

BEFORE

THE HON'BLE SUPREME COURT

AT KILMONACK

FLAVIA

*(Under Article 32 and Article 136 of the Constitution of Flavia read with
Rule 47 of Flavian Supreme Court Rules)*

IN THE CASE OF

MR. DOLFOPA SORIAL AND OTHERS

(PETITIONER)

v.

THE STATE OF FLAVIA

(RESPONDENT)

MEMORIAL *filed on behalf of* **PETITIONER**

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 ii. Public’s right to access information regarding Kazalia has been denied. 2

 B. The restrictions imposed upon the freedom of the press are not in accordance with the provisions of ICCPR. 3

 i. The restrictions are not governed by a defined law..... 4

 ii. The restrictions are not pursuant to a legitimate aim. 5

 iii. The restrictions are not necessary for a democratic society..... 6

II. The Court order directing Mr.. Dolfopa Sorial to reveal the identity of the author(s) of the anonymous article, and punishment for refusal to communicate the same, is illegal and violative of the freedom of press. 6

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B. The court order creates a ‘chilling effect’ in contravention of art. 19 of the ICCPR. 7

C. The Court Order does not fall under the legitimate restrictions. 8

 i. The court order is not ‘prescribed by law’. 9

 ii. The court order is not pursuant to a legitimate aim. 9

 iii. The court order is not necessary for a democratic society. 10

III. The refusal by the Govt to grant access to the requested official documents is invalid.
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 ii. Restrictions to freedom should also satisfy the test of reasonableness. 13

 B. Section 500-A of the FPC violates the essential and intrinsic right to freedom of
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 i. Section infringes freedom of speech and expression. 14

 ii. The Section is imprecise and vague. 14

 iii. The Section does not satisfy the test of reasonableness and proportionality and
stifles criticism. 15

 C. Section 124-A of the FPC violates the essential and intrinsic right to freedom of
speech and expression. 15

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iii. Mr. Mosante actively stayed in the public eye. 20

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LIST OF ABBREVIATIONS

§	Section
¶	Paragraph
¶¶	Paragraphs
AIR	All India Reporter
App.	Application
Art.	Article
Assn.	Association
Co.	Company
Comm.	Communication
Const.	Constitution
Ct.	Court
Doc.	Document
Eur. Conv. H.R.	European Convention on Human Rights
ed.	Edition
EHRR	Essex Human Rights Review
Eur. Ct. H.R.	European Court of Human Rights
Expl.	Explanation
FPC	Flavian Penal Code
G.A.	General Assembly

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Govt.	Government
H.R.C.	Human Rights Commission
HRLJ	Human Rights Law Journal
Inter-Am Comm'n H.R.	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
Ltd.	Limited
No.	Number
O.J.	Official Journal
pg.	Page
ResOr	Restraintment Order
RTI	Right to Information
SC	Supreme Court
SCC	Supreme Court Cases
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNHRC	United Nations Human Rights Commission
UNTS	United Nations Treaty Series
US	United States
Vol.	Volume

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STATEMENT OF JURISDICTION

Mr. Dolfopa Sorial and other editors of the Flavian Express has approached the Supreme Court of Flavia by filing a Review Petition in accordance with the Rule 47 of Flavian Supreme Court Rules. The Supreme Court has the jurisdiction to hear the Criminal Appeals against the petitioner under Article 136 of the Flavian Constitution. The Writ Petition filed by the Petitioner is maintainable with the Supreme Court under Article 32 of the Flavian Constitution.

STATEMENT OF FACTS

INTRODUCTION:

The Democratic Republic of Flavia recognises the Freedom of Press as a fundamental right under freedom of speech and expression guaranteed by the Flavian Constitution. The region Kazalia is the northernmost region of Flavia and the only region to have a ‘Special Category Status’ on account of its longstanding territorial dispute with the Federation of Rastow. Kazalia has witnessed the turmoil between the secessionist forces and the Army leading to Kazalia being, the most important internal security issue of Flavia.

ABOLITION OF SPECIAL CATEGORY STATUS OF KAZALIA:

Mr. Mosante won the Presidential Elections of 2017 in Flavia. Earlier, Mr. Mosante was a real estate tycoon and his AZM Group was engaged in the building and renovation of luxury hotels, golf courses as well as modernisation of heritage sites and buildings. After Mosante came to power, the attacks against the journalists by his supporters have increased as observed in the December 2018 report of the Media Rights Council. In July 2019, section 500-A was introduced in the Flavian Penal Code making the defamation of the President a punishable offence. On 1st December 2019, Mr. Mosante announced the decision to abolish the ‘Special Category Status’ of Kazalia in order to ensure full integration of Kazalia to Flavia. Prior to this decision, mobile and internet services in Kazalia were disconnected and a ban was imposed on all form of protests. Majority of the print and electronic media showed that the situation in Kazalia was under control.

PUBLICATION OF THE ANONYMOUS ARTICLE:

Mr. Dolfopa Sorial, the Editor in chief of the ‘Flavian Express’, is a very reputed journalist known for his honest coverage of issues. The Flavian Express introduced a page called ‘Open Book’ where anyone could publish anonymous articles criticising the actions of the government. An anonymous article appeared in the Open Book page titled ‘Family First: The Great Kazalia Land Scam’ on 15th December 2019 criticising the decision of abolition of Special Category Status of Kazalia as being a fraud committed in the furtherance of the interests of the President’s family. The publication of the article was followed by massive demonstrations in Kilmonack, the capital of Flavia leading to a fight between the supporters of Mosante and the opposition. It also resulted in violent protests in Kazalia where the Army had to deal with the protestors leading to the death of 25 people and detention of many protestors.

GOVERNMENT’S RESPONSE:

The Flavian Government sought an order of restraint on the publication of news on the situation of Kazalia till normalcy is restored. The High Court of Kilmonack passed a judgement restraining the media from publishing any such kind of information till restoration of normalcy in Kazalia in the interests of national security and public order. The President strongly denied the allegations of the article and framed the Flavian Express and Mr. Sorial under the offence of Defamation and Seditious. The Criminal Court of Kilmonack ordered the Flavian Express and Mr. Sorial to reveal the author(s) of the anonymous article but Mr. Sorial refused to communicate. Mr. Sorial requested access to certain official documents to justify the allegations in the article but the Government refused access to the official documents. He also challenged the constitutional validity of Sections 124-A and 500-A of the Flavian Penal Code.

PUBLICATION OF SECOND ARTICLE

Another news article titled ‘The Never-Ending Troubles for Kazalia’ was published in the Flavian Express revealing the escalation of tense environment in Kazalia with the increase in deployment of the armed forces and the denial of basic rights to Kazalian natives. The Flavian Government approached the Supreme Court of Flavia for prosecuting Mr. Sorial and the Flavian Express for committing a breach of the Supreme Court Order. Mr. Sorial and the editors filed a petition against the indefinite continuance of the order in violation of the constitutional guarantee of free speech.

PRELIMINARY HEARING BY THE SUPREME COURT

The Supreme Court constituted a Special Bench comprising of all its nine Judges to reconsider the validity of the restraintment order. In a preliminary hearing, the Judges asked the Government the time within which it expects to restore normalcy in Kazalia. The Attorney General, on instructions, submitted that the Government expects it by end of March or by mid- April. The Special Bench agreed to consider the Criminal Appeals and Writ Petition filed by Mr. Sorial. The Supreme Court observed that Flavia is a signatory to the International Convention on Civil and Political Rights [‘ICCPR’] and has ratified the same so it is bound by the provisions of the ICCPR. The Supreme Court has posted the matters for final hearing on 25th February 2020.

STATEMENT OF ISSUES

- I. WHETHER THE ORDER OF RESTRAINTMENT SOUGHT BY THE GOVERNMENT ON PUBLICATION OF NEWS FROM KAZALIA IS VALID AND ENFORCEABLE?

- II. WHETHER THE COURT ORDER DIRECTING MR.. DOLFOPA SORIAL TO REVEAL THE IDENTITY OF THE AUTHOR(S) WHO POSTED THE ANONYMOUS ARTICLE AND PUNISHMENT FOR REFUSAL TO COMMUNICATE THE REQUESTED INFORMATION IS ILLEGAL AND VIOLATIVE OF THE FREEDOM OF PRESS?

- III. WHETHER THE REFUSAL BY THE GOVERNMENT TO GRANT ACCESS TO THE REQUESTED OFFICIAL DOCUMENTS IS VALID?

- IV. WHETHER SECTIONS 124-A AND 500-A OF THE FLAVIAN PENAL CODE ARE VIOLATIVE OF THE FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION?

- V. WHETHER THE PROSECUTION AGAINST ‘THE FLAVIAN EXPRESS’ AND MR.. DOLFOPA SORIAL IS LIABLE TO BE QUASHED?

SUMMARY OF ARGUMENTS

I. The order of restraintment sought by the Flavian govt on publication of news from Kazalia is invalid.

The restraintment order sought by the govt of Flavia on publication of news regarding the situation of Kazalia is invalid because it violates the fundamental right to freedom of speech and expression recognised under art. 19 of the Constitution of Flavia. Freedom of press has been declared a part of the freedom of speech and expression. The restrictions imposed by the order restricts the rights of the press and journalists and prevents the public's right to access information on the situation of Kazalia.

Further, the restrictions violate the provisions of the ICCPR which has been ratified by the State of Flavia. A three-part test, governing the validity of restrictions on freedom of speech, has been prescribed under art. 19(3) of ICCPR. The Order does not fulfil the grounds for the validity of restrictions prescribed under the test.

II. The Court order directing Mr.. Dolfopa Sorial to reveal the identity of the author(s) who posted the anonymous article, and punishment for refusal to communicate the requested information, is illegal and violative of the freedom of press.

The court order to reveal the identity of the author who posted the anonymous article is invalid under the ICCPR. For a reservation to be valid under the ICCPR, it has to be compatible with the object and purpose of the ICCPR. The object and purpose of the ICCPR are to create legally binding human rights standards on states ratifying it. An arbitrary and vague reservation like this court order creates a 'chilling effect' on the right to seek and receive information under Article 19 as it encourages self-censorship amongst citizens. Hence, it is invalid under the ICCPR.

Further, the court order constitutes an interference with the rights under Article 17 and 19 of the ICCPR. Such interference would be valid if it is "prescribed by law" and "necessary in a democratic society". The court order does not fulfil any of these requirements. Further, it is not necessary and pursuant to any of the legitimate aims under the ICCPR. Hence, the court order conflicting with Article 17 and 19 of the ICCPR is invalid.

III. The refusal by the govt to grant access to the requested official documents is invalid.

The refusal of the govt to grant access to the requested official documents is invalid. The govt deliberations before the abolition of the 'Special Category' status of Kazalia should be

granted as under the Right to Information Act of Flavia, it is mentioned that once the decision has been made, the deliberations of the council must be made public. The documents related to third parties may be disclosed if the public interest in disclosure outweighs any kind of harm to the third party.

The internet and mobile services in Kazalia were suspended and all kinds of protests were banned. There were violent protests all over the country, which portrays that public interest in the matter is significant and bears more importance than the rights of the third party concerned. As for the documents about the president and his family members' assets, the public interest significantly outweighs his right to privacy. The release of such documents will also give the appellant to prove his innocence and credibility.

IV. Sections 124-A and 500-A of the Flavian Penal Code violate the Fundamental Right to Freedom of Speech and Expression.

Freedom of speech and expression is essential for every society that claims to be free and democratic. It has been both, nationally and internationally recognized. Restrictions to it must satisfy the test of reasonableness that includes legitimacy, necessity and proportionality and must adhere to constitutional morality. Section 124-A and 500-A of the Flavian Penal Code infringe free speech and expression under Article 19 of the Constitution. The provisions are imprecise, unreasonable and disproportionate. They stifle transparency and criticism of the govt, which is beyond constitutional morality.

V. The prosecution against the Flavian Express and Mr.. Dolfopa Sorial is invalid and liable to be quashed.

The actions of The Flavian Express and Mr. Sorial do not fall within the ambit of Sections 124-A and 500-A of the Flavian Penal Code. Their platform merely acted as a conduit in the publication of the anonymous article, which was furthered in good faith. Further, their prosecution is an abuse of the process of law as the Article portrays a matter of public interest and contributes to debate in a democracy. Thus, their prosecution fails to disclose an offence and is liable to be quashed.

ARGUMENTS ADVANCED

I. THE ORDER OF RESTRAINTMENT SOUGHT BY THE FLAVIAN GOVT ON PUBLICATION OF NEWS FROM KAZALIA IS INVALID.

¶ 1. The restraintment order [“ResOr”] sought by the Flavian Govt [“Govt”] to prohibit the print and electronic media on publication of news regarding Kazalia is invalid because the restrictions violate the fundamental right to freedom of speech and expression recognised under the Flavian Constitution [“Const”] [A], and violate the provisions of the ICCPR which has been ratified by Flavia. [B]

A. The restrictions violate the fundamental right to freedom of speech and expression recognised under Flavian Const.

¶ 2. The Fundamental Right to freedom of speech and expression can be restricted on the grounds of public order, morality, national security, defamation and incitement to an offence.¹ The importance of the right to freedom of expression as regards individuals and societies has been recognised in multiple judgements across jurisdictions.² The Flavian Supreme Court has widened the scope of this right by including the freedom of press.³ Presently, this right has been violated by the ResOr because it restricts the freedom of the press and journalists [i]; it denies the citizens’ right to access the information regarding Kazalia. [ii]

i. The freedom of press and journalists has been restricted.

¶ 3. The press plays a very significant role in the democratic machinery and the courts have a duty to uphold the freedom of the press and invalidate all laws and administrative actions that abridge that freedom.⁴ A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other rights.⁵ The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.⁶ This implies a free press and media to be able to comment on public issues without censorship or restraint

¹ FLAVIA CONST. art. 19.

² Park v. Republic of Korea, Comm. 628/1995, U.N. Doc. A/54/40, Vol. II, ¶ 85 (1998); Benhadj v. Algeria, Comm. 1173/2003, U.N. Doc. A/62/40, Vol. II, ¶ 122 (2007).

³ *The Case*, ¶ 1; Romesh Thappar v. State of Madras AIR 1950 SC 124 (India).

⁴ Indian Express v. Union of India, (1985) 1 SCC 641 (India).

⁵ Morais v. Angola, Comm. No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002, (Apr. 18, 2005).

⁶ Art. 19: Freedoms of opinion and expression, H.R.C. General comment No. 34, U.N. Doc. CCPR/C/GC/34, ¶ 13 (July 29, 2011).

and to inform public opinion.⁷ Therefore, the freedom of the press includes freedom of publication, freedom of circulation and freedom against pre-censorship.⁸

¶ 4. The govt's decision to abolish 'Special Category Status' of Kazalia was followed by the closure of mobile and internet services and a ban on all forms of protests in Kazalia.⁹ The media reports could not depict a clear picture as to the real situation of Kazalia.¹⁰ When the article was published in Flavian Express exposing the Kazalian Land Scam, the govt tried to prohibit the Flavian Express and other media houses from publishing any information or news on the situation in Kazalia till normalcy has been restored. The ResOr violates the freedom of press because they are absolute in nature on account of non-publication of any valuable information or news pertaining to Kazalia and the indefinite continuance of these restrictions. Therefore, the state should be held liable for infringement of freedom of speech and expression recognised under the art. 19 of the Flavian Const.

ii. Public's right to access information regarding Kazalia has been denied.

¶ 5. Right of the public to seek and receive information¹¹ on the matters of public importance is an important part of the right to freedom of speech and expression.¹² It ensures public access to multitudes of ideas and philosophies.¹³ The public's right to know and the journalists' right and duty to publish information in the public interest constitutes an essential aspect of freedom of speech and expression.¹⁴ This right embraces the public's need to seek the truth, its right to participate in the debates of general interest,¹⁵ social change and decision

⁷ The right to participate in public affairs, voting rights and the right of equal access to public service, H.R.C. General Comment No. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7, ¶ 25 (1996).

⁸ Sakal Papers Ltd. v. Union of India, AIR 1962 SC 305 (India); Bennett Coleman and Co. v. Union of India, AIR 1973 SC 106 (India); Brij Bhushan v. State of Delhi, AIR 1950 SC 129 (India).

⁹ *The Case*, ¶ 5.

¹⁰ *Id.*

¹¹ Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 (India) [hereinafter *UOI*]; Magyar v. Hungary, App. No. 18030/11 Eur. Ct. H.R. ¶ 142 (2016); Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Rep. on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, H.R.C., U.N. Doc. A/HRC/23/40, (Jan. 11, 2011); International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171; African Charter on Human and Peoples Rights art. 9(1), Oct. 10, 1986, 1520 U.N.T.S. 217.

¹² Axel Springer v. Germany, App. No. 39954/08 Eur. Ct. H.R. ¶ 79 (2012); Bladet Tromsø v. Norway, App. No. 21980/93 1999-III Eur. Ct. H.R. ¶¶ 59, 62 (1999); Pedersen & Baadsgaard v. Denmark, App. No. 49017/99 2004-XI Eur. Ct. H.R. ¶ 71 (2003); Financial Times Ltd. v. United Kingdom, App. No. 821/03 Eur. Ct. H.R. ¶ 59 (2009); M.G.N. Ltd. v. United Kingdom, App. No. 39401/04 66 Eur. Ct. H.R. ¶ 141 (2011); De Haes v. Belgium, App. No. 19983/92 Eur. Ct. H.R. ¶ 37 (1997).

¹³ Sarah Joseph and Melissa Castan, Commentary, *The International Covenant on Civil and Political Rights*, OXFORD UNIVERSITY PRESS, 590 (2013).

¹⁴ Mail & Guardian Ltd. v. Maharaj, App No. 37510/2012, (May 12, 2016).

¹⁵ Von Hannover v. Germany, App. No. 59320/00 Eur. Ct. H.R. ¶ 60 (2004); Leempoel v. Belgium, App. No. 64772/01 Eur. Ct. H.R. ¶ 68 (2006); Standard Verlags v. Austria (No. 2), App. No. 21277/05 Eur. Ct. H.R. ¶ 46 (2009).

making.¹⁶ Public's right to access information includes the right of the general public to receive information from the media on matters of public affairs and public importance.¹⁷ Matters of public importance include the well-being of the citizens or the welfare of a community.¹⁸ As a means to protect the right of media users, States parties are required to take particular care to encourage independent and diverse media so that the public could receive a wide range of information and ideas.¹⁹ The citizens can make a request for information²⁰ and the public authority may provide such information if the public interests in disclosure outweigh the harm to the protected interests.²¹

¶ 6. The abolition of the Special Category Status of Kazalia has provided the AZM Group owned by Mr. Mosante the contract to renovate the historical Kazalia Palace and acquire lands in Kazalia which would lead to personal gains of the President and his family.²² The publication of news is important to expose this large-scale scam to the public. Presently, the restrictions imposed by the Govt's ResOr are hindering the role of the media and journalists to bring to public knowledge the actions of the public officials, thereby denying the citizens' right to access information regarding the situation of Kazalia. Therefore, the Govt is obligated to provide access to information to the citizens regarding the situation of Kazalia as per the RTI Act of Flavia.

B. The restrictions imposed upon the freedom of the press are not in accordance with the provisions of ICCPR.

¶ 7. The right to freedom of opinion and expression is of paramount importance in any democratic society.²³ Art. 19(2) of ICCPR requires states parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.²⁴ The obligation to respect freedom of opinion and expression is binding on every state party and therefore all branches of the state and other public or govt authorities, at whatever level are in a position to engage the responsibility of

¹⁶ Michael G. Doherty, *Politicians as a species of "public figure" and the right to privacy*, 1 U. K. HUMANITAS J. EUR. STUD. 35 (2007); *The Representative on Freedom of the Media*, RECOMMENDATIONS ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (June 14, 2003).

¹⁷ Mavlonov and Sa'di v. Uzbekistan, Comm. No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004, (Mar. 19, 2009).

¹⁸ Gauthier v. Canada, Comm. No. 633/1995, U.N. Doc. CCPR/C/65/D/633/1995, (May 5, 1999).

¹⁹ *supra* note 6, ¶ 14.

²⁰ § 6, Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (Flavia).

²¹ *Id.*, § 8(2).

²² *The Case*, ¶ 7.

²³ *supra* note 2.

²⁴ *supra* note 6, ¶ 11.

the state party.²⁵ All forms of expression and the means of their dissemination are protected under art. 19.²⁶ The term expression includes political discourse,²⁷ commentary on public affairs,²⁸ discussion of human rights²⁹ and journalism.³⁰ This right includes the expression and receipt of communications of every form of opinion subject to the provisions in art. 19(3) and art. 20 of ICCPR.³¹

¶ 8. Art. 19(3) of the ICCPR establishes a three-part test for the validity of restrictions on freedom of expression.³² Only those restrictions are considered to be legitimate which meet this strict three-part test.³³ It requires that a restriction must be in accordance with the law [*i*]; the restriction must serve a legitimate aim [*ii*], and the restriction must be necessary for a democratic society³⁴ [*iii*]. The restrictions imposed herein through the ResOr are not valid under the art. 19(3) of the ICCPR and art. 29 of the UDHR as explained below.

i. The restrictions are not governed by a defined law.

¶ 9. First, a restriction must be in accordance with the law.³⁵ This includes primary legislation, as well as regulations and other legally binding documents adopted pursuant to primary legislation.³⁶ Under this part of the test, the power to authorise restrictions on freedom of expression is essentially vested in the legislative branch of govt.³⁷ A norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate conduct to a reasonable degree.³⁸ The rules must be foreseeable to a degree that is reasonable in the given circumstances.³⁹

²⁵ The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, H.R.C. General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 4 (Mar. 29, 2004).

²⁶ *Id.* at ¶ 12.

²⁷ *Mika Miha v. Equatorial Guinea*, Comm. No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (Aug. 10, 1994).

²⁸ *Coleman v. Australia*, Comm. No. 1157/2003, U.N. Doc. CCPR/C/87/D/1157/2003 (Aug. 10, 2006).

²⁹ *Velichkin v. Belarus*, Comm. No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (Nov. 3, 2005) [hereinafter *Velichkin*].

³⁰ *supra* note 17.

³¹ *Ballantyne, Davidson, McIntyre v. Canada*, Comms. Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (May 5, 1993).

³² Toby Mendel, *Restricting Freedom of Expression: Standards and Principles*, Centre for Law and Democracy, <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-onFOE.pdf>.

³³ *Mukong v. Cameroon*, Comm. No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (Aug. 10, 1994).

³⁴ Commission Regulation 2016/679, General Data Protection Regulation, art. 17(1)(c), 2016 O.J. (L 119); *Gaweda v. Poland*, App. No. 26229/95 2002-II Eur. Ct. H.R. ¶ 39 (2002); *Feldek v. Slovakia*, App. No. 29032/95 Eur. Ct. H.R. ¶ 52 (2001); *Konate v. Burkina Faso*, App. No. 004/2013 Afr. Ct. H. People’s R. ¶ 125 (2014).

³⁵ International Covenant on Civil and Political Rights art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171;

³⁶ *supra* note 32.

³⁷ *Id.*

³⁸ *Sunday Times v. United Kingdom*, App No. 6538/74 30 Eur. Ct. H. R. ¶49 (1979) [hereinafter *Sunday Times*]; *Malone v. The United Kingdom* (1984) 7 EHRR 1; *Mueller v. Switzerland*, (1988) 13 EHRR 212; *Connally v.*

¶ 10. The ResOr passed by the govt does not fulfil the criteria and standards prescribed under art. 19(3). It imposes an absolute limitation upon the freedom of speech and excludes the possibility of positive criticism. Further, there has been no definite legislation that formally governs the restrictions imposed on the media houses, journalists and independent authors leading to violation of this limb of the Test.

ii. The restrictions are not pursuant to a legitimate aim.

¶ 11. Under the second part of the Test, a restriction on freedom of expression can be valid only if it pursues a legitimate aim.⁴⁰ Legitimate grounds for restrictions have interpreted to be the respect for the rights or reputations of others⁴¹ and the maintenance and protection of public order.⁴² Criticism of actions of the public officials is a sign of a functioning democracy and it neither threaten the reputation of officials nor leads to public disorder.⁴³ The speech or writing must have a direct and proximate link with the danger it creates if published in the prevailing circumstances.⁴⁴ For restrictions to be considered being pursuant to a legitimate aim, a nexus should be established between the reasonable restrictions and the legitimate grounds.⁴⁵

The publication of the article regarding the ‘Kazalia Land Scam’ was an attempt to inform public regarding the sale and purchase transactions undertaken by the President and the govt in the wake of the abolition of Special Category status of Kazalia. The article was neither intended to defame the president or the govt nor create any kind of public disorder in Kazalia. The sole intention of the author was to create awareness among the general public and not to instigate any kind of violent activity. Therefore, the restrictions imposed on the media does not serve any legitimate aim and hence it is unreasonable to restrict media from publishing

General Construction Co. 269 U.S. 385, 391 (1926); Coates v. Cincinnati 402 U.S. 611 (1971); Kartar Singh v. State of Punjab (1994) 3 SCC 569.

³⁹ Harman v. UK (1984) Eur. Ct. HR 24; Open Door and Dublin Well Woman Centre v. Ireland (1992) ECHR 68; In Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors (1983) 31 O.R. (2d) 582 (Canada).

⁴⁰ *supra* note 6, ¶ 28; Sunday Times, *supra* note 38, ¶ 62.

⁴¹ JR Lopez-Fando Raynaud and E Pardo Unanua v. Spain App. No. 26601/95 Eur. Ct. H.R. (1997); H Mahler v. Germany App No. 18902/91 Eur. Ct. H.R. (1998); Middleburg and Ors v. the Netherlands App No. 34328/96 Eur. Ct. H.R. (1998); Annual Rep. of the Inter-Am. Comm’n on H.R., Report of the Office of the Special Rapporteur for Freedom of Expression EA/Ser.L/V/II.1unhrc (Mar. 8, 2008).

⁴² *supra* note 6, ¶ 21.

⁴³ Nihal Jayawickrama, Commentary, *The Judicial Application of Human Rights Law*, CAMBRIDGE UNIV. PRESS, p. 200 (2002).

⁴⁴ Schenck v. United States 294 U.S. 47 (1919); Sürek v. Turkey App. No. 24762/94 Eur. Ct. H.R. (1991); Oberschlick v. Austria App. No. 15974/90 Eur. Ct. H.R. (1991).

⁴⁵ O.K. Ghosh v. E.X. Joseph, AIR 1963 SC 812 (India); Supdt. Central Prison v. Dr. Ram Manohar Lohia, AIR 1960 SC 633 (India).

news on the present matter which holds great importance from the perspective of public awareness and govt accountability towards the public.

iii. The restrictions are not necessary for a democratic society.

¶ 12. Lastly, for a restriction to be necessary for a democratic society, it must fulfil a pressing social need and should be proportionate to the legitimate aim pursued.⁴⁶ In a representative democracy, public participation in political discourse is essential.⁴⁷ The press, being a public watchdog,⁴⁸ is obliged to impart information on the matters of public interest⁴⁹ eliciting general debate in a democratic society.⁵⁰ The public cannot be held liable if they carry on a peaceful demonstration which goes wrong, so long as no threats were made.⁵¹ The citizens can criticize their govt but that does not provide for the govt to suppress such criticism on the possible fear that exercise of free speech could lead to an undesirable situation when there exists a threat to public order.⁵²

¶ 13. The internet connectivity in Kazalia has not been restored past one month and the natives are being denied their basic rights.⁵³ The ResOr hinders the free speech of the media on the matter of the denial of human rights to Kazalian natives.⁵⁴ The fear of circulation of fake news and incitement to aggravate situations in Kazalia cannot be considered as a justified reason or a pressing social need for imposing such absolute restrictions. Further, the restrictions are escalating the already tense situation in Kazalia. Therefore, the imposition of ResOr violates the democratic setup of Flavia.

II. THE COURT ORDER DIRECTING MR.. DOLFOPA SORIAL TO REVEAL THE IDENTITY OF THE AUTHOR(S) OF THE ANONYMOUS ARTICLE, AND PUNISHMENT FOR REFUSAL TO COMMUNICATE THE SAME, IS ILLEGAL AND VIOLATIVE OF THE FREEDOM OF PRESS.

¶ 14. The Court order directing Mr.. Sorial to reveal the identity of the author(s) who posted the anonymous article, and sanctioning punishment for refusal, is violative of their right to

⁴⁶ *supra* note 37, ¶ 49.

⁴⁷ *supra* note 7, ¶ 23; Australian Capital Television (Pty) Ltd. v. Commonwealth (1992) 177 CLR 106 (Australia); Wojciech Sadurski, *Freedom of Speech and its limits*, KLUWER ACADEMIC PUBLISHERS, p. 102 (1999).

⁴⁸ Magyar Helsinki Bizottság v. Hungary, App. No. 18030/11 Eur. Ct. H. R. ¶ 165 (2016).

⁴⁹ Sunday Times, *supra* note 38, ¶ 65.

⁵⁰ Coudrec v. France, App. No. 40454/07 Eur. Ct. H.R. ¶ 188 (2015).

⁵¹ Ezelin v. France, App. No. 11800/85 Eur. Ct. H.R., (1991).

⁵² The Free Press of Namibia (Pty) Ltd. v. Cabinet for the Interim Govt of South West Africa 1987 (1) 614 (South Africa).

⁵³ *The Case*, ¶ 17.

⁵⁴ *supra* note 48.

privacy under art. 17 of the ICCPR [A], and creates a ‘chilling effect’ in contravention of art. 19 [B]. Further, it does not fall under the legitimate restrictions [C].

A. The Court order is violative of Mr.. Sorial and the author(s)’ right to privacy under art. 17 of the ICCPR.

¶ 15. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.⁵⁵ Privacy is a gateway to the enjoyment of other rights, particularly the freedom of opinion and expression.⁵⁶ In doing so, anonymity is regarded as a special safeguard to protect freedom of expression as it permits individuals to profess their interests, beliefs and political ideologies without fear of reprisals from the state or any other powerful organisation.⁵⁷ It is the condition of avoiding identification.⁵⁸ Anonymity also protects the privacy of the individual by preserving his/her identity, as guaranteed in art. 8(1) of the ECHR.⁵⁹ The U.S. High Court has emphasized the importance of anonymity in multiple landmark cases.⁶⁰

¶ 16. In the present matter, the right of the author of the article to remain anonymous is violated with the court order, which in turn is violative of his/her right to privacy. Hence, the court order directing to reveal the identity or the email address of the author of the anonymous article stands no ground.

B. The court order creates a ‘chilling effect’ in contravention of art. 19 of the ICCPR.

¶ 17. Art. 19 of the ICCPR states that everyone shall have the right to freedom of expression and it shall include freedom to seek, receive and impart information and ideas of all kinds, in writing or in print or through any other media of his choice.⁶¹ Not only does the press have the task of sharing information and ideas, but the public also has a right to receive them.⁶² The chilling effect may be defined as when individuals seek to engage in lawful activity but are deterred from doing so by a govt action not specifically directed at that

⁵⁵ International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵⁶ G.A. Res. 68/167, A/HRC/13/37 and H.R. Council Res. 20/8.

⁵⁷ Katherine S. Williams, *On-Line Anonymity, Deindividuation and Freedom of Expression and Privacy* 110 Penn St. L. Rev. 687 (2006).

⁵⁸ UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/23/40, 17 April 2013 (the 2013 Report of the SR on FOE), ¶ 9.

⁵⁹ Eur. Conv. on H.R. and Fundamental Freedoms, Nov. 4, 1950, art. 8.

⁶⁰ McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), p. 342-343; Talley v. California, 362 U.S. 60.

⁶¹ *supra* note 55.

⁶² Lingens v. Austria (1986) 8 EHRR 407, Series A No. 103, §41.

activity.⁶³ Surveillance systems may interfere with the right to form an opinion and cause a chilling effect, as the fear of unwilling disclosure of activity, deters individuals from accessing information, particularly where such surveillance leads to repressive outcomes.⁶⁴ Restricting anonymity creates a chilling effect on the journalists and also curbs journalistic freedom.⁶⁵ Journalistic freedom is one of the fundamental conditions for press freedom and if it's not protected, sources may be discouraged from assisting the press in informing the public on matters of public interest.⁶⁶ A fundamental tenet of journalism is the ability to access information, and in doing so, to keep sources safe and confidential.⁶⁷ In *Lewis Publishing Co. v. Morgan*,⁶⁸ it was held that by compelling public disclosure of the identities of the editors and owners of the newspaper violates their right to propagate ideas impersonally.

¶ 18. In the present matter, the court order to reveal the identity of the anonymous author curbs the journalistic freedom offered under freedom of speech and expression. The author has the right to share his views and publish the same. The court order regarding this matter not only violates the freedom of expression but also creates a chilling effect upon other journalists.

C. The court order does not fall under the legitimate restrictions.

¶ 19. The court order places a restriction on the freedom of speech and expression. The literal meaning of restriction implies a limiting condition or measure, especially a legal one.⁶⁹ By that definition, a restriction on freedom of expression can consist in anything ranging from a law to a court order to an internal disciplinary measure by a public body, whether or not it is legal under domestic law.⁷⁰

¶ 20. As court orders also fall under restrictions to art. 19, it must follow the three-part test. The Court order does not qualify as a legitimate restriction as it is not prescribed by law [i], does not serve any legitimate aim [ii], and is not necessary for a democratic society [iii].

⁶³ Gayle Horn, *Online Searches and Offline Challenges: The Chilling Effect, Anonymity and the New FBI Guidelines*, 60 N.Y.U. Ann. Surv. Am. L. 735 (2005).

⁶⁴ UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/23/40, (Apr. 17, 2013), ¶ 21; *Barfod v. Denmark* (1989) 13 E.H.R.R. 493.

⁶⁵ *Id.*

⁶⁶ *Goodwin v. the United Kingdom*, App. no. 17488/90, Eur. Ct. H.R. (1996) (GC); *Nagla v. Latvia*, App. No. 73469/10, Eur. Ct. H.R. (2013).

⁶⁷ *Id.*

⁶⁸ *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 298-99 (1913).

⁶⁹ OXFORD DICTIONARY, ninth ed., p. 1174, 1995.

⁷⁰ <https://uofahsmun.files.wordpress.com/2012/06/limitations-c2b7-what-we-do-c2b7-article-19.pdf>.

i. The court order is not ‘prescribed by law’.

¶ 21. For a norm to be ‘prescribed by law’, there must be a measure of legal protection in domestic law against the arbitrary interferences by public authorities with the rights safeguarded under ICCPR.⁷¹ The exercise of these freedoms is subject to such restrictions which are prescribed by law.⁷² The Eur. Ct. H.R. has held that the conviction of the journalist on basis of defamation of a politician is an interference not prescribed by law because it was merely a value judgement and the context of the article was dealing with an issue of public interest.⁷³ Also in the case of politicians, the limits of acceptable criticism are wider than in respect of a private individual.⁷⁴

¶ 22. In the present matter, the anonymous article is a value judgement which deals with a matter of significant public interest. Therefore, the court ordering the disclosure of the author is an interference with the freedom of expression and it is not ‘prescribed by law’.

ii. The court order is not pursuant to a legitimate aim.

¶ 23. Speeches, which contribute to any form of public debate capable of bringing about further progress in human affairs, are protected by freedom of expression and cannot be restricted for protecting the ‘right and reputation of others.’⁷⁵ Any restriction on the right to freedom of expression must have a legitimate aim. The Eur. Ct. H.R. has held that a journalist’s criminal conviction for defamation post the publication of articles accusing prominent public figures of fraud constituted a violation of art. 10 of the Eur. Conv. on H.R.⁷⁶ In *Karhuvaara and Iltalehti v. Finland*,⁷⁷ the Eur. Ct. H.R. found that the applicants’ conviction for interfering with the private life of a member of parliament infringed the freedom of expression and the punishment accrued was disproportionate to the legitimate aim pursued.

¶ 24. In the present case, the court order to disclose the identity of the anonymous author is not an interference pursuant to a legitimate aim because it does not secure the rights of the journalists and authors to publish writing and making speech. The author has a right to

⁷¹ *Malone v. United Kingdom* (1984) 7 EHRR 14, ¶ 67; *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984) UN Doc E/CN.4/1985/4, ¶ 25

⁷² *European Convention for the Protection of H.R. and Fundamental Freedom*, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

⁷³ *Grinberg v. Russia*, App. No. 23472/03, Eur. Ct. H.R. 2005.

⁷⁴ *Oljana Hoxhaj, Freedom of Expression*, 3 *Juridical Trib.* 168 (2013).

⁷⁵ *Otto-Preminger-Institut v. Austria* (1994) 19 EHRR 34; *supra* note 6, ¶ 28; *Leonid Svetik v. Belarus Comm.* No. 927/2000, U.N. Doc. CCPR/C/81/D/927/2000 (2004).

⁷⁶ *Dalban v. Romania [GC]*, App. No. 28114/95, Eur. Ct. H.R 1999, Reports 1999-VI, §49.

⁷⁷ *Karhuvaara and Iltalehti v. Finland*, App. No. 53678/00, Eur. Ct. H.R 2004, Reports 2004-X.

freedom of expression and his right cannot be restricted for protecting the right and reputation of the President. Therefore, the author cannot be subject to punishment for defamation of the President.

iii. *The court order is not necessary for a democratic society.*

¶ 25. For a norm to be ‘necessary in a democratic society’, it must correspond to a special social need.⁷⁸ Concerning the various penalties imposed for publishing articles, it was decided by the ECtHR that in most cases they had been unnecessary in a democratic society.⁷⁹ The Eur. Ct. H.R. court has held that if there is a violation of the freedom of expression by an injunction restraining publication of an article concerning significant information, then the injunction is not necessary for a democratic society.⁸⁰

¶ 26. In the present matter, the court order directing to divulge the identity of the anonymous author is not necessary for a democratic society because it contains significant information involving public interest. The article merely enables everyone to participate in the free political debate which is one of the tenets of democracy.

III. THE REFUSAL BY THE GOVT TO GRANT ACCESS TO THE REQUESTED OFFICIAL DOCUMENTS IS INVALID.

¶ 27. The Govt’s refusal to grant access to its deliberations preceding the abolishment of the Special Category Status of Kazalia [A]; and its subsequent allocation of land in Kazalia and the contract of renovation [B] to Mr.. Sorial is invalid. Further, obtaining details of the president and his family members’ assets do not violate their right to privacy [C].

A. The Govt’s refusal to grant access to its deliberations preceding the abolishment of the special category status of Kazalia is invalid.

¶ 28. The records of govt deliberations must be made accessible to the public, as the govt is a public authority and must ensure transparency in their functions.⁸¹ The public has a right to receive information and openness of the decision-making process is an innate feature of democracy.⁸² The Parliament and the office of President fall under the domain of public authority, which includes any authority or body or institution of govt established or

⁷⁸ *supra* note 38.

⁷⁹ *Jersild v. Denmark*, App. No. 15890/89, Eur. Ct. H.R (1994); *Castells v. Spain*, App. No. 11798/85 Eur. Ct. H.R (1992), Series A No. 236, §43.

⁸⁰ *Sunday Times*, *supra* note 38.

⁸¹ *Declaration on the right of access to information*, [1992] 1 C.M.L.R. at 785, 31 I.L.M. at 367 (1992).

⁸² *Szabadsagjogokert v. Hungary* (2011) 53 EHRR 3, p.26; 7 Curtin, D. and Mejers, H., *The Principle of Open Government in Schengen and the European Union: Democratic Retrogression*, 35 (1995) CML Rev., 390, 392; *Netherlands v. Council* [1996] ECR I 2169, ¶ 16.

constituted under the Const.⁸³ This includes the Parliament, which comprises of the President and the two houses, as it was established under the provisions of the Const.⁸⁴ Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over.⁸⁵ Records of govt officials deliberating on govt. functions must be made public in light of public interest.⁸⁶ In particular, the classification that restricts access to govt information on grounds of national security is not serving its intended purpose, it has become an unwarranted obstacle to information sharing.⁸⁷

¶ 29. In the present case, the announcement regarding the abolition of the Special Category Status of Kazalia is already made. Hence, the records of the deliberations in the govt preceding Mr.. Mosante's announcement must be made public in the interests of govt accountability to the public and principles of transparency and proportionality.

B. The Govt's refusal to grant access to its deliberations leading to the allotment of land in Kazalia and the contract of renovation is invalid.

¶ 30. Disclosure of documents regarding third parties may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.⁸⁸ When there is a conflict between third party confidentiality and public interest, the preference should be for disclosure.⁸⁹ There seems no possible harm or injury in any way to the third party concerned here, rather, the public interest is paramount in such a situation. It is a question of public interest as this, in turn, proves the credibility of the media and the innocence of the anonymous writer as it then becomes a fact and not defamation.

⁸³ *supra* note 20, § 2(h)(a).

⁸⁴ INDIA CONST. art. 79.

⁸⁵ *supra* note 20, § 8 (1)(a)(i).

⁸⁶ DFES v. Information Commissioner and Evening Standard, Appeal No. EA/2006/0006; Case T 194/94 Carvel and Guardian v. Council [1995] ECR 11-2765; Code of Conduct Concerning Public Access to Council and Commission Documents 93/731/EC OJ 1993 L340/41.

⁸⁷ Steven Aftergood, *Reducing Government Secrecy: Finding what works*, YALE LAW AND POLICY REV, p. 405.

⁸⁸ *supra* note 20, § 11(1); § 19 Freedom of Information Act, S.M. 1985, c. 6; § 11(2) of Freedom of Information and Protection of Individual Privacy Act 5 S.O. 1987, cl. 25.

⁸⁹ Arie Freiberg, *Commercial Confidentiality, Criminal Justice and the Public Interest*, 9 Current Issues Crim. Just. 125 (1997).

C. Obtaining details of the president and his family members' assets do not violate their right to privacy.

¶ 31. A public authority may allow access to personal information if larger public interest justifies the disclosure of such information.⁹⁰ Further, the right to information in democracy is recognized all throughout and is a natural right flowing from the concept of democracy.⁹¹ The right to privacy virtually fades out in front of the right to information when the larger public interest comes into the picture.⁹² Alternatively, by refusing access to the documents which substantiates the allegations in the article that the appellant requires for the purpose of defending himself, is an interference with his right to respect for private life.⁹³ The right to privacy is an important right but must be subordinated to the larger public interest.⁹⁴

¶ 32. In the present matter, the disclosure of the President and his family members' assets is of utmost public interest as not only does it give a chance to Mr. Sorial to substantiate the allegations in the article, but also preserves the larger public interest.

IV. SECTIONS 500-A AND 124-A OF THE FLAVIAN PENAL CODE VIOLATE THE FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION.

¶ 33. Art. 19 of the Flavian Const. recognises the fundamental right to freedom of speech and expression subject to certain restrictions.⁹⁵ Such freedom is the foundation stone for every free and democratic society⁹⁶ and is also enshrined under Art. 19 of the ICCPR. § 500-A and § 124-A of the Flavian Penal Code [“FPC”] are ultra vires the provisions of art. 19 since this Freedom is so fundamental that it cannot be curtailed ordinarily [A], therefore, § 500-A [B] and § 124-A violate the essential and intrinsic right to free speech and expression [C].

⁹⁰ *supra* note 20, § 8(1)(j).

⁹¹ UOI, *supra* note 11.

⁹² K.J. Doraisamy v. The Assistant General Manager, State Bank of India, Erode Branch W.P. No. 17761 (India).

⁹³ Leander v. Sweden (1987) 9 EHRR 433, ¶ 48.

⁹⁴ Laurie Durcan & Bruce K. Riordan, *Banking Disclosures, Financial Privacy, and the Public Interest*, 6 Ann. Rev. Banking L. 391 (1987).

⁹⁵ The Case, ¶ 1.

⁹⁶ *supra* note 6, ¶ 2. Tae-Hoon Park v. Republic of Korea, Comm. 628/1995, U.N. Doc. CCPR/C/57/D/628/1995 ¶ 10.3 (HRC 1998); Stephen Benhadj v. Algeria, Comm. 1173/2003, UN Doc. CCPR/C/90/D/1173/2003 (HRC 2007); Handyside v. United Kingdom, App. No. 5493/72 Eur. Ct. H.R. ¶ 49 (1976); Perna v. Italy, App. no. 48898/99 Eur. Ct. H.R. ¶ 38 (2003).

A. Freedom of Speech and Expression is fundamental and cannot be ordinarily curtailed.

¶ 34. Such freedom is so intrinsic, that it can only be subjected to limited, necessary restrictions in a democratic society.⁹⁷ It is fundamental since it is essential to the functioning of a democratic polity and is universally recognised [i]. Further, the restrictions to it must not only be sanctioned by law but also satisfy the test of reasonableness [ii].

i. Freedom is essential for democratic polity and is universally recognized.

¶ 35. Art. 19 protecting the freedom of speech and expression recognises the natural right to Freedom of Speech and Expression of an individual is treated absolutely essential to his being.⁹⁸ The Supreme Court of India has held a speech to be undeniable human right from which almost all other freedoms spring.⁹⁹ The right under Art. 19 is also essential to the sustenance of democracy and is necessary as a tool for proper governance in a constituted democracy.¹⁰⁰ Further, freedom of speech and expression is universally recognized. Free speech is a norm of international law under art. 19 of UDHR. Art. 19(2) of ICCPR protects freedom of expression in almost the same terms as art. 19 of UDHR.

ii. Restrictions to freedom should also satisfy the test of reasonableness.

¶ 36. The test of legitimacy implies that restriction imposed on freedom of speech and expression must be for one of the enumerated legitimate aims and must not be a colourable exercise of power.¹⁰¹ The test of necessity and proportionately implies that the restrictions cannot be broad in their application and must be narrowly tailored so as to restrict only what is absolutely necessary and must be justified on the anvil of necessity.¹⁰² The test of proportionality is one of balancing means and ends and to see whether the imposed restriction was least intrusive.¹⁰³ The action of State in imposing restriction is also to be tested on

⁹⁷ GC 34, *supra* note 97, ¶ 22; Velichkin *supra* note 29, ¶ 7.3; Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, App. no. 22947/13 Eur. Ct. H.R. ¶ 46 (2016).

⁹⁸ National Legal Services Authority v. Union of India (2014) 5 SCC 438 (India); Navtej Singh Johar v. Union of India (2018) 10 SCC 1 (India); Alagaapuram R. Mohanraj v. T.N. Legislative Assembly (2016) 6 SCC 82 (India).

⁹⁹ Re-Ramlila Maidan (2012) 5 SCC 1.

¹⁰⁰ Tehseen S. Poonawalla v. Union of India (2018) 9 SCC 501 (India); Shreya Singhal v. Union of India (2015) 5 SCC 1 (India) [hereinafter *Shreya Singhal*]; Subramanian Swamy v. Union of India 2016 (7) SCC 221 (India) [hereinafter *Subramanyam*].

¹⁰¹ Indian Express Newspapers v. Union of India 1985 (1) SCC 64 (India).

¹⁰² Shreya Singhal, *supra* note 101; S. Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574 (India) [hereinafter *S. Rangarajan*].

¹⁰³ Anuradha Bhasin v. Union of India (SC) WP No.1031/2019 (India).

propriety based on constitutional morality, i.e. adherence to core principles of constitutional norms in governance.¹⁰⁴ Thus, this right cannot be ordinarily curtailed.

B. § 500-A of the FPC violates the essential and intrinsic right to freedom of speech and expression.

¶ 37. § 500-A of the Flavian Penal Code is void and ultra vires art. 19 of the Const. and is not a legitimate restriction under it. It infringes freedom of speech under art. 19 [i]; it is imprecise and vague [ii]; it does not satisfy the test of reasonableness and proportionality and stifles criticism which is beyond public interest and constitutional morality. [ii]

i. Section infringes freedom of speech and expression.

¶ 38. Freedom of speech and expression permits dissemination of information as well as views and opinions and criticism of those in authority.¹⁰⁵ Further, defamation laws must be put in force when it is ensured that they do not stifle freedom of expression.¹⁰⁶ § 500-A makes defamation of the President an offence which stifles the said right and thus negatively affects the democratic process.¹⁰⁷ The conduct of a public servant, even if he is the President of the Republic cannot be a subject matter of restriction under art. 19.¹⁰⁸ Further, the last two clauses of the Section are not covered under art. 19 of the Const. Negative public opinion about the President or endangering his creditworthiness publicly are not covered under these exceptions. Thus, substantively, Art. 19 of Const. is violated.

ii. The Section is imprecise and vague.

¶ 39. A restriction must have adequate precision to enable citizens to regulate their conduct accordingly.¹⁰⁹ Precision required depends on the content of the law in question and the field it is designed to cover.¹¹⁰ § 500-A itself is imprecise and vague as to the absence of a precise definition of defamation. It is not clear as to whether defamation of President in his personal capacity is an offence or if he is defamed in respect of his public conduct or discharge of his

¹⁰⁴ K.S. Puttaswamy v. Union of India (2017) 10 SCC 1 (India); Shayara Bano v. Union of India (2017) 9 SCC 1 (India); Navtej Singh Johar & Ors. v. Union of India (2018) 10 SCC 1 (India); Joseph Shine v. Union of India (2019) 3 SCC 39 (India).

¹⁰⁵ Marques de Morais v Angola, Comm. 1128/02, U.N. Doc. CCPR/C/83/D/1128/2002 ¶ 6.7 (HRC 2005) [hereinafter *Marques*].

¹⁰⁶ GC 34, *supra* note 97, ¶ 47; *Albania*, U.N. Doc. CCPR/CO/82/ALB ¶ 19 (HRC 2004).

¹⁰⁷ *Marques*, *supra* note 106.

¹⁰⁸ S. Khushboo v. Kanniamal & Anr., (2010) 5 SCC 600 (India).

¹⁰⁹ GC 34, *supra* note 97, ¶ 25; *Maria de Groot v. The Netherlands*, Comm. 578/1994, UN Doc. CCPR/C/54/D/578/199 (HRC 1995); *Sanoma Uitgevers BV v. The Netherlands*, App. No. 38224/03 Eur. Ct. H.R. ¶¶ 82, 62 (2010); *VgT Verein gegen Tierfabriken v. Switzerland*, App. No. 24699/94 Eur. Ct. H.R. ¶ 52 (2001); *Gaweda v. Poland*, App no. 26229/95 Eur. Ct. H.R. ¶ 39 (2012).

¹¹⁰ *Magyar v. Hungary*, App. no. 73593/10 Eur. Ct. H.R. (2014); *Centro Europa 7 S.r.l. and Di Stefano v. Italy* App no. 38433/09 Eur. Ct. H.R. ¶ 142 (2012).

public duties is an offence. Explanation 2 inserted to explain “intentional defamation” under sub-§ (2) shows that even truth which defames the President is an offence under sub-§ (1). Also, the Section not only restricts intentional defamation but also unintentional. It does not create any distinction between good faith and bad faith.

iii. *The Section does not satisfy the test of reasonableness and proportionality and stifles criticism.*

¶ 40. The test of reasonableness and proportionality is not satisfied. There is no reason as to why the President of the Republic stands on a different footing than other public servants and why criminal prosecution and penalty is required to be imposed for comments which criticize or tend to defame the President. The restriction is so severe as to negate the very right of free speech and free press.¹¹¹ It is a settled principle that govt cannot sue for its defamation and that the head of the Govt is a public servant and expression of opinion in the discharge of his public duties is necessary for a democratic polity.¹¹² The restriction placed is against the international norm and the President being an executive authority under the Const. and therefore, the Section is against public interest and constitutional morality.

C. § 124-A of the FPC violates the essential and intrinsic right to freedom of speech and expression.

¶ 41. § 124-A of the FPC also violates freedom of speech and expression and is void since the Section is imprecise and vague [i], stifles criticism of the Govt, which is beyond constitutional morality [ii] and is outside the scope of restrictions under art. 19 of the ICCPR [iii].

i. *The Section is imprecise and vague.*

¶ 42. The Section is imprecise and vague for two reasons. *First*, the essentials of Section 124-A show that the spoken or written words by a person are punishable if the effect of the object is to bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards the Govt established by law. In essence, any criticism of the Govt is made punishable the effect of which on the audience depends on the intellectual capacity of

¹¹¹ Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Rep. on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, E/CN.4/2000/63, (Jan. 18, 2000).

¹¹² R. Rajagopal Alias R.R. Gopal v. State of T.N. (1994) 6 SCC 632 (India); *New York Times v. Sullivan*, 376 US 254; *Derbyshire County Council v. Times Newspapers Ltd.*, (1993) 2 WLR 449 (Eng.); *Attorney General v. Guardian Newspapers Ltd. (No 2)* (1990) 1 AC 109 (Eng.).

the viewers.¹¹³ It may or may not constitute any offence, depending in turn on the maturity level of the audience. *Second*, the Absence of an objective basis to determine the offence makes the offence vague and imprecise.¹¹⁴ No action on the part of the audience or response of the audience to objectively show whether hatred or contempt or disaffection was excited against the Govt is made necessary ingredient of the offence. Such broad and imprecise wording makes the offence unspecific and the Section is void for its vagueness.¹¹⁵

ii. Section stifles criticism of the Govt, which is beyond constitutional morality.

¶ 43. Discussion and criticism of govt are essential to working on democracy and an essential part of freedom of speech and expression.¹¹⁶ The Section violates freedom of speech and expression as free speech can only be suppressed when there is a reasonable ground to believe that imminent danger will ensue if free speech is practised.¹¹⁷ Even morally condemnable advocacy that violates the law cannot justify denial of free speech when nothing signifies that such advocacy is immediately acted upon.¹¹⁸ Further, a law is valid in curtailing free speech only when discussion/advocacy leads to incitement.¹¹⁹ Merely discussing or advocating a cause, however unpopular, cannot be curtailed in the garb of sedition.¹²⁰ Thus, § 124-A of the FPC in as much as it punishes or is capable of punishing mere discussion and advocacy is violative of art. 19 of the Const.

iii. The Section is outside the scope of restrictions under art. 19.

¶ 44. The five restrictions which can be imposed on free speech as per art. 19 are public order, morality, national security, defamation and incitement to an offence. None of these cover hatred, contempt or disaffection towards the Govt. Further, public order has been held not to be synonymous with law and order but something which affects the public at large.¹²¹ Similarly, incitement to an offence is not merely that the audience may have a feeling of hatred, contempt or disaffection but should have been by abetment to commit an

¹¹³ Guang Zeng, Effect of Growth Mindset on School Engagement and Psychological Well-Being of Chinese Primary and Middle School Students: The Mediating Role of Resilience (Nov. 29,2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5147462>.

¹¹⁴ Harakchand Ratanchand Banthia and Ors. v. Union of India, 1969 (2) SCC 166 (India).

¹¹⁵ Burstyn, *supra* note 19.

¹¹⁶ *supra* note 113.

¹¹⁷ Whitney v. California, 274 U.S. 357.

¹¹⁸ *Id.*

¹¹⁹ Shreya Singhal, *supra* note 101.

¹²⁰ *Id.*

¹²¹ Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740 (India).

offence.¹²² Thus, unless the presence of incitement to commit an offence is read into the section, it would be rendered unconstitutional.¹²³

V. THE PROSECUTION AGAINST THE FLAVIAN EXPRESS AND MR. DOLFOPA SORIAL IS INVALID AND LIABLE TO BE QUASHED.

¶ 45. A publication is not meant to be interpreted solely in connection with one or more statements in isolation, rather it must be construed in light of its overall spirit and thrust.¹²⁴ The prosecution against the Flavian Express and Mr. Sorial under § 124-A and § 500-A of the FPC is invalid and liable to be quashed since it fails to disclose any offence [A]. Further, their prosecution is an abuse of the process of law [B.].

D. Their prosecution fails to disclose any offence.

¶ 46. The actions of The Flavian Express and Mr. Sorial do not fall within the ambit of § 124-A and § 500-A of the FPC [i]. Alternatively, The Flavian Express merely provided a platform for anybody to write an anonymous post and therefore, acted as a mere conduit in its edition [ii]. Further, the publication was made in good faith [iii].

i. Their actions do not violate § 124-A and § 500-A of the FPC.

¶ 47. The actions of The Flavian Express and Mr. Sorial fall neither within the ambit of (a) § 124-A nor (b) § 500-A of the FPC. § 124-A is an offence against the Govt established by law. It refers to the govt collectively as a body and not as individuals.¹²⁵ In these circumstances, since the Article did not attack the Govt of Flavia, but the President as an individual and in relation to his association with the AZM group, the Article does not constitute an offence against the govt. Further, there is nothing in the Article which may be said to have been written with an intention to create a disturbance of law and order or disorder. The Article fell completely within Expl. (2) and (3) of § 124-A and therefore does not constitute any offence. Even strong condemnation which may be unreasonable, perverse and unfair is protected by the expl. (2) and (3).¹²⁶ These explanations have been added to remove any doubt about the application of the penal provision.¹²⁷ An offence under § 500-A

¹²² S.S. Cheena v. Vijay Kumar Mahajan, 2010 (12) SCC 190 (India).

¹²³ Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955 (India).

¹²⁴ Lewandowska-Malec v. Poland, App. No. 39660/07 Eur. Ct. H.R. ¶ 62 (2012).

¹²⁵ Emperor v. Bhaskar Balwant Bhopatkar, (1906) 4 Crim LJ (Bombay) 16; Kedar Nath v. State of Bihar, AIR 1962 SC 955 (India).

¹²⁶ Kedar Nath v. State of Bihar, AIR 1962 SC 955 (India); Re Annie Besant, AIR 1918 Mad 1210 (India).

¹²⁷ Niharendu v. Emperor, AIR 1942 SC 22 (India); Bhagwati Charan Shukla v. Provincial Government, C.P. & Berar, AIR 1947 Nagpur 1 (India); Nageshwar Sharma v. King Emperor, AIR 1925 Patna 99 (India).

is also not made out because the publication was made for the public good¹²⁸ to afford the public means to know different perspectives to the public conduct of public servant in discharge of his public function and cannot be considered defamatory.¹²⁹

ii. The Open Page platform acted as a mere conduit.

¶ 48. A forum cannot be liable for the words that it does not solicit, select or modify.¹³⁰ Intermediaries are ‘mere conduits’ and are exempted from liability of content posted by third party users.¹³¹ Not all intermediaries are data controllers.¹³² An intermediary may be a controller when it initiates the transmission of a communication, selects the receiver of the transmission, and modifies or selects the information within the transmission.¹³³ But when it acts merely technically and automatically, it is passive in essence.¹³⁴ The Flavian Express only provides a base to third parties, for them to post articles that criticise Govt activities in a healthy manner.¹³⁵ It does not control data and hence, must be exempted from liability of content posted by third party users.

iii. The information was provided in good faith.

¶ 49. If information is provided on public interest in good faith, such right exercised should be secured irrespective of any damage sustained by the affected persons.¹³⁶ In ordinary usage, ‘good faith’ denotes frame of mind indicating the presence of honesty of purpose and faithfulness to one’s duty or obligation.¹³⁷ Furthermore, to make certain that people have means to determine and form an opinion of attitudes of politicians,¹³⁸ the bounds of

¹²⁸ Thorgeirson v. Iceland, App. No. 13778/88 Eur. Ct. H.R. (1992); Castells v. Spain, App. No. 11798/85 Eur. Ct. H.R. (1992); Shivage Gowda v. T. Narayana, (1968) Crim LJ 836 (India); Chaman Lal v. Punjab, AIR 1970 SC 1372 (India).

¹²⁹ H.K. Dua v. Bharti Arora, 2008 (4) RCR(Criminal) 55 (India); Chaman Lal v. Punjab, AIR 1970 SC 1372 (India).

¹³⁰ Delfi AS v. Estonia, App. No. 64569/09 Eur. Ct. H.R. ¶ 7 (2015).

¹³¹ Manila Principles, Pr. I(b); U.N. Special Rapporteur on Freedom of Opinion and Expression; Organization for Security and Co-operation in Europe, Representative on Freedom of the Media; Special Rapporteur on Freedom of Expression and the Afr. Comm’n on H.P.R.; Special Rapporteur on Freedom of Expression and Access to Information; Article 19, Global Campaign for Free Expression; Centre for Law and Democracy, *Joint Declaration on Freedom of Expression and the Internet*, ¶ 2 (June 1, 2011).

¹³² Daphne Keller, *The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 3 Berkley Tech. L.J. 305, 323-324 (2018).

¹³³ Council Directive 2000/31 of 8 June 2000, Directive on electronic commerce, 2000 O.J. (L178/1) 42, 43.

¹³⁴ Joined Cases C-236/08, C-237/08 and C-238/08, Google France, Google Inc. v Louis Vuitton, 2010 E.C.R. 113; Johanna Tuohino, *Liability of Intermediary Service Providers in the EU: Review of current developments*, Masters, University of Lapland (2013).

¹³⁵ *The Case*, ¶ 6.

¹³⁶ Lepojic v. Serbia, App. No.13909/05 Eur. Ct. H.R. ¶ 74 (2007).

¹³⁷ Efron v. Kalmanovitz, 57 Cal. Rptr. 2d 248, 251 (Ct. App. 1967).

¹³⁸ Lingens v. Austria, App. No. 9815/82 Eur. Ct. H.R. ¶ 42 (1986) [hereinafter *Lingens*]; Herrera Ulloa v. Costa Rica, Inter-Am. Ct. H.R. (ser. C) No.107, ¶ 19 (July 2, 2004).

acceptable criticism against politicians¹³⁹ are more spread out as compared to a private individual.¹⁴⁰ Mr. Sorial, by the virtue of his quality journalism, is recognised throughout Flavia.¹⁴¹ With the endeavour of the Flavian Express guided by the vision of Mr. Sorial to continue to provide standard service, their right to provide information to initiate deliberations in the society must be protected.

E. Their prosecution is an abuse of the process of law.

¶ 50. The prosecution of The Flavian Express and Mr. Sorial is so unfair and wrong that even if it were a perfectly supported case, the Court should not allow prosecution.¹⁴² It would offend the Court's sense of justice and propriety to be asked to try the accused.¹⁴³ Their prosecution is an abuse of the process of law since this fails to recognize that the Article portrayed a matter of public interest [i] and that it contributes to a debate in a democratic society [ii]. Alternatively, Mr. Mosante has actively stayed in the public eye [iii].

i. The Article portrayed a matter of public interest.

¶ 51. The press is endowed with the duty to impart ideas and information on issues of political prominence and domains of public interest, while the people have a complementing right to be provided with the same.¹⁴⁴ The public interest includes an ethical standard for public action and society's optimal interest, among other things.¹⁴⁵ Allegations of corruption, even if based on mere suspicion, involve great public interest.¹⁴⁶ Further, public interest typically comprises matters related to public figures.¹⁴⁷ The abolition of the Special Category Status of Kazalia was a concern for many Flavian citizens, and the article published regarding this situation concerns public interest.

¹³⁹ Standard Verlags GmbH and Krawagna-Pfeifer v. Austria, App. No. 21277/05 Eur. Ct. H.R. ¶ 47 (2009); ErlaHlynsdóttir v. Iceland, App. No. 43380/10 Eur. Ct. H.R. ¶ 65 (2012); InstytutEkonomichnykh Reform, TOV v. Ukraine, App. No. 61561/08 Eur. Ct. H.R. ¶ 44 (2016).

¹⁴⁰ Lingens, *supra* note 139, ¶ 42; Wolfgang Schussel v. Austria, App no. 42409/98 Eur. Ct. H.R. ¶ 8 (2002); Marchenko v. Ukraine, App no. 4063/04 Eur. Ct. H.R. ¶ 52 (2009); Vides Aizsardzibas Klubs v. Latvia, App no. 57829/00 Eur. Ct. H.R. ¶ 40 (2004); Lopes Gomes v. Portugal, App no. 37698/97 Eur. Ct. H.R. ¶ 30 (2000).

¹⁴¹ *The Case*, ¶ 6.

¹⁴² Hui Chi Ming v. R. (1992) 1 AC 34 (PC).

¹⁴³ R. v. Horseferry Road Magistrates' Court, ex p Bennett (1994) 1 AC 42; R. v. Derby Crown Court, ex p Brooks (1984) Appr 164 DC; Connelly v. Director of Public Prosecutions (1964) AC 1254; Chandran Ratnaswami v. K.C. Palanisamy (2013) 6 SCC 740 (India).

¹⁴⁴ Mavlonov and Sa'di v. Uzbekistan, Comm. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004 ¶ 8.4 (HRC 2009); Lingens, *supra* note 139, ¶ 41; BladetTromsø and Stansaaas v. Norway, App. no. 21980/93 Eur. Ct. H.R. ¶ 62 (1999); Jersild v. Denmark [GC], App. no. 15890/89 Eur. Ct. H.R. ¶ 31 (1994).

¹⁴⁵ Sürek v. Turkey, App. No. 26682/95 Eur. Ct. H.R. ¶ 61 (1999); Kacki v. Poland, App. No. 10947/11 Eur. Ct. H.R. ¶ 46 (2017).

¹⁴⁶ Fuchsmann v. Germany, App. no. 71233/13 Eur. Ct. H.R. ¶ 36 (2017).

¹⁴⁷ Karhuvaara and Iltalehti v. Finland, App. no. 53678/00 Eur. Ct. H.R. ¶¶ 11, 44 (2004).

ii. The Article contributes to debate in a democratic society.

¶ 52. Publication of information about political figures gives rise to debates and deliberations in a democratic society.¹⁴⁸ Given the potential of such information to promote a discussion of general interest,¹⁴⁹ an enhanced standard of protection must be given to free expression¹⁵⁰ as it provides one of the best ways to form an opinion of political leaders to the public.¹⁵¹ The sharp and polemical criticism of the President in the article was part of an ongoing emotional public reaction in the political context of the abolition of the special category status of Kazalia and the criminal conviction for the same is a violation of the freedom of expression.¹⁵² The allegations put forward in the article were value judgments and thus, the prosecution for the same would amount to an interference with the right to freedom of expression.¹⁵³

iii. Mr. Mosante actively stayed in the public eye.

¶ 53. It is crucial to consider that prior to publication what the conduct of the person concerned was and whether connected information had surfaced in an earlier publication.¹⁵⁴ Political figures are subject to closer scrutiny by the public by virtue of their positions.¹⁵⁵ Attacks against journalists have increased since Mr. Mosante came to power.¹⁵⁶ Further, when there is more information value for the people through the Article, his interest in being protected against its publication is intensified.¹⁵⁷ This is supplemented by the fact that the allegations within the Article related to the President's character and moral values, which would be crucial in his discharge of public duties.¹⁵⁸

¹⁴⁸ Von Hannover v. Germany (No. 2), App. No. 40660/08, 60641/08 Eur. Ct. H.R. ¶ 85 (2012) [hereinafter *Hannover*].

¹⁴⁹ *Id.*

¹⁵⁰ Lingens, *supra* note 139, ¶ 42.

¹⁵¹ *Id.*

¹⁵² Renaud v. France, App. No. 13290/07 Eur. Ct. H.R. (2010).

¹⁵³ *Id.*

¹⁵⁴ Hachette Filipacchi Associates v. France, App. No. 71111/01 Eur. Ct. H.R. ¶¶ 52, 53 (2007); Sapan v. Turkey, App. No. 17252/09 Eur. Ct. H.R. ¶ 34 (2011); Fuchsmann v. Germany, App. No. 71233/13 Eur. Ct. H.R. ¶ 49 (2017).

¹⁵⁵ Lingens, *supra* note 139, ¶ 42; Article 29 Data Protection Working Party, Guidelines on The Implementation of The Court of Justice of The European Union Judgment On 'Google Spain And Inc. v. AgenciaEspañola De Proteccion De Datos And Mario Costeja Gonzalez' C-131/12 (2014).

¹⁵⁶ *The Case*, ¶ 4.

¹⁵⁷ Hannover, *supra* note 149, ¶ 109.

¹⁵⁸ Jorge Fontevecchia And Hector D'amico v. Argentina, Inter-Am. Ct. H.R. ¶ 46 (Sept. 9, 2011); Karhuvaara and Iltalehti v. Finland, App. No. 53678/00 Eur. Ct. H.R. (2004).

PRAYER

Wherefore in light of the facts stated, issues raised, arguments advanced and authorities cited, the Petitioner most humbly and respectfully request the Hon'ble Supreme Court to adjudge and declare that:

- A. The Order of Restraintment sought by the Government of Flavia on publication of news from Kazalia is invalid and therefore, it cannot be enforced.
- B. The Court order directing Mr.. Dolfopa Sorial to reveal the identity of the author(s) who posted the anonymous article is violative of the freedom of press and rights of the journalists.
- C. The Government's refusal to grant access to the requested official documents is invalid under the Right to Information, Act.
- D. The Sections 124-A and 500-A of the Flavian Penal Code are violative of the Fundamental Right to Freedom of Speech and Expression and therefore, should be declared unconstitutional.
- E. The prosecution against 'The Flavian Express' and Mr.. Dolfopa Sorial is liable to be quashed.

Respectfully submitted,

AGENTS FOR PETITIONER