at cinemas, and owners of cinemas at which films are exhibited, are not covered.

Mr. Marsoof submitted, first, that ER 14(3) and ER 14(4) had the effect of widening the category of persons to whom ER 14(2) applies. It is abundantly clear that those provisions apply only to those persons who contravene ER 14(2), and merely give teeth to ER 14(2): thus ER 14(4) provides that those persons are guilty of an offence, and ER 14(3) empowers the Competent Authority to prohibit and prevent future publications, broadcasts, etc, by those persons. ER 14(7) confirms that ER 14(3) only applies to those persons, namely, editors, publishers, and persons operating broadcasting and television stations.

Mr. Marsoof also relied on the definitions in ER 14(11): that "material" includes films, and that "publication" includes the exhibition of films to the public." Therefore, he argued, ER 14(2) applies to the exhibition of films to the public. However, that definition does not have the effect of widening the category of persons to whom ER 14(2) applies: it only expands the category of acts, which such persons are prohibited from doing. Accordingly, the effect of ER 14(11) is only that persons operating television stations – not cinema-owners are prohibited from exhibiting to the public films which fall within ER 14(2)(a) or (b).

(b) It is therefore unnecessary to decide the question whether the exhibition of the film was prohibited under or by virtue of ER 14 (2)(a) or (b).

3. SECTION 6 OF THE NFC ACT

Section 6 authorises the Minister to give directions "in relation to the general policy of the Government with respect to the film industry": not in relation to Government policy in general. The 1st Respondent was therefore not entitled to give directions in relation to Government policy on national security that was a matter for other Ministers.

But even assuming that "directions relating to Government policy with respect to the film industry" could be construed to include directions prohibiting the distribution and exhibition of films violative of the Emergency Regulations, the 1st Respondent was only entitled to give directions in relation to policy, and not the implementation of policy – which was a matter for the 2nd Respondent Corporation.

The 1st Respondent's "directive", given after viewing the film and discussing it with others, was not in relation to policy, but its implementation. Certifying a film to be fit for public exhibition was, by statute, a matter for the Public Performances Board, and not for him.

In any event, that "directive," was based on the incorrect assumption that ER 14(2) applied to the distribution of films by the 2nd Respondent, and to the exhibition of films by cinema owners.

It is significant that the 4th Respondent did not express the opinion that the film might be prejudicial to national security when the 3rd Respondent inquired from the 4th Respondent, or after viewing it in the company of the 1st Respondent.

Finally, even if section 6, *prima facie*, empowered the 1st Respondent was entitled to give that "directive", that would nevertheless have been a restriction on the Petitioner's freedom of speech and expression. Such restrictions may only be imposed by "law" (as defined), but not under law. Section 6 would be "law", and (under Article 16 of the Constitution) would be valid notwithstanding any inconsistency with fundamental rights. However, the impugned restriction was not imposed by section 6, but by a direction under section 6. It was an "executive" act, and not "law" for the purposes of Articles 15(2) and 15(7). Hence the 1st Respondent's "directive" – even if *intra vires* under section 6 – was not a valid restriction on the Petitioner's freedom of speech and expression.

The 3rd Respondent made no attempt to exercise an independent judgment in the matter. He simply rubber-stamped the 1st Respondent's decision, and his decision is vitiated by the same flaws.

4. THE AUDI ALTERAM PARTEM RULE

The Petitioner had taken all steps needed to have his film released for exhibition by the 2nd Respondent, who had a monopoly in respect of such exhibition. He had been told that his film would be released early; he had been asked to obtain the required number of copies and the advertising material; he had incurred expense; and with full knowledge of the Emergency Regulations, the 2nd Respondent fixed the date of release for 21.08.2000.

The Petitioner's legitimate expectations in respect of the release of his film had thus matured into a legal right. Without any notice or hearing the 1st and 3rd Respondents summarily took away that right. There was no reason for such haste, because the film was scheduled for release one month later. Having given him one specific reason, they now allege other reasons. I hold that the 1st to 3rd Respondents have denied the Petitioner equal treatment and the equal protection of the law.

DECISION

For the above reasons, I hold that ER 14(2) did not apply to the Petitioner or to the 2nd Respondent (as a distributor of films for exhibition at cinemas); that the 4th Respondent could not have suspended, and did not take any action to suspend, the release of the Petitioner's film; that the 1st to 3rd Respondents had no power to suspend the release of the film, either under ER 14 or section 6 of the NFC Act; that the 1st to 3rd Respondents acted in breach of the *audi alteram partem* rule in suspending the release of the film; and that the 1st

to 3rd Respondents acted unlawfully, arbitrarily, and contrary to the 2nd Respondent's practice in regard to the distribution of films, and thereby infringed the Petitioner's fundamental rights under Articles 12(1), 14(1)(a) and 14(1)(g).

The 4th Respondent did not interfere with, or instigate interference with, the Petitioner's rights, and I make no order against him.

The 1st Respondent not only exceeded his own powers under section 6, but attempted to usurp powers vested in other persons or bodies under the Public Performances Ordinance and the Emergency Regulations, and directed the suspension of the Petitioner's film without any notice or hearing. He was thus primarily responsible for this litigation, and must personally bear the Petitioner's costs.

The 3rd Respondent gave effect to the 1st Respondent's "directive" without any effort to exercise an independent judgment. I hold the 2nd Respondent Corporation liable for his acts and omissions.

In determining what relief this Court should give the Petitioner, the context of the infringement must be considered. When the 3rd Respondent inquired from the Competent Authority, he did not express an opinion in terms of ER 14(2)(b) that the film contained material prejudicial to national security (etc). The film had been internationally acclaimed, and had received a Presidential award as well. Further, on 21.07.2000, there was no need for summary action: a discussion with the Petitioner was called for. A good film is the work of many months, and requires a high investment, and since the 2nd Respondent had a monopoly, the refusal to release the film seriously affected the Petitioner's livelihood. There is evidence that the Petitioner had taken a loan of Rs 1.5 million from the 2nd Respondent. In his affidavit the Petitioner referred to his investment in the film, and assessed his loss at Rs 500,000. The 2nd Respondent's decision has impaired the Petitioner's ability to repay that loan and interest, and to recoup his investment.

This Court must therefore endeavour to restore the Petitioner, as far as possible, to the position in which he would have been if his film had been released as scheduled.

I grant the Petitioner a declaration that the 1st to 3rd Respondents have infringed his fundamental rights under Articles 12(1), 14(1)(a) and 14(1)(g). I direct the 2nd Respondent to release the Petitioner's film for exhibition not later than 15.09.2001, and in the event of delay, to pay the Petitioner compensation at the rate of Rs 100,000 per month; and if the

film is not released by 15.11.2001, the Petitioner may make an appropriate application to this Court. I further order that the 2nd Respondent shall not be entitled to claim any interest on the loan of Rs 1.5 million, and that repayment of that loan shall commence one year after the date of actual release of the film. The delay in release has undoubtedly caused loss to the Petitioner, and I order the 2nd Respondent to pay the Petitioner compensation in a sum of Rs 500,000, not later than 15.09.2001. The 1st Respondent shall personally pay the Petitioner costs in a sum of Rs 50, 000, not later than 15.09.2001.

JUDGE OF THE SUPREME COURT

AMERASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

EDUSSURIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

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