Constitutional Limitations on Judicial Activism in recognising a General Right to Information – The Need for a Right to Information Act

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In this article, Jayantha de Almeida Guneratne, a distinguished practitioner in public law, assesses the concept of judicial activism as an influence on the practical workings of the Sri Lankan legal system, and in particular on the implementation and protection of media freedoms. Though Sri Lankan courts have the power to enforce Fundamental Rights as defined in the Sri Lankan constitution, this power is in practice limited. From a detailed review of the relevant case law and judicial observations on issues of media freedom, he concludes that without a Right to Information Act '…the civic expectation…that the country is committed to basic democratic values will remain unfulfilled.'

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1. *Introduction*

The concept of Fundamental rights has different meanings. In the U.K they may be classified as rights based in the Common Law. They include for instance a person's right of access to the courts[1] and the right controlled by a government legal officer) to invoke the aid of courts for the enforcement of the criminal law.[2] Fundamental Rights also include those Rights enshrined in the European Convention on Human Rights and Fundamental Freedoms, which in the UK are incorporated in to the law by the Human Rights Act of 1998.

By comparison Sri Lanka's constitution has a Fundamental Rights Chapter which can be enforced by the courts. It incorporates the right to equality[3] and to freedom of speech and expression including

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[1]See. R v Lord Chancellor, ex p Witham [1998] QB 575

[2]See Observations in Gouriet v. Union of Post Office Workers and others [1977] 3 All ER 70 per Lord Wilberforce at p.79 and Lord Diplock at p.97

[3]Article 12 (1) of the Constitution of Sri Lanka

publication. [4]This has been judicially held to imply a right to information, but only in limited situations.[5]

There are other rights in English law -such as the right to justice, liberty and property - which have been recognised and upheld in Sri Lanka.[6] However, as was observed by the present Sri Lankan Court of Appeal, English Law principles would continue to apply so long as they have not been modified by the statute law of the country. The Supreme Court extended this recognition to what are known in English Law as "prerogative writs". The Court held that the concept of "sovereign power of the people" enshrined in the Constitution [7] replaced the concept of "prerogative writs", issued in the context of a monarchy[8].Subject to these qualifications, the English Law principles in the realm of Public Law continue to guide Sri Lankan courts, which place extensive reliance on English decisions as precedents.

Against this background, how should media freedom and rights fit into the existing constitutional cum legal framework of Sri Lanka? In the absence of a freedom of information Act similar to India's [9] how should our appellate courts approach the issue? Are there any relevant judicial precedents?

These are the issues this paper proposes to examine in regard to Media rights in general and journalists' rights in specific contexts. Sri Lankan governments in the past decade or more have failed and/or refused to enact a Freedom of Information Act. The Free Media Movement and the Editors' Guild[10] have both lobbied for such a law. The Law Commission of Sri Lanka has been in favour as well,[11] notwithstanding the alleged shortcomings of its own initiatives.[12]

2. ***Are Media Rights Fundamental Rights?***

English Judicial Precedents

R. v. Home Secretary ex parte Brind[13] was concerned with the imposition of certain restrictions by the Secretary of State on broadcasting corporations.

Responding to this cardinal issue, the court had laid down the following principles which may be discerned as follows:

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[4]Article 14(1) of the Constitution of Sri Lanka

[5] See later discussion in this paper, *infra*

[6]Thassim v. Edmund Rodrigo (Controller of Textiles)[48 N. L. R. 121.] (SC) and Nakkuda Ali v. Jayaratne [51 N. L. R. 457.] (PC) may suffice to serve as illustrations (when Sri Lanka (then Ceylon) was under the Soulbury Constitution and State Graphite Corporation v. Fernando [1981] 2 Sri LR 401 (at a time when the 1st Republican Constitution of Sri Lanka of 1972 was in operation) and Sirisena Cooray v. Tissa Bandaranayake and two others (1999) 1 Sri L.R. 1 (Under the present Constitution of Sri Lanka)

[7]Heather Mundy v. CEA and Others (SC 58/033-Unreported per MDH Fernando J.

[8] Heather Mundy v. CEA and Others (SC 58/033-Unreported per MDH Fernando J.

[9]Which so far successive governments in Sri Lanka have been reluctant to enact

[10]Kishali Pinto-Jayawardena, *Colombo Declaration on Media Freedom and Social Responsibility – 1998: Background Paper* (2008), at 15.

[11] Initially under the Chairmanship of Justice A.R.B.Amarasinghe (1994-2004) and more recently under the Chairmanship of Professor Lakshman Marasinghe, see Law Commission of Sri Lanka, *Report of The Law Commission on The Draft Freedom of Information Bill*, available at http://www.lawcomdept.gov.lk/info_English/index.asp-xp=723&xi=808.htm (last accessed on 15 January 2011).

[12] Kishali Pinto-Jayawardena, *Right to Information; Illusionary Court Victories and its Continuing Denial* -Issue 229 Vol. 17 November 2006 p.1 -9

[13] (1991) 1 AC 696

a) Even when the executive is given apparently unlimited discretion in exercising a power conferred on it, the courts may review the exercise of that discretion if it is found to infringe fundamental human rights;
b) However, the primary judgment (as decreed by parliament) must be conceded as to whether the public interest justifies restrictions by the executive in the exercise of its discretion;
c) The courts are entitled to exercise a secondary judgment by asking whether an agent of the state[14] could reasonably make that primary judgment on the material before him.[15]This principle of reasonableness lies at the heart of the judicial interpretation of fundamental rights.[16]

Investigative Journalism

Under UK law it has been held that the government's wide powers of administrative discretion do not allow for the obstruction of prisoners' correspondence or interviews with journalists and others for the purpose of challenging the justice of their convictions. It is held to be a part of their right to access to justice that they should have access to investigative journalism. Miscarriages of justice have often been exposed in this way. Although the courts had held that the right was restricted for that purpose only[17], the legal ruling in effect invalidated a government policy that journalists must undertake not to use the information professionally. As one of the judges in this case said:

"…fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process…."[18]

The case laid the foundation for a more overreaching doctrine than that of the pristine doctrine of reasonableness established in a previous case

However, this time around, the issue involved was investigative journalism, and therefore media freedom. The highest British court in effect upheld media freedom as being a basic or fundamental right, bringing into play "a presumption of general application operating as a constitutional principle."[19]

The judgment has a special impact on the Sri Lankan situation, given the significance of the Constitution of Sri Lanka. In a nation such as the United Kingdom, which historically has come to acknowledge the Sovereignty of Parliament, the judiciary has nevertheless ascribed to itself the power of review of administrative discretion where media freedoms have been involved.

How should the Sri Lankan administration approach the said issue of investigative journalism and media freedom?

3. ***The Constitutional Framework in Sri Lanka***

The Relevant Constitutional Provisions

[14]In that case the Secretary of State
[15] ibid, as per Lord Bridge
[16]Administrative Law (9th ed), (Oxford, Ind. Ed) p.393
[17] That is, the purpose of challenging the justice of their convictions
[18] Ibid. at p.341
[19] R v. Home Secretary , exp; Simms at p.390

Clearly the predominant characteristic of the Sri Lankan Constitution is the concept of People's Sovereignty. This includes inter alia that "the fundamental rights which are by the Constitution declared and recognized shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided……"

These fundamental rights include "the freedom of speech and expression including publication". [20] This constitutional right has been judicially expanded, as will be discussed in this paper.[21]

These freedoms may be limited by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others.

The wording of the constitution indicates that, when Parliament enacts a statute or the President issues a regulation under the Public Security Ordinance[22] both the legislature and the executive must be found to have reasonably exercised primary judgment as to the manner in which the right in issue is required to be "abridged, restricted or denied". If not, are not the Courts (exercising a secondary judgment) obliged to review the executive judgment? [23]

As noted above, the courts in the United Kingdom have assumed the power of review, deriving a constitutional basis therefore from the concept of Common Law. In contrast, the Sri Lankan courts, both the minor and the higher judiciary including the Supreme (apex) Court, derive their power from a written Constitution and statutes. Given the fact that the Supreme Court is vested with the sole jurisdiction to interpret the Constitution[24], the Supreme Court may claim to be on an even higher footing. The concept of the sovereign power of the people[25] is entrenched in the Constitution[26] (as interpreted by the Court).

Judicial precedents in Sri Lanka may be examined at this point in the context of Article 14(1) of the Constitution. We may ask the question whether despite the absence of a Freedom of Information Act, the Supreme Court could still recognize the right to investigative journalism and media freedom as a basic, fundamental right.

3.1. The Case of Wickremanayake v. The State[27] – A Restrictive Judicial Interpretation on the scope of Article 14(1)(a)

This case involved a parliamentary Bill which was challenged for its constitutionality, where the Petitioner had contended that, the provisions of the Bill, inter alia, contravened Article 14(1)(a). The Supreme Court held that the proposed Bill fell within the provisions of Article 15, "which sets out the

[20] Article 14(1)(a)
[21] Most notably in Fernando v. SLBC, (1996) 1 Sri LR 157
[22] Which has been held to have the force of law, though such expansion does not extend to provisions of the Prevention of Terrorism Act No 48 of 1979. Vide Thavaneethan v. Dayananda Dissanayake, [2003] 1 Sri.L.R. 74
[23] Review of legislation being out of the question in the context of the Sri Lankan situation (Vide: Article 80(3) of the Constitution)
[24] Article 125 (1) of the Constitution
[25] Article 3 of the Constitution
[26] Vide: Article 83(a) of the Constitution
[27] (1978-80) 1 Sri LR 299

manner and extent in respect of restrictions that can be placed on fundamental rights"[28]and that the Bill was not unconstitutional on these or other grounds.[29]

3.2. Visuvalingam and Others v. Liyanage and Others[30]

In this case, an appeal was made against an order promulgated under the terms of Emergency Regulations (ER) declared under the Public Security Ordinance[31]. The order was that a) No person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the newspaper "***Saturday Review***" for one month from the date of the order; and b) that the printing press in which the said newspaper was printed shall, for a period of one month from the date of the order, not be used for any purpose whatsoever.

Implications of the Supreme Court Ruling

For our purposes we will look at the propositions laid down in the ruling on the scope and content of media freedom.

> "Although freedom of speech and expression is an essential prerequisite for the purpose of successfully preserving democratic institutions and the freedom of the press embraces the freedom to propagate a diversity of views and ideas ...the ***Saturday Review*** carried material that must necessarily attract the attention of the authorities at a time when there are unsettled conditions in the country as today. It highlights the atrocities and excesses of the police and the armed services. In general, editorial policy inclines towards the radical groups waging a struggle against the State and, if not explicitly at least implicitly eulogises the terrorists and praises the sacrifices they have made. In the present context it cannot be said that the competent authority ... was so unreasonable or wrong when he said that the orders in question were made, as the editorial policy of the paper was extremely prejudicial to the security and safety of the country and its citizens.
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> The fundamental rights guaranteed by the Constitution cannot by their very nature be interpreted as being absolute rights. There are well recognised restrictions and exceptions to the exercise of these rights. Freedom of speech, press and assembly are dependent upon the powers of Constitutional government to survive. If it is to survive it must have the power to protect itself against unlawful conduct and under certain circumstances against incitements to commit unlawful acts.
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> Apart from a fatal prohibition and ban on certain topics offensive to society and orderly government, freedom of speech in other matters may be circumscribed by time, place and circumstances. What is permissible at one place and time may not be permissible at another place or time. .. In dealing with an emergency situation, courts have always been prepared to give the executive sufficient leeway in making decisions affecting the safety of the people and the security of the country. These decisions have to be made rapidly and in the light of information then available and under the constraint of available resources. It is not for the Court to substitute its opinion for that of the competent authority where the court is satisfied

[28] ibid. per Samarakoon , CJ , at p.303
[29] ibid. at p.309
[30] 1983(2) Sri LR 311
[31] ER (Miscellaneous Provisions and Powers Regulations Nos: 1, 2 and 3 of 1983

that the material before him was reasonably capable of supporting the view and opinion formed by him."

In reflecting on the propositions contained in the Court's ruling, the principles relating to media freedom as a fundamental right may be construed as follows:-

The Rule

Freedom of speech and expression logically includes freedom of the press, as a democratic initiative to propagate a diversity of views and ideas and the right of free and general discussion of all public matters, including matters not palatable to the government.

Qualification to the Rule

Should a newspaper publication highlight the atrocities and excesses of the police and the armed forces in a context of unsettled conditions … powers exercised by the state under ERs in arresting such an ensuing situation cannot be regarded as unreasonable … In referring to "unsettled conditions" (during a state of declared emergency), the Court shows a clear distinction in its possible approach to the closing down of a Press during an emergency as opposed to normal times.[32]

The reference to editorial policy must be regarded as a decree issued to editors of newspapers to maintain a balance in exercising media freedom, particularly when the security of the country and its people are at stake.

Consequently, media freedom cannot be accepted as an absolute right or freedom. It is submitted that that aspect of the Ruling addresses not only the media freedom which the court acknowledged as a right (though not absolute) but also the attendant issues relating to media responsibility or accountability.

In referring to emergency situations this aspect of the ruling provides a jurisprudential framework for reflection as follows:

Firstly, Courts would be willing to give the executive sufficient leeway in dealing with an emergency situation, thereby implying that such leeway may not be afforded to the executive in normal times.
This has important implication for the debate on the exercise of media freedoms during ordinary times.

Secondly, if a distinction in approach is to be adopted between "emergency situations" and "normal times" then it becomes necessary for the courts to determine as to whether "an emergency situation" exists.[33]

3.3. The Supreme Court decision in Fernando v. SLBC[34]

The facts

[32] An aspect which is proposed to comment on later in this paper
[33] An issue dealt with in "Habeas Corpus in Sri Lanka ;Theory and Practice of the Great Writ in Extraordinary Times, Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne (LST, 2011)
[34] (1996) 1 Sri LR 157

The State run SLBC had a new education service (NES) or non-formal education programme (NFEP) dealing with a wide range of topics, such as human rights, ethnicity, sociology, politics, current affairs etc. It was planned to cover a long period with a regular schedule of programmes. Participation in a programme included staff, invited experts and also listeners. The petitioner who was a regular listener complained that while a telephone interview with a Minister was in process, the broadcast was abruptly stopped and the programme (NFEP) was discontinued and the person in charge removed. Petitioner complained of violation of Article 14(1)(a).

Does Article 14(1)(a) Imply a Right to Information?

This important issue had arisen in consequence of the submissions made by the Attorney-General on behalf of the Respondents. He had contended that the NFEP was stopped for good reasons-constraints of money, time and equipment, possibility of being sued for defamation, irrelevancy of content, complaints by the public. But he had made the submission that, (the petitioner being) a listener might have been able to complain that his freedom of speech had been infringed if the broadcast had been stopped by a third party but not if the broadcaster itself had caused the stoppage.[35]

The Court reflected that the submission seemed to concede a fundamental right to a mere listener."[36]

The Court then posed the question: "…whether (where a third party stopped the broadcast) if the broadcaster itself did not complain of the infringement, a listener had an independent right to receive information which would entitle him to complain of that stoppage?"[37]

The Attorney- General hesitated to concede such a right. The Court then proceeded to consider whether a (mere) participatory listener could be declared as having freedom albeit not only to expression but also to a right to receive information.

The Court held thus:-

"The criticisms were not something irrelevant, but related to matters connected to the success of the NFEP"

The court's reasoning may be summarized as follows:

a) The Respondent (i.e. the Sri Lanka Attorney General) had not averred that criticisms contained in the programmes were untrue or exaggerated, and therefore it must be presumed that what was said was factually correct.
b) The criticisms were restrained in language and balanced in content in that, while the Chairman of the SLBC was commended for his positive response, subordinates who failed to comply with orders from the top were criticised.
c) The Respondents had not averred that these issues should have been raised internally and even if that had not been done, such default at most would have justified a reprimand to the officer concerned but not to the stoppage of the whole NFEP.
d) As to its right to stifle criticism of its own broadcasts, it is well to remember that the media asserts, and does not hesitate to exercise, the right to criticize public institutions and persons

[35] The SLBC under whose aegis the staff of the NEFS was conducting the said programme.
[36](1996) 1 Sri LR 157 per Fernando J, at p.167
[37] ibid., per Fernando, J.

holding public office, while of course such criticism must be deplored when it is without justification.

e) The Government's media policy was intended to encourage criticism in the public interest in order to expose shortcomings in the context of which, as required by the right to equality, the media itself is not immune from justifiable criticism, internally and externally.

The Court observed:-"The three complaints constituting (allegedly) public discontent with the NEFP were to the effect that, while media freedom was necessary, yet there should be some limit to criticisms of the Government, the SLBC and high officers. …."[38]

Freedom of Expression in the context of Article 14(1)(a) - Reflections on the findings of the Court

A number of principles are clear from the Court's ruling in this case:

a) The Facts (as alleged) must be presumed where the state authorities fail to aver the contrary.

b) Expressions (language) used must be restrained, balanced and justified.

c) Subject to the above, Article 14(1) (a) is not to be interpreted narrowly but broadly, to include every form of expression for the protection of which it may be invoked, in combination with other express guarantees, such as the right to equality.

d) Thus, the Court is seen not to hold that the freedom of expression necessarily encompasses an implied right to information as a fundamental right. This is explicit in the ruling which includes the words: "I doubt, however, that it includes the right to information *simpliciter*"[39], such a right being thus restricted to a participatory listener of a state sponsored media programme.

It is submitted that, notwithstanding a right to information the court was prepared to acknowledge to a participatory listener, nevertheless, the apex court is seen to be constrained in holding that Article 14(1)(a) which guarantees freedom of information includes the right to information as a general right.

Consequently, the Supreme Court ruling may be construed as a decision that went thus far and no further in regard to the existence of a Right to Information within the framework of the Constitution, thus emphasizing the need for legislation recognising such a right.

3.4. The decision in Leader Publication (Pvt) Ltd v. Ariya Rubasinghe and Others [40]

This was a case where the Competent Authority, appointed under Emergency Regulations, made an order prohibiting a publisher, printer and proprietor of newspapers from distributing its newspaper for a period and further had directed the Inspector General of Police to take possession of the said Company's printing press and its premises.

The petition of the company was allowed by the Court[41] on the basis that, where an authority is appointed to make orders by Emergency Regulations, for their exercise there must be a substantive legislative enactment. The Court in the course of its decision also overruled a preliminary objection

[38] per Fernando, J. at p.172 read with Fernando, J.'s findings at p.171
[39] At page 160, per Head Note, per Fernando, J.
[40] 2000 (1) Sri LR 265
[41] As per Justice Amarasinghe

(based on Article 35[42]) holding that the application was "not a proceeding against the President …what is in issue is the validity of ….the competent authority's orders."

Further Reflections on the Supreme Court Ruling

The upshot of the decision was to restore the freedom of the press, where the judge directed the Inspector General of Police to restore forthwith the petitioner's possession of the printing press etc.[43] A printing press and its publications depend on what they gather from communication with the public. The closure of a printing press has the effect of denying such communication. From that perspective, the ruling by implication upholds the right to information through investigative journalism as a fundamental right of expression under the Constitution.

It is not, however, recognized as a basic fundamental right to every citizen, being limited to a participatory listener[44] and to a printing press whose closure is ordered without legal competence or authority.[45]

3.4. The Supreme Court decision in Environmental Foundation Ltd v. UDA and Others[46]

The facts of this case related to a purported management agreement or lease entered into by the Urban Development Authority (UDA)[47]with a Private Company handing over the management and control of the 14 -acre seaside promenade of Colombo –the Galle Face Green. The Green has been open to the public and established and maintained as a public utility for over 150 years. Although the agreement purported to be a management agreement, the terms of the agreement revealed that it was in the nature of a lease. Newspaper reports annexed to the Petition reported a deal entered into between the UDA and the private company, whereby the control of the Galle Face Green would pass to the latter to set up a "Mega Leisure Complex", which would deny free access to the Green by the public. But the documentary evidence did not show that the Green had been vested in the UDA. The UDA responded to the press reports, which had implied a "secret deal", with a paper notification bearing the bold headline "More Transparent than Glass"[48]. This carried an assurance that the Public would have free and uninterrupted access to the Green. However, the UDA did not respond to a request for information that might have shown (or not) whether free access by the public to the Green would be protected by the agreement. The Petitioner described itself as a "non-profit making organization" that had dedicated itself for over 22 years to the protection of the environment in the public interest. It alleged that the refusal on the part of the UDA to disclose the information requested constituted an infringement of the fundamental right guaranteed by Article 14(1)(a) of the Constitution. It argued that in the circumstances of the case, the right to information was implicit in the freedom of expression, that is guaranteed by Article 14(1)(a) of the Constitution.

The Petitioner's Counsel contended that the refusal to disclose the information without specific reasons amounted to an arbitrary exercise of power.

[42] Re Presidential Immunity contained therein.
[43]2000 (1) Sri LR 265 at p.283, per Justice Amarasinghe
[44] ibid
[45] 2000 (1) Sri LR 265 , the decision under analysis
[46]SC(FR)47/2004-SC Minutes 28.11.05
[47] A statutory functionary
[48] Supra n.71

The court allowed the Petitioner's application and held that the complainant's rights under both Article 14(1)(a) and Article 12 (1) had been infringed.

The principles emanating from the ruling of the court were as follows:

The Court held that the Urban Development Authority was an organ of the Government. As such it was required to secure and advance the fundamental rights that are guaranteed by the Constitution. It had an obligation under the Constitution to ensure that a person could effectively exercise the freedom of speech, expression and publication in respect of a matter that should be in the public domain. Therefore, a bare denial of access to official information in the Court's view amounted to an infringement of the Petitioner's fundamental rights as guaranteed by the Constitution.

The reasoning behind this judgment is illustrated by the arguments put forward by the Petitioner's Counsel.[49]

Counsel had contended that the right to information in the circumstances of this case was implicit in the freedom of expression, that is guaranteed by Article 14(1)(a). The publication by the UDA containing a bold head line "More Transparent than Glass" [50] had brought the matter into the public domain. This entitled the Petitioner to check the accuracy of the information given by the UDA to enable it to act in the public interest.[51]

The submission of the Counsel and the ensuing judicial response suggest that the Court gave its ruling because the UDA (a state authority) had brought the matter into the public domain. The Petitioner's application relied on this as the basis of his right to information and freedom of expression.

The question arises: what if the UDA had not issued such a notification? Is it then to be understood that legal redress for the violation of the rights complained of could not have been available? Would it then mean that the Petitioners would not have been entitled to come forward in the public interest?

The Court was not called upon to answer the issue whether a bare denial of access to official information ….amounted to an infringement".[52] This was because the UDA had made it plain that information relating to the transaction in question was in fact in its possession but that it was refusing to disclose it. It was not a bare denial that such information existed; on the contrary, it was a bare denial to disclose information which it possessed.

4. *Need for a Freedom of Information Act*

We would argue that this is a significant aspect of the decision, which reinforces the call for the enactment of a Freedom of Information Act.

There are two situations which arise for consideration on this issue:

a) Where there is a bare denial of access to official information demonstrably in the possession of a public authority This was the issue contended before court;

[49]SC (FR)47/2004-SC Minutes 28.11.05 per S.N Silva, CJ. at page 7 of the judgement
[50] Supra n 71
[51] See at page 6 of the Judgment under consideration - SC (FR)47/2004-SC Minutes 28.11.05
[52]See at page 7 of the Judgment under consideration - SC (FR)47/2004-SC Minutes 28.11.05

b) Where there is a bare denial that such information exists, but where a petitioner alleges it has credible material to support such an allegation.

In either situation, the state authorities no doubt would be entitled to withhold information in the public interest - for example on the basis of national security concerns.- even against a petitioner who seeks official information also in the public interest.

4.1. The Courts' Role in the event of Competing Public Interests

How should the Courts' approach be decided in such a situation? Should the Courts accept the unsupported argument (*ipse dixit)* of the Executive (state authorities) when official information is sought to be withheld on the ground that disclosure would be prejudicial to national security concerns? Or should the Courts be the final arbiter on such a plea being taken and examine the executive fiat at least *in camera*?

We would argue that, having regard to the concept of sovereign power of the people entrenched in the Constitution of Sri Lanka[53], the Courts must assume and are indeed obliged to assume a role in favour of the latter situation.[54] This issue has been dealt with in earlier writings which reveal that even in England, where there is no deference paid to any concept of People's Sovereignty, the English Courts are moving towards judicial review of the executive fiat in claiming a right to withhold official information in the public interest.[55]

This brings into focus the potential for future discussions arising from the Supreme Court ruling. One issue is the *locus standi* of a Petitioner seeking the Right to Information as being implicit in Article 14(1)(a).

For instance, is an incorporated body entitled to maintain an application under Article 12 and 14?

This issue arose in the case on account of a preliminary objection being raised that, as the relevant articles of the constitution speak of "citizens" and not "persons", the Petitioner (as an incorporated body) had no legal status to have and maintain the application in question.

Responding to this objection, Justice S.N Silva, CJ, held that the word "person" as appearing in Article 12(1) should not be restricted to "natural" persons as appearing in Article 12(1) but extended to all entities having legal personality….."[56]

The Court's decision was that this distinction did not carry with it a difference which would allow a company incorporated in Sri Lanka to get away with an infringement of either Article of the constitution.

[53] Article 3 read with Article 4(c) (where judicial power is declared to be an aspect of People's Sovereignty)
[54] Being the opinion of the writer on this matter
[55] See: J.de Almeida Guneratne, "Public Interest Privilege –A comparative study" (1985) , Masters of Laws Dissertation, University of Colombo Library (unpublished), "Concept of Sovereign Power of the People in the context of an Autochthonous Constitution (1997) Doctor of Philosophy Dissertation . American Library of Congress (Unpublished).
[56] Deriving support from past precedent .See: at page 8 of the judgment under consideration-SC(FR)47/2004-SC Minutes 28.11.05

Past precedent, as the judgment reveals[57], had extended the concept of *locus standi* in the context of Article 12 to accommodate not only natural persons" but also to include "all entities having legal personality."

The Ruling of the Supreme Court thus established a judicial precedent extending further the concept of *locus standi* to include "entities having legal personality in the context of Article 14 as well.

The factors that influenced the Court in extending the concept of *locus standi* to maintain the application in question were that:

(i) The petitioner had pleaded that, it is a non–profit making organization with the object of monitoring State Departments and Regulatory Agencies, to ensure that the public interest is protected in the matter of preserving the environment.[58]
(ii) The plea had not been contradicted.[59]
(iii) The petitioner had assisted Court in important matters previously with regard to the preservation of the environment in the public interest.

On this basis one may suggest a formula for Non- Governmental Organizations (NGOs) which are desirous of engaging in litigation in the Public Interest in this area:

Firstly, any NGO would have to first plead that it is not a profit making organization and if contradicted must be in a position to sustain such a plea. Otherwise, the criteria that would allow an NGO to come forward in the public interest would be absent.

Secondly, the court would be asking, at least, two pre-conditional questions:

i. The organisation would have to demonstrate its involvement in previous matters of Public Interest Litigation (PIL);
ii. It would also have to show that its involvement in the name of (PIL) had constituted impartial matters in the eye of the Court.[60]

4.2. The Supreme Court Determination in the Sri Lanka Broadcasting Authority Bill

The Ceylon Broadcasting Corporation Act [61] had established the Ceylon Broadcasting Corporation [62] for the purpose of radio broadcasting and to exercise, supervise and control programmes broadcast by it. Section 3 of the Act required it to satisfy itself in regard to several requirements in doing so.

Likewise, the Sri Lanka Rupavahini Corporation Act [63] established the Sri Lanka Rupavahini Corporation [64] for the purpose of carrying on television broadcasting and casting on it functions and duties in similar terms to that of the SLBC.

[57] Ibid.
[58] page 8 of the judgment under consideration -SC(FR)47/2004-SC Minutes 28.11.05
[59] ibid.
[60] See: at page 8 of the Supreme Court Ruling under consideration -SC(FR)47/2004-SC Minutes 28.11.05
[61] No.37 of 1966
[62] SLBC
[63] No. 6 of 1982
[64] SLRC

The Sri Lanka Broadcasting Authority Bill (1997) sought to establish an Authority to regulate the establishment and maintenance of broadcasting stations to provide for the issue of licences for that purpose. Clauses in the Bill sought to empower the Authority to impose such terms and conditions on licences issued by it in regard to both radio broadcasting as well as television broadcasting. Consequently, amendments were sought to be made to both the SLBC Act (1966) and the SLRC Act (1982).

Fifteen citizens including incorporated bodies challenged and attacked the Bill for lack of constitutional validity on several grounds.

The Supreme Court ruled that some Provisions in the Bill were inconsistent with those of the existing Provisions of the SLBC Act and the SLRC Act. The Court examined the provisions of the Bill in the light of the maxims *leges posteriores priores contrarias abrogant*[65] and *generalia specialibus non derogant*[66]. The Court determined that several clauses of the Bill had the effect of enabling the Authority to supervise, direct and control the content of the programmes to be broadcast via Radio as well as Television. They were therefore inconsistent with the provisions of the SLBC Act and the SLRC Act. But the result left intact the two corporations' right merely to satisfy themselves in regard to the content of their respective broadcasts.

Impact on other Radio (and) or Television Broadcasting

Having held so, the Supreme Court determined that, "if the proposed Bill is enacted, other radio or television broadcasters will not have the privilege of self- regulation enjoyed by the SLBC and SLRC concerning the content of their programmes; for they are to be, in that respect, subject to the supervision, direction and control of the proposed Authority sought to be established by the Bill."[67]

Consequently, the Court proceeded to hold that the Bill contained discriminatory provisions as between the SLBC and SLRC on the one hand and other radio and television broadcasters on the other in enabling the proposed Authority to impose different standards for the issue of licences to them and the content of their programmes.[68] Accordingly, the Court determined that the said provisions in the Bill were inconsistent with Article 12(1) of the Constitution and cannot become part of the law of Sri Lanka unless they are passed by a special majority in terms of Article 84 of the Constitution.[69]

5. ***Responsibility of a broadcasting licensing authority for the allocation of frequencies and other technical aspects of broadcasting***

This section considers the bearing of International Covenants on the responsibility of Broadcast Licensing authorities. We cite a publication of the international non-governmental organisation Article XIX, entitled "Article XIX on the subject of Broadcasting Freedom- International standards and Guidelines". In it, the importance of uniform standards for public and private broadcasting, administered by an independent, [70] single authority, is underlined. This was specially referred to by the Court in its decision. Article XIX lays emphasis on the need to achieve "pluralism" for the sake of promoting freedom of thought. The United States Supreme Court had also spoken of;

[65] Later laws abrogate earlier contrary laws
[66] A general provision does not derogate from a special one
[67] See: at folio 1141 of the Parliament Hansard of 6th May, 1997
[68] ibid.
[69] ibid.
[70] "Independent" of the government

> "…the 'evils to be prevented' .These were not the censorship of the press merely, but any action of government might prevent free and general discussion of public matters, which seemed absolutely essential to prepare the people for the intelligent exercise of their rights as citizens."[71]

Nevertheless, the Court, having regard to the purpose of the Bill, viz: to provide for the establishment of a body to regulate the establishment and maintenance of broadcasting stations and to provide for the issue of licences for the purpose,[72] rejected the petitioner's challenge to the Bill. The Court did not endorse the contention that any attempt to regulate broadcasting by a system of licensing would deprive broadcasters of their fundamental rights of freedom of speech and expression.[73]

However, the Court ruled that the composition of the Board of Directors and the Minister's involvement with the proposed authority went against the need for an independent regulatory body. It amounted to creating an Authority which is "no more than an arm of the Government", the Court said. Moreover, the Court determined that such lack of independence had the potential to open the door to interference with a licensee's right of publication in the public interest and the right of the public to balanced programmes, taking account of the diverse nature and interests of the population.

Further, the Court determined that, in addition to the lack of independence of the authority proposed to be created under the Bill, the Minister's unbridled power to make regulations could interfere with the presentation of programmes. It would thereby undermine the principle of fairness which is at the heart of responsible broadcasting. Similarly it would interfere with commercial advertisements and thereby interfere with and or/ infringe the right of the public to have information to enable them to make independent judgments.

The court ultimately determined that several clauses contained in the proposed Bill are inconsistent with Article 10 and 14(1)(a) of the Constitution and in terms of Article 83 of the Constitution required to be passed by a special majority of Parliament and approved by the people in a Referendum.[74]

6. ***Judicial observations noted by the Court***

The previous sections have assessed the impact of decisions of the Sri Lankan Supreme Court on issues of free expression. At this point, it may be appropriate to refer to earlier judicial observations noted by the Court that:-

a) The right to information (the staple food of thought) could be seriously jeopardized unjustifiably because the Constitution does not permit it. [75]
b) The basic assumption in a democratic polity is that the government shall be based on the consent of the governed. This implies not only that the consent shall be free but also that it shall be grounded on adequate information and aided by the widest possible dissemination of information.[76]

[71] At folio 1142, of the Parliament Hansard of 6th May, 1997
[72] As stated in the Long Title of the Bill
[73] At folio 1143, of the Parliament Hansard of 6th May, 1997
[74]At folio 1148 of the Parliament Hansard of 6th May, 1997
[75] *Joseph Perera's Case* (1992) 1 Sri LR 199
[76] Ibid

c) The freedom to form public opinion, which plays a crucial role in modern democracy, demands the condition of virtually unobstructed access to and diffusion of ideas viz: the right to know and the right to hear.[77]
d) The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.[78]
e) The United States Supreme Court has said that it was now well established that the Constitution protects the right to receive information and ideas.[79]

To summarise the present position in Sri Lanka:

i) The citations made by the Sri Lankan Supreme Court leave no doubt that there is a need to recognize the Right to Information in a democratic system.

ii) Although the U.S Constitution recognizes the Right to Information, [80] the Constitution of Sri Lanka does not (at least expressly).

iii) Although the Sri Lankan Constitution does not expressly recognize the right to information, it must be taken as having included such a right. This is explicit from the observation made by court thus:

> "….. the right to freedom of speech and expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority."[81]

iv) As such rights carry with them duties and responsibilities, they may be subjected in their exercise to some restrictions such as those contained in Article 15(2) [82] and in Article 15(7).[83]

v) In as much as a regulation to be passed by a Minister such as those contemplated by the proposed Sri Lanka Broadcasting Authority Bill (1997) did not fall into those restricted categories, clauses in issue in the proposed Bill violated rights, including the right to information. This prompted the Court to hold that, as a whole, the proposed Bill was inconsistent with Article 10 as well, for the freedom of thought was at the core of other rights such as expression, speech, publication and information.

vi) Finally, it would follow from the reasoning and approach of the Supreme Court that, if one has freedom to think, one must have the right to express oneself through speech and publication. And for one to publish, there must be in turn the right to receive information. The logical connection cannot be denied. [84]

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[77] Thornhill v. State of Alabama (31 US 88)
[78] Lamont v. Post Master General of US (381 US 301)
[79] Stanley v. Georgia (394 US 557) The case of Red Lion Broadcasting Co. v. F.C.C was also sited at folio 1150 of the Parliament Hansard of 6th May, 1997
[80]
[81] Folio 1150 of the Parliament Hansard of 6th May, 1997
[82] Prescribed by law in the interest of racial and religious harmony or in relation to parliamentary privileges, contempt of court or incitement to an offence
[83] Prescribed by law in the interest of national security , public order , public health or morality which would include regulations made under the Public Security Ordinance by the Parliament
[84] What the court explained in terms of the "Matrix Theory" (the indispensible condition) at folio 1151 of the Parliament Hansard of 6th May, 1997

7. Some General Reflections and Conclusions

In surveying the existing state of the law in relation the right to information, the following question may be posed. Given the fact that the Constitution of Sri Lanka does not expressly recognize the Right to Information, could the Supreme Court in the context of the Constitution have recognized such a right?

Wickramanayake v. The State [85] clearly adopted a restrictive interpretation of Article 14(1)(a) which guarantees the freedom of expression, thus shutting out any argument extending the scope of that article to other such articles in Article 14 and to a general constitutional right to information.

In *Visuvalingam and Others v. Liyanage and Others*[86] principles on media freedom as propounded in that decision reveal that freedom of speech and expression was taken to include the freedom of the press, subject to responsible editorial policy. This placed the emphasis on Media Accountability. This salutary aspect of the right to investigative journalism was not even touched upon, apart from the fact that the Court emphatically held that during emergency times it would be a mere "hands off" policy with regard to any claim based on media freedom. The Right to Information even as a token right was not discussed.

The decision in Fernando[87] demonstrates the laborious process of reasoning that the Court had to get involved in, in recognizing an implied right to information contained in the right to expression. But that too was in the special facts and circumstances of that case, such a right being recognized as a restricted right confined to a listener of a state authorized programme.

Moreover, the Court doubted that Article 14(1) includes the right to information *simpliciter*.[88] The decision in *Leader Publication (Pvt) Ltd* [89] may be viewed as a ruling that restores the freedom of the press and an implied right to information through investigative journalism but limited to a printing press whose closure had been ordered without legal competence or authority. *Environmental Foundation Ltd*[90] stands revealed as a decision that indeed upheld the right to information in the public interest but only where the state authorities deny disclosure of information which they admit as being in their possession. *Joseph Perera's case* [91] while carrying illuminating dicta suggesting the need for a right to information in a democratic system, was slow to declare such a right.

Finally, the Supreme Court determination in the *Sri Lanka Broadcasting Authority Bill*[92] appears to have come the closest to recognizing a right to information. Yet it left room for two interpretations. The broader interpretation no doubt favours the inclusion of a Right to Information in the light of Article 10 read with Article 14(1)(a). The narrower interpretation would restrict that right to publication to 'balanced programmes'. The right of a licensee to balanced programmes in the public interest was narrowed further, in the context of the right of the public contained in the Bill to information in commercial contexts.

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[85] (1978-80) 1 Sri LR 299
[86] 1983 (2) Sri LR 311
[87](1996) 1 Sri LR 157
[88]ibid., at page 160, per Head Note, per Fernando, J.
[89]nn 64-70
[90]nn. 71-87
[91] (1992) 1 Sri LR 199
[92] nn. 88-107

Yet another aspect needs reflection at this point. Progressive as the judicial exposition in the said determination was, the judicial thinking and advancement was in the context of a Parliamentary Bill for determination of its constitutional validity. Thus, the same would not be good enough for the public's right to balanced programmes or to information even in commercial contexts. The public would only be able to claim such a right if it were conferred by legislation.

Conclusion - Limits to Judicial Activism and the need for a Freedom of Information Act

India has in its statute book a Right to Information law.[93]So has the United States of America.[94] These are two jurisdictions that have no doubt influenced the Sri Lankan judicial jurisprudence on account of the fact that both have written constitutions like Sri Lanka. This is perhaps the reason why English precedents have not been preferentially adhered to. The task for American Judges in particular has been made that much easier for the US Constitution explicitly recognizes the freedom of the press.

In contrast, the Sri Lankan Court has had to grapple within the narrow confines of Article 14(1) relating to the freedom of expression, stretching its judicial initiatives to the maximum in recognizing a right to information in limited areas as demonstrated in this paper.

It is common knowledge in the country that there have been attempts in the recent past to enact a Right to Information Act for Sri Lanka which have proved to be abortive. Consequently, it is submitted as a fervent hope that the government of Sri Lanka of the day be sensitive to the need for such an enactment in the name of good governance and the Rule of Law and enact such a law with such riders as may be necessary in the interest of national or public security.

Until a Right to Information Act is contained in the statute book of Sri Lanka, if not a Constitutional Amendment expressly recognizing the right to information, the civic expectation of the body politic of the Sri Lanka nation that the country is committed to basic democratic values will remain unfulfilled.

[93] Right to Information Act No.22 of 2005. Several other countries in the South Asian region also have similar laws.

[94] (1966) US Code 552 (as amended) and the Open Government Act, 2007