

# Recent Developments in Sri Lanka on the Freedom of Expression

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## 1. An Introduction

It is axiomatic that in an ideal arrangement between citizen and State there must be a system of laws that declare and protect Human Rights. Whenever a Constitution declares that certain Rights are fundamental, then the Constitution must provide a set of logically structured procedural and substantive safeguards that may ensure that the fundamental nature of such Rights are protected. No Constitution, however carefully framed and structured, can respond to all slings and arrows aimed at it by the Executive arm of Government. The Judges remain the ultimate guardians of the Rights of the citizen, whether such Rights have been enshrined or implied in a Constitution. As guardians of those sacred Rights upon which the edifice of democratic government is built, the Judges must accept their responsibility to expand and contract constitutional provisions, with a commitment to strengthen fundamental principles, which underpin democratic government. Unless there is such a commitment by the Judiciary, any solemn declarations of Human Rights in Constitutions may remain in the realm of mere platitudes, rhetoric and solemn political declarations of governments seeking to hoodwink both the international community and their local constituents.

The Constitution of Sri Lanka<sup>1</sup>, having first declared that Sri Lanka shall be a Free, Sovereign, Independent<sup>2</sup> unitary state<sup>3</sup>, proceeded to repose that sovereignty upon the people of Sri Lanka.<sup>4</sup> The Constitution declared that sovereignty reposed upon the people of Sri Lanka was inalienable. Thereafter the Constitution proceeded to declare that the powers of the three arms of government, namely – Legislative, Executive and Judicial, shall be exercised by the people through their elected representatives.<sup>5</sup> The elected representatives exercised the Legislative powers and the Executive powers exercised by an elected President. As for Judicial powers, Article 4 (c) of the Constitution reads:

<sup>1</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka, Government Printer, 1978.

<sup>2</sup> *Ibid.*, Article 1.

<sup>3</sup> *Ibid.*, Article 2.

<sup>4</sup> *Ibid.*, Article 3.

<sup>5</sup> *Ibid.* Article 4.

Article 4 (c): "The Judicial Power of the people shall be exercised by Parliament through Courts, Tribunals and Institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the people may be exercised directly by Parliament according to law ..."

This sub-Article raises interesting constitutional propositions. Firstly, the judicial functions that the Courts exercise, in an ultimate sense, emanate as an aspect of sovereignty that the Constitution reposes upon the people. Secondly, the nominees of the people, the Parliament, exercise the judicial functions, and in doing so, Parliament uses the Courts as its agency to exercise those functions. Thirdly, the Constitution, by implication places upon the Courts, acting as they do under the sovereign powers emanating from the people, an obligation to protect and enforce those Rights, which the Constitution declares as fundamental. The Constitution, in Article 4 (d) confirms this view.

Article 4 (d): "The fundamental Rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided ..."

The Courts, as the discussion on the case law may show, have utilised Article 4 (d), to issue administrative directions, particularly to the police. These in many instances have required the Sri Lanka Police Force to correct their practices and procedures, so that not only the letter of the law but also, its spirit and intent too may be observed, in a way that future violations of Human Rights may be aborted.

The Constitution roots the exercise of the sovereignty of the people, by the people, upon their elected representatives. In doing so, by implication, all matters connected with the electoral process must receive constitutional protection. In particular, the first three subparagraphs of Article 14 are directly connected with the exercise of the franchise. Namely:

Article 14 (1): Every citizen is entitled to:

- (a) "The freedom of speech and expression including publication;
- (b) The freedom of peaceful assembly;
- (c) The freedom of association."

All three freedoms have a direct relevance to the exercise of the franchise, without which the people's sovereignty can not be properly exercised. This paper deals with the first of this trilogy of Rights. But the importance of these three Rights, as a collective of sentinels, guarding the gate way to all other Rights, whether expressly declared or implied in the Constitution, including the electoral process, could never be over emphasized.

The effective implementation of the electoral process is a sacred duty placed upon the Executive arm of Government. The lawful execution of this process is an important litmus test of democratic governance. The Courts have interpreted widely, and in doing so have expanded each of these three supports of the electoral process. This paper will deal only with the extent to which the Courts have interpreted and expanded the first of these three Rights, namely: "The freedom of speech and expression including publication."

It must, however, be mentioned that these Rights are, as all other fundamental Rights mentioned in the Constitution, not absolute Rights. These Rights must always be balanced against the wider interest of protecting the fabric of the State, through, among others, the preservation of law and order. To this extent, the Constitution prescribes certain parameters, within which these Rights declared by the Constitution, may be enjoyed. Article 15 of the Constitution, in eight paragraphs, subjects, each of these Rights is declared to be fundamental, to a variety of limitations. Restricting this discussion to the constitutional limitations applicable to Article 14 (a), Article 15 (2) reads:

"The exercise and operation of the fundamental Right declared and recognized by Article 14 (a) shall be subject to such restrictions as may be prescribed by law in the interest of racial and religious harmony or in relation to Parliamentary privilege, contempt of Court, defamation or incitement to an offence."

The limitation of this Right is well described by Article 15 (2). This allows the Courts not only to interpret the ambit of the application of Article 14 (a) but also the ambit of the constitutional limitations that may be placed upon it. The case law indicates that the Sri Lankan Courts have not been slow or tardy in seizing this power and exercising it.

One of the difficult questions that the Constitution raises in this area is the relationship between the provisions of the Public Security Ordinance and the fundamental Rights guaranteed by the Constitution. Article 155 (1) of the Constitution reads:

"The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament."

The ordinance has been subsequently amended several times, and a question that has not been answered is whether those amendments should be considered as constitutional amendments. That would indeed be the position if the import of Article 155 (1) were to make the Public Security Ordinance a constitutional document. That makes the subsequent amendments to the Ordinance constitutional amendments requiring a two-thirds majority. However, Article 155 (2) is explicit in that it says:

"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 overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution."

This clearly means, and as the case law shall show, the Executive has no power under the Sri Lankan Constitution to pass Emergency Regulations under the Public Security Ordinance so as to take away the protections prescribed in the fundamental Rights declared under it. Therefore, unless the Executive is able to justify regulations made under the Public Security Ordinance as those falling under any one of the exceptions detailed under Article 15, where specific restrictions on fundamental Rights are allowed, emergency regulations made under the Public Security Ordinance are null and void and of no effect, because they are unconstitutional. This is an important protection, which the Sri Lankan Constitution provides to the citizen. With reference to this aspect of the Constitution, The Supreme Court, per Sharvanada C J held:

"Article 155 (2) of the Constitution empowers the President to make regulations overriding, amending or suspending the operation of the provisions of the Constitution. Thus, the President's legislative power of making Emergency Regulations is not unlimited. It is not competent for the President to restrict via Emergency Regulations the exercise and operation of the fundamental Rights of the citizen beyond what is warranted by Articles 15 (1)-(8) of the Constitution. The grounds of restriction specified in the limitation Article 15 are exhaustive and any other restriction is invalid."<sup>6</sup>

The Public Security Ordinance and the Human Rights provisions of the Constitution have caused a number of troubling issues. Sections 8 and 9 of the Ordinance have a preclusive effect. They read:

Section 8: "No emergency regulation, and no order, rule or direction made or given thereunder shall be called into question in any court."

Section 9: "No prosecution or other criminal proceedings against any person for any act purporting to be done under any provision of any emergency regulation or of any order or direction made or given thereunder shall be instituted in any Court except by, or with the written sanction of, the Attorney-General; and no suit, prosecution or other proceeding, civil or criminal, shall lie against any person or any act in good faith done in pursuance or supposed pursuance of any such provision."

The Courts have carved out a limitation in the application of these two sections. The preclusion from Courts mentioned in Sections 8 and 9 are applicable only when the emergency regulations which are promulgated, fall within the ambit of Article 15 (2) of the Constitution. It may be recalled that Article 15 lays down the limitations to the provisions contained

<sup>6</sup> See Mark Fernando J, in *Sunanda Deshapriya v Municipal Council, Nuwara Eliya*, and SC 884 / 92.

in Article 14 (1) that declares the several fundamental Rights guaranteed by the Sri Lanka Constitution. By using Article 15 (2) of the Constitution as laying down the absolute limits within which the fundamental Rights declared under Article 14 (1) may be abridged, the Courts have, in Sri Lanka, placed the same limitation upon the Rights of the citizen to commence both civil and criminal proceedings against officers of the State that violate the Human Rights protections provided by the Constitution. In such an action, the Sri Lanka Courts do not recognize the defence of acting under superior orders – *respondeat superior*. The awards made in such cases<sup>7</sup> were made against the officer in his personal capacity, and Courts have expressly prohibited such payments to be made by the State. In a recent decision<sup>8</sup> of the Supreme Court, where a Judge of the High Court was arrested by two senior police officers, ostensibly acting under orders from the Attorney-General, was ordered to pay two large sums of money personally to the Judge as a part of the overall award made by the Supreme Court for the violation of the applicant’s fundamental Rights. The applicant had been on bail at the time of the arrest. The two police officers had ignored that fact, which was known to them, at the time they arrested the Judge. The Court considered this to be a gross violation of the applicant’s fundamental Rights.

The Sri Lankan Courts<sup>9</sup> have claimed the power to inquire into the basis upon which the citizen had been deprived of his or her fundamental Rights, declared by the Constitution. Without such an inquiry, the Courts have declared their inability to determine whether the reasons for such a deprivation could be justified by the powers given under Article 15 (2), to exclude such Rights. The onus of proof is placed upon the State to justify such an exclusion, and thereby deprive the citizen of his / her Rights. It might be pointed out that such an inquiry transcends the preclusion placed upon the citizen under the aforementioned Sections 8 and 9 of the Public Security Ordinance. Moreover, the Sri Lanka Courts<sup>10</sup> have viewed the limitations allowed in Article 15 (2) within the larger ambit of a citizen’s Right to legitimate political activity. Therefore, even when an abridgement of a Human Right falls under Article 15 (2), the Courts may nevertheless decide against its application, and thus excluding it, if it appears that the activity of the citizen which the State complains of falls under legitimate political activity. The case law has expanded legitimate political activity to

<sup>7</sup> *Thilakarathne v AG and three others* (unreported-decided in July 1999). Each of the two Police officers was ordered to pay Rupees 50,000 personally, while the government (AG) was ordered to pay Rupees 200,000.

<sup>8</sup> See footnote 6 above.

<sup>9</sup> *HP Shantha Wijeratne v Vijitha Perera, Sub-Inspector of Police, Polonnaruwa*, SC 379 / 93; *Percy Mahinda Rajapakse v The Chief Police Inspector, Slave Island*, SC 2 / 93 and S 4 / 93. *Asoka Gunawardene and another v SCW Pathirana, Officer-in-Charge, Police-in-Charge, Elpitiya* SC 519 / 95.

<sup>10</sup> SC 884 / 92.

include canvassing, putting up posters, and holding strategy sessions and even the Right to vote at elections.

This preliminary discourse is meant to point out two matters. First, that the framers of the Sri Lanka Constitution of 1998, had structured the various constitutional devices in such a way that the delicate balance between fundamental Rights and the legitimate needs of a government to govern is realized. And second, the Courts had in their search for a formula in each case to do justice between the citizen and the State had, where necessary, recognised the fundamental importance of protecting the Rights of the citizen. In doing so, when ever it became evident to the Judges that the Executive had alternative means for protecting the fabric of the State without a resort to Article 15 (2) provisions, a resort to these exceptions contained in the various paragraphs of Article 15 was prevented. In such instances the Sri Lanka Courts had refused to recognize the relevance of Article 15 (2) limitations on the Right to free speech, expression and publication. An examination of the case law should highlight these tendencies of the Sri Lanka Courts.

## 2. The Case Law

### *The Denial of Equal Treatment or Political Discrimination as an Aspect of Freedom of Speech, Expression and Publication*

Among the cases that stand out in this respect, *Sunanda Deshapriya v Municipal Council of N'Eliya*<sup>11</sup> and *Asoka Gunawardene and another v SCW Pathirana*<sup>12</sup> may be considered. In *Sunanda Deshapriya*, 450 copies of an opposition Newspaper – *Yukthiya* – were seized on the orders of a Mayor of a provincial city – *Nuwara Eliya*. It was established that the seized newspaper was a fervent critic of the Government of Sri Lanka. The paper did not belong to any opposition party, but was generally critical of the Government. The action was not brought in The Roman Dutch Law, the action of *Actio Injuriarum*, which encompasses what in the English Law would amount to Trespass or Conversion, but for the violation of the freedom of speech, Expression and Publication. The Supreme Court allowed the action, and awarded damages which were ordered to be paid personally by the Lady Mayor of *N'Eliya*. It was under her orders that the copies of the newspaper were seized. The Court emphasised the fact that the seizure of the newspaper was politically motivated, as opposed to a business rivalry, and therefore was a grave breach of the Article. *Mark Fernando J.*, wrote:

<sup>11</sup> SC 519 / 95.

<sup>12</sup> *Ibid.*

"While infringements of Article 14 (1) (a) may sometimes have to be viewed in isolation, they often do involve other factors, such as denial of equal treatment or political discrimination violative of Article 12. Suppressing freedom of speech and expression, including publication, whether by preventing a newspaper being published or otherwise, would be graver if motivated either by a desire to benefit a rival or by political antagonism. The facts that the particular news paper was an anti-government newspaper, are therefore relevant."<sup>13</sup>

It is most significant that the Supreme Court viewed the:

"[T]he infringement of Article 14 (1) (a), by Executive or Administrative action, can take many forms, and may be direct or indirect; the exclusion of anti-government news and views in Newspapers owned or controlled by the government, particularly when it amounts to a denial of equal treatment or discrimination because of political opinion (see Article 12), would be as much an infringement as the suppression (by force or otherwise) of such news and views in newspapers independent of the government. The infringement in this case was in the latter category, and in my opinion was more serious."<sup>14</sup>

Article 12 of the Constitution, to which the dictum refers, declares in its (2<sup>nd</sup>) paragraph, that "No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds." What the Court did in *Sunanda Deshapriya* was to forge a nexus between that sub-section and the freedom of expression Article. In doing so, the Court has expanded the ambit of the freedom of expression in Article 14 (1) (a) to include "denial of equal treatment or discrimination because of political opinion". There is therefore no reason why in another situation the Court cannot find discrimination on the grounds of race, religion, language, caste, sex or place of birth amounting to a violation of freedom of speech, expression and publication.

Along the same lines, in *Asoka Gunawardene and another v SCW Pathirana*<sup>15</sup> the petitioners were supporters of the United National Party, which lead the opposition in Parliament. They sold lottery tickets for a living. With each lottery ticket they sold, they gave free pamphlets containing speeches made in Parliament by the Opposition on the debate to extend the State of Emergency on the Island. Of the pamphlets, one carried the title, "What is going to happen to the Country?" and the other bore the title, "Here is the Truth". Both sets of pamphlets were seized and the petitioners were arrested and were kept in police custody for a period of 26 hours. The present action was brought upon an alleged violation of Article 14 (2), which protects the freedom of expression – et al. The Court held that, the

<sup>13</sup> *Ibid.*

<sup>14</sup> SC 519 / 95.

<sup>15</sup> [1992] 1 Sri L R 199.

Executive did not have the power to scrutinise the speeches made in Parliament, for they were privileged. While deciding in favour of the petitioner, the Court adopted with approval the following passage, from Sharvananda C J, in *Joseph Perera v A G*<sup>16</sup>, a case to which reference will be made later. In that passage, the Chief Justice observed:

"... freedom of speech and expression would be illusory if the police can with impunity arrest and detain a person if he does not obsequiously sing the praises of the Government. The danger to a party in power is not the same as rocking the security or sovereignty of the State. The police should not be timorous to scent in every utterance criticising the Government, an attempt to incite disaffection against or to overthrow the Government."<sup>17</sup>

*A Violation of the Right to Legitimate Political Protest as an Aspect of a Violation of the Freedom of Speech and Expression including Publication*

As the below mentioned case law shall show, legitimate political protest may take several forms. In *H P Shantha Wijeratne v Vijitha Perera (Sub-inspector of Police, Polonnaruwa)*<sup>18</sup>, the Government at the time announced a general increase of salaries granted to public sector employees. That announcement did not include those who were in casual employment. There was a separate labour union to which casual workers belonged. That union protested against the exclusion of their members from the proposed salary increase. They hung posters and the offending posters allegedly read: "Increase Salaries", "Grant Permanency of Employment", "Abolish the System of Contract Employment". During an unauthorised police raid, the 1st Respondent, a sub-inspector of Police, searched the Petitioner's house, and some of the posters that were hung were removed. The Petitioner successfully claimed that among other violations, his freedom of speech and expression including his freedom to publish had been violated. The violation of Article 14 (1) (a) was a result of not only the removal of the posters criticising the Government, but also all the attendant acts by the police to show their disapproval of the Petitioner's protests made through the posters. Justice Mark Fernando observed:

"Articles 10, 12 & 14, recognized the fundamental Right of every Sri Lankan to be different, to think differently, and to have and express different opinions – not merely a Right to disagree privately in silence, but to communicate disagreement openly, by word, conduct and action, by peaceful and lawful means. Dissent, or disagreement manifested by conduct or action is a corner stone of the Constitution. It is a Right enjoyed by Members who speak and vote as they wish in Parliament – by Judges who must de-

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

cide controversies according to their considered opinion, and by every citizen at election time when he casts his vote for the candidate of his choice."<sup>19</sup>

By a resort to Article 4 (d), to which reference had previously been made, the Court enjoined the Police to observe, respect and educate their members regarding the due observance of Human Rights found in the Constitution. Alluding to this aspect of the Constitution, Mark Fernando J wrote:

"Democracy requires not merely that dissent be tolerated, but it be encouraged; and this obligation of the Executive is expressly recognised by Article 4 (d), which therefore requires that the Police not only refrain from suppressing lawful dissent, but also that they 'respect, secure and advance' the right to dissent."<sup>20</sup>

In a previous decision<sup>21</sup> of the Supreme Court, the same Judge admonished the Police, having first upheld the Right to dissent, he expressed the hope that the:

"Inspector-General of Police will of his own volition issue appropriate directions and instructions to all officers-in-charge of Police stations, that criticisms of the Government, and of political parties, and of policies, is, *per se*, a permissible exercise of the freedom of speech and expression under Article 14 (1) (a) of the Constitution."<sup>22</sup>

It is important to note that in *Shantha Wijeratne* the Supreme Court made the seizure of the petitioner's posters, and stopping him from conducting his political campaign by picketing and / or by displaying posters, through threats of arrest, a breach of his freedom of speech, expression and publication. The Court ordered the IGP to issue fresh Orders to all Officers-in-Charge, to respect the Rights declared under the Constitution, and a copy of such Orders to be forwarded to the Registrar of the Supreme Court, within a specified period of time. Additionally, the Respondents were ordered to pay a sum of money personally and the IGP was ordered to delay their promotions for a period of one year. These were all based on Article 4 (d) of the Constitution.

Legitimate political protests may take several forms. In *Dayasena Amaratunga v P Sirimal (Police Constable) and another*<sup>23</sup>, The Sri Lanka Freedom Party, then in the Opposition, organised a rather unusual political protest against the Premadasa Government, on 1 July 1992. On that date, people who opposed the Government were called out to perform what

<sup>19</sup> *Ibid.*

<sup>20</sup> *Amaratunge v Sirimal* SC 468 / 92.

<sup>21</sup> *Ibid.*

<sup>22</sup> SC 468 / 92.

<sup>23</sup> *Carey v Brown* (1980) 447 US 455; *Police Department of Chicago v Mosley* (1972) 408 US 92, 95-96; *Tinker v Des Moines* (1969) 393 US 292; *US v O'Brien* (1968) 391 US 367-377; *Bromberg v California* (1931) 283 US 359; *Cohen v California* (1971) 403 US 15, 26.

was called in the vernacular a "Jana Ghosha" – a peoples' vocal protest – by "in concert with others at the same time on the same day cause a terrible din by causing noises, by drumming and striking saucepans and such objects, in public." The Petitioner was first found to have been beating a drum. The Respondents, Police constables from the local police station, first broke the drum by bashing it with a rice pounder. The Petitioner was, however, able to continue to beat the drum, which appears to have enraged the Respondents. They there after smashed the drum to small pieces. Unable to use the drum any further, the Petitioner began to clap. Having reached their limit of tolerance, the Respondents arrested the Petitioner. Thereafter the Petitioner was unable to take part in the protest. The Supreme Court held that the Respondents had violated the fundamental Rights of speech, expression and publications, found in Article 14 (1) (a) of the Constitution. After a careful perusal of a number of decisions from the US Supreme Court<sup>24</sup>, Justice Mark Fernando, observed:

"Speech and expression extend to forms of expression other than oral or verbal – placards, picketing, the wearing of black arm bands, the burning of draft cards, the display of flags, badges, banners or devices, the wearing of a jacket bearing a statement, etc. ..."

Quoting with approval from a decision of the US Supreme Court, Mark Fernando J observed:<sup>25</sup>

"The Right to support or to criticize governments and political parties, policies and programs, is fundamental to the democratic way of life, and the freedom of speech and expression are essential which the Court can not deny without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."

Article 14 (a) (1) would not apply unless there was an interference with a Right to speak. In *Percy Mahinda Rajapakse v Chief Inspector of Police, Slave Island and others*<sup>26</sup> the Petitioner and others who were Members of Parliament were taking part in a "Satyakiri". This was a non-violent form of opposition to the Premadasa Government against disappearances of persons. The Petitioner was not however expected to speak on that occasion. The Police, using tear gas and baton charges, dispersed those who were taking part in this non-violent protest. The Petitioner claimed a violation of several fundamental Rights contained in Articles 11, 13 (1), 14 (1) (a) and 14 (b) of the Constitution. The Respondent was found to have violated three of the aforementioned Articles, except Article 14 (a). It was held that insofar as Article 14 (a) was concerned there was no violation of freedom of speech, ex-

<sup>24</sup> *De Jones v Oregon* (1937) 299 US 353.

<sup>25</sup> SC 2 / 93.

<sup>26</sup> SC 452 / 92

pression or publication, as the Petitioner was never intending to speak or publish. Unless those were his intentions, there could not be a breach of his Right of expression. Therefore the Right of expression arises out of the Right to speak and the Right to publish.

*The Right to Organise, Hold and Conduct Meetings as an Aspect of the Freedom of Speech and Expression, including Publication*

Freedom of speech etc, provides by themselves and without more, a set of hollow Rights. This will be so unless the law recognizes a Right to hold meetings with others, enabling the citizens to publicly convey their ideas couched in words, both in the written and in the spoken form. The Right to hold meetings are concomitant Rights which the Constitution must by implication protect, as a necessary element of the set of principal Rights contained in Article 14 (1) (a). The Supreme Court has on many occasions stated this position. The Right to hold meetings has been linked to the set of three Rights recognised in Article 14 (1) (a) of the Constitution. Namely, free speech, expression and the Right to publish.

In *MCP Seneviratne v Attorney-General*<sup>27</sup>, while an eclectic group of persons of nearly 15 in number were meeting in a premises of a Buddhist Temple, Police broke into the room where the meeting was being conducted and arrested them. This was done under powers vested in them under Emergency Regulations promulgated with in ambit of the Public Security Ordinance. This group comprised of university students, the Buddhist clergy, and committed Marxists. The Police claimed that the group was plotting to overthrow the Administration of President Premadasa. The Petitioners successfully claimed that several of their fundamental Rights had been violated. Limiting the discussion here to Article 14 (1) (a) – freedom of speech, expression, including publication – the Court observed that, these Rights provide three intrinsic elements. They are the desire to discover the truth, the need of every person to achieve personal fulfillment, and the need to respond to the demands of a democratic socio-political regime. A Right to free speech, expression and publication, the Court thought, was important both as values unto themselves, benefiting the individual, and as having an instrumental value, in benefiting society. The Court pointed out that under the Constitution, the people through their elected representatives, exercised the Legislative powers, the Executive powers and the Judicial powers. That has been pointed out at the beginning of this paper. At the root of the Sri Lanka Constitution lies the electoral process, and as such, the Supreme Court held, that the fullest range of Rights supportive of that process should be given recognition by the Courts. The Supreme Court held that in the electoral process critical discussion of matters of political interest, while expressing the people's views, is an essential element for the enhancing of democratic government. The Court observed:

<sup>27</sup> *Ibid.*

"But the discussions were not engaged in the development of an apparatus designed and dedicated to overthrow the Government by unlawful means. The Petitioners were considering matters of personal concern and were anxious to mobilize public opinion to accept their views so that they might replace those in power with other representatives who may give effect to their views. The idea was to affect a change of Government by the mobilization of public opinion, which is a thoroughly permissible and lawful step to take under the Emergency Regulations [promulgated under The Public Security Ordinance]. Therefore there was no justification for the Respondent to stifle the on- going discussion. Article 14 (1) (a) was violated."<sup>28</sup>

Again in *Joseph Perera v Attorney-General*<sup>29</sup>, the Petitioner and three others, who were members of the "Revolutionary Communist League" organized a meeting to discuss "Popular Fronts and Free Education". Two days prior to the meeting a leaflet was issued pertaining to the meeting. In that leaflet "the organisers accused the governing United National Party, of supporting the local Catholic Bishop, of getting enmeshed in a capitalist racist war (with reference to the War with the Tamil Tiger movement), that there were no funds to spend on free education, and calling upon the 'witch hunted' teachers, progressive students and parents to attend the meeting, to get together and establish their rights by imposing the fact that the accused United National Party is the enemy of the students and was trampling their rights." This leaflet was circulated two days prior to the meeting. On the morning of the meeting, the Principal and Vice-Principal of two leading denominational schools informed the Police, that if the meeting were held, as planned, it might create unrest among the students in the area. Acting on this information, the Police arrested the Petitioner and his principal organizers, stopped the meeting and dispersed those who had come to attend it. The Petitioners were arrested on the 27<sup>th</sup> June and kept in the local Police Station until July 15<sup>th</sup>. Thereafter they were produced before a Magistrate and were remanded until July 29<sup>th</sup>, and thereafter they were further remanded until 7<sup>th</sup> August. These events took place in 1986. This action was brought for the violation of several Rights guaranteed under the Constitution. As far as Article 14 (1) (a), the Court held that the initial arrest was justified. The leaflet and the other information, which the police received, left them with a reasonable impression that the meeting was subversive. However, by July 15<sup>th</sup>, they ought to have found out that it was not, and therefore should have released the Petitioners on July 15<sup>th</sup>. The failure to do so after that date made the further detention of the Petitioners a violation of Article 14 (1) (a) of the Constitution. Sharvananda C J, wrote:

"Freedom of speech and expression means the Right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or by any other mode. It includes the expression of one's ideas through banners, posters, signs etc. It includes

<sup>28</sup> *Ibid.*

<sup>29</sup> [1992] 1 Sri L R 199.

the freedom of discussion and dissemination of knowledge. It includes the freedom of the press and the propagation of ideas. This freedom is ensured by the freedom of circulation. The Right of the people to hear is within the concept of freedom of speech. There must be untrammelled publication of news and views and of the opinions of political parties, which are critical of the actions of the Government and expose its weaknesses. Debate on public issues should be uninhibited, robust and widely open and that may well include vehement, caustic and sometimes sharp attacks on Government. Such debate is not calculated and does not bring the Government into hatred and contempt."<sup>30</sup>

This passage of the learned Chief Justice has been quoted in subsequent decisions as the *locus classicus* when considering the thin line between legitimate criticism and legitimate concerted action against the policies of a government on the one hand and subversion on the other.

### *The Right to Publish is inherent in the Freedom of Speech and Expression*

Freedom of thought enshrined in Article 10 of the Constitution is meaningless unless there is the fullest support in the Constitution to the freedoms of speech and expression. These two freedoms, as was mentioned earlier become a reality through the freedom to publish. These freedoms therefore are inter linked and do provide the underpinnings for the other freedoms that provide the *origio et fons* for a democratic society. The Sri Lanka Supreme Court has adopted this view in a number of cases. The two of its decisions that may be considered here have restated this position, yet again.

In *re The Constitutionality of the Sri Lanka Broadcasting Bill*<sup>31</sup>, the Petitioners raised the issue before the Supreme Court as to whether the Bill in its present form violated, among others, Article 14 (1) (a) of the Constitution, in that the Bill requires to be passed with a two-thirds majority, and not with a simple majority. If it did violate that Article, then the Bill must be considered as an amendment to the Constitution. There were certain features of the Bill that the Supreme Court examined and concluded that it did violate the freedom of publication and therefore it constituted an amendment to the Constitution. The Government did not have the two-thirds majority to pass the Bill and therefore in its wisdom the Bill was withdrawn.

It is important to examine the contents of the Bill, as the Court did. The bill sought to appoint an "Authority" called the Sri Lanka Broadcasting Authority, which had the power to license both privately owned broadcasting and television stations. As for the govern-

<sup>30</sup> *Ibid* at p 202.

<sup>31</sup> SC / SD / 1/97-15 / 97.

ment-controlled Sri Lanka Broadcasting Corporation, which provided both TV and Radio Broadcasting Services under the governance of a Cabinet Minister in charge of the media, there was no such licensing required. Further, the government broadcaster was required to conform to certain guidelines only where it was practicable. The private sector broadcasters had no such privilege. It was made compulsory that conformed to the guidelines. As far as the private broadcasters were concerned, it was an offence to breach any regulations that provide the guidelines to the contents of their programs. It, however, was not an offence in the case of the government broadcaster to breach the guidelines. The government broadcaster was subject to a less strict standard of accountability than the private broadcaster. The Court held that there was a violation of the equality provisions of the Constitution. Additionally, there was violation of Article 14 (1) (a), the freedom of publishing. GPS de Silva CJ, observed:

"... fundamental Right of freedom of thought enshrined in Article 10 of the Constitution was the womb in which some other fundamental Rights, especially those protected by Article 14 of the Constitution developed."

Cardozo J, in *Palko v Connecticut* 302 US 319, categorised the freedom of speech – not the freedom of thought – as "the matrix, the indispensable condition of nearly every other freedom."<sup>32</sup>

The patent inequality meted out to the private broadcasters, and the governmental controls imposed upon them, amounted to imposing governmental controls upon the private radio and TV broadcasts on the Island. The Supreme Court held that by controlling the media of publications, the freedoms of speech and expression enshrined in the Constitution was abridged. The Court recognized that freedoms could be abridged, and are not absolute. With this in mind, the Supreme Court quoted a passage from one of its earlier judgments with approval. It was from *Sharvananda C J, in Joseph Perera v AG*<sup>33</sup>, a decision to which reference had previously been made. The passage read:

"Article 14 of the Constitution deals with those great and basic Rights which are recognized and guaranteed as the natural Rights inherent in the status of a citizen of a free country. Freedom of speech – goes to the heart of the natural Rights of an organized freedom-loving society to impart and acquire information. This freedom is not absolute. There is no such thing as absolute and unrestricted freedom of speech and expression, wholly free from restraint; for what would amount to uncontrolled license, which would tend to disorder and anarchy. Absolute and unrestricted individual Rights do not and can not exist in a modern State. The welfare of an individual, as a member of collective society, lies in a happy compromise between his Rights as an individual and the inter-

<sup>32</sup> *Ibid.*

<sup>33</sup> [1992] 1 SLR 199.

ests of the society to which he belongs. Our Constitution has rightly struck a proper balance between the varying competing social interests, and has set forth the restrictions to which the fundamental Right of speech and expression may be subject to.<sup>34</sup>

The limitations placed on the various freedoms enshrined in the Constitution have been previously mentioned. These may be found in eight sub-sections of Article 15 of the Constitution. The Courts have, on many occasions, considered and placed suitable restrictions upon the freedom of speech, expression and publication, particularly for the preservation of law and order and to maintain the security of the State. In *Wickremasinghe v Edmund Jayasinghe, Secretary to the Ministry of Media*<sup>35</sup>, in the face of the war that the Government was conducting in the North of the Island, certain restrictions were placed on material that may be published in the media. Those restrictions included:

- (a) information of Military operations carried out or proposed to be carried out by the Defence Forces;
- (b) information concerning procurement or proposed procurement of arms or supplies for the Armed Forces;
- (c) information concerning the deployment of troops or personal, or the deployment or use of equipment, including aircraft or naval vessels, by such forces;
- (d) information pertaining to the official conduct or the performance of the Head or any member of any of the Armed Forces or the Police forces.

The Court was required to decide whether these restrictions on publications violated the freedom of speech, expression and publication. The Court held that the restrictions were justified. It observed:

"In the instant case, it can not be said that the occasion and manner of pre-censorship is arbitrary. The Government if faced with a serious civil war. The matters in respect of which censorship is imposed are specified. The restriction is against the publication of matters that could be classified as sensitive information. [Quoting from *The Zamora* [1916] AC 77, the Court adopted the following passage from the House of Lords:] Those who are responsible for national security must be the sole Judges of what the national security requires. It would be obviously undesirable that such matters should be made the object of evidence in a court of Law or otherwise discussed in public."<sup>36</sup>

<sup>34</sup> *Ibid* at pages 212-213.

<sup>35</sup> SC 592 / 95.

<sup>36</sup> *Ibid*.

*Right to Receive Information as an Aspect of the Right to Free Speech, Expression and Publication*

The essence of education is to receive news and views and impart news and views. It is this exchange of views and news that lie at the heart of the educating process. Right to receive news is intertwined with the Right of free speech, expression and publication. These together underpin education. In *Wimal Fernando v The Sri Lanka Broadcasting Corporation*<sup>37</sup>, the Petitioner alleged that the government-controlled Sri Lanka Broadcasting Corporation terminated its "non-formal Education Program" and by doing so the Corporation violated his fundamental Rights to "freedom of speech and expression". The program dealt with a wide range of subjects, namely: human rights, ethnicity, sociology, legal and medical issues, Arts and culture, politics, current affairs, the environment, behavioural sciences, history, archeology, literature, drama, women's rights and pre-school teacher training. It provided 24 hours of instruction a week and it attracted listener participation as well. This two-way stream of exchanging ideas served the educating process well. The Supreme Court unanimously held that the freedom of expression of the listener, as a participatory listener had been violated. His Right to receive and impart his views, which the program provided, was an aspect of his fundamental Right to free speech, expression and publication and therefore its withdrawal constituted a violation of Article 14 (1) (a) of the Constitution. In the course of the Judgment, the Court referred to a wealth of material<sup>38</sup> where it had been

<sup>37</sup> SC 81 / 95.

<sup>38</sup> In *Prabha Dutt v Union of India* AIR 1982 SC 6, The Supreme Court of India upheld the rights of journalists to interview prisoners under sentence of death, where they are agreeable to be interviewed. There is however, no right to obtain information simpliciter – for one's personal amusement or glorification, but only where it would facilitate the free exercise of the freedom of speech. In *Opendoor Counselling and Dublin Well Women Centre v Ireland*, 29<sup>th</sup> October 1992, Series A No 246 the Irish Supreme Court held that an injunction issued by a lower court against the petitioner from divulging where outside Ireland could women obtain abortions, violated Article 10 (1) of the European Convention which ensured Free speech. The Article read: "Everyone has a Right to freedom of expression. This Right shall include freedom to receive and impart information." In *Redllion Broadcasting Co v FCC* (1969) 395 US 367, a listener was subject to a personal attack by a guest speaker in a radio program which was the subject of a broadcast. The listener in question sought from the broadcasting companies a transcript of the broadcast, a tape, and times to reply, all these without a fee. The company refused this. By this action the court allowed the listener's claim to receive all of the above without a fee, not as a mere right to information but as a right to information, ancillary to the Freedom of Speech. In *Lamont v The Postmaster General* (1965) 381 US 301 under a statute in the US, a person was required to fill in a card before a particular type of mail was received. The post card required all his personal details to be filled in. The mail in question was Communist mail. He refused to fill the card in. The US Supreme Court held that that requirement was a violation of the first amendment, which guaranteed unfettered exercise of the freedom of speech. In *Narayan v Kerala* 1973 A.I.R 97, persons in detention have a fundamental right of expression, manifested in their right to receive books, write books and express their views. The limitations are the general limitations applicable to all, such as dealing with seditious or subversive literature.

established that the Right to receive information was an aspect of the Right to freedom of speech, expression and publication.

In *Visualingam v Liyanage* a newspaper was banned from publication. The two Petitioners, one who regularly read the newspaper and the other, who wrote a column, claimed that their Rights to free speech and expression were violated. The Court held that the reasons for banning the publication were legally justifiable reasons and therefore the resultant abridgement of the fundamental Rights of the two Petitioners was lawful. However had the reasons being otherwise, and were not justifiable, the Court was prepared to say that there was a violation of Article 14 (1) (a) of the Constitution. On this point the Court observed:

"... that public discussion was important in a democracy, and that for its full realization public discussion demanded the recognition of the Right of the person who is the recipient of information ... the fundamental Right to the freedom of speech and expression includes the freedom of the recipient. Accordingly, the Petitioners have a locus standi to seek relief under Article 126 (Right to petition the Supreme Court). But like all fundamental Rights, the fundamental Right of the recipient is also subject to the same restrictions."<sup>39</sup>

In *Sunil Jayantha Wanigasuriya and two others v ADS Pieris, Sub-Inspector of Police, and another*<sup>40</sup>, the Petitioners sought permission from the local Urban Council to hold "An Adult Education Seminar". The Respondents, who were members of the police force, found out that the seminar was to engage in a discussion on "Decisions of the Supreme Court on Human Rights". The discussion was on subjects relevant to arrests, detentions, assaults, and torture and unequal treatment before the law and on questions relating to Human Rights. The police considered this outside the ambit of adult education, and therefore decided to terminate the meeting. The petitioners successfully claimed that there was a violation of their Right to free expression, which is central to education. *GPS de Silva CJ*, said:

"In my opinion, there is little doubt that a discussion of the Supreme Court decisions on Human Rights falls well within the area of adult education. Freedom of speech and expression necessarily includes the freedom to impart knowledge, and to propagate ideas. It seems to me that a meaningful discussion on Human Rights would not be complete without reference to the relevant Supreme Court decisions."<sup>41</sup>

The freedoms of speech, expression and publication are central to education. If any one of these were wrongfully denied, that would clearly affect education. What these cases suggest is that education involves the imparting and the receiving of knowledge, an aspect of

<sup>39</sup> *Ibid.*

<sup>40</sup> SC 199 / 87.

<sup>41</sup> *Ibid.*

speech and expression. And therefore any denial of the process that is called education might amount to a denial of imparting and receiving of knowledge and would therefore constitute a violation of Article 14 (1) (a) of the Constitution.

### *A Right to Vote at Elections as an Aspect of the Freedom of Expression*

It has been previously mentioned that the Sri Lanka Constitution ties sovereignty to the electoral process. The elected representatives of Parliament, as the agents of the people, exercise that sovereignty in the three arms of government. In legislating, in executing the functions of the State and in performing the judicial function while interpreting and enforcing the laws of the State. The Right to vote, therefore is central to the whole process of government, and the Courts have interpreted the Right to vote as an aspect of the freedom of expression which is a fundamental Human Right under the Constitution.

In *Janatha Vimukthi Peramuna v AG and 5 others*<sup>42</sup>, the Government proposed to pass an Act, and published a Bill<sup>43</sup> to that effect which read "The Provincial Councils Elections (Special Provisions) Bill". The provisions of that Bill postponed the holding of elections in several Provinces, beyond the date on which the statutory period of its mandate would end. That was when the elections for a new Council should have been held. This amounted to an unauthorised extension of the mandatory period of The Provincial Councils, after which they would have become defunct. The validity of this Bill was challenged upon several grounds. What concerns here is that the Supreme Court held, among other grounds, that the provisions of the Bill violated Article 12 (1) (a) of the Constitution. The Supreme Court held that the Right to vote was an aspect of the Right of free speech and of expression. There must be legitimate representatives of the people who may speak on behalf of the people and there must be in the people a Right to express their wishes as to which those legitimate representatives are. These persons, the court held, must be chosen, and that must be done through a free expression of the vote. Franchise was not limited to voting. It includes the Right to stand for elections, and indeed the whole process stretching from the Right to be nominated to the declaration of the person elected at the end of the process. Therefore clause 2 of the Bill which was designed to permit The Commissioner General of Elections to postpone the holding of elections, notwithstanding Article 154 E of the Constitution was held to be violative of Article 12 (1) (a). Article 154 E provided for an automatic dissolution of the Provincial Councils upon the expiry of their statutory life span of five years. There are no provisions for a caretaker Administration during the interim period,

<sup>42</sup> SC / SD No 9/ 98.

<sup>43</sup> The Long Title of the Bill read: "An Act to make provisions enabling the Commissioner of Elections to fix a new date for Western, Uva, Sabaragamuwa, Central and North Central Provincial Councils".

which the Supreme Court held was indicative of the intention of Parliament that the holding of election at the end of the five year statutory period was a strict one, admitting no exceptions. There must be a strict adherence to the Constitutional life span of five years given to them.

### **3. Conclusions**

As the above recitation of recent decisions from the Supreme Court show, there appears to be a developing trend among them to use Article 14 (a) – the Right to speech, expression and publication – as a hub around which several interconnecting Rights are spun. By their very nature, those three Rights provide the foundation for education. With the recognition of education as an element in this equation the next step is for the Courts to expand it to religious education, which necessarily bring into focus and aspect of religious Rights. Freedom of religion is separately protected in the Constitution, but it could be linked to the freedom of speech as well. This Article 14 (a) might further be utilised by the Courts to compel the Government to provide special facilities for the deaf and the dumb at government and semi-government establishments. The courts may further expand the provisions of Article 14 (a) to include such private establishments as insurance companies, to which the deaf and dumb may need to attend.

Another emerging aspect of Article 14 (a) is that it appears to project its own "basic structure". This is an aspect that has been engaging the attention of those who have been interpreting the Indian Constitution. In Indian constitutional theory their Constitution has a basic structure which can not be changed or in any way altered. The emerging basic structure of Article 14 (a) appears to provide the matrix, if not for all, at least for some of the Rights declared as fundamental in the Sri Lanka Constitution.

Chechnya. The European Court of Human Rights will be able to glean important insights from the recent case law of the Inter-American Commission which has made a number of interesting propositions with regard to the relationship between regional human rights protection and the *ius in bello*.

## **Recent Developments in Sri Lanka on the Freedom of Expression**

By *M. Lakshman Marasinghe*

The Human Rights provisions found in the present Sri Lankan Constitution encompass a very large and fruitful area. They include such fundamental rights as Right to the Freedoms of: Speech, Expression, including publication; Peaceful Assembly (Art. 14.1.b); Association ( Art. 14.1.c); to form and join a Trade Union (Art. 14.1.d); to manifest his religion in worship, observance, practice and teaching (Art. 14.1.e); to promote his / her own culture and to use his own language (Art. 14.1.f); to engage in any lawful occupation, profession, trade, business or enterprise (Art. 14.1.g); of movement, choosing ones residence within Sri Lanka (Art. 14.1.h) and lastly the freedom to return to Sri Lanka (Art. 14.1.i). These freedoms have been limited under Article 15.

The Article published here deals with the first of those fundamental freedoms, namely, the "Freedom of Speech and Expression including Publication". This freedom, as in the case of others, has been interpreted in a way that in most cases it has been periodically expanded and periodically contracted. The cases discussed in this writing show the high water mark of this freedom. Among others, the right to vote, has been included as a fundamental right, being an emanation of the freedom of expression. Similarly, the right of expression has been extended to include political protests and demonstrations. No declaration of Fundamental Rights could encompass all its different manifestations.

It is therefore left to the Courts to interpret the provisions in a way so as to ensure that the particular violation complained of, did fall within the area of protection afforded by the constitution. Additionally, the courts have justified punishing the violators of human rights, directly, and in their personal capacities, rather than punishing the institution, such as the Police, to which they may have belonged. The differentiation between personal liability of the violator, and the vicarious liability of the institution to which violator belonged is a significant development that the Supreme Court of Sri Lanka has recently introduced into this area of the law.