SIRIWARDENA AND OTHERS
V.
LIYANAGE AND OTHERS

SUPREME COURT
WIMALARATNE, J., RATWATTE, J.,
COLIN - THOME, J., ABDUL CADER, J. AND RODRIGO, J.
S. C. APPLICATION 120/82,
DECEMBER 10, 15, 16, 17, 1982.
AND JANUARY 10, 11, 12, 13, 1983.

Fundamental Rights — Public Security Ordinance, S. 5 — Regulation 14(3) of the Emergency (Miscellaneous Provisions and Powers) Regulations Nos. 2 and 3 of 1982 — Sealing of press - Fundamental right of the freedom of speech and expression including publication (Article 14(1)(a) of the Constitution) —Freedom to engage in any lawful occupation, profession, trade, business or enterprise (Article 14(1) (g) of the Constitution) — Abuse of power — Campaign against referendum — Mala fides — Ulterior purpose — Public Security Ordinance, S. 8 — Restrictions (Article 15(2) and 15(7) of the Constitution).

Held —

The freedom of speech and expression including publication is subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony, or in relation to parliamentary privilege, contempt of court, defamation, incitement to an offence, national security, public order and the protection of public health or morality etc. Law in this context includes regulations made under the Public Security Ordinance.

Section 8 of the Public Security Ordinance (finality clause) will not prevent the grant of relief if the petitioners are entitled to it.

The phrase "for the preservation of public order" in our Emergency Regulations ought to be interpreted, having regard to S. 5 of the Public Security Ordinance and means" for the purpose of preventing disorder".

Under Regulation 14(3) if a competent authority is of opinion that there is or has been or is likely to be in any newspaper, publication of matter which is in his opinion calculated to be prejudicial to the interests of national security, the preservation of public order, etc., he may make an order as specified in such Regulation. The decision must be reasonable in the sense that it is or can be supported with good reasons or at any rate be a decision which a reasonable person might reasonably reach. Where the opinion formed is that a publication is prejudicial then the opinion is a subjective opinion, but where the opinion is one that is formed on something that has already been published or is being published then the opinion is not a purely subjective opinion.

Checks and balances against official abuse and misconduct are enshrined in the freedom of publication which is a cherished right in any free society. At the same time, there are essential limits on the right to publish. The limitations are greater when a nation is at war or under a state of emergency. Criticism which invites the public to disregard the Rule of Law itself is dangerous incitement to act outside the Law, even in normal times.

Some of the material on which the competent authority acted could have incited persons to breaches of the peace. Some others are highly defamatory, while still others are scurrilous and in extremely bad language. Against the history of escalating post election violence and the mounting tension prior to the Referendum, the decision of the Competent Authority was not unreasonable. Hence the fundamental right of freedom of expression, guaranteed by Article 14(1)(a) of the Constitution has not been violated.

The Mahajana Press prints the Aththa Paper and this was its principal work. The other work undertaken by the Press would be trivial compared to the work involved in the printing of the Aththa. Hence the order for sealing the press was validly made and there has been no violation of the fundamental right to the freedom of engaging in one's lawful occupation, trade, business or enterprise guaranteed by Article 14(1)(g).

Cases referred to :

1. *Jaggannath Misra v. The State of Orissa* AIR 1966 SC 1140.
2. *Ras Behari Lal v. King Emperor* (1933) 60 Indian Appeals 354, 361.
3. *Romesh Thapar v. State of Madras* AIR 1950 SC 124.
4. *Virendra v. State of Punjab* AIR 1957 SC 896.
5. *The Supdt. Central Prisons v. Dr. Lohia* AIR 1960 SC 633.
6. *Ram Manohar Lohia v. The State of Bihar* AIR 1966 SC 704.
7. *Yasapala v. Ranil Wickremasinghe* S.C. Application No. 103 of 1980 S.C. Minutes of 8.12.80.
8. *Rameshwar Shaw v. District Magistrate,* Burdwan AIR 1964 S.C. 334.
9. *Hirdaramani v. Ratnavale* (1971) 75 NLR 67.
10. *Liversidge v. Anderson* (1942) AC 206.
11. *Greene v. Secretary of State for Home Affairs* (1942) AC 284.

12. *Carltona Ltd v. Commissioner of Works* (1943) 2 All ER 560, 564.

13. *Padfield V. Minister of Agriculture, Fisheries & Food* (1968) AC 997.

14. *Breen v. Amalgamated Engineering Union* (1971) 2 QB 175.

15. *Secretary of State v. Tameside* (1976) 3 All ER 665.

16. *Land Commissioner v. Ladamuttu* 62 NLR 126.

17. *Perera v. Peoples' Bank* (1975) 78 NLR 239, 249.

18. *Nokes v. Doncaster Amalgamated Collieries Ltd.* (1940) AC 1014, 1022.

19. *Regina v. Medical Appeal Tribunal Exparte Gilmore* (1957) QB 583.

20. *Nakkuda Ali v. Jayaratne* (Controller of Textiles) 51 NLR 462.

21. *Smith v. East Elloe Rural District* (1956) AC 736, 750.

22. *Gunasekera v. Ratnavel* 76 NLR 316.

23. *Anisminic Ltd. v. Foreign Compensation Commission* (1969) 2 AC 147.

APPLICATION under Article 126 of the Constitution.

S. Nadesan Q.C. with *Peter Jayasekera, R. B. Seneviratne* and *S.H.M. Reeza* for the Petitioners.

M. S. Aziz, *Deputy Solicitor-General* with *K. C. Kamalasabayson, Senior State Counsel* and *D. M. G. Dissanayake, State Counsel* for the Respondents.

Cur. adv. vult

January 27, 1983.

WIMALARATNE. J.

A state of Emergency was proclaimed by the President of the Republic soon after the Presidential Election had been concluded on 20.10.82.

Purporting to act under powers vested in him by Regulation 14(3) of the Emergency (Miscellaneous Provisions & Powers) Regulations, Nos. 2 & 3 of 1982 made by the President under section 5 of the Public Security Ordinance (Cap. 40) the 1st Respondent, who is the competent authority appointed for the

purpose of that Regulation, made orders dated 2.11.82 and 20.11.82 directing that no persons shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the newspaper known as the "Aththa", and that the press (the "Mahajana Press") in which the newspaper is printed shall not be used for any purpose whatsoever, during the continuance in force of the said orders.

The 2nd Respondent, who is the Inspector General of Police, purporting to act in persuance of the order of 2.11.82 caused his subordinate officers to seal the editorial office, the composing section and the printing-press in whch the "Aththa" was printed, situated at No. 91, Cotta Road, Colombo 8 and also seized copies of the first edition of the "Aththa" of 3.11.82 which were awaiting despatch.

Emergency Regulation 14(3) is in these terms :—

> "(3) If a competent authority is of opinion that there is or has been or is likely to be in any newspaper, publication of matter which is, in his opinion, calculated to be prejudicial to the interests of national security of the preservation of public order of the maintenance of supplies and services essential to the life of the community or matter inciting or encouraging persons to mutiny, riot or civil commotion, he may—
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> (a) by order direct that no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of such newspaper for such period as may be specified in the order, and that the printing-press in which such newspaper was printed shall, for such period as is specified in the order, not be used for any purpose whatsoever or for any such purpose as is specified in the order, and authorize any person specified therein to take such steps (including the taking possession of any printing-press with respect to which the order is made or of any premises in which it is contained or of any part of such printing-press or premises) as appear to the person so authorized to be necessary for securing compliance with the order; or

(b) take such measures or give such directions or make such order as is provided for in paragraphs (1) and (2) of this regulation, in respect of such newspaper".

The order made by the 1st Respondent on 20.11.82 and which was the order in force when the present application was made is as follows :—

"By virtue of the powers vested in me by Regulation 14(3) of the Emergency (Miscellaneous Provisions & Powers) Regulations No. 3 of 1982, I , Don John Francis Douglas Liyanage, Secretary to the Ministry of State and Competent Authority appointed for the purpose of Regulation 14, being of opinion that there has been published in the "Aththa" newspaper matter which in my opinion is calculated to be prejudicial to the interests of national security, the preservation of public order, the maintenance of supplies and services essential to the life of the community, and matter inciting and encouraging persons to mutiny, riot or civil commotion, do by this order direct that;

(a) no person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the said newspaper during the continuance in force of this order; and

(b) that the printing-press in which the said newspaper is printed shall, during the continuance in force of this order, not be used for any purpose whatsoever.

I also hereby authorise the Inspector General of Police to take possession of such printing-press and of any premises in which such printing-press or any part thereof is contained and take such other steps as appear to him to be necessary for securing compliance with this order."

The Petitioners to this application, who have invoked the jurisdiction of this Court under Article 126 of the Constitution, are the editor, publisher and proprietor of the "Aththa" and the

proprietors of the "Mahajana Press". They complain that as a result of the orders made by the 1st Respondent, which have been carried out by the 2nd Respondent, the fundamental right of the freedom of speech and expression, including publication, guaranteed by Article 14(1)(a) and of the freedom to engage themselves in any lawful occupation, profession, trade, business or enterprise guaranteed by Article 14(1)(g) have been violated. They aver that the said orders are unlawful and made *mala fide* in abuse of the powers conferred by Regulations 14(3) not for a legal purpose, but for an ulterior purpose, and are void *ab initio* and a nullity. They pray for a declaration that the orders of the 1st Respondent are null and void and/or in contravention of the provisions of the Constitution, and that the acts of the 2nd respondent and his subordinate officers are also in contravention of the Constitution. They ask for a direction that the offices of the "Aththa" and the "Mahajana Press" be handed over to them, and they also ask for damages by way of compensation for loss of business suffered by them.

In support of the allegation of *mala fides* the Petitioners aver that the major newspaper which supported and campaigned for the S.L.F.P. Presidential candidate Mr. Kobbekaduwa was the "Aththa", and the manner in which such support was extended is fully set out in paragraphs 14 to 23 of the Petitioners' affidavit. It was never expected, according to the Petitioners, that the Emergency Regulations would be utilised for the purpose of investigating alleged offences committed by the supporters of Mr. Kobbekaduwa during the Presidential election and anyone who does this would be guilty of abuse of power which the "Aththa" would have taken up in its columns if it was not closed down. One result, according to petitioners, of this abuse of power is that a large number of active workers of the S.L.F.P. has been detained under Emergency Regulations and thereby prevented from participating in the referendum campaign.

On 27.10.82 the President announced to the Cabinet of Ministers that, instead of a Parliamentary general election, he proposed to extend the life of the present Parliament by resort to a referendum for a further period of six years from August 1983.

This proposal, according to the Petitioners, was considered by the "Aththa" and it was decided to carry on as vigorous a campaign as it did during the Presidential election in respect of the Referendum and urge voters to vote against the extension of the life of Parliament. It also decided to publicise in its papers foreign as well as local criticisms of this proposal. They were among others, criticisms levelled against the proposal by the Civil Rights Movement and three Indian newspapers, which criticisms are more fully set out in paras 34 to 49 of the Petitioners' affidavit.

The proprietors of the "Mahajana press" who are the 4th and 5th Petitioners complain that their business has suffered as a result of the sealing of the press because besides printing the "Aththa" they used to do in addition, job work like the printing of books, periodicals, pamphlets, notices and handbills. Accordingly persons opposed to the referendum have not been able to get notices of meetings or leaflets printed putting forward their views in order to carry on propaganda against the referendum, and the press has been deprived of its legitimate income from this source.

The manner in which the "Aththa" could have exposed for the benefit of its readers the "fallacious" reasonings of speakers supporting the referendum on various ceremonial occasions as well as on television, had the publication of the paper not been banned, is referred to in paragraphs 56 to 60. Whilst the party in power has "unleashed" on the citizens a gigantic propaganda barrage, every attempt has been made, say the Petitioners, to thwart even the extremely modest referendum campaign that the opposition was capable of launching. The Petitioners allege in paragraphs 63 and 88 that party supporters and office bearers of the S.L.F.P. have been detained and questioned by the C.I.D., illegal searches made and documents removed with the object of hampering the participation in the campaign against the referendum. Reference is made in paragraphs 89 to 92 of the display of placards and posters with the symbol of the lamp and a cross against it, signifying that people should vote for the referendum, and this in violation of section 50 of the

Referendum Act. Had the "Aththa" paper not been closed it would have exposed not only the unlawfulness of what has been done by supporters of the party in power, but also of the 2nd Respondent and his subordinates for the failure to carry out their duties.

By closing down the Aththa the Petitioners aver in para 103 that readers of the paper have been denied their right to know news regarding meetings, seminars and other matters relating to the referendum in which the opposition takes part, and also views and issues relating to the referendum.

The "Aththa" newspaper has at no time, according to the Petitioners, published matter calculated to be prejudicial to (a) the interest of national security, or (b) the preservation of public order, or (c) the maintenance of supplies and services essential to the life of the country. Neither has there been (d) any matter inciting persons to mutiny, riot or civil commotion. The 1st respondent could not therefore have formed the opinion which he says he did.

On these averments this Court granted the Petitioners leave to proceed and issued notice on the respondents. The 1st respondent avers that in terms of Article 15(7) of the Constitution the exercise and operation of the fundamental rights declared and recognized by Article 14 are subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing the due recognition and respect for the rights and freedoms of others or of meeting the requirements of the general welfare of a democratic society. The 1st Respondent submits that the orders sought to be impugned in these proceedings are orders validly made under Regulation 14(3) and hence not subject to review and cannot be questioned in these proceedings. As there has been a lawful restriction of the Petitioners' fundamental rights to freedom of speech and expression including publication, and of their freedom to engage in any lawful occupation, profession, trade, business or enterprise, they are not entitled to any relief under Article 126.

The Respondents state that in any event the orders made in pursuance of the Emergency Regulations, cannot be called in question or be reviewed by this Court. The 1st Respondent has, however, placed material before us appraising us of the reasons that led to the making of the orders. He states that upon a consideration of the contents of the "Aththa" newspaper published prior to 2.11.82 (random samples of articles and comments of which have been marked as 1R1 to 1R14) he was satisfied that their tenor and contents were highly provocative, inflammatory and were likely to incite sections of the community to violence and breaches of the peace and thereby imperil the maintenance of law and order in the country; and that they were in fact, according to his information fanning unrest and dissension among various sections of the community. The 1st Respondent specifically denies that the orders were made for an improper purpose or for preventing the lawful dissemination of news or comments pertaining to the Referendum.

Mr. Nadesan's principal contention has been that the orders have been made by the 1st Respondent *mala fide* for an ulterior purpose, namely, to prevent the "Aththa" newspaper from actively compaigning against the impending referendum. By sealing the paper the 1st Respondent has closed the mouth of the main newspaper which supported the parties campaigning against the referendum. The competent authority has taken the most drastic step of completely prohibiting publication whereas it was open to him to have taken the less drastic step of imposing a censorship by virtue of powers vested by regulation 14(1). *Mala fides* may also be inferred, according to counsel, by the denials in the affidavit of the 1st respondent of facts which were obvious. As an illustration he pointed to the averment in the petitioners' affidavit that after the proclamation for the holding of the referendum was made on 15.11.82, the persons who had put up placards and posters made out of green polythene which had the imprint of a lamp (a symbol of the 'yes' vote) with a cross against it did not remove them but continued to display them in violation of the Referendum Act. The 1st respondent's reply was that he was 'unaware' of this averment, when in fact it was obvious to anybody that the averment was true and called for an admission.

Learned Counsel has addressed us on the importance in a democratic country of the freedom of speech and expression including the freedom of the press and referred us to various decisions of the Supreme Courts of the United States and of India, as well as to the written submissions made by Counsel on behalf of Mr. J. R. Jayewardene when he was Leader of the Opposition at the time when the Press Council Bill came up for consideration before the Constitutional Court on 2.2.73.

Reference has also been made to the wording of the orders made by the 1st Respondent. Counsel says that the competent authority has in the orders merely copied out all the grounds stipulated in Regulation 14(3). It is therefore apparent that he has not applied his mind in the matter of the prohibition of the publication of the newspaper. He has referred us to the case of *Jaggannath Misra v. The State of Orissa* [1] where in an order of detention made under Re. 30(1)(b) of the Defence of Indian Rules, six out of a possible seven grounds on which a citizen could be detained were mentioned, whereas in the affidavit of the Minister only two of such grounds were mentioned. Wanchoo, J. in releasing the detainee referred to the casualness with which the order had been made in these terms :—"In these circumstances there can be little doubt that the authority concerned did not apply its mind properly before the order in question was passed in the present case. Such discrepancy between the grounds mentioned in the order and the grounds stated in the affidavit of the authority concerned can only show an amount of casualness in passing the order of detention ..... This casualness also shows that the mind of the authority concerned was really not applied to the question of the detention of the petitioner in the present case" **at 1142.** In the instant case, however, there is no such serious discrepancy between the grounds stated in the order and the grounds specified in the affidavit of the 1st respondent, and it cannot therefore be said that the mind of the competent authority had not been applied to the orders of closure before they were made. In any event, it cannot be inferred that the competent authority had not brought his mind to bear on the question he had to decide from the mere fact that he had copied all the grounds stated in the Regulations.

The learned Deputy Solicitor General submits that the only ground on which an order of the 1st Respondent can be vitiated is that it has been made in bad faith. The test of the validity of an order, in his contention, is not whether the Court considers it to be reasonable, or whether a reasonable man considers it to be reasonable, but the only test is "has there been bad faith ?" He submits that bad faith has not been established even on a *prima facie* case. If an order is manifestly absurd or perverse or is manifestly unreasonable then it could be said that the order has been made *mala fide*. But such circumstances are totally lacking in this case, and in order to demonstrate the competent authority's *bona fides* he has taken us through the publications marked 1R1 to 1R14 which are issues of the "Aththa" published between 17.9.82 and 2.11.82. There was ample justification, in his submission, for the orders made by the 1st respondent which orders were made solely because the publications produced were, in the opinion of the competent authority, calculated to be prejudicial to the preservation of public order and calculated also to incite persons to riot or civil commotion or to breaches of the peace. Apart from directly inciting people to violence the articles could have provoked the supporters of the ruling party which could lead to public disorder and therefore the publications would fall within the ambit of the Regulations.

I shall deal with the several questions of law before summarising the material on whch the competent authority says he formed his opinion.

The finality clause. Section 8 of the Public Security Ordinance (Cap. 40) ordains that no emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any Court. The effect of such a finality clause has best been stated as follows :— "The Courts have made it a rule that such clauses cannot hamper the operation of judicial control ..... there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the Courts. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will.

'Finality is a good thing but justice is a better' quoting Lord Atkin in *Ras Behari Lal v. King Emperor* at 361"2. **Wade, Administrative Law (4th Ed) 566.** I am of the view that the above section 8 does not prevent the Petitioners from obtaining relief, if they are entitled to any.

The freedom of expression —Article 14(1) of the Constitution provides that every citizen is entitled to —

(a) the freedom of speech and expression, inlcuding publication ;
.....

But there are restrictions placed on the freedom of speech and expression, and they are contained in Articles 15(2) and 15(7). This freedom is subject to such restrictions as may be prescribed by law in the interests or racial and religious harmony, or in relation to parliamentary privilege, contempt of court, defamation, incitement to an offence, national security, public order and the protection of public health or morality, or for the purpose of securing the due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society. "Law" in this context includes regulations made under the Public Security Ordinance. It will be seen that these restrictions are much wider than any restrictions placed on the freedom of speech and expression either in the American Constitution or in the Indian Constitution. In the Constitution of the United States the 1st amendment, which provides that "Congress shall make no law .....abridging the freedom of speech or of the press", does not make any permissible constitutional restrictions. But Judges have worked out reasonable restrictions; for example, that the restriction of this freedom was justified only if there was "a clear and present danger" or on a "balancing of the competing interests" between free speech and the needs of society. Whether one applies the "clear and present danger" test or the "balancing of interests" test the extent of the freedom will depend on the philosophy of the Judges.

In India, before the first amendment to the Constitution was effected in 1951, no restriction on the freedom of speech and

expression guaranteed by Article 19(1)(a) could have been placed on the ground that such restriction was necessary in the interest of "public order". See *Romesh Thapar vs. State of Madras.*[3] Soon after that case the restriction clause 19(2) was amended to read as follows :—

> "Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law in-so-far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to offence".

As restrictions may be placed on the freedom of expression "in the interests of pubilc order" both in India and in Sri Lanka it would be relevant to examine the interpretation placed on this phrase by the Indian Supreme Court. In *Virendra v. State of Punjab*[4] the Punjab legislature enacted a special Press Act under which the state or any other authority on its behalf could take steps to prevent acts which were prejudicial to communal harmony or likely to effect public order, as a result of the partition of the State on a linguistic and communal basis which led to a great deal of tension between Hindus & Sikhs. Two newspapers were prohibited from publising anything dealing with the 'Save Hindi Agitation' and the editors were prohibited from bringing any issue of the newspapers which carried any news or views on this subject. The Court, while conceding that the right of freedom of speech and expression carried with it the right to propagate and circulate ones views, went on to add that in their view the social interest had priority over what was considered to be an individual's right of freedom of expression. Observed Das C. J. "The expression' in the interest of' makes the ambit of the protection very wide, for a law may not have been designed to directly maintain the public order or to directly protect the general public against any particular evil, and yet it may have been enacted 'in the interests of' the public order or the general public as the case may be". **at 899.**

A criticism of this decision is that the Supreme Court appears to have drawn a nexus between reasonable restriction and public order. However, in the subsequent case of *The Suptd: Central Prisons v. Dr. Lohia*[5] Subba Rao J. thought that the distinction between the phrases "in the interest of public order" and "for the maintenance of public order" does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act. Dealing with the expression "public order" he said that it has a very wide connotation. Order is the basis of any organised society. It implies the orderly state of society or community on which citizens can peacefully pursue their normal activities of life". at 636. He went on further : "Public order is equated with public peace and safety .... All the grounds mentioned in Article 19(2) can be brought under the general head "public order" in its most comprehensive sense. But the juxtaposition of the different grounds indicate that though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. Public order is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that public order is synonymous with public peace, safety and tranquillity" at 639.

Mr. Nadesan has drawn our attention to the subsequent decision of the Supreme Court of India in the case of *Ram Manohar Lohia v. The State of Bihar*[6] where a distinction has been drawn between an order for detention made for the purpose of maintenance of public order, and an order made for the maintenance of law and order. The Court took the view that by "maintenance of public order" is meant the prevention of disorder of a grave nature, a disorder which the authorities think is necessary to prevent in view of the emergent situation; while "maintenance of law and order" may not have been used in the sense of prevention of disorder of a grave nature. The expression may mean prevention of disorder of comparatively lesser gravity and/or of local significance only. Hidayatullah J. underlined the difference by taking the example of three concentric circles in which "law and order represents the largest circles, within which is the next circle representing public order, and the smallest circle represents security of the State. It is then easy to see that an act may affect law and order but not public order, just as an act may alter public order but not security of the State" at page 758 para 52. It is the contention of the Counsel that the phrase "preservation of public order" in our Emergency Regulations

ought to be interpreted in the wider sense, as meaning the prevention of disorder of a grave nature, rather than to disorders of a trivial nature such as petty breaches of the peace or tension and dissension between rival parties particularly after a political election, which do not lead to public disorder.

The definition of "public order" was given in the two cases referred to above under different circumstances, and in the interpretation of two different Statutes, namely Article 19(2) of the Constitution (after its 1st amendment in 1951) and Rule 30(1)(b) of the Defence of Indian Rules (1962). In the context of our Emergency Regulations, however, it is my view that the phrase "for the preservation of public order" ought to be interpreted having regard to section 5 of the Public Security Ordinance, which empowers the President to promulgate Emergency Regulations as appear to him to be necessary or expedient in the interest of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion. In this context it is my view that the phrase "for the preservation of public order" ought to be interpreted to mean "for the purpose of preventing disorder". Islandwide breaches of the peace can lead to disorder by the disturbance of peace and tranquillity. It is in that sense that the term "public order" has been defined in *J. A. Yasapala v. Ranil Wickramasinghe & Others*[7] which was a case which revolved around the interpretation of section 5 of the Public Security Ordinance, and I would adopt that interpretation for the purpose of Regulation 14(3) as well.

The subjective formulation of powers. Regulation 14(3) is formulated in terms which say that "if a competent authority is of opinion that there is or has been or is likely to be in any newspaper, publication of matter which is, in his opinion calculated to be prejudicial to ...., he may by order direct etc:" "this is a commonplace technique in emergency legislation, and it is to be expected that the Courts will show due deference, not only to the opinion of the Executive that a state of emergency exists but also to the opinion of the Executive that particular facts exist calling for the exercise of detailed emergency powers granted by statute": but "an ostensible unfettered grant of discretionary power does not necessrily stultify judicial review" **de Smith, Judicial Review of Administrative Action (4th Ed) 362.**

The Indian Supreme Court, in the case of *Rameshwar Shaw v. District Magistrate, Burdwan*[8] considered the approach to such formulation of powers in a case of detention under section 3(1)(a) of the Preventive Detention Act (1950) and the attitude of the Court as may be gathered from the judgment of Gajendragadkar, J. may be summarised as follows :—

> (a) The reasonableness of the satisfaction of the detaining authority cannot be questioned in a court of law; the adequacy of the material on which the said satisfaction purports to rest also cannot be examined in a court of law.
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> (b) Though the satisfaction of the detaining authority is his subjective satisfaction, cases may arise where the detainee may challenge the validity of his detention on the ground of *mala fides* and in support of the said plea urge that along with other facts which show *mala fides,* the court may also consider his grievance that the grounds served on him cannot possibly or rationally support the conclusion drawn against him by the detaining authority. It is only in this incidental manner and in support of his plea of *mala fides* that this question can become justiciable.
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> (c) The past conduct or antecedent history of the person on which the authority purports to act, should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary.

In Sri Lanka the test to be applied when an order for detention is made under Emergency Regulations formulated in subjective terms was considered in the case of *Hirdaramani v. Ratnavale*[9]. The Emergency Regulation under which the detainee was detained read as follows :—

> "Where the Permanent Secretary is of opinion with respect to any person, that with a view to preventing such person (a) from acting in any manner prejudicial to the public safety, or to the maintenance of public order, or to the maintenance of essential services; or
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> (b) from acting in any manner contrary to any of the provisons of paragraphs 2(a) or (b) of Regulation 38 or Regulation 24, it is necessary so to do, the Permanent Secretary

may make order that such person be taken into custody and detained in custody".

The detention order recited that the Permanent Secretary "being of opinion that with a view to preventing (the detainee) from acting in any manner prejudicial to the public safety and to the maintenance of public order, it is necessary so to do, do hereby order that such person be taken into custody and detained in custody".

The wife of the detainee sought to have him released in habeas corpus proceedings on the ground that the detainee had been taken into custody not with a view to preventing him from acting in any manner prejudicial to public safety and/or to the maintenance of public order, but for the purpose of assisting and/or facilitating the investigation by the C.I.D. into certain alleged offences and contraventions under the Exchange Control Act.

The Permanent Secretary filed an affidavit in which he referred to the widespread armed insurrection which commenced in April 1971, and stated *inter alia,* that he was satisfied, after considering certain material placed before him by the Police, that the detainee had taken part in cetain foreign exchange smuggling transactions which were under investigation, and that he should be prevented in future from engaging in similar transactions, which directly or indirectly helped and financed the insurgent movement : H. N. G. Fernando, C.J., in refusing the application, considered the decisions in *Liversidge v. Anderson*[10], *Greene v. Secretary of States or Home Affairs*[11], and discerned three different situations when powers are granted in subjective terms :—

> (1) where a power cannot be exercised **unless certain physical facts exist.** In such a case if the validity of the exercise of the power is disputed, then the executive must prove that the requisite facts actually existed.
>
> (2) where a power may be exercised by some authority **if he is satisfied of the existence of certain facts.** In such a case a court can inquire into the circumstances, in order to ascertain

whether it was reasonable for the authrority to be satisfied of the existence of the facts.

(3) Where, as in the case before him, the power can be exercised **merely because of an opinion** that it is necessary to exercise it ; in such a case the mere production of the instrument whereby the power is exercised concludes the matter, unless good faith is negative. (The underlining is mine).

"In regard to this third category, it is no doubt true that the existence of a particular state of mind is a question of fact, in the sense that it is not a question of law ; but the ascertainment of the existence of a state of mind surely involves considerations and difficulties which do not enter into the ascertainment of the existence of purely physical facts". at p 81.

Dealing with the burden of proof the Chief Justice observed —"It is *prima facie* shown that an official who makes an executive order had an antecedent motive against the person affected by the order, or had an antecedent bias in favour of a person benefited by the order, then I think the Court may call upon the official to disprove the existence of bias. But even if such antecedent bias was to be shown in the circumstances of the instant case, the special feature of the Permanent Secretary's inability to disclose facts leading to the formation of his opinion might well be a reason why a proper investigation cannot be held. There may be instances in which the truth of a reason or an opinion stated by an official in an executive order can be disproved by statements of the official containing some different statements or opinions or tending to show that the stated reason or opinion stated in an executive order is manifestly absurd or perverse" at p. 79.

The reason for the refusal of the application in *Hirdaramani's case* (above) was that although only an **inference** that the detainee was taken into custody for the purpose of investigation either into foreign exchange violations or into the detainee's

involvement in the insurrection readily arose upon the facts which had been established, yet the petitioner failed to establish a *prima facie case* against the good faith of the Permanent Secretary, and therefore the onus did not shift to the Permanent Secretary to satisfy the Court of his good faith.

But the following passages in the judgments seem to indicate that the court was prepared to "lift the veil" to ascertain the true reasons for the detention. G.P.A. Silva, J., for example, states that when "a subject complains to court of an order restraining his liberty, a Court is obliged not merely to take a look at the face of the order, but to go behind it and to satisfy itself that it has been validly made" at p.106. Likewise Samarawickrema, J. after stating that the Court cannot substitute its own opinion for that of the Permanent Secretary, says this :— "It is, however, open to a party challenging a detention order to show, if he can do so, that the Permanent Secretary never had the opinion that it was necessary to make an order for the detention of the person named, and that the detention order was not made because he had formed an opinion as required by the regulation but for an ulterior object ..... Again if there is overwhelming ground for believing that no reasonable Permanent Secretary could form the opinion that it was necessary to make a detention order in respect of the person affected, it might show that the Permanent Secretary was acting in bad faith, and that the detention order was not made on the basis of the opinion required by the regulation, but for an improper purpose". **at p.112.**

In England, where the connection between the subject matter of the power to be exercised, and the purpose prescribed by Statute is expressed to be determinable by the opinion of a competent authority, the earlier view was that all that the Court could do was to see that the power was exercised fully within the four corners of the power granted and to see that those powers were exercised in good faith. Apart from that, the Courts had no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction — *Carltona Ltd.v. Commissioner of Works.*[12] The decision of the House of Lords in *Padfield v. Minister of Agriculture, Fisheries & Food*[13] is an

important landmark in the change in the attitude of the Courts in this area of administrative law. The importance of the House of Lords' decision was underlined by Lord Denning M.R. in the case of *Breen v. Amalgamated Engineering Union*[14] when he said "the discretion of a statutory body is never unfettered. It is a discretion to be exercised according to law. That means at least this : the statutory body must be guided by relevant considerations, and not by irrelevant. If its decision is influenced by irrelevent considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless the decision will be set aside. That is established by *Padfield v. Minister of Agriculture, Fisheries and Food* which is a landmark in modern administrative law" at 190.

Another feature of recent decisions has been the willingness of the Courts to assert their power to scrutinise the factual bases upon which discretionary powers have been exercised. **de Smith 294.** A good example is afforded by *Secretary of State v. Tameside*[15] where the subjective formulation was in these terms :—"If the Secretary of State is satisfied either on complaint by any person or otherwise, that any educational authority .... have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under the Act, he may ..... give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient". In the Court of Appeal Lord Denning M.B. stated that "the decision to which he (the Secretary of State) comes must be reasonable in this sense, that it is, or can be supported with good reasons, or at any rate be a decision which a reasonable person might reasonably reach". at 671.

In the House of Lords, Lord Wilberforce said, in reference to powers formulated in subjective terms that "if a judgment requires, before it can be made, the existence of facts, then, although the evaluation of these facts, is for the Secretary of State alone, the Court must inquire whether the facts exist, and have been taken into account, whether the judgment has not been made on other facts which ought not to have been taken into

account. If these requirements are not met, then the exercise of the judgment, however *bona fide* it may be, becomes capable of challenge" at 681.

Even if we are to accept the position that the power exercised by the competent authority in the instant case is one exercised merely because of an opinion formed by him, and thus falling within the third category of situations enumerated by the Chief Justice in **Hirdaramani's Case** (above) it does not mean that the order of the competent authority concludes the matter, even if good faith is established. It is open to the party who has been deprived of his liberty to ask the Court to go behind the order in order to satisfy itself that the order has been validly made or to establish that there are overwhelming grounds for believing that no reasonable competent authority could form the opinion that it was necessary to make the orders (for the prohibition of the publication or for the closure of the press) for the purpose of the preservation of public order etc.

It also seems to me that there is a significant difference between the power to make an order for the detention of a person under Emergency Regulation 17(which is in the same terms as emergency regulation 18(1) under which Hirdramani was detained) and the power to make an order prohibiting the printing or publication or distribution of a newspaper under regulation 14(3). In the case of a detention order, the Secretary is empowered to make one with respect to any person, if he is of opinion that with a view to preventing such person from acting in a certain manner, it is necessary so to do. The order is one made to prevent a person from acting and it is one made merely on the opinion of the Secretary that unless he is so detained he would act in that manner. But in the case of the control by total prohibition of publications the competent authority has to be of opinion that there is, or has been or is likely to be matter which, in his opinion calculated to be prejudicial to the interest of national security etc. Where the opinion formed is that a publication is **likely to be** calculated to be prejudicial, then the opinion is a subjective opinion, which is similar to the opinion that has to be formed before a detention order is made. But

where the opinion is one that is formed on something that has **already been** published or is being published, the opinion is in my view, not a purely subjective opinion. The opinion can be formed only if he is satisfied of the existence of certain facts, namely, the existence of publications which are calculated to be prejudicial to the interests of national security or the preservation of public order etc. In such an event the competent authority's power can be exercised only if he is satisfied of the existence of those facts; the power he exercised seems to fall, not within the third, but within the second of the situations enumerated by the Chief Justice in **Hirdramani's case.** And in such a situation a court can inquire into the circumstances, not in order to substitute its own opinion for that of the authority, but in order to ascertain whether the authority was reasonable in his opinion that the publications were calculated to be so prejudicial. In the words of Lord Denning M. R. in the **Tameside case** (above) the Court inquiry is directed towards a determination as to whether the opinion is one which "a reasonable person may reasonably reach'. Although in such a determination the Court does not substitute its opinion for that of the authority, and the evaluation of the facts is for the authority, the Court can inquire whether the facts exist, and if the facts do not exist the exercise of the judgment, however *bona fide* it may be, becomes capable of challenge; the House of Lords has so held in **Padfield & Tameside**(above).

I may now summarise my conclusions on the several questions of law that arise for determination —

(a) The finality clause in section 8 of the Public Security Ordinance does not preclude the Court from examining and ruling upon the validity of an order made under any Emergency Regulation, when such order is challenged.

(b) Emergency Regulation 14(3) is framed not entirely in subjective terms. The competent authority is empowered to make an order under that Regulation only if he is satisfied of the existence of certain facts. The Court can inquire whether it was reasonable for the authority to be satisfied of the existence of those facts.

(c) The evaluation of those facts is for the competent authority alone. The Court will not substitute its opinion for that of the competent authority.

(d) The phrase "preservation of public order" in this Regulation means the prevention of disorder, or the maintenance of peace and tranquility.

(e) The freedom of expression including the freedom of the press, is subject to such restrictions as are prescribed by the Emergency Regulations.

I shall now consider whether, on the affidavits of the competent authority and the documents annexed thereto, in the form of certain publications of the "Aththa" newspaper, facts existed by reason of which the competent authority could have formed the opinion that there have been news or views which, in the opinion of a reasonable person were calculated to be prejudicial to the interests of national security, or the preservation of public order, or the maintenance of supplies and services essential to the life of the community, or matter inciting or encouraging persons to mutiny, riot or civil commotion. In this connection one has to bear in mind the requirement that there has to be a reasonable nexus between the publication and the mischief which the order of the competent authority is aimed at curbing.

While I may say straightaway that none of the publications considered by the competent authority in forming his opinion were either prejudicial to the interests of national security or prejudicial to the maintenance of supplies and services essential to the life of the community, we are left with the question as to whether the competent authority was reasonable in the opinion he formed that the publications, considered as a whole, were calculated to be prejudicial to the preservation of public order or were incitement or encouragement to persons to riot or cause civil commotion.

It is self evident that in a democratic society, an essential ingredient in the composition that makes or should make for an equitable system is that of public opinion. Criticism plays a vital and necessary role in safeguarding both the system as well as the Rule of Law from being subverted. Indeed, in a true democracy the right of even the humblest citizen to publicly point out any type of misconduct or misrule or corruption goes to the core of what is accepted as a democratic society. This is the cornerstone of freedom. In a word, the principle that the elected representatives in a democracy are not immune from any form of comment or criticism for improper, illegal or questionable conduct that harms the state or society or the individual, is fundamental. No one is above the law; it is the Rule of Law that is supreme.

At the other end of the scale is the need to maintain and uphold the sanctity and force of the same law which, while permitting the right to publish, criticise and comment, also must ensure that such publications or criticisms do not exceed the limits of fairness, and above all, become a vehicle (worse than what it may seek to condemn) that seeks to upset the very Rule of Law under which it has the full freedom to inform the public and seek to mould its opinions.

The checks and balances against official abuse and misconduct that are enshrined in the freedom of publication is a cherished right in any free society. Likewise it is incumbent on the publisher to carry out his responsibilities in such a way that it does not invite censure and criticism in turn. In a word, there are essential limits on the right to publish. The limitations are greater when a nation is at war or under a state of emergency. The need for a state of emergency is a matter entirely for the Executive.

It would be obvious that criticism which invites the public to disregard the Rule of Law itself is dangerous incitement to act outside the Law, even in normal times. This seeks to subvert the very foundation of a society whose *raison d'etre* and purpose are not based on the whims of any special group, but on the interests of the whole society within the strict confines of the framework of the law. And this interest of the whole community

that forms our society, the Courts must uphold at all costs, whatever the source of abuse or improper conduct, without fear or favour.

The documentry evidence on which the competent authority has formed his opinion.

IR1 is a copy of the 'Aththa' dated 1.10.82. It contains six photographs of events during the strike of June 1980 in the course of which a trade union leader by the name of Somapala met with his death. There are pictures of women wailing over his dead body. According to the respondents these pictures and the captions relating to them are calculated to show that because the workers demanded a wage increase of Rs.10/- per day, and went on strike when the request was turned down, they were assaulted by U.N.P. thugs. These pictures form part of a series named the "Bonaparte" series in all of which there is a caricature of the President dressed in the uniform of a fascist dictator, carrying a pistol in hand, followed by a 'thug' clad in a sarong tucked up. The title given to this is බොනපාට් (අංක 7) මිනීමරුවා The Deputy Solicitor General contends that these words "Bonaparte (No.7) Murderer" are calculated to remind the reader that that the President was responsible for the assaults on the strikers, and for the murder of Somapala.

IR2 is a publication of the same paper dated 2.10.82 headed "Canine Assembly". The meeting of the Cabinet is likened to a meeting of dogs. The D.S.G. invites us to interpret this publication as being one calculated to ridicule the proceedings of the Cabinet by likening it to an assembly of dogs. The article is scattered with insulting references to the President and Ministers.

IR3 is a letter to the editor published on 10.10.82 in a column titled "election field". There is a reference to a threat to burn down houses including that of the writer, who intends meeting the challenge because on his side too there are thugs. It predicts that after the 20th (election day) the U.N.Pers will be thrashed by the U.N.Pers themselves.

IR4 is an open letter addressed to the President and published in the "Aththa" of 9.10.82. The President is brought to ridicule. He is asked to fly over Europe without clothes so that the spectators on the ground will, fortunately for him, mistake him for Wijeweera by reason of the "bell" symbol they will see on him.

IR5 is an editorial dated 13.10.82 criticising the President for the insults hurled at the Sinhalese Kings. The insulting reference is this "Do not come to the level of a dog by simply trying to attain kingship".

IR6 is a publication dated 19.10.82 which contains a number of cartoons in which the President is shown as the head of a corrupt administration. The last of the captions depicts an invitation by several corrupt persons to the President to rule on behalf of them and promising that they would in turn commit corrupt practices on behalf of him.

IR7 is an editorial dated 17.10.82 referring to the President as a අමිචුවා (meaning "villain" according to Respondents, but "adharmishta' according to Petitioners) who has no mercy or kindness towards human beings whom he rules, and accusing him of being a party to corruption because he has turned a blind eye on corruption. The President is described as a person who has no shame and not fit enough to have clothes on.

IR8 is an account of a mock trial of the President held by the Yama Raja (King of Hell) Bonaparte is dragged before the King and is accused of having committed corrupt practices in Sri Lanka. There is a reference to him as a narapanuwa (human worm) and he is told that if he has committed even one out of the hundred acts alleged against him he ought to be put in a barrel of lodiya (boiling water) and tortured by making him climb the katuembul tree (full of thorns). During the course of the trial he was told that his balu (dogly) government had destroyed the holy Island blessed by the Lord Buddha. He is found guilty and told that he has been a traitor to his country. New methods of punishment would be devised to make a hell for him separately.

1R9 consists of a number of poems published in the issue of 20.10.82 sent in by several readers of the paper, predicting the defeat of the President and the victory of Kobbekaduwa. The President is described in one of the poems as a villain who was attempting to create a situation where people could not even breathe. The fires of the masses were raging ablaze to destroy him with those flames. "No harm (you) bring even a broomstick, you can rake the fire with it".

1R10 is an editorial of 30.10.82 which is pure criticism and which does not exceed the limits permitted by law.

1R11 is a cartoon published on 27.10.82 in which the President is depicted as encouraging an armed thug to violence. In the background is a house on fire with four people lying prostrate in four directions.

1R12 is an editorial of 2.11.82 which states that there are a series of reports of incidents where U. N. P. thugs were committing murder, arson, assault and even dashing children to death.

1R13 is an editorial of 1.11.82 which does not exceed the bounds of legitimate criticism.

We come now to **1R14** which is a set of documents, marked by the D.S.G. at a later stage as publications, also, relied upon by the competent authority in forming his opinion.

1R14A is a flashback to the events at the Getambe temple depicted in eight photographs, the first of which portrays the President carrying a casket of Buddha relics on his head. The caption reads "All the anti religious activities were directed whilst carrying this casket of relics on his head", thus inviting the readers to infer that it was the President who was responsible for a Buddhist monk being driven away from the temple and for the erection of a barb wire fence surrounding the temple.

1R14B is a flashback to the burning of some buildings in Jaffna. The photographs and caption are an invitation to the reader to infer that "Bonaparte" was responsible for the vandalism.

1R14D is the front cover of a booklet "Nuthana Devadatha" compiled by one Malalgoda and published in the "Aththa" on 23.9.82. It shows the President in the uniform of a dictator attempting to destroy a Buddha statue enclosed by barbwire.

1R14F is a set of nine poems quoted from the same booklet. The eighth verse is, in my view, an incitement to violence, for it says—

> "without being afraid of any law
> let all of us unite and be united like hooks of a golden chain
> And set fire to the despicable government of these fellows"

1R14E is a publication of 23.9.82 of the Bonaparte series depicting in six photographs the damage caused to buildings after the general election of 1977 and claiming that they were the work of U.N.P. thugs, the hunting hounds of Bonaparte.

1R14J is a publication of the Bonaparte series in the Aththa of 10.10.82. It contains photographs of the disruption of the meeting of the Bauddha Bala Mandalaya held at the Buddhist Congress Hall. The hitting and kicking of Buddhist Priests, the pelting of stones and the breaking of windows, and the dragging by his legs of Ediriweera Sarathchandra, are described as the work of the inhumane rule of Bonaparte.

1R14K is a cartoon in the paper of 10.10.82 depicting the President exhorting a member of the J.S.S. (a U.N.P. trade union) who is carcicatured as a thug, to do his dirty work notwithstanding a report that the police were on the look out for thugs.

Two submissions were made by Mr. Nadesan relating to all these documents.

(1) That there ought to be an affidavit of the competent authority averring what he understood by these cartoons, editorials, mock trials etc; and that it is not for this Court to draw its conclusions from them. The answer to that is that most of the documents speak for themselves, and no further affidavit is necessary apart from the averments in two affidavits filed wherein the competent authority has said that "the tenor and contents of some of the articles and comments published prior to the date of the Presidential election were highly provocative, inflammatory, and likely to incite persons to violence and breaches of the peace, and thereby imperil the maintenance of law and order".

(2) That the publications made after the declaration of Emergency, namely 1R10, 1R11, 1R12, & 1R13, only constitute legitimate criticism. The competent authority ought to have formed his opinion of them alone and not on what was published before the declaration of emergency. The answer to that is that regulation 14(3) is not restricted to an opinion formed only on publications made after the declaration; it contemplates publications that had been made at a time prior to the declaration as well.

The question is whether on this material the competent authority could reasonably have formed the opinion which he formed, namely that these publications were calculated to be prejudicial to the preservation of public order or were likely to incite and encourage persons to violence and breaches of the peace. Some of them, in my view, could have incited persons to breaches of the peace. Some others are highly defamatory, while still others are scurrilous and in extremely bad language. Taking also into account the history of escalating post election violence in this country, and the mounting tension prior to the Referendum I am of the view that the decision of the Competent Authority was not unreasonable, for the publications taken as a whole were certainly calculated to be prejudicial to the preservation of public order. The orders P13 and P14 prohibiting the publication of the "Aththa" newspaper were orders validly made under powers vested in the 1st respondent by Regulation

14(3). There has, therefore, been no violation of the fundamental right to the freedom of expression guaranteed by Article 14(1) (a) of the Constitution.

The question was raised as to whether the order for the sealing of the "Mahajana Press" was necessary, because besides the publication of the "Aththa" the Press was engaged in the printing of other publications. The learned D.S.G. drew our attention to the address of the "Mahajana Press" which is 91, Cotta Road, Colombo 8. The address of the 3rd respondent, who is the proprietor of the "Aththa" is also the same 91, Cotta Road, Colombo 8. The inference is therefore irresistable that the principal work done by the "Mahajana Press" was the printing of the "Aththa" newspaper, which had in its employment no less than 55 employees whose monthly wages added up to Rs. 46,000/-. The other work undertaken by the Press would have been trivial, compared to the work involved in the printing of this newspaper. The logical consequence of the order prohibiting the publication of the newspaper was the sealing of the press. The order for the sealing of the press was therefore, in my view, an order validly made. There has been no violation of the fundamental right to the freedom of engaging in ones lawful occupation, trade business or enterprise guaranteed by Article 14(1) (g).

This application is accordingly refused, without costs.

RATWATEE, J. — I agree.
COLIN - THOME, J. — I agree.
ABDUL CADER, J. — I agree.
RODRIGO, J. — I agree.

RODRIGO, J.

There was an island-wide poll on October 20, 1982 for the election of the President of the Republic of Sri Lanka for a new term. The incumbent President was re-elected with the results of the Poll being announced on October 21. But a state of Emergency was declared on October 20 after the closure of the poll to be effective throughout the island. This declaration received unanimous approval of the presidential candidates, all political parties and the Parliament. It was said in the Parliament that post-election violence, though sporadic had occurred island-wide earlier and the declaration of the Emergency was both opportune and pre-emptive. The declaration of Emergency brought out Emergency Regulations. One Regulation — Reg. 14 (3) of Emergency Regulations No. 3 of 82 empowered the Competent Authority to make order prohibiting the printing and publication of any newspaper wherein there has been or there is or there is likely to be any matter published, which, in his opinion, is calculated to be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies of services essential to the life of the community or matter inciting or encouraging persons to mutiny, riot or civil commotion and, in addition make order in such terms as to effectively close the printing-press concerned. In the purported exercise of this power the Competent Authority had made an order on November 2, prohibiting the publication of a Sinhalese newspaper tabloid called "The Aththa" and to close the printing-press that was printing it at the time. The declaration of Emergency was renewed on November 20 and the order made on November 2 was also renewed with a modification in the wording of the grounds for his opinion.

Aggrieved by these two orders and more particularly by the order of November 20 the Editor of the "Aththa" moved this Court by filing a petition for an order to annul the orders of the Competent Authority. The publisher and the proprietor of the Aththa too joined in the petition of the Editor. So did the owners of the printing-press.

It is not the case for the Petitioners that the declaration of a state of Emergency or the Emergency Regulations No. 3 of 1982 are invalid or of no force or effect in law. Regulation 14(3) itself therefore is *intra vires.* But the Petitioners say that the orders made by the Competent Authority in the purported exercise of his powers in Reg. 14 (3) are null and void in as much as he had made the orders not because he in fact held the opinion which he says in his orders he held but for a collateral purpose namely to shut out legitimate but damaging political criticism and propaganda which were anticipated from the "Aththa" newspaper against the President and the U.N.P if there was a General Election or against a victory for the President if a Referendum instead of a General Election was held.

The submission that the Competent Authority (Authority) could not have held the alleged opinion is supported with reference to the statement in the orders themselves which repeat wholesale all the conditions specified in Reg. 14(3), the existence of one or more of which will empower the Authority to make an order. Attention was also drawn to paragraphs — paras 20 and 23 — in the affidavit of the Authority wherein some situations like the maintenance of essential services and mutiny and riots mentioned in the order are omitted and new situations like unrest and dissention not found in the regulation or the order are deposed to as grounds for forming the opinion that prompted the orders.

The problem that arises at this point is what is the permissible extent of judicial review of executive orders made under Emergency Regulations. The authorities cited from our own Courts relate to detention orders that had given rise to habeas corpus applications and that too at a time when there were no entrenched justiciable fundamental rights in the Constitution unlike now. There is no authority that had been cited which relates to the sealing of a press under Emergency Regulations. So it is contended that the judgments of our Courts dealing with Emergency orders of detention have no application to the instant matter and more so because, unlike detention orders which are prompted by information which the executive normally does not

make available to Court for reasons of public security, in a matter like this, the publications in the newspaper in question that induced the opinion of the executive is not by its nature a secret and the Court can freely have a look at the publications for purposes of review. The Authority in fact has made available to us the publications or most of them that had allegedly induced his opinion. He has also deposed that he had credible information that some of the articles were in fact fanning unrest and dissention among various sections of the community without disclosing the sources of that information though his Counsel said that he was prepared to divulge them if we needed them while, on the other hand, Counsel for the Petitioners cited this averment as an instance of the Authority misdirecting himself by extraneous matters not covered by the regulations. That is to say, dissension and unrest among sections of community were not matters mentioned in the regulations. But the point is the Authority maintained that the publications are being made available without prejudice to his legal plea that the orders are not justiciable by this Court and that in any event they are made available merely to rebut a prima facie case of lack of good faith in the Competent Authority if any such arises on the petitioner's affidavit and not — he was emphatic — because there was a burden cast on him in law to establish a case for his opinion.

Before turning to authorities I must turn to the enactments and the regulations which are relevant.

No challenge is offered to the vires of the Public Security Ordinance or any provision therein or to the Emergency Regulations themselves. It follows therefore that the relevant provisions of the Public Security Ordinance (Ordinance) and the Emergency Regulations (Regulations) must be given their full effect as far as their plain words carry them. Section 8 of the Ordinance enacts that "no Emergency Regulations and no order, rule or direction given thereunder shall be called in question in any Court". Then, regulation 2(2) of Emergency Regulations No. 3 of 1982 enacts that the Interpretation Ordinance shall apply to the interpretation of any Emergency Regulation and of any orders or regulations made thereunder as it applies to the interpretation

of any Act or Ordinance or Law. The Interpretation (Amendment) Act No. 18 of 72 provides by the addition of a new Section 22 to the Ordinance that:

> "22. Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression" shall not be called in question in any court," or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal:
>
> Provided : . . . . . ."

Then by the Interpretation (Amendment) Law No. 29 of 74, Section 24 of No. 18 of 72 was repealed and the new Section 24 was substituted. This reads:

> "24(1). Nothing in any enactment, whether passed before or after the commencement of this Ordinance, shall be deemed to confer upon any court jurisdiction to grant injunctions or to make orders for specific performance against the State, a Minister or a Deputy Minister, upon any ground whatsoever.
>
> (2). No court shall upon any ground whatsoever grant any injunction or make any order against a state officer, if the effect of the granting of such injunction or the making of such order would be, whether directly or indirectly, to restrain the State, a Minister or a Deputy Minister from proceeding with, or to compel the performance by the State, a Minister or a Deputy Minister of, any matter or thing.

Before the Act No. 18 of 1972 was enacted the phrase "shall not be called in question in any Court" appearing in Acts had come up for judicial interpretation. In the *Land Commissioners v. Ladamuthu* [16] the Privy Council observed :—

> "Their Lordships consider that any question of finality in the Land Commissioners determination can only arise in regard to his exercise of individual judgment whether he should or should not acquire any land which he is authorised to acquire under subsection (1). His personal judgment can only be brought to bear upon the question as to whether or not he should acquire land that is covered by the wording of subsection (1)."

This was adopted and applied in *Perera v. People's Bank*[17] in relation to an action filed in the District Court. The Act No. 18 of 72 was also considered in this case. Since this was an appeal from the decision of the District Court how the provisions of the Act would be applied by a superior Court in proceedings initiated before it was not decided. It seems to me that the legislature was desperate in its attempt to put a brake on the practice of the Courts in reviewing orders, decisions, directions etc; of an administrative or executive authority made under enactments containing the expression "shall not be called in quesion in any Court". This is made still more evident by the enactment of the next amendment to the Interpretation Ordinance namely No. 29 of 74 which restricted every Court from granting injunctions and making orders for specific performance against executive authority if such authority were the State or a State Officer, etc; if the effect of the order was to compel specific performance of anything or any matter by a Minister or a Deputy Minister or the State. In this connection the observations of Viscount Simon, L.C. in *Nokes v. Doncaster Amalgamated Colieries Ltd.*[18] are relevant and useful.

> "Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words but where, in construing general words the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an

interpretation as would disregard fundamental principles, then, we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

There is, however, a distinction between the phrase "shall not be called in question in any Court" and the phrase "final and conclusive". Where it is the latter phrase that attaches to an order the opinion of Denning, L.J. .expressed in *Regina v. Medical Appeal Tribunal ex parte Gilmore:* [19]

> "Notwithstanding that the decision is by a statute made final, *certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record".

can well be applied. So that we find two situations with regard to the phrases "shall not be called in question in any Court" and "final and conclusive". In either event, the Courts will go behind an order to see if any antecedent question such as whether, in the case of an acquisition of a piece of land, the land falls into a category of land authorised to be acquired, has been erroneously answered or whether jurisdiction has been exceeded. But where in a situation such as that envisaged by the Act No. 18 of 72 the Court is prohibited from inquiring and exercising jurisdiction to inquire or pronouncing on any ground whatsoever upon the validity or legality of the order, decision etc, it is my view that the order of the Competent Authority as in this case, cannot be reviewed by a Court by removing the veil and going behind the order to probe matters upon which the Competent Authority formed his opinion.

When giving full effect to s.22 of the Interpretation (Amendment) Act No. 18 of 1972, the Court is not abandoning its traditional role as watch-dog of the liberty of the citizen or as custodian of the fundamental rights of the citizen enshrined in the Constitution. For,

even without these phrases and words, in enactments and rules, the Law Lords of England had refused to review orders of executive authority when such orders were made by the authority under enactments empowering them to make such orders in pursuance of an opinion without need to be satisfied as to the existence of any antecedent fact or facts as a condition for holding such opinion, notwithstanding that as in the instant case, certain matters are specified at length in the regulations which, on a closer examination, are a mere narrative of events for the guidance of the authority forming the opinion and not as grounding the jurisdiction of the authority to form such an opinion. In *Secretary of State for Education and Science v. Tameside (Metropolitan Borough Council)*[15] Lord Wilberforce said:—

> "The section is framed in a 'subjective' form - if the Secretary of State is satisfied. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment."

The phrase here is "is satisfied" as against "is of opinion". Still it was said to be framed "in subjective form"; a fortiori, the phrase "is of opinion" is subjective and does not attract an objective test. It is narrower than the phrase "is satisfied". Restrictions sought to be put on the phrase by suggestions of requirements of good faith which connotes lack of collateral purpose and dishonesty have not found favour in English cases. In *Nakkuda Ali v. Jayaratne (Controller of Textiles)* [20] Lord Radcliffe expresses himself as follows:—

> "If the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality."

The use of the word "opinion" in the Emergency Regulation in question being narrower than the phrase "is satisfied" it would appear that even a dishonest or wrong opinion is not a ground for review.

This approach may at first appear to deprive the citizen of any legal remedy. But in *Smith v. East Elloe Rural District (at 750)* [21] Viscount Simonds observed,

> "Anyone bred in the tradition of law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. It may be that the Legislature had not in mind the possibility of an order being made by a local authority in bad faith or even the possibility of an order made in good faith being mistakenly, capriciously or wantonly challenged. This is a matter of speculation. What is abundantly clear is that words are used which are wise enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology. But, it is said, let those general words be given their full scope and effect, yet they are not applicable to an order made in bad faith, but, My Lords, no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which the paragraph bars."

Then he continues:—

> "There is nothing ambiguous about the paragraph. There is no alternative construction that can be given to it; there is in fact no justification for the introduction of limiting words such as "if made in good faith", and there is less reason for doing so when those words would have the effect of depriving the express words "in any legal proceedings whatsoever" of their full meaning and content."

"An order even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead."

East Elloe case was concerned with property rights relating to a compulsory purchase of land. Not very different from the instant case, which relates not to a detention order. But where detention orders were sought to be reviewed as in *Liversidge v. Anderson* -[10] and in *Greene v. Secretary of State* -[11] the same principle was applied. Viscount Maugham in Greene's case stated:

> "It would be useless to attempt to examine the truth of the fact alleged in an order in a case where the fact relates to the personal belief of the Secretary of the State formed partly at least on grounds which he is not bound to disclose."

In the case of *Liversidge,* Viscount Maugham pointed out that Regulation 18 (b) requires the Secretary of State to have reasonable cause to believe two different things. In regard to the second thing, namely, the belief in the need for the detention of a particular person he made the following observation.

> "But then, he must at the same time also believe something very different in its nature, namely, that by reason of the first fact it is necessary to exercise "control over" the person in question. To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the order in Council would have contemplated for a moment the possibility of the action of the Secretary of the State being subject to the discussion, criticism, and control of a Judge in a Court of Law."

The cases above referred to were considered and applied in *Hirdaramani v. Ratnavel* [9] H.N.G. Fernando, C.J. *Gunasekera v. Ratnavel* [22] Alles, J. and Thamotheram, J. While G.P.A. Silva, S. P. J. and Samarawickrame, J. in the first case and Wijayatilake, J. in the second case took views different from those of the other Judges, the Chief Justice in the former case and the majority of Judges in the latter case took the view that the orders of the Competent Authority are not justiciable if they are ex facie valid, and the Court is precluded from considering "the only possible issue which can be raised when a detention order valid on the face of it is produced before the Courts namely, the issue of good faith. The Chief Justice,

however, refers in his judgment in Hirdaramani case to what he thought was a conflict of judicial opinion on this matter between the *East Elloe case* and the case of *Anisminic Ltd. v. Foreign Compensation Commission* [23]. But Alles, J. referring to this observation of the Chief Justice has said in the case of *Gunasekera* that in the *Anisminic case* the tribunal concerned had its jurisdiction prescribed and defined and it was the overstepping of that jurisdiction that constituted a successful challenge to its order. In fact the *East Elloe case* was not considered of any assistance in the *Anisminic* case by Their Lordships in deciding that case and the principle enunciated in the *East Elloe case* was not departed from.

So that even where the personal liberty of a subject was concerned as in *Hirdaramani* and *Gunasekera cases*, the view taken was that the detention orders are beyond judicial review. It must then be more so where the party aggrieved is complaining only against a prohibition to say and publish things by reason of an order under Emergency Regulations. It must be remembered that the *Hirdaramani case* was decided before the Act No. 18 of 72 and the *Gunasekera case* a few days after the said Act was enacted. But the Act had not been considered in that case either. Even without a consideration of the Amending Act 18 of 72 the judges had taken the view in the Hirdaramani and Gunasekera cases that the detention orders are beyond judicial review, how much more so has it to be the position by reason of the provisions of the Act No. 18 of 72.

It is pertinent to remind ourselves that Courts are not governing this country. Jurisdiction of the Courts themselves is a creation of legislation which the Parliament makes under an authority derived from the supremacy of the people. In Western style democracies such as Sri Lanka is, this supremacy is real and assertive. The people will replace the Parliament if it makes unjust legislation or permits the executive to make unjust orders for which his Minister must take responsibility. The judicial system can only be as just as possible and permitted. The solicitude of the Courts for the liberty of the subject during an Emergency rule need no longer be overstretched particularly in present day Sri Lanka wherein sits a Government with overwhelming genuine popular support after an

honest referendum and a clean plebiscite. The rationale behind such solicitude is rooted in English history and was carried here during the British Colonial rule when the rulers did not depend on the will of the people unlike now.

Another consideration that impells me to hold that order under Emergency Regulations are not reviewable by Courts, in any case by petitions under s.126 of the Constitution relating to alleged infringement of fundamental rights, is the lack of adequate constitutional machinery to subject the Competent Authority to criticism and control of a Judge during an Emergency. Affidavits from the executive are required to be filed within a week of the service of the petition, and this puts the Department of the Competent Authority and the Attorney-General under intolerable pressure and strain as was visible in the case of the Deputy Solicitor-General appearing for the Respondents in this case. The constitutional machinery is not geared to meet this kind of challenge during an emergency when state officers ought to be more usefully left alone to deal with urgent matters needing prompt attention and decisions in the conditions of an Emergency.

For these reasons, I would refuse this application. In all the circumstances, however, I make no order for costs.

Application refused.