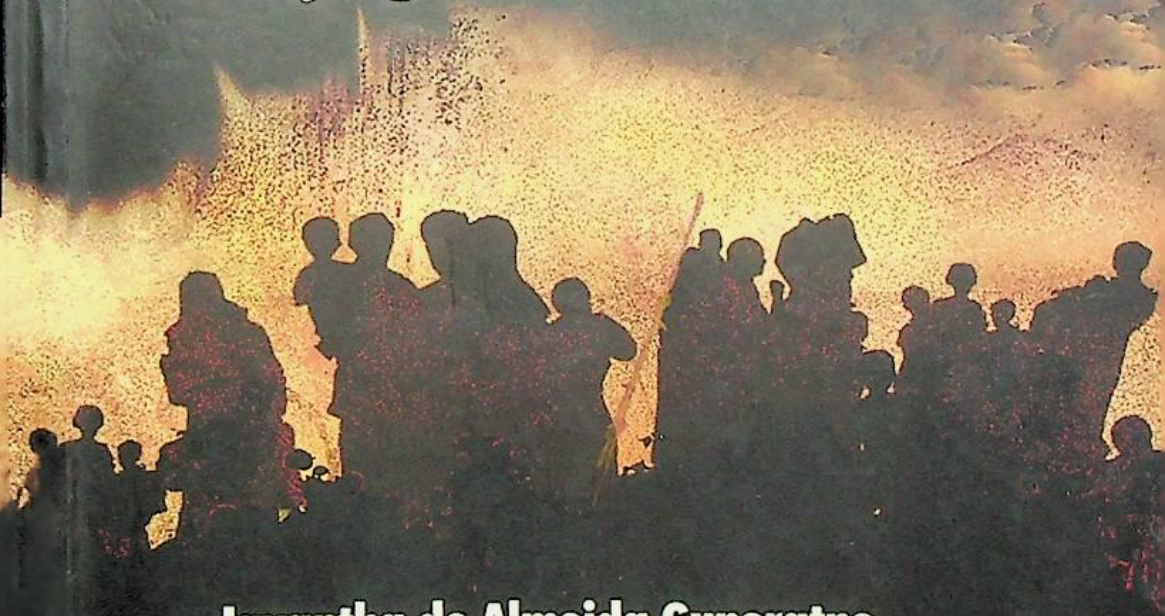
The Judicial Mind in Sri Lanka

Responding to the Protection of Minority Rights



Jayantha de Almeida Guneratne
Kishali Pinto-Jayawardena
Gehan Gunatilleke

THE JUDICIAL MIND IN SRI LANKA;

RESPONDING TO THE PROTECTION OF MINORITY RIGHTS

Jayantha de Almeida Guneratne
Kishali Pinto-Jayawardena
Gehan Gunatilleke

Edited by Kishali Pinto-Jayawardena

Law and Society Trust
January 2014

The Judicial Mind in Sri Lanka;
Responding to the Protection of Minority Rights

ISBN :978-955-1302-59-7

Law & Society Trust
No. 3, Kynsey Terrace
Colombo 8
Sri Lanka
Tel: 94 11 2684845 / 94 11 2691228
Fax: 94 11 2686843
Email: lst@eureka.lk

Dedicated to those Sri Lankan judges who had the fortitude to uphold their constitutional role during extraordinary challenges to the Rule of Law

Table of Contents

Notes on the Authors

Jayantha de Almeida Guneratne is a President's Counsel, former member of the Law Commission of Sri Lanka and visiting lecturer and examiner for the Faculty of Law, University of Colombo. He was a member of the 1995-1997 Presidential Commission on Involuntary Removals and Disappearances of Persons from January 1989 to December 1994. He has written variously on developments in writ law and constitutional law including *The Swiss Constitution: Lessons for Sri Lanka* (Colombo, 1995). In 2011, he co-authored *Habeas Corpus in Sri Lanka; Theory and Practice of the Great Writ in Extraordinary Times* with Kishali Pinto-Jayawardena (Colombo, 2011). He is a Salzburg Fellow, 2002.

Kishali Pinto-Jayawardena works on law and policy reforms in the area of civil liberties in Sri Lanka. She is the editorial (legal) consultant for *The Sunday Times* Colombo contributing a regular column on rights and the law. She has authored widely referenced books on Sri Lanka's Rule of Law systems including *The Rule of Law in Decline* (Copenhagen, 2009) and *Still Seeking Justice* (Geneva, 2010). She is a Salzburg (Austria) Fellow, 2002, a WISCOMP (New Delhi) Scholar of Peace Fellow 2003, was nominated Sri Lanka's Woman of Courage in 2007 by the United States Department of State and was awarded a Distinguished Visitor fellowship in 2013 by the Australian National University (ANU), Canberra, Australia.

Gehan Gunatilleke is the coordinator of the Masters of Human Rights and Democratisation (Asia Pacific) Programme jointly offered by the University of Sydney and the University of Colombo and a visiting lecturer at the University of Peradeniya. He is also a senior research analyst at Verité Research. His recent publications include: *Reporting on Human Trafficking and Forced Labour: A Practical Guide for Journalists in Sri Lanka* (ILO, 2012); Emergency *Law in the Context of Terrorism: Sri Lanka* (co-author with Niran Anketell,

(South Asians for Human Rights, 2011) and *The Normative Framework on Internal Displacement: A Literature Review* (Center for the Study of Human Rights, 2010).

Acknowledgements

Valuable editorial assistance was rendered by Eva Sparks, independent researcher who also contributed to segments of the comparative law references. We are indebted to attorneys Shihan Ananda, Radika Gunaratne and Mathuri Thamilmaran who assisted in the collection of cases and analysis thereto.

Abbreviations

AIR	All India Reporter
B-C Pact	Bandaranaike – Chelvanayagam Pact
BBS	*Boddu Bala Senawa*
BWCC	Butterworth's Workmen's Compensation Cases
CC	Constitutional Council
CID	Criminal Investigation Department
DCCSL	Decisions of the Constitutional Court of Sri Lanka
ECHR	European Court of Human Rights
ER	Emergency Regulations
FR	Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Persons
JVP	*Janatha Vimukthi Peramuna*
KBD	King's Bench Division
LESL	Legislative Enactments of Sri Lanka
LTTE	Liberation Tigers of Tamil Eelam
MP	Member of Parliament
MRO	Marriage Registration Ordinance
NLR	New Law Report
NSA	National State Assembly
OIC	Officer In Charge

OUSL	Open University of Sri Lanka
PSO	Public Security Ordinance
PTA	Prevention of Terrorism Act
SC	Supreme Court
SCR	Supreme Court Report (India)
SCSD	Supreme Court Special Determination
SLFP	Sri Lanka Freedom Party
Sri.L.R	Sri Lanka Law Report
STF	Special Task Force
TID	Terrorism Investigation Division
TNA	Tamil National Alliance
TULF	Tamil United Liberation Front
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNP	United National Party
WCO	Workman's Compensation Ordinance

Latin Maxims and Phrases – General Explanations

A vinculo matrimony	'from the bond of marriage'
Ab initio	'from the beginning; from the first act; from the inception'
Certiorari	'an order issued by a superior court to quash an illegal act'
Cursus curiae	'consistently established as judicial precedent'
De facto	'exercising power without being legally or officially established'
Ex facie	'on the face [of it]'
Habeas corpus	'you have the body'
In toto	'totally'
Incommunicado	'without the means or right of communicating with others'
Inter se	'that which is between'
Intra vires	'within powers'
Ipse dixit	'an unsupported statement that rests solely on the authority of the individual who makes it'
Locus standi	'the right of a party to appear and be heard before a court'
Mala fides	'in bad faith'
Mandamus	'a writ issued by a superior court ordering a

	public official or body or a lower court to perform a specified duty'
Mutatis mutandis	'unless otherwise changed, what is there already continues'
Obiter dictum	'not forming the crux or the *ratio* of the case'
Omnia praesumuntur rite esse acta	'all things are presumed to be done in due form'
Per se	'by itself; by themselves'
Pro tanto	'only to the extent of, so far, for so much'
Prima facie	'on the first appearance'
Ultra vires	'beyond the powers'

PREFACE

Traditionally minorities in Sri Lanka have been defined by conceptions of 'identity' and 'treatment'. Members of religious, ethnic and sexual groups derive their identities by virtue of certain unique experiences, distinctive culture and shared values. This collective sense of identity is often the underlying basis for minority aspirations of autonomy and minority resistance to assimilation and colonisation projects.

This is perhaps an 'empowering' conception of minority status. Then again, certain groups derive their minority status from the nature of their treatment by the state. Discrimination towards a discrete group of people often defines, and at times entrenches, their status as minorities. This conception of minority status is distinctly 'disempowering'. The empowering conception of minority status often leads to its disempowering conception, as the political project of minority groups to secure and consolidate power often attracts suppressive and discriminatory treatment by the state. While the demand for empowerment attracts measures intended to disempower, the suppression and discrimination inherent in such measures, in turn, legitimises the need for empowerment. This cyclical phenomenon is at the heart of minority status in Sri Lanka.

As discussed in this study, the concentrated application of public security and counterterrorism laws to persons of Tamil and Muslim ethnicity and the inadequacy of the judicial response in regard to protection of minority rights in emergency and non-emergency times is perhaps a compelling example of how this cyclical phenomenon emerges in reality.

We have titled this publication, the *Judicial Mind in Sri Lanka* as the intention is not to dwell on political failures which have

been conducive to the failure of the Rule of Law. Instead, the focus is unequivocally on the judicial role. A central point that has engaged us is the manner in which - historically - the judicial response to legal safeguards of extraordinary importance such as constitutional provisions securing language and religious rights and *habeas corpus* became deferential to the executive. This conservatism (if one may call it that) has gone far beyond merely succumbing to executive pressure.

Instead, as is argued, the judiciary has become a complicit partner of the executive by rationalising that rights must yield to the security of the state. In recent years, the judicial institution has moreover been plagued by the *internal* subversion of its independence, emanating from not only subservience to the executive but direct identification with the executive. Whatever exceptions pioneered by a few individual judges to this general rule have been marginalised to the extent that the role of the law is now a matter of indifference to the powerful. The judiciary is perceived as a tool through which, political objectives could be achieved. This has had dangerous consequences for the polity in Sri Lanka's post-war years.

Sri Lanka illustrates therefore a devastatingly poignant example of how, despite the development of seemingly rich jurisprudence following independence, failures on the part of the judicial institution have led to the entrenching of state authoritarianism and a lack of protection for the minorities.

We hope that this effort will contribute towards an honest understanding of the context, manner and impact of these failures.

The authors
Colombo, January 2014

INTRODUCTION

On the cusp of Sri Lanka's independence in 1948, it was commonly believed that freedom from colonial rule would ensure the formation of a state serving the common good and functioning as a welfare provider and protector of the people. Safeguarding territorial integrity and putting enlightened laws into place to ensure right governance were thought to be an essential part of the state's duties. Much hope was reposed in the various segments of a typical constitutional order, such as a Bill of Rights, an independent judiciary and an independent electoral process. In turn, the state assumed the responsibility to speak and act for the people against aggressors, internal as well as external.

Since independence however, these comfortable assumptions have been displaced by state practice which has subordinated constitutional structures to crude political imperatives. An ethnic war between the government security forces and the Liberation Tigers of Tamil Eelam (LTTE) in the North and East and two insurrections led by majority Sinhalese radical youth during the seventies and eighties/early nineties, framed the state's response to public security, infringing rights at will.

An overtly militaristic state made creeping excursions into civil liberties through excessive emergency laws and was justified as being necessitated by threats to the security of the state. Hardly any difference came to be seen between emergency times and non-emergency times in regard to the deprivation of life and liberty. Minorities were not the only victims of state terror; a lesson that the Sinhala community learned to its cost in the seventies and particularly in the eighties when the numbers of Sinhala 'disappeared' in the South during the second insurrection, equaled the Tamil 'disappeared' in the North and East.

The normal law was replaced by an emergency regime which conferred wide powers of search, arrest, detention and disposal of bodies on the security forces. Correspondingly, the balance of power between the three organs of state, the executive, the legislature and the judiciary, was gradually displaced in the republican era. The 1972 Constitution disproportionately vested power in the legislature (national state assembly) and subordinated the judiciary. The 1978 (present) Constitution 'enthroned' the Office of an Executive Presidency as virtually immune from the law[1] and possessing the capacity to run the country singlehanded, as it were.

In the working of this Constitution, the reality of presidential power was masked with, at least, the appearance of constitutional propriety in the early years. Successive - and increasingly ruinous - onslaughts on constitutional rights were made on the part of each incumbent in presidential office. Consequent to the LTTE being defeated in May 2009, direct Presidential rule has been evidenced with the judiciary being reduced to an executive appendage despite continuation of the formality of courts. The patently illegal impeachment of Sri Lanka's 43rd Chief Justice despite two opinions handed down by the Court of Appeal and the Supreme Court advising the executive to desist was a coruscating reminder of the irrelevance of the judicial role.

---

[1]Vide Article 35 (1) of the Constitution, the President of the Republic has immunity in regard to "anything done or omitted to be done by him either in his official or personal capacity" during office, subject to narrow exceptions relating to, among other things, electoral challenges. Optimists have contended that other constitutional articles restrain Presidential powers. Thus, Article 32(1) (read with the Fourth Schedule) requires the President to affirm the faithful performance of duties and act in accordance with the Constitution and the law when taking the oath of office. Further, Article 33 (f) specifies that the President must do all such acts not being inconsistent with the Constitution or written law, required to be done by international law, custom or usage. Yet these views disregard the powerful impact of the immunity bar. Put simply, the President cannot be brought to justice for the violation of the Constitution, as we would discuss later.

In the post-war years, belief in the normative power of the Constitution has been finally laid to rest in a bitter repudiation of the rule of law. With good reason, the judiciary is perceived as having little authority when pitted against executive power. At each and every 'hard' testing point, the strength of the legal system has given way to political expediency. This, as we would argue, has been particularly inimical to the minorities. Thus, convictions of alleged 'terrorists' are commonly arrived at through the manipulation of emergency laws. Thereafter, the President's power of pardon is exercised to obtain clemency for the accused. The law becomes of little account in the process. Offences, including murder and rape, are committed by ruling party politicians who are not brought before the courts except where external compulsions propel a superficial adherence to the legal process.

Some continuing misconceptions ought to be dispelled at the outset. First, the perception that Sri Lanka's ethnic and civil conflagration has come about solely as a result of communalistic post-colonial politics on the part of Sinhala and Tamil leaders, is perhaps only part of the story. As is persuasively put elsewhere, British colonies 'shared a fundamental contradiction'[2] in common;

> On the one hand, British imperial authorities and jurists insisted that the British colonial project was built upon a foundation not merely of force, but of the *universality* of the rule of law. On the other side, the colonizers insisted upon two reservations to law's radical equality and universality; (a) a reservation in the form of a *law of exception* and b) a reservation embodied in a *rule of difference.*[3]

As far as Sri Lanka is concerned, these rules of differences and exceptions in the colonial project were seen early on in the seminal

---

[2] Terence C. Halliday, Lucien Karpik and Malcolm M. Feely, *The Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex, Cambridge University Press,* 2013, at 11.
[3] *Ibid,* at 12.

Bracegirdle case[4] in which the colonial administration sought to deport Bracegirdle for expressing controversial views on aspects of political and racial life in Ceylon, as the country then was. Striking down this order through a writ of *habeas corpus*, a pre-independence court declared that executive power is not absolute, it may be exercised only under the condition as to whether or not a state of emergency existed and such powers are subject to judicial scrutiny.[5]

This was a singular instance of judicial boldness. Indeed, in the years thereafter, the post-independence judiciary was characterised by some of its best decisions[6] in regard to the upholding of the separation of powers between the executive and the legislature. However—and in contrast thereto—the judicial record in regard to the protection of minority rights was starkly different. This difference, as we will argue, continued and was pervasive throughout the republican era when, under the 1972 and 1978 Constitutions, a clear distinction came to be seen between the judicial response to 'ordinary' rights violations and those that challenged the minority-majority equation in religious and language contexts. This would then constitute the second point that we would pursue, namely that the trajectory of the judicial protection of rights was flawed in certain fundamental respects, in regard to which the institution of the judiciary itself bears a specific—and historical—responsibility.

This discussion has at its core, the discarding of what could have been unique constitutional safeguards for the protection of the minorities at the same time that the country freed itself from the shackles of colonial power. In drafting recommendations for constitutional reform which came to be the genesis of Sri Lanka's Independence

---

[4] [1937] 39 NLR 193.
[5] *Ibid.*
[6] *Queen v. Liyanage* [1962] 64 NLR 313; *Liyanage v. the Queen* [1965] 68 NLR 265; *The Bribery Commissioner v. Ranasinghe* [1964] 66 NLR 73; *Senadheera v. the Bribery Commissioner* [1961] 63 NLR 313; *Muttusamy v. Kannangara* [1951] 52 NLR. 324; *Corea v. the Queen* [1954] 55 NLR 457.

Constitution, the Soulbury Commission[7] took into account the fact that the population of Ceylon (as Sri Lanka was then known) comprised various minority ethnicities needing specific protections from the possible dangers of majoritarianism following independence. Primary to the Soulbury Commission's proposed protections in that regard was Section 29 of the Soulbury Constitution which, given its overriding importance in this discussion, will be reproduced in full:

> (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
>
> (2) No such law shall;
>
> > (a) prohibit or restrict the free exercise of any religion or
> >
> > (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable or
> >
> > (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions or

[7] Recommendations for constitutional reforms made by a three member Commission headed by Lord Soulbury led to the Ceylon (Constitution) Order in Council of 1946 which revoked the Ceylon (State Council) Order in Council of 1931 and provided for a Constitution with an executive comprising of the Prime Minister and a Cabinet acting in the name of the British Monarch, and a legislature comprising the British Monarch, the House of Representatives and the Senate. The British Monarch was represented by the Governor. Later, the Ceylon (Independence) Act of 1947 and the three Ceylon Constitution (Amendment) Orders in Council were passed in 1947 containing minor amendments to the 1946 Order in Council. The result after amendment became the 1948 Constitution of Ceylon upon independence on February 4th, 1948 (Vide W.I. Jennings and H.W. Thambaiah, *The Dominion of Ceylon: The Development of its Laws and Constitutions* (1952), at 46.

(d) alter the constitution of any religious body except with the consent of the governing of that body.

Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

(3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention be void.

(4) In the exercise of its powers under this section Parliament may amend or suspend any of the provisions of any Order in Council in force in the Island on the date of the first meeting of the House of Representatives, other than an order made under the provisions of an Act of Parliament of the United Kingdom, or amend or suspend the operation of any of the provisions of this Order :

Provided that no Bill for the amendment or suspension of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present); every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any Court of law.

The British had, according to their own constitutional conventions at that time, not included a Bill of Rights within the Soulbury Constitution, since they believed that the people had inherent rights and that such rights need not be enumerated. This was based on the belief that the enumeration of rights would mean that only certain rights were applicable and others were not. This, they thought, would

create a false dichotomy.[8] Section 29 (2), it was felt, would make up for the absence of detailed rights protection. Interestingly, Lord Soulbury himself was to regret in retrospect, the failure to include a bill of individual rights in the Constitution affording more protection to the country's minorities.[9]

There was sufficient reason for such regrets. The performance of the judiciary in regard to giving effect to the substance of Section 29 (2) resoundingly defeated its framers' expectations. At the outset, the questions that arose were simply as to whether Section 29 (2) of the Soulbury Constitution was to be regarded and interpreted as an entrenched limitation to Section 29 (1)? Or could it be amended under Section 29 (4) in the face of Section 29 (3)?

Some judicial interpretations of Section 29(2), expressed as *dictum*, recognised the necessity for entrenched protections for the minorities. In the Privy Council, Lord Pearce stated in *Bribery Commissioner v. Ranasinghe*[10] that '...religious and racial matters shall not be the subject of legislation' and that they constituted the solemn balance of rights between the citizens of Ceylon, as fundamental conditions upon which they accepted the Constitution and therefore these are considered unalterable under the Constitution. In *Ibralebbe v. The Queen*[11], Viscount Radcliffe claimed that Section 29 confers the power on Parliament to legislate for 'peace, order and good government' subject to protective reservations for the exercise of religion and the freedom of religious bodies. An academic view has been expressed that these two comments illustrate that Section 29 (2) contained an absolute limitation on the legislative power of Parliament

---

[8] The authors are appreciative of the contributions made by attorney-at-law Mathuri Thamilmaran to this sub-section of the study.
[9] B.H. Farmer (1963), *Ceylon: A Divided Nation* (Oxford: OUP): *Foreword by Lord Soulbury*, at vii-ix.
[10] (1968) 66 NLR, at 73.
[11] (1963) 65 NLR, at 433.

and was an unalterable and entrenched provision.[12] A contrary view has, however, been expressed in that regard.[13]

The Supreme Court in *Kariapper v. Wijesinghe*[14] articulated that, the words used in Section 29(1) of the Constitution are the words 'habitually employed to denote the plenitude of Sovereign legislative power.'[15] This view had been preceded in the acknowledged precedent of *Queen v. Liyanage*[16] by the Supreme Court and the Privy Council as well[17] and followed thereafter by the Supreme Court in *Abdul Basir v. S.A. Puttalam*[18] where it was accepted that, the Parliament of Ceylon could even pass retrospective legislation and laws contrary to the fundamental principles of English Law.

In *Suntharalingam v. Attorney General* (1972),[19] wherein Mr. C. Suntharalingam sought an injunction against the then Minister of Constitutional Affairs (Dr. Colvin R. de Silva) from taking steps against repealing the Soulbury Constitution, the Court's response implicitly seemed to support the view that Section 29 was amendable. The Court in this case stated that it could not consider the validity or legitimacy of a new Constitution until it had been established or purported to be established. The Court did not consider Section 29 of any relevance in this manner thereby implicitly recognizing its amendable nature.

Consequently, judicial rhetoric in regard to Section 29(2) was not translated into reality by both the Privy Council and the country's

---

[12] C.F. Amerasinghe, *'Sovereignty of the Ceylon Parliament Revisited'*, (1969) Colombo Law Review 99.
[13] W.I. Jennings, The Constitution of Ceylon (Oxford: OUP), 1953. Also see: R.K.W. Goonesekere and J. de Almeida Guneratne, *Constitutional Law*, Open University of Sri Lanka (OUSL), 1982, at 92-94 for a useful discussion of the same.
[14] (1965) 68 NLR 529.
[15] *Ibid.*, per Sansoni C.J.
[16] (1963) 65 NLR , at 75.
[17] (1965) 68 NLR at 265.
[18] (1968) 66 NLR, at 219.
[19] 75 NLR 126, and 75 NLR 318.

Supreme Court. The interpretation of Section 29 (2) of the Soulbury Constitution manifestly failed to emulate the seminal Indian judicial precedent in *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr*[20] which propounded the basic structure doctrine, cautioning the Indian legislature that it does not possess the power to alter the basic structure of the Constitution so as to change its identity. Drawing strength from this evident judicial timorousness, Sri Lanka's 1st Republican Constitution in 1972 was drafted on the basis that the entire Constitution or any part of it can be amended by Parliament by adopting the procedure mentioned in Section 29(4) of the Soulbury Constitution.

In fact, the vastly different directions that political liberalism[21] has taken in India and Sri Lanka in the post-colonial period raises valid questions as to what has driven those differences quite apart from the complexities of colonial history. With all the dissimilarities in socio-political contexts, the contrasting constitutional histories offer useful illustrations thereto.

Unlike the Indian constitutional drafting process which reflected considered deliberations balancing democratic interests of a newly emerged nation, the drafting of Sri Lanka's constitutional documents in the republican era was more a product of political expediency, uninfluenced by grander considerations. Freed from the inconvenient

---

[20]AIR (1973) SC 1461.

[21] For the purposes of this analysis, we would borrow the useful definition of 'political liberalism' as argued to 'be analytically distinct from democracy' and comprising 'an amalgam of three elements; a moderate state whereby the power of the state is fragmented, commonly by a counter balancing of the executive and the legislature, or both of these by the judiciary; civil society, in which thrive autonomous voluntary associations outside the control of the state and capable of both restraining the state and contributing to constructive dialog; and basic legal freedoms, which include first generation civil rights that protect individuals against state tyranny...such as those of speech, association, belief and movement; and property rights.' vide Halliday, Karpik and Feely (eds) *Political Liberalism in the British Post-Colony*, op.cit. at 11.

restraints of the Soulbury Constitution, the 1st and 2nd Republican Constitutions in 1972 and 1978 took power away from the people and deposited it in the hands of political rulers notwithstanding intricately reasoned justifications and elaborately designed constitutional language which masked the true objectives of the exercises.

One of these most unconscionable exercises was the 1972 Constitution's much vaunted boast of being an 'autochthonous'[22] Constitution while politicising the public service and subordinating the judiciary. On its own part, the 1978 (2nd Republican) Constitution used grandiloquent concepts such as the 'sovereignty of the people'[23] while, at the same time, installing the office of an Executive Presidency which was positively monarchical, thus defeating the entire purpose of protecting a 'sovereign people.' In a cruel irony, these 'disempowering' Constitutions of 1972 and 1978 were devised by some of the most well known 'intellects' of the day. Critical reactions by the legal community were few, despite occasional spurts of protest.

Then again, the 1972 Constitution did not provide for a specific judicial procedure to enforce a constitutional fundamental rights chapter. The 1978 Constitution, while providing for such a procedure, hedged that right with several restrictions that severely negated those very rights. Petitioners needed to go to the Supreme Court within one

---

[22]Essentially meaning of 'native origin.'

[23] Article 3 of the Constitution - In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise. Article 4 of the Constitution details the manner of such exercise, namely the legislative power of the People through Parliament, and by the People at a Referendum, the executive power of the People through an elected President, the judicial power of the People by Parliament through courts, tribunals and institutions except where Parliament directly exercises such power in the case of its privileges. This also includes the constitutionally guaranteed fundamental rights and the franchise. For a comprehensive discussion of the material content of these Articles, see Jayantha de Almeida Guneratne, 'Judicial Response to the Concept of the Sovereign Power of the People in Sri Lanka', in *Pursuit of Justice, A Collection of Legal Essays in Memory of KC Kamalasabayason PC*, 2008, at 137.

month of the alleged violation[24] with only limited exceptions to this rule, as for example where a person is held *incommunicado* without access to legal counsel.[25]

Moreover, Article 126(2) of the Constitution gives the right to move court only to a person alleging the infringement of any right 'relating to such person', or an attorney at law on his behalf.[26] There has been some relaxation of this *locus standi* rule in cases alleging corruption, cases impacting on political imperatives and prisoners' rights and where a dependant has been allowed to appear before court when an individual dies of torture.[27] However, such practical difficulties have impeded access of disadvantaged communities to the Supreme Court sitting in the capital.[28]Further, judges do not have the power to strike

---

[24]Article 126(2) of the Constitution.

[25]*Yogalingam Vijitha v. Mr. Wijesekara and others*, SC (FR) App. No. 186/2001, 23.08.2002 (citing *Saman v. Leeladasa and another*, [1989] 1 SLR, 1 ("the period of time necessary would depend on the circumstances of each case...") and *Namasivayam v. Gunawardena* [1989] 1 SLR 394 at 400 ("to make the remedy under Article 126 meaningful to the applicant the one month period prescribed by Article 126(2) should be calculated from the time that he is under no restraint."). *See also, Nesarasa Sivakumar v. Officer in Charge, Special Task Force Camp, Chettipalayam and others*, SC (FR) App. No. 363/2000, 01.10.2001 ("the delay in filing this application should be excused on the basis that is was due to circumstances beyond the petitioner's control.")

[26] Article 126(2). Rules of Sri Lanka's Supreme Court formulated in 1990 permit some relaxations, as for example Rule 44 (2) which allows a putative petitioner who is unable to sign a proxy appointing an Attorney-at-law to instead authorise a person (whether orally or in any other manner, whether directly or indirectly) to retain an Attorney-at-law to act on his/her behalf and such person may sign proxy on his/her behalf.

[27]*Lama Hewage Lal (Deceased),Rani Fernando (wife of deceased Lal) and others v. OIC, Minor Offences, Seeduwa Police Station and others* [2005] 1 Sri. LR. 40.

[28] Pinto-Jayawardena, Kishali and Kois, Lisa *'Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response'*, Law & Society Trust, 2008. One finding was that access to the Court based in Colombo in filing fundamental rights petitions requires access to resources, financial and legal, as well as geographic access to the capital. Out of the petitions surveyed, 'the majority of the cases under review emerged not only from the South, but also from within a 30-mile radius of Colombo. Of those cases that arose in the minority dominated North and East, of

down enacted laws that are unconstitutional[29] but can only examine a draft law at bill stage and that too within a limited one week period of the Bill being placed on the Order Paper of Parliament.[30]

These restrictions include also the omission of the right to life in the constitutional rights chapter. In a bizarre development, the judiciary took well upon two and a half decades to infer the right to life as integral to constitutional protections. In 2003, Sri Lanka's Supreme Court inferred an implied right to life in a limited context as implied in Article 13(4) of the Constitution, that 'no person shall be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law.'[31] The right to life as so implied was narrowly confined to the physical right to life rather than its positive affirmation in all other aspects of liberty and due process. This implied jurisprudential extension was affirmed by two judges in just three judgments.[32]

Omitting the right to life, fundamental rights specified in Chapter III of the Constitution broadly comprised the right to equality, freedom from arbitrary arrest and detention, freedom of speech, assembly, association, occupation and movement, freedom from torture, the right to freedom of thought, conscience and religion. All the above rights, excepting the last two rights, (namely freedom from torture and the right to freedom of thought, conscience and religion which are absolute), may be restricted by emergency law but cannot be negated *intoto*. The Constitution privileged emergency law over ordinary laws,

---

which there was a total of eight, seven petitions were brought only after the victim-petitioners transferred to the South. Thus, all but one of the 39 cases had a Southern nexus.', at 14.

[29]Article 16 of the Constitution.

[30]Article 121 (1) of the Constitution.

[31]*Perera vs Iddamalgoda* [2003] 2 SriLR, 63, *LamaHewage Lal (Deceased),Rani Fernando (wife of deceased Lal) and others v. OIC, Minor Offences, Seeduwa Police Station and others* [2005] 1 Sri. LR, 40; *Kanapathipillai Machchavallavan v OIC, Army Camp, Plantain Point, Trincomalee and Others* [2005] 1 Sri LR, 341.

[32]*Ibid.*

including the normal criminal procedure, penal law and evidentiary rules, and in so doing, bypassed the principle of the presumption of innocence in favour of emergency law.[33]

Judicial interventions particularly in the early nineteen nineties attempted to impose restraints. For example, a *cursus curiae* of the Supreme Court was established that emergency regulations (ER) must not be inconsistent with fundamental rights and consequently must be *intra vires* regulations.[34] The state must show a proximate or reasonable connection between the nature of the action that it prohibits and constitutionally permitted restrictions. Any indirect or farfetched connection between the two would make the regulation invalid.[35] Flowing from this reasoning, the Court, in several cases struck down emergency regulations as unconstitutional and in so doing, overrode statutory clauses in emergency laws prohibiting judicial review of ER.[36]

Yet, the judicial responses despite some excellently reasoned decisions, have been contradictory and inconsistent. Indeed, it is important to stress that this judicial inconsistency is evidenced even in 'non-emergency' contexts;

---

[33]Article 15(1) of the Constitution expressly declares that, 'the exercise and operation of fundamental rights declared and recognised by Articles 13(5) (i.e. the principle relating to the presumption of innocence) and 13(6) relating to the protection against retrospective punishments, shall be subject to such restrictions as may be prescribed by law in the interests of national security. Judicial interpretation has limited the meaning of 'law' in this paragraph to emergency regulations (ER) made under the PSO, *Thavaneethan v Dayananda Dissanayake Commissioner of Elections and Others* [2003]1 Sri LR,74.

[34]*Joseph Perera v. The Attorney General* [1992] 1 Sri LR 199, 230, vide also the principle that though due weight would be given to the opinion of the President as to whether a particular regulation was necessary or not, the power to question the necessity of the regulation and whether the required proximity exists, rested in the Court.

[35]*Ibid.*

[36]*Perera v. AG,* [1992] 1 Sri LR 199; *Wickremebandu v. Herath* [1990] 2 Sri LR 348.

> Strong victim-centered decisions, awarding high levels of compensation and unequivocally condemning police abuse, represent a relatively small number of judgments. Overwhelmingly, compensatory awards to victims are low. Article 11 decisions seem to be influenced strongly by the personality of the individual justice who writes the judgment...Consequently, it appears that once a victim brings a fundamental rights petition, the petitioner is subjected to a legal process that is, to some degree, arbitrary and unpredictable.[37]

In any event, whatever positive precedents that were handed down had little impact on actual changes in policy and practice in 'normal' instances of rights violations as well as (more so) in times of emergency. If at all, redress was restricted to the factual context of the particular case/s in question, leading to judicial perturbation;

> In many cases in the past, this Court has observed that there was a need for the Inspector General of Police to take action to prevent infringements of fundamental rights by police officers, and where such infringements nevertheless occur, this Court has sometimes directed that disciplinary proceedings be taken. The response has not inspired confidence in the efficacy of such observations and directions.....[38]

Inconsistencies pervaded the judicial response elsewhere as well. In the case of immunity for presidential actions, the Supreme Court stated that this bar does not apply after a President has left office. Further, subordinate officers, as for example an Inspector General of Police or a Commissioner of Elections, were prohibited from using the immunity principle to shield himself/herself from responsibility for

---

[37] Pinto-Jayawardena, Kishali and Kois, Lisa *'Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response'*, Law & Society Trust, 2008 at 9.

[38] *Nalika Kumudini, AAL (on behalf of Malsa Kumari) v. N. Mahinda, OIC, Hungama Police & Others*, [1997] 3 SriLR, 331.

unconstitutional actions.[39] However, where stronger challenge was needed to the increasing arbitrary executive action, the judiciary faltered. This was most strikingly evidenced in respect of the bypassing of the 17th Amendment to the Constitution (2001), probably the most important constitutional amendment in recent times.[40]

Judges refused to intervene when former President Chandrika Kumaratunge brushed aside her constitutionally duty of appointment of the Chairman of the Elections Commission as nominated by the Constitutional Council (CC) under the 17th Amendment.[41] In 2006, her successor President Mahinda Rajapaksa (the incumbent President) refusal to make appointments to the CC despite nominations being sent to him by the relevant bodies and political parties passed unchallenged again on the basis of presidential immunity.[42] The country's legal community stayed markedly silent in the face of these constitutional infringements. Indeed, in a curiously disillusioning development, many lawyers and retired judges accepted appointments unilaterally made by the President to oversight commissions despite the appointment process clearly infringing constitutional conditions.

---

[39] *Karunatilleke v Dissanayake* [1999] 1 Sri LR 157, *Senasinghe v. Karunatilleke*, SC 431/2001, SCM 17/3/2003 and *Perera v. Balabatabendi and Others*, SC(FR) No 27/2002, SCM 19.10.2004.

[40] Under the 17th Amendment, key public officers and judicial officers as well as members to constitutional commissions had to be first nominated/approved by a ten member Constitutional Council (CC) consisting of non-political public personalities together with political leaders sitting *ex officio*. The CC functioned during its first term only (2002-2005) and performed its task for the most part creditably.

[41] The Court of Appeal held that Article 35(1) of the Constitution conferred a 'blanket immunity' on the President, except in limited circumstances constitutionally specified in relation to *inter alia* ministerial subjects or functions assigned to the President and election petitions in *Public Interest Law Foundation v. the Attorney General and Others*, CA Application No 1396/2003, CA Minutes of 17.12.2003.

[42] In September 2010, the government passed the 18th Amendment to the Constitution which replaced the Constitutional Council with a recommendatory Parliamentary Council that has no actual powers over the President's appointments. Sri Lanka has therefore returned to the previous *status quo* in terms of a politicised public, judicial and police service.

The internal politics of the Sri Lankan judiciary had also taken its toll on public support for the Court by this time. Though never free from turmoil in the best of times, the independence of the judiciary had been subjected to unprecedented controversy during 1999-2009 following the appointment of a former Attorney General as Chief Justice.[43] The failure of legal academics and professionals to protest against the politicisation of the office of the Chief Justice was profound even as judgment after judgment by the apex court invoked suspicion as to political motives underlying apparent judicial reasoning.[44] Emboldened, an increasingly powerful Presidency set the stage for the reducing of the judiciary to a pitiable shadow of what it had once been, cumulating in the arbitrary impeachment of a sitting Chief Justice in 2013. In that respect, application of the concept devised by Halliday and Karpik of the 'legal complex'[45] to these

---

[43] This appointment of Attorney General Sarath Silva as Chief Justice was made by then President Kumaratunga while there was a pending judicial inquiry into allegations of professional misconduct. See Report by the United Nations Special Rapporteur on the Independence of the Judiciary, (April 2003), E/CN.4/2003/65/Add.1, 25.02.2003 and among several relevant press releases of the Special Rapporteur, see releases dated 27.02.2003 and 28.05.2003.

[44] See Report of the Human Rights Institute of the International Bar Association, (IBAHRI) '*Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary,*' November2001 and '*Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*' May 2009. See also discussion of the context of this Chief Justice's constitutionally untenable order in the *Singarasa* case in which Sri Lanka's accession to the International Covenant on Civil and Political Rights was ruled to be unconstitutional in Section 2.2.2.7. of the study. Academic discussion of this extraordinary order was virtually absent at that time.

[45] The legal complex is defined as comprising 'all those law-practicing occupations that mobilize, whether cooperatively or not, on a given issue at a given moment.' It is acknowledged that collective actions of private lawyers cannot be segregated artificially from the fraternity of legal professionals who actively practice law at other sites – in law schools or courts, in government agencies or prosecution services, in corporations and non-profits. It is affirmed moreover that transitions to or from political liberalism must be explained in part by the politics of the legal complex, Halliday, Karpik and Feely (eds) *Political Liberalism in the British Post-Colony*, op.cit. at 7.

events leads us to the inevitable conclusion of the complicity of the legal fraternity in these dismal happenings.

Examining the nature of the judicial response to minority rights in Sri Lanka therefore cannot be confined to strict legal theory or the bare reading of judgements. Keeping this caution in mind and in the background of a convoluted constitutional and legislative history, this study covers a broad sweep of cases spanning several rights protections relating to minorities ranging from pre-independence to present-day times. It is not claimed that all the relevant cases in this respect pertaining to the particular judicial treatment of minority rights are scrutinised.[46] Instead, the objective is to look at a spectrum of decisions which provide insights into the performance of the judicial role in relation to the protection of the minorities. In the main, the study deals with reported cases due to the formidable difficulties that we were met with in regard to obtaining access to unreported judgments. However, the most important unreported decisions of the Court in relation to the post-war implementation of the emergency regime were obtained through much effort and are included in the critique.

In the first Part, the analysis focuses on the manner in which the Sri Lankan judiciary has responded in specific socio-political, socio-economic, socio-cultural and socio-religious contexts to minority rights. A methodology in terms of classification under the following contextual headings is adopted in order to provide an analytical reference; rights of minorities in relation to languages, including in reference to processes of court, rights of minorities in the context of official communications, rights of minorities in the context of the employer-employee relationships, the right to citizenship of a minority, land and housing rights in relation to minorities, rights of minorities to hold and take part in processions and lastly, the right to form religious associations, religious rights of minorities including the

[46](1968) 66 NLR, at 219.

right to voluntary conversion to a religion and rights to worship with particular focus on the caste right to religious worship.

Case law is used from each of these contexts to examine the judicial approach to confronting minority issues and explore the reasoning behind the rulings of the Court, particularly the Court's approach to implementing fundamental rights.

Part Two of this study critically looks at the judicial response in the context of the emergency regime with particular emphasis on the post-war period in three chapters. The first chapter deals with early judicial responses to public security. This chapter essentially focuses on case law from the post-colonial era under the 1947 Soulbury Constitution and 1972 Republican Constitution and explores the inception and germination of the public security doctrine as a means of suppressing political dissent.

The chapter discusses a selection of seminal cases that frames the judiciary's general response to public security, in order to provide a contextual background for examining the judicial response to cases specifically involving minority rights. The second chapter deals with the rhetoric of counterterrorism and its influence in the suppression of minority voices. The case law relating to Prevention of Terrorism Act passed during the 1978 Constitutional era and more recent Emergency Regulations is discussed in this chapter. The third and final chapter examines the post-war rights dispensation and investigates the transformation of the Sri Lankan judiciary from a guardian of rights to an enabler of rights violations.

PART ONE

JUDICIAL PROTECTION OF MINORITY RIGHTS IN GENERAL

1. Language Rights of Minorities including in relation to Processes of Court

1.1 Rhetoric v. The Reality; Negation of the Promise held out by Section 29(2) of the Soulbury Constitution

The limited protection that Section 29(2) of the Soulbury Constitution offered is well evidenced by the fact that during the twenty four years of its operation, there is no single instance of discriminatory legislation being invalidated by the Courts on the basis that a violation of Section 29 had been occasioned.[47]

In *Meera v. Dias (1957)*[48], the Supreme Court considered certain amending legislation which made visas necessary for the entry of non-citizens to Ceylon, leaving the granting of visas in the hands of the executive. A non-citizen was thus deprived of a right which he enjoyed earlier to renew his Temporary Residence Permit. The Court held that this legislation was not *ultra vires* Section 29(2) on the same argument as in *Kodakkan Pillai's Case.*[49]

As subsequent sections in this Part of the study will discuss, an early historical example of post-colonial discrimination aimed at the minorities by majority dominated governments was the Ceylon

---

[47] L.J.M. Cooray, *Constitutional Government in Sri Lanka*, 1984, at 56.
[48](1957) 58 NLR 571.
[49](1953) 54 NLR 433.

Citizenship Act No. 18 of 1948 which provided that no person shall be qualified to have his name entered or retained in any register of election if he was not a citizen of the country.

The practical effect of this Act denied citizenship to around one million Indian Tamil estate workers who were summarily deprived of the right to vote which they had been able to exercise since the grant of universal franchise in 1931.[50] Protests were articulated by Tamil politicians, most particularly, by S.J.V. Chelvanayagam who "foresaw in the legislation, dark times ahead for the minorities."[51]

> In the following year, (1949) Chelvanayagam and other Tamil politicians formed the Federal Party with Tamil self-determination within the state, being one of their main demands. Communal divisiveness became more pronounced on the part of both the Sinhala and Tamil political parties with a corresponding resort to expedient communal politics.[52]

As is critically analysed later, in *Kodakkan Pillai v. Mudanayake*[53], which affirmed the Supreme Court decision in *Mudannayake v. Sivagnanasundaram*[54] it was contended on behalf of the affected minorities that the Citizenship Act of 1948 along with the Franchise Plan, was part of a legislative plan to reduce their electoral power of the Indian Tamil community and was in violation of Section 29(2) of

---

[50]In the 1947 General Election, seven Tamil members of Parliament were elected by the workers in the hill country, see: Sansoni Commission report, Sessional Paper VII – July, 1980, at 71.

[51]Hoole, Rajan, '*The Citizenship Acts and the Birth of the Federal Party*', University Teachers for Human Rights (Jaffna), *Sri Lanka, The Arrogance of Power: Myths, Decadence and Murder*, Wasala Publications, Colombo, (2001), at 7.

[52]Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka; Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*, International Commission of Jurists, (2010), at 13.

[53](1953) 54 NLR 433.

[54](1951) 53 NLR 25 in which case, the Ceylon Supreme Court discussed the scope of Section 29(2) and stated *obiter dicta* that, even if Section 29(2) would have been intended by the Soulbury Commissioners to be a protection for minorities, it was not brought out/manifested in the words chosen by the legislature.

the Constitution.[55] The Citizenship Act in Section 4 and 5 defines who is a citizen of Ceylon and the Parliamentary Elections (Amendment) Act of 1949 provided that only citizens of Ceylon had the right to vote. When the matter was taken in appeal to Privy Council, it was affirmed that there could be legislation which though directly does not seem to offend against any particular constitutional provision may indirectly do the same in which case it would be *ultra vires*. However, their Lordships of the Privy Council stated that in the present instance it was a natural and legitimate function of the legislature of a country to determine who its nationals were and that therefore the Citizenship Act was within the State's legislative competences and did not intend to make the Indian Tamil community liable to disabilities to which other communities were not.

The Privy Council also took into consideration that the legislature had provided for the conferring of citizenship to some persons of Indian origin through the Indian and Pakistani (Residents) Citizenship Act and that the migratory habits of Indians are relevant to the question of their suitability as citizens of Ceylon. The members of the Privy Council later regretted this decision in which they had categorised both the Indian Tamils and Ceylon Tamils together as one community and had concluded that the Act did not discriminate between communities.[56] The underlying reason for this thinking had apparently been that Ceylon being a newly independent State, had to be assured that it had all the powers to legislate for itself without interference by her former colonisers.

Similar tensions were evidenced in regard to the enactment of the Official Language Act of 1956, which made Sinhala the Official

---

[55] L.J.M. Cooray, *Constitutional Government in Sri Lanka*, (1984) at 130.

[56] Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran and Asanga Welikala, *Power Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: Centre for Policy Alternatives), at 200.

Language of Ceylon as is discussed in *Kodeswaran v. Attorney – General*[57] below.

Indeed, language rights of Sri Lanka's minorities have been greatly contentious, forming a primary reason for the aggravation of minority insecurities whilst being a historically focal point of the play for votes between the majority dominated two main Sri Lankan political parties, namely the United National Party (UNP, traditionally comprising of the Colombo based English educated elite) and the Sri Lanka Freedom Party (SLFP, formed by S.W.R.D. Bandaranaike in 1951 with its centre-left political orientation being buttressed by a mainly Buddhist Sinhala rural electoral base).

Contesting from an electoral promise to establish the Sinhala language as the sole language of state, the 1956 elections were won by an SLFP-led alliance and Bandaranaike became the prime minister. The Official Language Act, No. 33 of 1956 made Sinhala the sole medium of state affairs.[58] Though the other main political party, the UNP had first articulated its support for parity of languages rather than a 'Sinhala-Only' policy, it changed its stance after its resounding defeat to the SLFP in the 1956 elections.[59]

The 'Sinhala-Only' policy of the SLFP was objected to by the Federal Party formed by leading Tamil minority politicians of the time who protested at Galle Face Green but were attacked by unruly mobs while the police declined to intervene. Tensions heightened in the North with the Federal Party commencing Tamil medium schools in opposition to the use of the Sinhala language as a medium of

---

[57](1969) 72 NLR 337.

[58]The Official Language Act, No. 33 of 1956 made Sinhala the sole medium of state affairs, vide Section 2 that 'the Sinhala language shall be the one official language of Ceylon.'

[59]Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*, International Commission of Jurists, 2010, at 13.

instruction.[60]S.W.R.D. Bandaranaike entered into the Bandaranaike-Chelvanayagam (B-C) Pact of July 1957 securing the use of the Tamil language as a national minority language and devolving power to regional councils[61]but amidst communal riots resulting in the killing of Tamils, the B-C Pact was unilaterally abrogated.[62]

Later, the Tamil Language (Special Provisions) Act of No. 28 of 1958 which allowed for the Tamil language to be used for 'prescribed administrative purposes' in the North and East without prejudice to Sinhala being the official language and hence the language of administration, was passed.[63] The Tamil language was declared to be the medium of instruction for students educated in Tamil as well as in public service entrance exams and administration in the north and eastern provinces was allowed to be conducted in Tamil. [64] Regulations were stipulated to be made for that purpose.[65] However, following the assassination of Bandaranaike by a Buddhist monk in 1959 and the assumption of the office of Prime Minister by his widow Sirimavo Bandaranaike in the 1960 elections, the 'Sinhala-Only' policy was implemented but the Tamil Language (Special Provisions) Act No. 28 of 1958 was bypassed. The legal validity of regulations under this Act was contested.[66]

In 1965, the UNP government which was returned to power signed the Senanayake-Chelvanayakam Pact on the basis that the support of the Federal Party would be secured. The Pact paved the way for the Tamil

---

[60]*Ibid.*
[61]*Ibid.*
[62]*Ibid.*
[63]Tamil Language (Special Provisions) Act of No. 28 of 1958, Section 5.
[64]*Ibid.*, Sections 2 (1), 2 (2), 3 and 4.
[65]*Ibid.*, Section 6 (1).
[66]Sansoni Commission report, Sessional Paper VII, July 1980, at 72.

Language (Special Provisions) Regulations of 1966[67] but this Pact too was abandoned.

The turmoil continued in succeeding decades. Tamil parliamentarians walked out of the Constituent Assembly drafting the 1st Republican Constitution in 1972 in protest that their demands for parity of status for languages had been ignored and their requests, in the minimum, to ensure that the draft Constitution contain provision similar to Section 29(2) of the Soulbury Constitution, had been bypassed. The 1972 Constitution, as enacted, decreed state patronage for the protection and fostering of the Buddhist religion[68] and constitutionally enthroned the Sinhala language as the single official language of the courts and the administration.[69] Its provisions declared that the use of the Tamil language shall be in accordance with the Tamil Language (Special Provisions) Act, No. 28 of 1958.[70] In describing the rationale behind these provisions, one of the primary drafters of the 1972 Constitution later explained that the Constitution did not make Buddhism the state religion but that this provision was subject to Section 18 (1) (b) which protected the fundamental right of religious belief.[71]

Notably, it was argued that the entrenchment of Sinhala as the Official Language in the Constitution was aimed at ensuring that the rights already in existence were given protection in the Constitution.[72] This

---

[67]These Regulations were more satisfactory than the provisions in the 1958 Act in that the Tamil language was allowed to become the language of administration in the North and East rather than the far more limited stipulation that the 1958 Act permitted, of being used only for 'prescribed administrative purposes.'

[68]Article 6, The 1972 Constitution.

[69]*Ibid.*, Article 11. Provided that the National State Assembly may provide otherwise in the case of institutions exercising original jurisdiction in the Northern and Eastern Provinces and also of courts, tribunals and other institutions established in terms of the Industrial Disputes Act and the Conciliation Boards Act, No 10 of 1958.

[70]*Ibid*., Article 8(1).

[71] Colvin R. de Silva, *Safeguards for the Minorities in the 1972 Constitution*, 1987,at 24.

[72]*Ibid.*, at 20

involved both the Sinhala Only Act and the Reasonable Use of Tamil Act. It was however admitted that equal standing for both languages and not just national language status being given to the Tamil language may have been preferable and that the lack of parity of status for both languages was a wrong done to the Tamil community[73].

Section 18 (3) of the 1972 Constitution provided that all existing law would remain in force despite their inconsistency with any of the fundamental rights. Whether this was done to prevent the challenging of Acts that were detrimental to the minorities (e.g. the Official Language Act) is a relevant question particularly as the 1972 Constitution provided for Sinhala as the Official Language. Indeed, the entrenchment of Sinhala as the Official Language in the 1972 Constitution was a response to *Kodeswaran v. Attorney General*[74] where an action was brought by a Tamil clerk in government service, who had not presented himself for a Sinhala proficiency test and whose increments were stopped by a Treasury Circular made under the Official Languages Act. It was argued that the Act transgressed the constitutional prohibitions against discrimination and therefore the Circular deriving its force from the Act was also invalid. The Court however avoided the constitutional issue and decided the case on a different basis altogether, i.e., that the Crown could not be sued upon a contract of employment by its employees. This decision is referred to later in the substantive analysis.

The 1978 Constitution recognised both Sinhala and Tamil as national languages while continuing to state that Sinhala will be the official language.[75] Later, Tamil was also given official language status thorough amendments effected in the eighties to the 1978 Constitution.[76] Currently, the recognition of the Tamil language is

---

[73] *Ibid.*, at 21.
[74] (1969) 72 NLR 337.
[75] Articles 18 and 19 of the 1978 Constitution in its un-amended form.
[76] 2nd, 4th, 13th and 16th Amendments.

effected through several constitutional provisions, namely Articles 18,[77] 19,[78] 24 (1), 24 (2), 24 (3) and 24 (4).[79]

---

[77] Article 18, The Constitution of Sri Lanka reads:

(1) The Official Language of Sri Lanka shall be Sinhala.

(2) Tamil shall also be an official language.

(3) English shall be the link language.

(4) Parliament shall by law provide for the implementation of the provisions of this Chapter.

[78] Article 19, The Constitution of Sri Lanka reads:

The National Languages of Sri Lanka shall be Sinhala and Tamil.

[79] Article 24, The Constitution of Sri Lanka reads:

(1) Sinhala and Tamil shall be the languages of the Courts throughout Sri Lanka and Sinhala shall be used as the language of the Courts situated in all the areas of Sri Lanka except those in any area where Tamil is the language of administration. The record and proceedings shall be in the language of the Court. In the event of an appeal from any Court records shall also be prepared in the language of the Court hearing the appeal, if the language of such Court is other than the language used by the Court from which the appeal is preferred:

Provided that the Minister in charge of the subject of Justice may, with the concurrence of the cabinet of Ministers direct that the record of any Court shall also be maintained and the proceedings conducted in a language other than the language of the Court ;

(2) Any party or applicant or any person legally entitled to represent such party or applicant may initiate proceedings and submit to Court pleadings and other documents and participate in the proceedings in Courts, [in either Sinhala or Tamil]

(3) Any judge, juror, party or applicant or any person legally entitled to represent such party or applicant, who is not conversant with the language used in a Court, shall be entitled to interpretation and to translation into [Sinhala or Tamil] provided by the State, to enable him to understand and participate in the proceedings before such Court and shall also be entitled to obtain in [such language] any such part of the record or a translation thereof, as the case may be, as he may be entitled to obtain according to law.

(4) The Minister in charge of the subject of Justice may, with the concurrence of the Cabinet of Ministers, issue, directions permitting [the use of English] in or in relation to the records and proceedings in any Court for all purposes or for such purposes as may be specified therein. Every judge shall be bound to implement such directions.

> It is an ironic observation that much of the burgeoning sense of grievance on the part of the Tamil minority community might have been appeased in the seventies if these very constitutional provisions had been incorporated at the outset, instead of (grudgingly) at a point in the eighties when the conflict had progressed to a more advanced stage.

As later decades showed us, the implementation of these constitutional provisions was confined to paper and the correction of historical injustices to the minority Tamil-speaking communities, (including individuals of both Tamil and Muslim ethnicity) in the context of language rights remained practically in abeyance.[80]

1.2 Use of Language and the Service of Summons

The cases of *Victoria v. The Attorney General* (1920)[81] and *Habeebu Mohamadu v. Lebbe Marikkar* (1947)[82] are early cases where the Court ruled on the service of summons and languages. These cases came before the Court prior to the introduction of the Official Language Act of 1958. The relevant procedural provisions to this case can be found in the Civil Procedure Code of 1889, namely Section 55, Section 801, Section 806, Section 823 (2) and the Courts Ordinance of 1889, Section 36 and Section 78.

1.2.1. Victoria v. The Attorney General[83]

In *Victoria v. The Attorney General*[84] the Court was called upon to decide whether every copy of an *order nisi* and the translation needed to be stamped.[85] The Court held that none of the relevant provisions of

---

[80] B. Skanthakumar. (ed.), *Language Rights in Sri Lanka – Enforcing Tamil as an Official Language*, Law & Society Trust, (2008).
[81] (1920) 22 NLR 33.
[82] (1947) 48 NLR 370.
[83] (1920) 22 NLR 33, at 33.
[84] *Ibid.*
[85] *Ibid.*

the Civil Procedure Code of 1889 required the duplicate of a summons to be in any language other than English, referencing Section 55 as one of the sections containing the general provisions referred to in Section 801.[86]

1.2.2. Habeebu Mohamadu v. Lebbe Marikkar[87]

Habeebu Mohamadu v. Lebbe Marikkar[88]was concerned in part with the serving of a summons to a Tamil speaking defendant in a Court of Requests in English. The Commissioner of Requests held that a summons served to a Tamil speaking defendant under Section 806 of the Civil Procedure Code should be in Tamil.[89] The Supreme Court reversed that ruling citing *Victoria v. The Attorney General*[90]and the absence of any specific language requirements under Section 806, stating specifically that the Court was 'unable to agree with the view of the Commissioner that the summons served on a Tamil-speaking defendant under Section 806 of the Civil Procedure Code should be in Tamil.'

As noted, *Habeebu Mohamadu v. Lebbe Marikkar*[91] was before the introduction of the Official Language Act of 1958 and the present constitutional provisions addressing official languages in Sri Lanka. Consequently, 'the right' claimed by the defendant as a Tamil speaking Muslim which was denied to him, would have been denied to a Sinhalese as well, based on provisions of the Criminal Procedure Code as judicially interpreted. After observing there were contrary opinions favoured in some decisions, the Court made inquiries from Registrars of several jurisdictions. It found in Colombo, Kandy and Galle no translations had been served on defendants except when the plaintiff's attorney engages in that task, while in Kegalle a Sinhalese

---

[86] *Ibid.* at 33.
[87] (1947) 48 NLR 370, at 371.
[88] *Ibid.*
[89] *Ibid.*
[90] (1920) 22 NLR 33.
[91] (1947) 48 NLR 370 ,at 371.

translation was served on a Sinhalese speaking defendant but the Tamil speaking Tamil or Moor was served only with a summons in English. This was described by the Court as 'strange practice'.[92]

In these early cases, the Court could have been more proactive in confronting language concerns of the minorities and the majority alike. The rulings demonstrate that exercise of the Court's discretion as outlined by the Code was used to overrule the requests of the defendants. It is notable that in *Habeebu's case*,[93] evidence was specifically led to establish that the first defendant did not know English. These cases were symbolic of problematic judicial patterns in the positive protection of fundamental freedoms as manifested in the country's jurisprudence.

1.3 Election of Jurors in Criminal Trials

1.3.1. The King v. Nadarajah[94]

The King v. Nadarajah (1945)[95] explores the Court's approach to language rights in the context of the election of jurors in criminal trials. The Tamil defendants in this case elected to be tried by an English speaking jury when committed to trial in the Northern circuit in Jaffna. The Attorney General[96] subsequently transferred the trial from the Northern Circuit to the Western Circuit resulting in the defendants requesting to be tried by a Tamil speaking jury. The Court (Commissioner of Assize) held that the language of Section 165 B of the Criminal Procedure Code of 1898[97] does not necessarily indicate

---

[92] *Ibid.*
[93] *Ibid.*
[94] (1945) 46 NLR 198.
[95] *Ibid.*
[96] Under powers vested in him under the Courts Ordinance of 1889.
[97] Section 165 B, The Criminal Procedure Code of 1898 reads:

> On committing the accused for trial before any higher court the Magistrate shall ask the accused to elect from which of the respective panels of jurors the jury shall be taken for the trial in the event of the trial being held before

that the defendant will always be tried by the jury he elected before the Magistrate. In its ruling the Court relied upon the language in the Criminal Procedure Code that states 'shall be bound' and 'may be tried' as opposed to 'shall be bound and shall be tried'.[98] The Court observed:

> It is probable that at the time the election was made, it was believed that the trial would be held before an English speaking jury at Jaffna, and it was (hoped) that the majority of, if not all, the jurors would be Tamil speaking gentleman, well versed in local conditions etc.. The action of the crown by transferring the case to Colombo may have frustrated that intention.[99]

The Court reasoned that Section 224 (1)[100] in these circumstances conferred judicial discretion to take a decision one way or another. Despite the same, it was held that the prisoners were bound by their election to be tried by an English-speaking jury and that the Court would not use its discretion under Section 224 (1) of the Criminal Procedure Code to alter the panel as the prisoners were deemed 'not to be prejudiced by their being tried according to their original election by an English-speaking jury.

In acknowledging that the transfer of the trial to Colombo frustrated the intention of the initial request of the defendants to be tried by an English speaking jury, the Court demonstrated its awareness of the concerns of the defendants. Yet, having the opportunity to use its discretion, the Court did not elect to decide in favour of the

---

the Supreme Court, and the Magistrate shall record such election if made. The accused so electing shall, if the trial is held before the Supreme Court be bound by and may be tried according to his election, subject however in all cases to the provisions of Section 224.

[98](1945) 46 NLR 198, at 199.

[99]*Ibid*.,at 199.

[100] Section 224 (1), The Criminal Procedure Code of 1898:

The jury shall be taken from the panel elected by the accused unless the court otherwise directs.

defendants. It would be indeed difficult to identify an example of judicial insensitivity as extreme as the instant case.

1.3.2. The King v Thelenis Appuhamy[101]

The King v. Thelenis Appuhamy (1945) [102] presents similar circumstances where defendants in the Magistrates Court asked to be tried by a Tamil speaking jury. In this case the defendants were all Sinhalese and had reasoned that a Sinhalese speaking jury 'would be influenced by the other side'.[103]

Under Section 224 (1) of the Criminal Procedure Code the Attorney General moved that the trial should take place before an English speaking jury for efficiency reasons as all the witnesses in the case were Sinhalese. His reasoning was that with a Tamil jury questions for the witnesses would have to be translated from English, the language of the Court, to Tamil and then the responses back into Sinhalese. The evidence would also have to be interpreted from Sinhalese to both English, the language of the Court, and Tamil. The Attorney General argued that this was a waste of public time as there was no evident advantage for the defendants and they had not shown that there was any particular reason why they should be tried by a Tamil speaking jury.

As against this argument, it was contended by Counsel for the defendants that a Tamil speaking jury would be fairer in assessing the case and that further, some English speaking jurors could be chosen from the Tamil speaking jurors to avoid having to translate into Tamil also. The Court rejected this suggestion stating that it would be 'improper and irregular to select English speaking persons from

---

[101](1945) 46 NLR 304, at 305.

[102]*Ibid.*

[103]*Ibid.* at 305. Note: The Judge later commented, 'I cannot see on what grounds these accused fear that a Sinhalese speaking jury would be influenced by 'the other side'. I presume the 'other side' refers to the private aggrieved parties and not to His Majesty's Attorney General who is the 'other party' to this case.' at 306.

amongst a panel of Tamil speaking jurors and then treat them as if they were an English speaking jury.'[104]

The Court employed the decisive criteria of 'convenience' and 'no prejudice to the accused' to agree with the submissions of the Attorney General. Referencing *The King v. Nadarajah,*[105] it was ruled that once an accused elects under Section 165(B), he is bound by it but that decision could be overridden by Section 224. Consequently, by virtue of the judicial discretion exercised against the defendants under Section 224 (1), it was held that 'convenience demands that this trial should take place before an English-speaking jury, particularly as no prejudice whatsoever will be caused to any of these prisoners by being so tried.'

Both the rulings in *The King v. Nadarajah*[106] and *The King v. Thelenis Appuhamy*[107] failed to recognise a defendant's right to elect jurors of his choice in criminal trials and subjected that right to the overriding exercise of judicial discretion. Most evidently in *The King v. Nadarajah,*[108] such judicial reasoning failed to be sensitive to the rights of a minority community.

1.4 *Athamlebbe v. Inspector of Police, Batticaloa*[109]- The Supreme Court's Definition of 'Foreign Language' in Sri Lanka

Athamlebbe v. Inspector of Police, Batticaloa (1948)[110] was an appeal to the Supreme Court after a Tamil man had been convicted by the Magistrate's Court of forging documents that might have qualified

---

[104](1945) 46 NLR 304, at 305.
[105](1945) 46 NLR 198.
[106]*Ibid.*
[107](1945) 46 NLR 304, at 305.
[108](1945) 46 NLR 198.
[109](1948) 49 NLR 234.
[110](1948) 49 NLR 234.

him to be appointed to an official post, certifying he had passed the eight standard in Tamil

Counsel for the accused contended that a document in the Tamil language had been 'irregularly admitted' in evidence in the course of the proceedings without a duly authenticated translation thereof being filed, drawing upon Section 301 (2) of the Criminal Procedure Code,[111] which states that a document filed in a foreign language must be filed with an English translation.

Of particular interest is the Court's response to that contention in dismissing the appeal. The Court reasoned as to whether or not this provision applied to the circumstances of the case and whether the Code indicated that the evidence submitted in Tamil required an authenticated English translation. It was found that Tamil could not be considered a foreign language within the context of the provisions of the Code.[112] In its finding, the Court stated:

> I am unable to read Section 301 (2) of the Criminal Procedure Code as applying to a document in the language of the native inhabitants of this country. Tamil is the language of a large section of the people and cannot, in my opinion, be regarded as a foreign language within the ordinary meaning of that expression in an enactment of our legislature...It should however be borne in mind that English is still the language of our Courts and that great inconvenience to counsel and judges, hardship and even injustice to accused persons can result from the absence of duly authenticated English translations of documentary evidence in a language other than English even though that language be not a 'foreign language' for the purpose of Section 301 (2).[113]

---

[111] Section 301 (2), The Criminal Procedure Code:
Where any document is in a foreign language there shall be filed with it an English translation thereof or of so much thereof as is material.

[112](1948) 49 NLR 234, at 235.

[113]*Ibid.*, at 236.

The Court also considered whether the admission of the logbook contributed to any prejudice or disruption to justice. It held that since the counsel for the accused was given the opportunity to examine the logbook and utilise it in his cross-examination of a witness, including the entries in Tamil, that the accused 'therefore had not been prejudiced and the interests of justice have not suffered'[114]

In reflecting on this positive ruling, it must be pointed out that neither the Official Language Act (No. 33 of 1956)[115] nor the Tamil Language (Special Provisions) Act, No. 28 of 1958[116] had been passed by the legislature at that time. While the accused gained no advantage from the ruling, the jurisprudential significance in this decision is found in Basnayake, J using a standard dictionary meaning of the word 'foreign' meaning 'belonging to, situated in, or derived from another country, not native, alien, exotic.'[117] This decision of the Supreme Court just after independence in 1948 does not regard Tamil as being derived from another country; rather, the Court regarded it as a language of the native inhabitants of the country.

It is unfortunate that this commendable ruling had not reached the social consciousness of either the Sinhalese or Tamils in public debates. Furthermore, social justice and human rights movements had apparently not noted these judicial sentiments as a seminal marker of enlightened judicial thinking.

1.5 *Kodeswaran v. Attorney - General*[118]- Challenges to the Official Languages Act of 1956

Kodeswaran who was a public servant refused to appear for a language proficiency test in Sinhala and therefore lost his salary

---

[114] *Ibid.*, at 235.
[115] Which made the Sinhalese the official language.
[116] Which provide for the use of the Tamil language in the Northern and Eastern Provinces.
[117] (1948) 49 NLR 234, at 236.
[118] (1969) 72 NLR 337.

increments. In *Kodeswaran v. Attorney - General*[119], Kodeswaran argued that the refusal to provide his salary increments due to an administrative circular issued under the Official Languages Act was contrary to law since the Act itself was unconstitutional due to inconsistency with Section 29(2) of the Soulbury Constitution. The District Court being the Court of first instance upheld his contention but the decision was reversed by the Supreme Court which, as observed in the prefatory parts to this section, avoided the constitutional issue and upheld a preliminary objection raised by the Attorney General that a public servant did not have the right to bring a case against the Crown.[120]

Kodeswaran appealed to the Privy Council which rejected the preliminary objection and sent it back to the Supreme Court for decision. The Privy Council too did not consider the legality of the Official Languages Act since the appeal only dealt with the preliminary objection. But, when the matter was sent back to the Supreme Court, there was no interest shown in pursuing the case and the Supreme Court eventually did not come to a decision on the legality of the Official Languages Act.

As opposed to the other cases that we have discussed before which have not generally been the subject of reasoned critique, the *Kodeswaran case*[121]is a widely known and rightly critiqued illustration of judicial cowardice on the part of the Supreme Court in failing to recognise language rights of the Tamil community in the context of constitutional provisions which may have lent themselves to an enlightened judicial interpretation if the judicial will to do so had been manifested.

It is solemn cause for retrospective thought that if the country's judiciary had been bolder in asserting the practical relevance of

---

[119](1969) 72 NLR 337.
[120]*Attorney General v. Kodeswaran*, (1968) 70 NLR 121.
[121]*Ibid.*

Section 29(2) of the Soulbury Constitution in a manner that upheld the rights of minority communities while at the same time, recognising the needs and concerns of the majority community which had been undermined and unrecognised during colonial rule, Sri Lanka's unhappy history of ethnic division and conflict may well have been written differently. It is however an inescapable fact that the judiciary failed to uphold its constitutional role and instead, submitted to the political dictates of the day.

1.6 Pleadings Filed in the Original District Courts - *Coomaraswamy v. Shanmugaratne Iyar and Another*[122]

In an excellent departure from the norm of judicial conservativeness, this case involving judicial interpretation of provisions of the 1978 (the present) Constitution concerned a Rent and Ejectment action in the District Court. The defendant's answer to the charge was filed in Tamil with a copy in English. Although no objection was raised on behalf of the plaintiff, the District Judge held that Article 24 of the Constitution did not permit the defendant to file pleadings in Tamil in the District Court of Colombo and directed the defendant to file his answer in Sinhalese.

In an application for leave to Appeal[123]and for Revision[124] to the Court of Appeal by the defendant, a divisional bench of the Court of Appeal in the exercise of its appellate jurisdiction while holding that, 'an answer filed in Tamil is an answer that should have been accepted'[125] referred the case to the Supreme Court for a determination on the

---

[122] [1978 – 79-80] Sri.L.R 323.
[123] Under Section 757 of the Civil Procedure Code (Chap 105 of the Legislative Enactments of Sri Lanka (LESL) (1980 Revised).
[124] Article 138, The Constitution of Sri Lanka.
[125] [1978-79-80] Sri.L.R.323, at 324.

basis that it involved a matter of constitutional interpretation, in terms of Article125.[126]

The Supreme Court was called upon to examine the relevant provisions of the Constitution namely, Articles 18,[127] 19,[128] 24 (1), 24 (2), 24 (3) and 24 (4). On the notion of official languages in relation to national languages the Court reasoned:

> Thus, though the language of the Courts throughout Sri Lanka is Sinhala, the language of the Courts in the Northern and Eastern Provinces is also Tamil. The fact that Tamil is not the language of the Courts in the rest of Sri Lanka other than in the Northern and Eastern Provinces does not mean that it cannot be used in those Courts. While Tamil can be used in these Courts, it is mandatory that their records and proceedings shall be kept in Sinhala, the official language. Thus it is not correct to state that the only national language used in the District Court of Colombo is Sinhala. It is quite regular to use both national languages in the District Court of

---

[126] Article 125, The Constitution of Sri Lanka reads:

(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and accordingly, whenever any such question arises in the course of any proceedings in any other Court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi- judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.

(2) The Supreme Court shall determine such question within two months of the date of reference and make any such consequential order as the circumstances of the case may require.

[127] Article 18, The Constitution of Sri Lanka reads:

(1) The Official Language of Sri Lanka shall be Sinhala.

(2) Tamil shall also be an official language.

(3) English shall be the link language.

(4) Parliament shall by law provide for the implementation of the provisions of this Chapter

[128] Article 19, The Constitution of Sri Lanka reads:

The National Languages of Sri Lanka shall be Sinhala and Tamil

> Colombo, but the records therein should however be maintained in the official language.[129]

Following this, the language of Article 24 (2) and the directive issued by the Minister of Justice under Article 24 (4) should be considered. The directive saw the Minister of Justice acting with the Cabinet of Ministers permitting the use of English for all purposes 'in or in relation to the records and proceedings in all Courts throughout Sri Lanka'.[130] A second directive was issued ordering that the first be read subject to the following modification:

> I hereby direct that in any Court other than the Supreme Court and the Court of Appeal a language other than a national language may be used for any purpose in any case in which the conduct of the proceedings in a national language might be prejudicial to the proper adjudication of any such matter in such proceedings.[131]

This raises the question of whether the directive made by the Minister of Justice under Article 24 (4) could be regarded as impinging on Article 24 (2). The Supreme Court proceeded to hold as follows:

> This Article [Article 24 (4)] makes provision for the use of a language other than a national language in the Courts. It does not deal with the use of national languages in the Courts, and hence neither this Article not any direction issued under it can have any application or relevance to the use of either of the national languages in Courts. The right to the use of either of the national languages in any Court stems from Article 24 (2), and no direction of the Minister issued in terms of Article 24 (4) can impinge on or impair that right. Any direction which directly or indirectly modifies such right will *pro tanto* be invalid. Hence that direction can have no bearing on the ordinary and natural sense of the words of Article 24 (2).[132]

---

[129] [1978-79-80] Sri.L.R.323, at 324.
[130] *Ibid.*, at 325.
[131] *Ibid.*, at 325.
[132] *Ibid.*, at 325.

In addition to this, the Court considered the validity of the directive from the Minister of Justice. The Court held that the provisions the Minister made were *ultra vires*[133] Article 24 (4):

> In my view, the proviso in the direction dated 7th May 1979, 'provided however that the pleadings, applications and motions in all such cases shall also be in such national language as is used in such Court', is not warranted by Article 24 (4) and is *ultra vires* the powers of the Minister. In the exercise of his powers under Article 24 (4), it is not competent for the Minister to incorporate a direction in respect of the use of a national language in Court.[134]

The Supreme Court's reasoning in finding fault with the District Judge's order held that an error had been made in his assumption that the second directive from the Minister of Justice could 'abridge or negate the unqualified right granted by Article 24 (2).'[135] The Court also held that the Minister's directions under Article 24 (4) were irrelevant in considering the scope or ambit of the language right secured to a party by Article 24 (2).[136]

The Supreme Court also commented on the appellate Court's referral of the case to it under Article 125 and the relevant constitutional duty imposed on the State to provide 'adequate facilities' for the use of the languages specified in the Constitution, as envisaged in Article 25:[137]

> A party or applicant or any person legally entitled to represent such party or applicant has a right, by virtue of paragraph 2 of Article 24 of the Constitution, to submit pleadings in the Tamil language in the District Court of Colombo and that such party is not bound to submit such pleadings in Sinhala also. The State is obliged to

---

[133] beyond the legal power or authority.
[134] [1978-79-80] Sri.L.R.323, at 326.
[135] *Ibid.*
[136] *Ibid.*, at 325.
[137] Article 25, The Constitution of Sri Lanka reads:

The State shall provide adequate facilities for the use of the languages provided for in this chapter.

> provide a translation of the Tamil pleadings into Sinhala for the purpose of keeping the record in Sinhala in the District Court of Colombo in terms of Article 24 (l).In view of the above determination, this Court sees no useful purpose in remitting the case to the Court of Appeal. It makes the following consequential order. The Order of the Additional District Judge dated 19.10.79 is set aside and he is directed to accept the pleadings in Tamil submitted by the defendant and to take further steps according to law.[138]

The ruling of the Supreme Court centred on the distinction between the use of Tamil as a national language and the obligation of the state to maintain court records in the official language. The Court held that a party litigant is entitled to submit pleadings in Tamil, being a national language, in any Court. In this case it was the District Court of Colombo, yet it would equally apply to any Court in any of the other provinces. It is the responsibility of the state to translate the case records into Sinhala in keeping with Article 24 (1) as stated by Sharvananda J in the ruling.[139] This is even more necessary where the language of the Courts is Sinhala.[140]

Several matters that were not examined by the Court warrant reflection in the wake of the ruling. The first matter is the impact of

---

[138] *Ibid.*, at 326.

[139] *Ibid.*

[140] *Dominique Guesdon v. France* Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986 (1990)

The right of a defendant to choose their language in court proceedings was ruled on by the United Nations Human Rights Committee in *Dominique Guesdon v. France*. In this case the petitioner, Guesdon, wanted to conduct Court proceedings through a translator in Breton, an officially recognised regional language but not the official national language. Upon appearing in court, he requested that twelve witnesses be heard on his behalf, and that he and the witnesses wished to give testimony in Breton on the basis that this was the language they could most comfortably express themselves in. When brought before the UNHRC, the Committee opined there was no obligation for the proceedings to be conducted through a translator and that this was only necessary if the accused or defence witnesses had difficult understanding or expressing themselves in the Court language.

Section 41 (1) of the Judicature Act.[141] These provisions indicate that an attorney would be entitled to conduct his or her case in Tamil in Colombo and in the other seven provinces where the official language applies. The Court would be obliged to provide a translator for the purpose of keeping the records in Sinhala, which contention is reinforced by Article 24 (2).

The question then arises as to what happens to the proceedings in the original Courts in the Northern and Eastern Provinces? Article 24 (1) makes it explicit that proceedings should be conducted in Sinhala in all areas of Sri Lanka, apart from those where Tamil is the language of administration. Consequently, if an attorney seeks to plead and assist his or her client and files pleadings in Sinhala, the reverse situation to the Supreme Court ruling would equally apply in that the record is to be maintained in Sinhala or Tamil.

This illustrates the effort to assert ethnic pride from a minority community in Sri Lanka who are constitutionally declared equal rights under Article 12.This aspect comes from the Supreme Court's admonition of the impugned order of the District Judge, holding that:

> The fundamental error committed by the Addl. District Judge is that he has sought to construe the clear language of Article 24 (2) by reference to a directive purported to be issued by the Minister of Justice under Article 24 (4) of the Constitution, providing for the use of a non-national language in Court. I can find no warrant for this process or mode of construction.[142]

In retrospect, it must be noted that the Supreme Court could have easily given a different construction, limiting itself to the definition of 'official language', the focus of the ruling being on the District Judge having incorrectly relied on the directive by the Minister under Article

---

[141] Section 41 (1), The Judicature Act:
Every Attorney at Law shall be entitled to assist and advise clients and to appear, plead or act in every Court or other institution established by Law.

[142] [1978-79-80] 1 Sri.L.R.323, at 325.

24 (4) of the Constitution. After all, the District Judge had not rejected the answer filed in Tamil. And the appellant could not have filed a fundamental rights application under Article 126 of the Constitution as the grievance was not against executive or administrative action but against a decision of a Court. There is also the aspect of the judicially defined proposition that, fundamental rights must be distinguished from ordinary rights.[143]

For those reasons, the Supreme Court could not have derived assistance from Article 12 of the Constitution expressly. But the unexpressed theme that lies behind its approach is the right to equality enshrined in that Article, albeit, upholding by implication equal status of a minority Tamil seeking to vindicate his ethnic pride. Therein lies the proactive judicial approach in the Supreme Court ruling, which presents a contrast to the Supreme Court decision in *Adiapathan v. Attorney General* discussed later in this study.[144]

1.7 Minority Language Rights in Official Communications - *Adiyapathan v. Attorney General*[145]

Adiyapathan v. Attorney General (1979)[146] was one of the earliest – and most critiqued – cases under the present Constitution where the issue of minority language rights was brought sharply into focus. The decision attracts considerable scrutiny for the reason that the matter involved an alleged fundamental rights violation under the newly justiciable fundamental rights chapter of the Constitution.

The petitioner, who was entitled to receive his provident fund benefits, had received a cheque from the relevant Government Department in Sinhala as part of the communication informing him of

---

[143][1978-79-80] 1 Sri.L.R.102 and [1978-79-80] 1 Sri.L.R. 60.
[144][1978-79-80] 1 Sri.L.R. 60.
[145][1978-79-80] 1 Sri.L.R. 60.
[146][1978-79-80] 1 Sri.L.R. 60.

his dues. The petitioner spoke Tamil and returned the cheque demanding that he be sent a cheque in Tamil. This case raised the question of language rights; whether the drawing of the cheque in Sinhala was a violation of his rights under Article 22 (2) (a) of the Constitution and if he was entitled to receive his cheque in Tamil. After the filing of the application, on the advice of the Attorney General, the petitioner had been sent a cheque in Sinhala with a Tamil translation.

The key provisions that address this issue are Article 22 (1),[147] Article 22 (2) (a) and Article 22 (2) (c)[148] of the Constitution. Having submitted that he was not relying on Article 22 (2) (c) and the Court not expressing any view on that aspect, Counsel for the petitioner argued that the cheque in question was part of the communication in terms of Article 22 (2) (a) and therefore the petitioner was entitled to receive it in the Tamil language as it is a national language.

---

[147] Article 22 (1), The Constitution of Sri Lanka reads:

> Sinhala and Tamil shall be the languages of administration throughout Sri Lanka and Sinhala shall be the language of administration and be used for the maintenance of public records and the transaction of all business by public institutions of all the Provinces of Sri Lanka other than the Northern and Eastern Provinces where Tamil shall be so used;
>
> Provided that the President may, having regard to the proportion which the Sinhala or Tamil linguistic minority population in any unit comprising a division of an Assistant Government Agent, bears to the total population of that area, direct that both Sinhala and Tamil or a language other than the language used as the language of administration in the province in which such area may be situated, be used as the language of administration for such area.

[148] Article 22 (2) (a), (c), The Constitution of Sri Lanka reads:

> In any area where Sinhala is used as the language of administration a person other than an official acting in his official capacity shall be entitled:
>
> (a) to receive communications from and to communicate and transact business with, any official in his official capacity, in either Tamil or English.
>
> (c) where a document is executed by any official for the purpose of being issued to him, to
>
> obtain such a document or a translation thereof, in either Tamil or English.'

Relying on Article 22 (1), Counsel for the respondents (representing the administrative officials in question) argued that the cheque had been drawn in Colombo and as a result it was in Sinhala. Had it been drawn in the Northern or Eastern Province it is likely to have been drawn in Tamil. Furthermore the cheque was not part of the communication and the latter part of Article 22 (1) entitled the petitioner to transact business with the officials concerned in either of the national languages, and consequently it did not entitle the petitioner to receive a cheque written in Tamil.[149]

---

[149] Some comparative illustrations may be pertinent at this point. *Alexander v. Sandoval*, 532 U.S. 275 (US 2001).,The United States Supreme Court has tended to avoid direct rulings on official languages. While the United States of America does not have an official national language, individual states can elect to have their own official language. This was the case in Alabama, which amended the State Constitution in 1990 to declare English as the official language. Following this, it was ordered that all driving-tests were conducting only in English. Sandoval, an immigrant, sued the Director of the Alabama Department of Public Safety under Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, colour or national origin by programs that receive federal funding. Both the district court and the US Court of Appeals for the Eleventh Circuit found that Sandoval had a private right of action and the policy was discriminatory. The Supreme Court overruled this decision when reviewing the question of whether or not Sandoval had a private right of action to enforce the regulation (see 532). The Court, ruling on procedure, held that there was no private right of action to enforce the disparate-impact regulations promoted under Title VI of the Civil Rights Act of 1964. This was also the case in *Arizonans for Official English v. Arizona* (520 U.S. 43). See: Soltero, Carlos R.; *Latinos and American Law: Landmark Supreme Court Cases* (University of Texas Press), at 193.

Indian practice is also illustrative. Article 343 of the Constitution of India specifies that Hindi in Devanagari script is the official language of the Union, with English also being used for official purposes. The Constitution also acknowledges twenty-two official languages (Article 351) with states being permitted to choose their own official language. The High Court of Gujarat ruled in 2010 that Hindi was not a national language of India. The petitioner had filed a Public Interest Litigation seeking direction to Central and State government to make it mandatory for manufacturers to print details on packaging in Hindi. The Court commented 'normally in India the majority of people have accepted Hindi as a national language and many people speak Hindi and write in Devanagari script, but there is nothing on record to

The Court dismissed the application holding that the cheque did not form part of the communication in the context of Article 22, and subsequently was not entitled to relief under Article 126.This was for two reasons, first, the receipt of a cheque was on a par with the receipt of currency constituting legal tender; and second, there is no provision requiring a cheque to be endorsed in the official language, although in the civil law of the land, the petitioner may have been entitled to receive a cheque in a language of his choice if there was express or implied agreement to that effect.[150]

The distinction drawn between a fundamental right and an ordinary right is an important feature of the ruling. The reasons adduced by the Court in dismissing the application reveals a jurisprudential basis in drawing a distinction between a fundamental right and an ordinary right in determining that, the cheque in question was not part of an official communication.

The Attorney General had advised, upon the petitioner's complaint that he does not understand Sinhala, to send a Tamil translation of the cheque in question. Several questions arise as a result. Why should the Attorney General have advised so? Was it to appease the petitioner's ethnic pride? Why could not the cheque be sent in Tamil as requested by the petitioner? Would that not have been a measure to address a stand based on, simply ethnic lines as insisted upon by the petitioner? Given the definition of a document under the rules of evidence to include even a cheque, could not the Court have regarded the same as part of the official communication in issue?

But the Court did not do that, though acknowledging that 'there was no doubt that the petitioner had some sense of grievance in which the communication was made to him in regard to the payment of money

---

suggest that any provision has been made or order issued declaring Hindi as the national language.' See: The Hindu, *Hindi Not a National Language· Court*; found at http://www.thehindu.com/news/national/hindi-not-a-national-language-court/article94695.ece; Date accessed 7/1/14

[150][1978-79-80] 1 Sri.L.R. 60.

due to him.'[151] If so, could not the matter have been decided as being a violation of the petitioner's fundamental right to have received the cheque in Tamil and not a right in the context of the ordinary civil law? For, as the Court had reasoned 'the cheque' was an enclosure and was not an official 'communication'.

The further question then arises as to the fact that the petitioner had received a translation of the cheque in Tamil. So what was his grievance? That could be explained in terms of ethnic pride in being a citizen of this country in the context of Article 12 of the Constitution. In terms of the relevant constitutional provisions, the stand taken by the Attorney General could not have been faulted.

However, could not and ought not Court have regarded the cheque as part of an official communication? The Court could have brought in the petitioner's grievance as being a violation of his fundamental right based on language[152] given the fact that, the Court itself acknowledged that the petitioner had some sense of grievance as previously mentioned. .

Of further relevance is that when the petitioner received the cheque in Sinhala, it was November 1978, just over a year since the August 1977 riots. The ruling of the Court was delivered in June 1979, a time when ethnic tensions were growing. This would eventually erupt into the Black July riots, which is seen as the catalyst for the calamitous ethnic conflict which would engulf the country in succeeding decades. In August 1983 the President of Sri Lanka appeared on national television and lamented that 'this is the result of continuing tensions between majority Sinhalese and minority Tamils for years'.[153]

Granted, these tensions would not have been resolved by a judgement of the Supreme Court on the matter of language rights in the issuance of government cheques. And certainly political struggles should be

---

[151] *Ibid.*, at 64.
[152] [1978-79-80] 1 Sri.L.R.60, at 63.
[153] J.R Jayawardene (President of Sri Lanka) on 22 August 1983.

left to politicians no doubt. Yet here was an opportunity for the Supreme Court of the country to respond to a citizen of a minority community seeking to make a point based on ethnic pride amidst rising tensions between ethnic groups. The Court, in assuming a pro-active role, could very well, in its constitutional authority to interpret the Constitution,[154] have held the case as being a violation of a fundamental right of a minority citizen, without relegating the petitioner's grievance to the realm of civil rights. Instead, the Court interpreted the constitutional provisions regarding what is an official communication in the context of 'official' with regard to a 'national' language. As observed quite rightly:

> ...the Bench confined itself to the nature of the cheque which (it) held not to be an official communication but rather an enclosure, thereby exempting the matter from the fundamental rights jurisdiction of the Supreme Court and skirting the larger issue. This case among others underlines how Sri Lanka's higher judiciary was slow in evolving itself into an institution constitutionally defining the public policy framework for pluralism and multi-culturalism...reluctant to play the role of an assertive arbiter...when encountering violation of rights on the basis of ethnic discrimination[155]

[154]Article 125, The Constitution of Sri Lanka.

[155] See: B. Skanthakumar, *Official Languages Policy and Minority Rights* in *Sri Lanka: State of Human Rights 2007*, (Law and Society Trust, 2007), at 337.

2. Minority Rights in Relation to the Employer – Employee relationship- *Valliamma v. Trafford Hill Rubber Estates Ltd*[156]

In this case, a Tamil labourer had been working on a Rubber Estate in Galagedera, an area where ethnic tensions between the Tamil and Sinhalese villagers had become extremely high. The tensions had often resulted in physical conflict and property damage in the area. While at work, a group of Sinhalese villagers assaulted a Tamil labourer and as a result of the injuries, the labourer later died. At the time of the attack, the victim had been undertaking the job of 'forking' the earth close to one of the roads running by the estate and was working away from other labourers. The workman's widow claimed compensation from the employer under Section 3 of the Workman's Compensation Ordinance (WCO).[157]

Section 3 of the WCO applies to the case of injury occurring in the course of employment. In application to the circumstances of this case

---

[156](1960) 26 NLR 468.

[157]Chapter 158, Vol. VIII, (LESL) (1980 Revised) herein known as Workman's Compensation Ordinance. Section 3 reads:

> If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Ordinance:
> Provided that the employer shall not be so liable-
>
> (a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding seven days ;
>
> (b) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to –
>
> (i) the workman having been at the time thereof under the influence of drink or drugs, or
>
> (ii) the willful disobedience of the workman to an order expressly given , or to a rule expressly framed, for the purpose of securing the safety of workmen, or
>
> the willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen.

the phrases within Section 3 that were of relevance to the Commissioner for Workman's Compensation under the Statute and then in the Supreme Court were 'in the course of employment' and 'arising out of employment'. The Commissioner had determined that the incident had been caused during the 'course of employment' but referred the matter to the Supreme Court as provided for by Section 39 of the Statute for a ruling as to whether the incident could be considered as 'arising out of employment'.

Drawing support from English precedents in making his decision, Justice T. S. Fernando, writing for the Supreme Court asked the two-fold question as to whether it could be said that 'the incident had resulted from a risk incidental to the employment' and whether it could be said 'that 'the accident' was connected with the 'employment'? Both questions were answered by him in the negative.

Reflecting on the ruling, it must be conceded that in a strict legal sense, the incident could not have been said to be connected with the employment. What should be considered however is the role of the conductor of the employer's estate in allocating the work to the victim on the day, without thought to the imminent risk posed to the victim. Could the analogical reasoning based on 'struck by lightening' or 'a workman being injured by bombs and shells from bombardment during a war' by the Court have been treated on par for that reason?[158]

The Court also stated that 'it was not suggested that either the workman or the conductor who allocated work to him was aware of

---

[158] (1960) 26 NLR 468, at 470:

> Their Lordships' attention was drawn to various decisions in cases in which workmen were injured by bombs and shells from bombardment during the war. They do not refer to them in detail, for they appear to confirm the conclusions which their Lordships have reached. Neither bombs nor shells have ordinarily anything to do with a workman's employment. It is therefore necessary to show special exposure to injury by them. They represent exactly for this purpose the operation of such forces as lightning, heat or cold.

any risk of attack by Sinhalese on the Tamils working in the estate that day'.[159] Counsel for the applicant had brought the case of the workman within the statute by contending that he was exposed to danger by reason of his having been compelled to work alone and unprotected in proximity to the road. In this position he became a target for the rioters, as opposed to the other Tamil labourers who were working together in the middle of the estate out of sight from the road and therefore not targeted for the attack.[160]

In rejecting this contention, support was drawn from *Charles Appu v. The Controller of Establishments*[161] *where* reliance had been placed by Counsel on a legal proposition from Russell, L.J. in *Lawrence v. George Mathews*[162] which stated:

> ...a sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred and the spot in fact turns out to be a dangerous spot. If such a risk is established, then the accident arises out of the employment, even though the risk which caused the accident was neither necessarily incidental to the performance of the man's work, nor one to which he was abnormally subjected.

Considering the circumstances of the case, this exposition should have sufficed to find in favour of the applicant. However, the Supreme Court sought to distinguish the same by resorting to another English precedent from *Holden v. Premier Waterproof and Rubber Co. Ltd.*[163]. This case interpreted 'a dangerous spot' as being:

> A spot which owing to its locality is in fact inherently dangerous although the danger may be a lurking danger and not known to anyone, such as a wall with a bad foundation which may collapse, a

---

[159](1960) 26 NLR 468, at 469.
[160]*Ibid.*, at 470-71.
[161](1946) 47 NLR 464.
[162](1929) 1 KBD 19.
[163]*Holden v. Premier Waterproof and Rubber Co. Ltd.* (1930) 23 B.W.C.C. 460.

> tree which may fall or a spot running the risk of being attacked by a mad man.[164]

Apart from the illustration employed being inappropriate and far fetched, given the facts from this case, in as much as the conductor had compelled the workman to work at a spot that was away from the other labourers, close to the road where the Sinhalese mob was active, the Supreme Court failed to adopt the more acceptable and worker-friendly interpretation found in *Lawrence v. George Mathews Ltd.*[165]

Given the context of the victim's fate which he had been compelled to face while in employment, the Supreme Court failed to evoke a sensitive response and adopt a proactive role in regard to the rights of a minority member of the community in the context of 'employer-employee' relationship. It is also pertinent to question as to what repercussions may have visited the victim, if having expressed concern for his own safety working alone in those circumstances, he had refused to adhere to the direction given by the conductor of the estate.

---

[164](1960) 26 NLR 468, at 470.

[165]*Lawrence v. George Mathews Ltd.*, (1929) 1 K.B. 1.

3. The Right to Citizenship of a Minority

Several cases in the early 1950s had to grapple with this issue. It is proposed to examine them *seriatim*.

3.1 Mudannayake v. Sivagnanasunderam[166]

In *Mudannayake v. Sivagnanasunderam* (1951)[167] X, an Indian Tamil claimed to have his name inserted in the register of elections. He alleged in his affidavit that, he possessed the requisite residential qualifications, that he was domiciled in Ceylon (Sri Lanka) and that he was qualified to be an elector under the provisions of the Ceylon (Parliamentary Elections) order in Council, 1946. The Registering Officer having inquired into X's claim decided that X was not entitled to have his name inserted in the register, as he was not a citizen of Ceylon within the meaning of the Citizenship Act No. 18 of 1948.

His appeal under Section 13 of the aforesaid Order in Council, 1946 by the Revising Officer was allowed on the following basis;

a) That, the Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1948, which prescribed Citizenship of Ceylon as a necessary qualification of an elector and he Citizenship Act No. 18 of 1948 were invalid as offending Section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council of 1946 and 1947;
b) That, the operative law was that contained in the Ceylon (Parliamentary Elections) order in Council, 1946 as it stood before it was amended by the Amending Act.

The Revising Officer accordingly held that 'X' was a duly qualified elector and directed his name to be included in the register of electors. The Attorney General sought a writ of Certiorari to have the said

---

[166](1951) 53 NLR 25.
[167]*Ibid.*

decision of the Revising Officer quashed. The main question the Court was obliged to answer was whether the Revising Officer's decision as to what was the law which laid down the qualifications of voters in general was *ex facie* erroneous. In answering the said question the Court described as the relevant legislative provisions.

The relevant provisions of the Ceylon (Constitution) Order in Council, 1946 (the Soulbury Constitution) are Section 29 and Section 37.

Relevance of the Ceylon Independence Order in Council of 1947, the Ceylon Independence (Commencement) Order in Council of 1947, read with the Ceylon Independence Act of 1947

The cumulative effect of these enactments was to retain Section 29 of the Ceylon (Constitution) Order in Council of 1946 and as at February 4th, 1948 [168] became the Supreme Constitution which in effect conferred fully responsible status within the British Commonwealth of Nations to pass legislation in regard to any matter subject to the limitations contained in Section 29. (Section 37 thereof standing revoked).It is in that constitutional background that The Citizenship Act, No 18 of 1948 was passed. The relevant provisions are Section 2,[169] Section 4,[170] and Section 5.

---

[168] The date of Independence.

[169] Section 2, The Citizenship Act, No 18 of 1948

(1) With effect from the appointed date, there shall be a status to be known as 'the status of a citizen of Ceylon'

(2) A person shall be or become entitled to the status of a citizen of Ceylon in one of the following ways only:

(a) by right of descent as provided by this Act;

(b) by virtue of registration as provided by this Act or by any other Act authorising the grant of such status by registration in any special case of a specified description.

(3) Every person who is possessed of the aforesaid status is hereinafter referred to as a "citizen of Ceylon'. In any context in which a distinction is drawn according as that status is based on descent or registration, a citizen of Ceylon is referred to as 'citizen by descent' or 'citizen by registration';

In regard to the Ceylon (Parliamentary Elections) Order in Council of 1946, the relevant provisions impacting on the issue under consideration are Section 4,Section 5, and Section 7 (1).
The Court posed the question thus:

> The substantial question we have to decide is whether section 3 (1) (a) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, read with the Citizenship Act, No. 18 of 1948, is void as offending against Section 29 of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947. The answer to this question turns on the interpretation of these provisions, primarily Section 29. Till we discover exactly what Section 29 means it is not possible for us to reach a decision as to whether the impugned Act is in conflict with it.[171]

Employing principles of statutory interpretation as to the intention, object and purpose of Parliament in relation to an Act of Parliament and not seeing assistance coming from several English, Canadian, the U.S. which were cited on behalf of 'X',[172] the Court formulated the question for it to answer thus:

---

and the status of such citizen is in the like context referred to as 'citizenship by descent' or 'citizenship by registration'.

[170] Section 4, The Citizenship Act, No 18 of 1948

(1) Subject to the other provisions of this Part a person born in Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent, if

(a) his father was born in Ceylon, or

(b) his paternal grandfather and paternal great grandfather were born in Ceylon.

(2) Subject to the other provisions of this Part a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if-

(a) his father and paternal grandfather were born in Ceylon ; or

(b) his paternal grandfather and paternal great grandfather were born in Ceylon.

[171](1951) 53 NLR 25.

[172] *Ibid.*, at 37.

> After a careful consideration of all these authorities we have come to the conclusion that if Section 3 (1) (a) of the Ceylon-(Parliamentary Elections) Amendment Act, No. 48 of 1949, read with the Citizenship Act, No. 18 of 1948, does not offend against Section 29 of the Ceylon. (Constitution and Independence) Orders in Council, 1946 and 1947, it does not matter what effects they produce in their actual operation.[173]

The Court thereafter proceeded to examine as to whether the two impugned Acts violated the provisions of Section 29. The Citizenship Act, No. 18 of 1948, was enacted after various Commonwealth conferences in which representatives of Canada, Australia, New Zealand, Southern Rhodesia, India, Pakistan and Ceylon took part. Among the most significant features of the Citizenship Act is one that provides a definition of a citizen of Ceylon. Section 4 (1) says that a person born before the appointed date, that is November 15, 1948, the date on which the Act came into operation, shall have the status of a citizen of Ceylon by descent if-

> (a) his father was born in Ceylon; or
> (b) his paternal grandfather and paternal great grandfather were born in Ceylon
> (c) Section 4 (2) says that a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if-
> (a) his father and paternal grandfather were born in Ceylon; or
> (b) his paternal grandfather and paternal great grandfather were born in Ceylon.
>
> Section 5 (1) says that a person born in Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon.

It was opined by the judges that it is not disputed that these sections confer a 'privilege' or an 'advantage' on those who are or became

---

[173] *Ibid.*, at 37.

citizens of Ceylon within the meaning of Section 29 (2) (c) of the Constitution.

> When the language of Sections 4 and 5 is examined it is tolerably clear that the object of the legislature was to confer the status of citizenship only on persons who were in some way intimately connected with the country for a substantial period of time. With the policy of the Act we are not concerned, but we cannot help observing that it is a perfectly natural and legitimate function of the legislature of a sovereign country to determine the composition of its nationals.

The Court stated that Section 3 (1) (a) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, links up with the Citizenship Act and specifies that anyone who is not a citizen or has not become a citizen is not qualified to have his name entered or retained in the register. It restricts the franchise to citizens. The further question was asked;

> Can it be said that these two provisions, the words of which cannot in any shape or form be regarded as imposing a communal restriction or conferring a communal advantage, conflict with the prohibition in Section 29 of the Constitution? This is the simple question for our decision. In approaching the decision of this question it is essential that we should bear in mind that the language of both provisions is free from ambiguity and therefore their practical effect and the motive for their enactment are irrelevant. What we have to ascertain is the necessary legal effect of the statutes and not the ulterior effect economically, socially or politically.[174]

It was then observed that Section 29 (2) was enacted for the first time in the Ceylon (Constitution) Order in Council, 1946. The Attorney General had conceded before Court that the Indians are a contemplated community and that citizenship and the franchise are contemplated benefits. Agreeing with this submission, the Court

---

[174] *Ibid.*, at 44.

stated that the language of the section is clear and precise and it is, therefore, not permissible for the Court to go outside its ambit to ascertain the object of the legislature in enacting that section. The judges ruled that even if it was the intention of the Soulbury Commission to make Section 29 (2) a safeguard for minorities alone, such intention has not been manifested in the words chosen by the legislature. Referring to *Brophy v. The Attorney General of Manitoba*,[175] it was observed that the 'the question is not what may be supposed to have been intended but what has been said.'

Section 29 (3) declares any law made by Parliament void if it makes-

> (1) persons of any community liable to disabilities or restrictions ;
> (2) to which persons of other communities are not made liable.
> It was observed that the conditions for the avoidance of a law under this provision are both (1) and (2). If (1) is satisfied in any particular case but not (2) the law is not void. Both conditions must exist to render the law void. If a law imposing disabilities and restrictions expressly or by necessary implication applies to persons of a particular community or communities and not to others, then such a law would undoubtedly be void, because in such a case both conditions (1) and (2) would be satisfied.
>
> If, however, a law imposes disabilities and restrictions when certain facts exist (or certain facts do not exist) and these disabilities and restrictions attach to persons of all communities when these facts exist (or do not exist as the case may be) then condition (2) is not satisfied for the reason that the disabilities and restrictions are imposed on persons of all communities. The same reasoning applies to Section 29 (2) (c) if the law is regarded as conferring privileges or advantages on persons of any community or communities because the law confers privileges and advantages on persons of any other community in the same circumstances.

Specifically, the Court decided that it would be irrelevant to urge as a fact that a large section of Indians now resident in Ceylon are

---

[175] *Brophy v. Attorney General of Manitoba*, (1895) A.C. 202.

disqualified because it is not the necessary legal effect which flows from the language of the Act. Hence condition (1) is not satisfied. It was further observed that even if this argument can be urged, it is clear that persons of other communities would be similarly affected, because the facts which qualify or disqualify a person to be a citizen or a voter have no relation to a community as such but they relate to his place of birth and to the place of birth of his father, grandfather or great-grandfather which would equally apply to persons of any community. Hence, the Court opined, condition (2) is not satisfied.[176]

The Court held in conclusion that, the Revising Officer 'had made a fundamental error in travelling outside the language of the statutes to ascertain their meaning.' He had appeared to have considered that the proper mode of approach was to gather the intention of the legislature in passing the impugned statutes by first reading the minds of the Commissioners appointed to recommend constitutional changes rather than by examining the language of the statutes and what its plain meaning conveys.

As a prelude to reflecting on this judgment, it is proposed to reproduce verbatim the reasoning of the Court leading to the quashing of the favourable order of the Revising Officer had given to 'X' (an Indian Tamil)

> It seems to us that the inherent power of a sovereign state to determine who its citizens should be and what qualifications they should possess to exercise the franchise was a consideration more germane to the issues before him than a perilous expedition to the political controversies of the past. After reading the Soulbury Commission Report and the connected Sessional Papers, he seems to have formed the opinion that Section 29 was intended to be a safeguard for minorities. He then appears to have examined the affidavit P1 made by the second respondent and to have been influenced by the statement in it that thousands of Indians domiciled in Ceylon have had their names deleted from the register of electors

[176] (1951) 53 NLR 25, at 43 – 44.

> 'by the simple expedient of deleting practically all non-Sinhalese names' and regarded the action of the registering officers as part of the legislative plan to discriminate against the Indians.

Yet, the Court emphasized that no materials had been placed before the Revising Officer, assuming that such materials were relevant to the issues which he had to try, as to how many of the persons whose names were arbitrarily expunged were entitled to be restored to the register. He had overlooked the fact that when an enactment is put into force, one community may be affected by it more adversely than another. Thus, as reasoned;

> A high income or property qualification may affect more adversely the voting strength of one community than another. Would that be discrimination? If the effects of a controversial piece of legislation are weighed in a fine balance not much ingenuity would be needed to demonstrate how, in its administration, one community may suffer more disadvantages than another. To embark on an inquiry, every time the validity of an enactment is in question, into the extent of its incidence, whether for evil or for good, on the various communities tied together by race, religion, or caste would be mischievous in the extreme and throw the administration of Acts of the legislature into confusion.

The judges pointed out that the first respondent appeared to have held the view that the Indians who were qualified for the franchise under the laws prior to the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, had acquired a vested right to continue to exercise the franchise and that if any legislation, in its administration, had the effect of taking away the franchise from large sections of the community, such legislation would for that reason be discriminatory.

This view did not find support with the Court. It was of the view that the Parliament of Ceylon has the power to alter the electoral law in any manner it pleases if it thinks it necessary to do so for the good government of the country subject to the narrow limitation in Section

29. The Parliament has the power to widen or to narrow the franchise. If it widens the franchise the more advanced communities may feel that they are affected; on the other hand if it narrows the franchise the less advanced communities may also feel they are adversely affected.

Using definitive language, the Court agreed with the contention of the Attorney General that if it is open to a person to say that as a result of the alteration, the voting strength of his community has been reduced, then 'Parliament will only have the power to pass legislation as to what the polling hours or the polling colours should be.'

> For these reasons we are of opinion that Sections 4 and 5 of the Citizenship Act, No. 18 of 1948, and Section 3 (1) (a) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, are not invalid and that the latter enactment contains the law relating to the qualification of voters.[177]

Central to the ruling was the conclusion the Court reached when it held that, Section 3 (1) (a) of the Ceylon (Parliamentary Elections) Amendment Act, No.48 of 1949 links up with the Citizenship Act and says that anyone who is not a citizen or has not become a citizen is not qualified to have his name entered or retained in the Register. It restricts the franchise to citizens and therefore it cannot be said these two provisions impose a communal restriction as being in conflict with Section 29 of the Constitution. The Court having noted that the Indians are a Contemplated Community and the Citizenship and franchise are contemplated benefits[178] proceeded to hold that:

> Even if it was the intention to make Section 29 (2) a safeguard for minorities alone, such intention has not been manifested in the words chosen by the legislature.[179]

---

[177] *Ibid.*, at 45 – 47.
[178] *Ibid.*, at 44.
[179] *Ibid.*, at 44.

It was consequently held that:

> The two conditions for the avoidance of a law under Section 29 (3) must both exist to render the law void and it is clear that not only Indians (a large section now resident in Ceylon) but also 'other communities would be similarly affected, because the facts which qualify or disqualify a person to be a citizen or a voter have no relation to a community as such but they relate to his place of birth and to the place of birth of his father, grandfather or great grand father which would equally apply to persons of any community.'[180]

The clarity of thought and reasoning reflected in the judgment cannot be doubted. However some thoughts as to the literal construction of the statute as opposed to the purposive construction thereof may be opportune at this point.

Counsel for the Revising officer[41] had relied on the argument that Section 29 of the Soulbury Constitution constitutes a limitation on the legislative powers of the Legislature of Ceylon. It was pleaded that the Constitution has to be looked at as a whole to see the scope of Section 29 and that it is necessary to consider the context in which Section 29 was framed. The Section was meant to protect the minority communities. In the present case the question the Court has to decide is whether Section 3 (1) (a) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, read with the Citizenship Act, No. 18 of 1948, offended Section 29 of the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947. That question could not be answered by merely looking at the face of the two statutes. As he contended, the legislature could enlarge or narrow down the franchise only if it was in conformity with Section 29.[181]

He further submitted that;

---

[180] *Ibid.*, at 45.
[181] *Ibid.*, at 28.

> In interpreting Section 29 it might be necessary to refer to some extraneous evidence or to take judicial notice of any particular fact of which judicial notice may be taken. The conferment of a benefit on a community may be apparent in the language of the statute. But there may be a case in which the language itself does not show discrimination. The point is what the statute does and what it says. One has to find out the meaning of a statute from its contents and its historical circumstances. For the purpose of ascertaining whether the word 'confer' in Section 29 contemplates conferment by language or conferment in fact, and for the purpose of finding out what 'community' means, it is necessary to look at the legislation and to examine the circumstances under which the legislation came to be passed, so far as those circumstances appear in documents and papers which the Court is entitled to look into.'[182]

These arguments were not accepted by Court. The Court preferred to adopt the literal test of statutory construction as against a purposive construction of the relevant statutory provisions.

3.2 *Kodakkan Pillai v. Mudannayake*[183]

This was the appeal to the Privy Council against the Supreme Court (Divisional Bench) decision in *Mudannayake v. Sivagnanasunderam.*[184] In affirming the Supreme Court decision, the Privy Council however made the following observations that:

i. The applicant (X) had been resident in the electoral district in question for a continuous period of six months in the eighteen months immediately prior to the relevant date
ii. the applicant (appellant in the Privy Council) had at the relevant period been a British subject ;
iii. his name had been included in the register prepared in the year 1949

---

[182] *Ibid.*, at 28.
[183] *Ibid.*, at 43.
[184] (1951) 53 NLR 25.

iv. the appellant was not seeking registration under the Citizenship Act No. 18 of 1948 or under the Indian and Pakistani Residents Citizenship Act, No. 3 of 1949;[185]

v. the appellant's claim was made under the Ceylon (Parliamentary Elections) Order in Council of 1946, without the same being modified or amended by Act, No.48 of 1949.[186]

The Privy Council also made the following observation:

> With much of the reasoning of the Supreme Court of Ceylon, their Lordships find themselves in entire agreement but they are of opinion that there may be circumstances in which legislation though framed so as not to offend directly against a constitutional limitation of the power of the legislature may indirectly achieve the same result, and that in such circumstances the legislation would be *ultra vires*.
>
> The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships' Board and a legislature must of course be assumed to intend the necessary effect of its statutes. But the maxim *omnia praesumuntur rite esse acta* is at least as applicable to the Act of a legislature as to any other acts and the Court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a statute which is upon its face *intra vires* that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.[187]

The Privy Council in reaching its conclusion (dismissing the appeal) having posed the question:

---

[185] An Act, as observed in (1953) 54 NLR 407, at 408 '.... was designed to benefit Indians and Pakistanis' who satisfied the criteria of 'permanent settlement' contemplated under that Act and addressed by the Supreme Court in (1955) 56 NLR 313.

[186] (1953) 54 NLR 433, at 435 - 437.

[187] *Ibid.*, at 438.

> Is it in the present legislation on Citizenship or is it legislation intended to make and making Indian Tamils liable disabilities to which other Communities are not liable? It is as the Supreme Court observed a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. Standards of literacy, of property, of birth or of residence are as it seems to their Lordships standards which a legislature may think it right to adopt in legislation on citizenship and it is clear that such standards though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people do not create disabilities in a community as such since the community is not bound together as a community by its literacy, its poverty or its migratory character but by its race or its religion. The migratory habits of the Indian Tamils (see paragraphs 123 and 203 Soulbury Report) are facts which in their Lordships' opinion are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community.[188]

Indeed, one could hardly find fault with the proposition that, it is perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. However, the matter to be reflected upon is whether the two Courts ought to have adopted a literal construction of the statutes they thought were the relevant statutes or a purposive interpretation as was contended for by counsel for the applicant (for registration as an elector).

There is one other aspect that warrants reflection. The Privy Council itself had noted that the applicant's name had been included in the year 1949. Perhaps this is the reason why the applicant made his application for registration as an elector under the Ceylon (Parliamentary Elections) Order in Council of 1946, Section 4 (1) (a). The applicant had claimed that, at the relevant time he was a British subject. There was no finding against that by either Court. Moreover, the Ceylon (Parliamentary Elections) Amendment Act, No.48 of 1949

---

[188] *Ibid.*, at 439.

came into operation on May 26th, 1950 containing the provisions in Section 3 (1).[189]

Thus, the applicant appears to have lost his right to be an elector through the retrospective operation of the said Amending Act of 1949. It is both ironic and surprising that, counsel for the applicant had not pursued that aspect of the matter for the consideration of either Court, but the Courts ought to have addressed this matter given the socio – political significance and importance of the issue to have arrived at a final ruling either way. If they had arrived at a determination in favour of retrospectivity, this discussion's focus, of course would have taken a different direction.[190]

Both the Supreme Court and the Privy Council in their impugned rulings failed to show a sensitive and humane approach to the issue in question – a minority community member's right to be an elector which, if they did, may have helped, to some extent to avoid the 'Sirima – Shastri Pact' of the rights of Indian Tamils which eventually led to the Indo – Ceylon Agreement and its implementation thereafter through the Act No. 14 of 1967 (as amended by Act No. 43 of 1971)).

It may not be inappropriate in conclusion, to reiterate a dictum of Lord Pearce of the Privy Council in regard to *Bribery Commissioner v. Ranasinghe*[191] which has been referred in the introductory paragraphs

---

[189] 3 (1) Section 4 of the Principal Order is already amended in sub-section (1) thereof:

By the substitution for paragraph (a) of the following paragraph:

(a) is not a Citizen of Ceylon, or if he is by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to any Foreign Power or State which is not a member of the Commonwealth

[190] In which context, see *Queen v. Liyanage* (1962) 64 NLR, at 313 and 350 and *Abdul Barir v. S.A.Puttalam* (1968) 66 NLR, at 219 where it was accepted that, the Ceylon Parliament could pass retrospective legislation and laws contrary to Fundamental Principles of English Law, see further *Constitutional Law*, R.K.W. Goonesekere and Jayantha de Almeida Guneratne (OUSL) (1980).

[191] (1964) 66 NLR 73.

to this Part. The said dictum had nothing to do with the issue for determination in the case and therefore was rendered '*obiter*'. Nevertheless, the Privy Council, referring to the provisions of Section 29 (2) (b), (c) and (d), opined that, the Sections:

> Set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution, and these are therefore unalterable under the Constitution.[192]

It is true, that, Lord Pearce referred to 'Citizens of Ceylon' and not to persons belonging to communities who had not been declared as being so. But, the point sought to be made is as at the date before Independence all segments of society, whether, Sinhalese, Tamils, Ceylon or India Muslim, Burgher or some other, were British subjects who were qualified as electors by virtue of Section 4 (1) (a) of the nascent enactment *viz:* the Ceylon (Parliamentary Elections) Order in Council of 1946 amended by Act No.48 of 1949.

In that perspective, if Sinhalese were to be regarded as Citizens of Ceylon, at the relevant time, why not (Indian) Tamils who admittedly stood as a large section of the community? On what rationale could the Sinhalese be regarded as being transferred from the status of British subjects to Citizens of Ceylon and not the Indian Tamils most of whom have been employed in the Plantation Sector?

These are considerations that appear to have escaped both the Supreme Court in *Mudanayake v. Sivagnanasunderam* [193] and in appeal in the Privy Council in *Kodakkan Pillai v. Mudanayake.* [194]

---

[192](1964) 66 NLR 73, at 78.
[193](1951) 53 NLR 25.
[194](1953) 54 NLR 433,at 43.

4. Land and Housing Rights Pertaining to Minorities

4.1 Right to Housing - *Mowjood v. Pussadeniya and Another*[195]

The matter of the right to housing arose in the context of the Rent (Amendment) Law No 10 of 1977.[196] In this instance, there were five cases initially heard and determined by the District Court. In these cases, the respective landlords had obtained judgment and decree against their tenants on the ground of reasonable requirement. The rent in respect of the several premises was under 100 rupees and the landlords were 'one house' owners. The law required that, writ in execution of the decree[197] was not to be issued until the Commissioner of National Housing notifies the Court that 'alternative accommodation' had been found and made available for the tenants to move into.[198] Upon the District Court being so informed the Court issued the writ. The tenants sought orders in the nature of writs of *certiorari*[199] and *mandamus*[200] to make available to them alternative premises giving consideration to their circumstances. The Court of Appeal that is vested with jurisdiction to issue writs under Article 140 of the Constitution dismissed the said application for *certiorari* and *mandamus*. The tenants appealed to the Supreme Court.

In appeal to the Supreme Court the Counsel for the landlords made the argument that once they had got judgment and decree, the tenants were liable in law to be evicted This could be postponed only to the

---

[195][1987] 2 Sri.L.R. 287.

[196]Repealed in the year 2002. (Act No. 26 of 2002). The history of rent legislation is not necessary for the purposes of this study.

[197] That is, to have the tenants physically ejected.

[198] Section 22 (1) (c)

[199]Under Article 140 of the Constitution to quash the Commissioner's notification on the basis.

[200]An order under Article 140 to perform a statutory duty.

extent that once the Commissioner informed the District Court that, 'alternative accommodation' was available, the Court had no option but to issue writ of execution for 'beggars cannot be choosers'[201], meaning, even if such alternate accommodation was going to be provided in 'a far off area with which the tenant has no connection'[202] they had to take it or leave it. The Counsel for the tenants argued:

> The alternative accommodation that is offered has not taken into account the circumstances of the tenant and is not appropriate accommodation to the tenant. Accommodation, miles from that, the commissioner in offering houses to the tenants way out of where they were located as tenants had acted unreasonably, arbitrarily and capriciously [and therefore *ultra vires*] and that the present location, in areas which are not safe for the defendants to reside do not constitute alternative accommodation.[203]

The Supreme Court observed that in response to the social objective behind the legislation, the legislature had made special concern to protect tenants of premises who pay less than one-hundred rupees. Consequently, a purposive interpretation of the statute to give effect to the legislation was required.[204]

In reference to the needs and circumstances of the tenant, the Court commented on both the criterion of the alternative accommodation, in terms of the same being habitable, the size of the family and amenities; and in reference to the location of where the alternative accommodation had been offered. The Court's response specifically to the nature of the alternative accommodation was that, in view of the social objective of the Act, this must have some relevance to the needs and circumstances of the tenant so as not to render the offer of alternative accommodation illusory and meaningless. The accommodation offered must be habitable and appropriate to the

---

[201] [1987] 2 Sri.L.R. 287, at 293.
[202] *Ibid.*,
[203] *Ibid.*,
[204] [1987] 2 Sri.L.R.287, at 287.

tenant and the members of his family. It must be roughly comparable with the existing accommodation in basic amenities, rental and suited to the mode of life he is leading in the premises from which he is to be rejected.[205]

Meanwhile, the Supreme Court's observation on the location of the alternative accommodation is particularly important;

> The alternative accommodation must not be located in a far off area where because of his religion, race or caste etc., it is unsafe for the tenant to dwell. The nature of the environment is a relevant consideration. The tenant cannot expect a better house than the one being occupied by him[206]

The Court ultimately ruled that it would exercise its jurisdiction to issue writ of execution, only after being satisfied that what is offered by the Commissioner is alternative accommodation, 'meaningful to the particular tenant in the case; meaningful does not mean that it should be adequate or suitable to the tenant.' The Court also held that it was prohibited by Section 22 (1E) from inquiring in any proceeding under subsection (1C) into the adequacy or suitability of the alternative accommodation offered by the Commissioner but that this prohibition did not however render irrelevant the determination of the question whether what is offered is basically alternative accommodation to the tenant or not.[207]

When considering the nature of this case, it is important to note the political climate of the day. The litigation had taken place after the Black July riots of 1983 during which large numbers of Tamils had been killed and their property destroyed by Sinhalese mobs instigated by a senior government minster of the time. Although only one party's name appears in the law report, there were five cases taken together as

---

[205] *Ibid.*
[206] *Ibid.*, at 294.
[207] *Ibid.*, at 297.

the report itself reveals.[208] The majority either belonged to the Muslim or the Tamil community. Could a Tamil, in particular have been asked to move to Nittambuwa,[209]a far off place from where they were earlier residing, in a predominantly Sinhala population area? Given the prevalence of the ethnic conflict, would it have been realistic to regard such alternative accommodation as being a genuine 'alternative'?

Sharvananda C.J. is seen adopting a realistic approach in regard to the alternative accommodation offered when he stated that 'the alternative accommodation should not be in a far off place where it was unsafe for the tenant to dwell.'[210] In other words the upshot of the ruling is that, the new accommodation must be capable of being fairly described as a viable alternative.

As the landlords' counsel had argued, a decree had been entered against the tenant as 'beggars cannot be choosers'. Therefore whatever accommodation offered to the tenant had to be accepted by him. Yet another possible argument would be that the Rent Act did not employ the words 'suitable alternative accommodation'. Thus the local legislation stood in contrast to, for instance, the South African Rent Statute which refers to suitable alternative accommodation. Consequently, although using the words that the new accommodation offered must be capable of being fairly described as an alternative, those words could perhaps be substituted with the word 'suitable' which the legislature had omitted. As a result, a broad criticism of the judgment could be to say that it amounts to judicial legislation.

On the other hand, the judgment could be defended on the basis that, in preference to a literal construction of the words 'alternative' it had adopted a purposive construction, having regard to the intention of the legislature in taking a certain category of tenants under its protective wings in view of their economic circumstances not to render them

---

[208] *Ibid.*, at 289.

[209] A town about 32 kilometers from Colombo on the Kandy Road.

[210] [1987] 2 Sri.L.R.287, at 294.

homeless. The socio-ethnic factors therefore obliged the State to offer such tenants 'suitable' alternative accommodation. Ultimately the judgment of the Supreme Court[211] must rank as imaginative, adopting a realist approach to the concerns of minority communities and their right to housing in the socio – ethnic context in particular in that the affected tenants in this instance belonged to the minority community and were also in the low-income category.[212]

4.2 Land Rights of Minorities in the context of the State's power to acquire private lands; the *Manel Fernando* case[213] and the *Deeghavapi* case[214]

4.2.1 Manel Fernando v. Minister of Lands[215]

The right to acquire privately owned land by the State for a 'public purpose' has historically been a prerogative of the State. However, patterns of land acquisitions resorted to by governments since

---

[211] per Sharvananda C.J. (with Athukorale J and Sevevirathne, J agreeing).

[212] In *Residents of Joe Slovo Community v. Thubelish Homes, Minister for Housing and Others Case CCT 22/08* (2009)at 8, the Western Cape Constitutional Court of South Africa ruled on appropriate displacement and resettlement obligations of residents from a low socioeconomic context. Here, an informal housing settlement home to 20 000 residents was to be displaced to make way for housing development. The Court issued an order that provided for the resettlement of the residents and that the respondents were directed to allocate 70 percent of the new houses, which were low-cost government housing, to the residents of the former settlement.[212] The Court provided a detailed plan of resettlement including provisions for the location, specifying the location of the temporary place of residence or 'another appropriate location;' as well as details of the size and facilities of the new location stating that the new residence must of 'an equivalent or superior quality' to the former residence (at 4). The ruling also ordered that assistance be provided for the resettlement of the possessions of the residents (at 8). This ruling takes into consideration the full circumstances of the residents affected by the relocation and acknowledges the disadvantages they would be confronted with based on their socioeconomic status.

[213] [2000] 1 Sri.L.R 112.

[214] [2009] (1) Sri.L.R 54.

[215] [2000] 1 Sri.L.R 112.

independence have raised certain questions; what is meant by 'public purpose' as stated *per se* without identifying the specific purpose by the authority vested with the power to acquire such land? Could such intent be questioned in a Court of Law under the present Land Acquisition Act No 9 of 1950 (as amended)? Furthermore, what would be the situation if the 'purpose' is changed after the land is acquired? Generally, judicial responses to these questions have been conservative. Even alleged *mala fides* had failed to challenge an acquisition, the question of burden of proof coming to play and having a bearing thereon.

The Supreme Court ruling in *Manel Fernando v. Minister of Lands*[216] adopted an eminently progressive judicial approach.[217]This decision is particularly important in the context of this study given the sensitivity that the Court demonstrated to the question of rights of members of a minority community in the context of entitlements to land. Of particular importance is the Court's ruling on Article 12 (2) of the Constitution relating to non-discrimination.

Here, two petitioners went to Court, on the basis that the proposed acquisition of their 80 perch allotment of land on the ground of urgency[218] was, *inter alia*, *mala fide* and in violation of Article 12 (1) and (2) of the fundamental rights afforded to them under the Constitution. The first petitioner was a Sinhala woman married to the second petitioner, a Sri Lankan Tamil. The second petitioner had purchased the land in question containing a substantial house and a small rubber plantation which they occupied after the purchase. The land and house was in Horana, a suburban town around 30 kilometers from Colombo.

---

[216][2000] 1 Sri.L.R 112.

[217] Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena & Radika Guneratne, *Not This Good Earth: The Right to Land, Displaced Persons and the Law in Sri Lanka*, Law & Society Trust, October 2013.

[218] Section 38 (a), Land Acquisition Act.

The State Authorities whose actions were challenged were the Minister of Lands and Agriculture, the first respondent, who has statutory authority to acquire a land on the ground of urgency under Section 38 (a) of the Act; the *Grama Seveka* of Henagama, the second respondent; the Assistant Divisional Secretary, the third respondent, who was the designated acquiring officer under the Land Acquisition Act; *Govi Niyamaka*, the Secretary of the ruling Sri Lanka Freedom Party, the fourth respondent; and the Minister for Parliament of the Sri Lanka Freedom Party for the area, the fifth respondent.

On the facts of the case, it was disclosed that following the purchase of the house the second respondent, the *Grama Sevaka* had began visiting the property, sometimes bringing police officers and harassing the petitioner, claiming he was a terrorist.[219] As a result of the ongoing harassment the second petitioner moved from the property and advertised the land for sale on 14th July 1996.[220] In the affidavit of the petitioner, it stated that some of the prospective buyers had complained that the fourth respondent, the Secretary of the Sri Lanka Freedom Party, had approached the buyers and told them not to purchase the land.[221]It is relevant to note at this point that, as the law report would reveal, the incident took place between 1996 and 1997 while the armed conflict between the LTTE and government troops was ongoing.

Apart from the allegations of harassment made by the petitioners, they also averred in their affidavits that the *Grama Sevaka* and the Assistant Divisional Secretary had 'connived and instigated' a conspiracy to request that the government acquire the property[222] which had led to the statutory decreed steps being taken by the Assistant Divisional Secretary[223] and the Minister of Lands and

---

[219][2000] 1 Sri.L.R.112, at 115.
[220]*Ibid.*
[221]*Ibid.*
[222]*Ibid.*
[223]Presumably under delegation by the Divisional Secretary.

Agriculture. On 2 November 1996 a notice was displayed on the land under Section 2 of the Land Acquisition Act[224] allowing for authorised officers to enter the property for inspection purposes. The notice and accompanying letter by the Assistant Divisional Secretary were provided in Sinhala although, as the Court noted, the second petitioner was a Tamil.[225] This is in violation of Section 2 of the Land Acquisition Act which states that such a notice should be in Sinhala, Tamil and English.[226]

In the meantime the first petitioner had made several appeals to different sources to stop the proposed acquisition and had not received a response. Consequently, the second petitioner's mother appealed to the Prime Minister[227] who had felt it enough to write to the Minister of Lands with regard to the proposed acquisition which would be appropriate to reproduce verbatim in the context of the focus of this paper. In a letter dated 7th January 1997 the Prime Minister wrote:

> I have received an appeal from a dear friend of mine, Mrs. Polly Murugesu of 33C, Aponso Avenue, Dehiwela, requesting me to intervene on her behalf in what she alleges [is] discrimination and victimization. Her son had bought a house situated within the Horana Divisional Secretary's Division. Your Ministry has issued a notice under section 2 of the Land Acquisition Act (Chapter 460) to acquire this house which the *Grama Seva Niladhari* of Horana 609 *Grama Seva Niladhari* Division has misrepresented as abandoned. I am attaching a copy of the notice under section 2. I am personally aware that Mrs. Murugesu had very difficult times during the disturbances in 1983. They had to leave Colombo and for sometime they were in Jaffna. They bought this house recently as houses in Colombo were beyond their reach. However, they were unable to live in Horana as people there were hostile to them. I believe that it is a crime to acquire this house which they are now planning to dispose of. I reliably understand that the residents of Horana have

---

[224]Section 2 of Land Acquisition Act.
[225][2000] 1 Sri.L.R.112, at 118.
[226]Section 2 (2), Land Acquisition Act.
[227] At the time, Rathnasiri Wickramanayake.

> chased away people who have come to purchase the house informing that this house is to be acquired.
>
> I certainly [indecipherable] you to take very urgent action on this matter and stop forthwith any acquisition proceedings, lest it will be misconstrued as an act of communal discrimination.[228]

In April 1997 the petitioners were informed that the Commissioner of Agrarian Services would conduct a hearing into the case. Following the hearing the petitioners were informed by the Assistant Commissioner that he would not recommend the acquisition as it would be 'unreasonable' to acquire the property. Despite the actions of the Prime Minister and the Commissioner of Agrarian services on 12th September 1997 the first petitioner was issued a notice from the Assistant Divisional Secretary that the land had been acquired and he needed to hand over possession on 18th September 1997.

When the case came before the Supreme Court, Justice Mark Fernando writing for the Court held the following:

1. In fact the petitioner's land was not required for a public purpose, hence the acquisition was unlawful, arbitrary and unreasonable. The statutory power given in order to enable the state to acquire land needed for a public purpose cannot be used for any other purpose. That would be a gross abuse of power, particularly in this case, where the owner's wish to dispose of his land had been brought about by unlawful and improper harassment on account of race.
2. The 1st to 5th respondents infringed the fundamental rights of the second petitioner, who was the owner at the relevant time, under Articles 12 (1) and (2).
3. The order under Section 38, proviso (a) was also unlawful, arbitrary and unreasonable and that the first and third respondents thereby infringed the fundamental rights of the petitioner under Article 12 (1).
4. The notice under Section 2 was invalid and the provisions of Section 4 A were inapplicable for the reason that:

---

[228][2000] 1 Sri.L.R 112, at 119.

a. A Section 2 notice must state the public purpose – although exceptions may perhaps be implied in regard to purpose involving national security and the like.
Per Fernando J., 'In my view the scheme of the Act requires a disclosure of the public purpose, and its objects cannot be fully achieved without such disclosure.'
b. The Section 2 notice sent to the second petitioner was in Sinhala only despite the provisions of Section 2 (2) and the fact that he was a Tamil. Section 2 (2) requires the notice to be in the Sinhala, Tamil and English languages. That amounts to noncompliance with a material statutory provision.
c. In view of the fact that the petitioners land had already been determined to be suitable for acquisition it was Section 4 and not Section 2 which should have been resorted to.[229]

In its decision, the Court took into consideration five key points. First, that although the land was stated as being required for a *Govi Sevana* centre, there had been no request from the Commissioner of Agrarian Services; second, the recommendation had come from the fifth respondent, another Minister of the SLFP; third, another Minister, (Mr.) S. Thondaman had made a request to abandon the acquisition which is provided for in the Land Acquisition Act[230] and which had been stayed temporarily; fourth, the 5th respondent, the SLFP Minister had, notwithstanding, the Prime Minister's intervention had directed the acquisition to continue; which finally had led to the acquisition of the land, not under normal procedure but on the ground of urgency.

The most significant feature of the Supreme Court's ruling was its finding under Article 12 (1) and (2) of the Constitution regarding the

---

[229] *Ibid.*, at 113.
[230] Section 50, Land Acquisition Act.

right to protection against discrimination based on race. The Court held:

> In my view, the Petitioners' allegation that the second, third and fourth respondents connived and conspired to procure the acquisition of this property has been established. Their conduct resulted in the 5th Respondent's recommendation[231] and the 1st Respondent's[232] decision to acquire. I hold that the 1st to 5th Respondents have infringed the fundamental rights of the 2nd Petitioner, who was the owner at the relevant time, under Articles 12(I) and (2).[233]

A valuable aspect of the ruling came from Justice Fernando, when he recapitulated the background facts in one lucid proposition as follows:

> The statutory power given in order to enable the state to acquire land needed for a public purpose cannot be used for any other purpose. That would be a gross abuse of power, particularly in this case, where the owner's wish to dispose of his land had been brought about by unlawful and improper harassment on account of race.[234]

The ruling here is one of the rare rulings on discrimination based on race by virtue of Article 12 (2) of the Constitution. The intervention of the Prime Minister surely must have impacted on the justice of the Supreme Court, highlighting the often talked about notion of comity between the Judiciary and the Executive in the quest of good governance and the rule of law. Nevertheless, the case exposes the lack of collective responsibility on the part of the Cabinet of Ministers though decreed by the Constitution[235] given the fact that a minister,

---

[231] Member of Parliament (a Minister) and SLFP Organizer of the area whose recommendation had been sought for the said acquisition.

[232] The Minister of Lands and Agriculture

[233] [2000] 1 Sri.L.R 112, at 122.

[234] *Ibid.*, at 113.

[235] Article 43 (1), The Constitution of Sri Lanka reads:

> There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.

whose designation is not revealed from the case report, had made the recommendation to acquire the land in question notwithstanding, the Prime Minister's expression of concern to the contrary.

This case also demonstrated a number of gender concerns with regard to the first petitioner and the devaluation of her participation in the proceedings and intimidation tactics used against her. The first of these was the appeals she submitted to the first and fifth respondents on 29 October 1995 which were not responded to. The second of these was the incident which occurred on 18 November 1997 when the third respondent came to the property to take possession. The first petitioner requested he produce his identity card, but he refused. The third respondent proceeded to inspect the property and later arrested the first petitioner for obstruction of justice. The first petitioner was brought before the Magistrates Court and in the hearing the third respondent did not deny he had refused to show his identity card, and did not say how the first petitioner had obstructed him.[236] The act of arresting the first petitioner purely due to her asserting the right to know the identity of an authority figure gaining access to her property, particularly when the petitioner is a female and the respondent is a male, is another instance of abuse of power in the case. Unfortunately this aspect appeared not to have received adequate consideration in the judgement.

4.2.2 *Ven. Ellawala Medananda Thero and others v. Kannangara, District Secretary, Ampara and others*[237]

This case, popularly known as the *Deegavapi case*, concerned a challenge lodged by members of the Buddhist clergy among others to a decision taken by a state authority to alienate sixty acres of land situated near an ancient Buddhist temple (*Deegavapi Raja Maha Viharaya*) to 500 families solely of the Muslim community on the basis that this was discriminatory to Sinhala and Tamil villagers in

---

[236][2000] 1 Sri.L.R 112, at 123.
[237][2009] (1) Sri.L.R 54.

that area who were landless. It was further contended that, given the large extent of the land sought to be so alienated, this action would result in Sinhalese Buddhist villagers not being able to reside close to what was a site of ancient religious significance.

In ruling for the petitioners, the Supreme Court, in an opinion written by (then) Chief Justice Sarath Silva [238] stated that the impugned alienation had been effected *mala fide* as the process of selection had no basis and was bereft of any legal authority. It was concluded that state land is held in trust for the public and may be alienated only as permitted by law.

In retrospect, this ruling may seem justifiable given that the basis of selection appeared to be arbitrary (as disclosed on the facts emerging from the judgment), and limited to members of one community. However, the question arises as to whether the Court would have been so sensitive in this same manner if the question had involved the settlement of a large number of Sinhala Buddhist families in a similar extent of land close to a Hindu or Moslem place of worship? While it would seem unfair to engage in hypothetical speculations as such a practical situation has not yet been brought before the Court, these are questions that would inevitably remain in the minds of minorities who perceive that they have been subjected to religious discrimination.

---

[238] Notably this Chief Justice was subjected to considerable scrutiny during the term of his office (1999-2009) not only in terms of allegations of abuse of power resulting in two attempted impeachments but also, relevantly for the purposes of this discussion, for bringing the socio-religious impartiality of the office of the Chief Justice into controversy by unprecedentedly commandeering a television programme to himself where he proceeded to regularly pronounce on Buddhist religious precepts, see: for a full review of this period, among a plethora of critical reports, *Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka* International Bar Association Human Rights Institute (IBAHRI) Report May 2009, at 7.

5. Rights of Minorities to hold and take part in Processions

Article 14 (1) (e) of the Constitution has proved to be pivotal in relation to a minority religious group's right to take out religious processions. This constitutional article protects the freedom of association in public or private, and the freedom to manifest one's religion. *Ex facie*, the article makes no distinction between Buddhists and other faiths. The article specifies that observance and practice as key words of the article. As a result, in the same manner that a procession of Buddhists during a *poya* day or on the way to temple to observe '*dana*', '*pinkamas*' and '*peraharas*', other religions should also enjoy the same right to take out a procession as per their right to manifest their religion in practice. This right should be examined against Section 77 of the Police Ordinance.[239]

---

[239]Section 77, Police Ordinance reads:

(1) No procession shall be taken out or held in any public place in any area, unless notice in writing of such procession has, at least six hours before the time of the commencement of such procession, been given to the officer in charge of the police station nearest to the place at which the procession is to commence:

Provided that nothing in the preceding provisions of this subsection shall apply in the case of any procession of any such description as may be exempted from these provisions by Order made by the Minister and published in the Gazette.

(2) Where any procession is taken out or held in contravention of the provisions of subsection (1), every person organizing that procession or doing any act in furtherance of the organization or assembling of that procession and every person taking part in any such procession, shall be guilty of an offence.

(3) Notwithstanding anything in any other law, an officer of police of a rank not below the grade of Assistant Superintendent, if he considers it expedient so to do in the interests of the preservation of public order, may give directions (whether orally or in writing) prohibiting the taking out of any procession or imposing upon the person or persons organizing or taking part in the procession such conditions as appear to him to be necessary, including conditions prohibiting or restricting the display of flags, banners or emblems.

The right to take out public processions applies to any person or religious group.[240] This raises the question of whether Buddhists and non-Buddhists are accorded the same rights with respect to taking out processions. Processions are an important and well-known part of Buddhist religious practice and could not be stopped by the police under the Police Ordinance by virtue of Article 9 read with Article 10. Considering these are entrenched rights, and therefore even if they were found to be incompatible with Article 16 (1), the right to undertake a procession would be protected given the constitutional jurisdiction of the Court of Appeal (Article 140). The concern here however is whether or not other minority religions would be allowed the same response and legal protection.

A close examination of the practical application of Article 9, 10 and 14 (1) (e) answers this query. It becomes apparent that the same constitutional guarantee is not allowed to non-Buddhists because Article 14 (1) (e) is divorced from Article 10. However, the implications of according Buddhism with the foremost place along with the provision's inclusion of the right to manifest one's religion in practice and teaching in Article 9 remains an open constitutional issue as it has not yet been judicially considered.

These complications are exemplified by the Police Ordinance, raising the question of whether the six-hour limit to be given in regard to the holding of religious processions, and the wide powers of the police to prohibit processions, could be reconciled with the religious practices of

---

(4) Any person who organizes or takes part in any procession which is prohibited by directions given under subsection (3), or otherwise acts in contravention of any such directions, shall be guilty of an offence.

(5) Every person who is guilty of an offence under this section shall be liable, on conviction after summary trial before a Magistrate, to a fine not exceeding one thousand rupees, or to imprisonment of either description for a term not exceeding three years, notwithstanding that such term exceeds the term of imprisonment which a Magistrate may impose in the exercise of his ordinary jurisdiction, or to both such fine and imprisonment.

[240][1984] 1 Sri.L.R 399.

non-Buddhists. This is particularly relevant for Muslims who are required to bury their deceased within twenty-four hours, as would they still be able to conduct their procession if they were unable to provide the six-hour notice? This is a concern for minority groups, particularly because the decision would be left in the hands of a police officer.[241] Furthermore, the statutory power conferred on a police officer under the Police Ordinance appear to be incompatible with equality provisions outlined in Article 12 (1) and (2) of the Constitution as it could lead to abuse of power as was the case in *Athukorala v. De Silva.*[242]

Section 77 of the Police Ordinance survives on account of the *mutatis mutandis* provision in Article 16 of the Constitution. The six-hours notice period decreed in the Police Ordinance must be amended. This is particularly relevant to the concerns of Muslims. A police officer would not be able to nor be in the position to deal with such a situation for his mandate, statutorily and officially, would be to act in accordance with his conferred powers.

---

[241][1997] 3 Sri.L.R 265, at 266, in which the Court stated that the decision whether activities of a citizen constitutes a threat to national security is a matter not for a police officer whatever his rank might be.

[242] Jayantha de Almeida Guneratne, *Religious Freedom of Minorities in Sri Lanka* Law Students' Muslim Majlis, (2006), Issue 42, Meezan, at 8 - 9. In *Atukorale v. de Silva* [1996] 1 Sri.L.R 280 which related to a case of alleged political discrimination alleged by an opposition political party, the Court held that (i) The law does not require any formal application to be made to anyone and that according to Section 77 (1) of the Police Ordinance, it was required that six hours notice was given. (ii) In terms of Section 77 (3) of the Police Ordinance the first respondent could have prohibited the procession in the interest of public order, but this had not been given. (iii) Section 78 (1) of the Police Ordinance empowers the police, when necessary to direct the conduct of processions and prescribe the routes they should take, but there is no occasion for the police to offer alternative venues. (iv) The petitioners' right to equality had been violated and they had been discriminated against on the ground of their political opinion, Article 12 (1), (2). (v) The refusal of permission to hold their meeting and procession was a violation of their entitlement to freedom of speech, expression and assembly Article 14 (1) (a), (b).

The legislature must step in to protect the rights of minority religions to take out processions. By doing this, it would demonstrate its commitment to Article 9 of the Constitution, which assures all religions the rights granted by Articles 10 and 14 (1) (e).

A further practical issue that requires addressing is as to how the police would approach the problem in the event that both a Buddhist and a non-Buddhist group applies to have a procession on the same day or at the same locations. Article 9 places Buddhism at the foremost place, but it is subject to the provisions regarding protection of other minorities in Article 14 (1) (e). This is an issue that has not yet surfaced even in litigation, whether by way of fundamental rights jurisprudence or otherwise. It is recommended that the police employ a set of criteria in exercising its discretion as to which party made the first application, and make such decisions with parity between religions.

This suggestion however could cause a conflict of interest for the police where an officer exercising his authority in favour of a minority group could be faced with a fundamental rights violation application based on Article 9. At the same time, if favour was given to the holding of a Buddhist procession, the same officer could be faced with a fundamental rights violation application under Article 14 (1) (e) and/or Article 12(2). As a result, the criterion relating to prioritizing the first application that is lodged, must be regarded as being decisive.

There is no gainsaying that such a regulative formula would be conducive to religious harmony to harmoniously accommodate both Buddhist and non-Buddhist processions, as committed to in the constitutional provisions.

6. The Right to Religion, form Religious Associations, Right to adopt a Religion of Choice and Right to Religious Worship

Protection of religious rights in Sri Lanka has had a troubled and intensely complicated history. Post-war, the country has seen an intensification of attacks on places of minority religious worship, including churches, mosques and temples while the legislative framework in regard to definition of 'sacred areas' has been inchoate.[243] Though the pace of these attacks has increased in recent years, the underlying tensions have always been present in the country's socio-religious ethos.

Much of these tensions can be traced to decades-long majority-discriminatory practices followed by the country's colonial rulers which fostered feelings of extreme indignation on the part of the Sinhala Buddhist community. That said, the rise in militancy within groups styling themselves as protectors of the Sinhala Buddhists and engaging in actions that are clearly contrary to law in targeting minority places of worship in the post-war period have a distinctly political agenda. The following analysis will first briefly look at the history of colonial practices in regard to the formation of religious associations, post-independent developments and legal challenges brought before the Supreme Court in regard to the constitutionality of religious associations.

It will then proceed to examine the judicial response to the right to adopt a religion of choice and lastly examine the right to religious worship as manifested through several decisions of Sri Lanka's courts.

---

[243] Jayantha de Almeida Guneratne, Kishali Pinto-Jayawardena and Radika Guneratne, *Not This Good Earth: The Right to Land, Displaced Persons and the Law in Sri Lanka*, Law and Society Trust, 2013, at 221.

6.1 The Right to Form Religious Associations

6.1.1 History of Religious Conversions in the Pre-Republican Era in Sri Lanka

The Pre-Colonial and Colonial Era -South Indian invasions in pre-colonial Sri Lanka had led to an *Aryan – Dravidian* racial dualism, while the *Dravidian* settlements that followed in its wake, and the Muslim settlements that had taken place in the medieval period had not resulted in conversion of Buddhists. However the intermixing of ethnic groups, particularly through marriages, had resulted in conversions as distinguished from 'forced conversions'.

Religious Conversions in the Colonial Era - With the arrival of the Portuguese,[244] the freedoms of Sinhala Buddhists to pursue and practice their beliefs stood threatened. While some converted to Roman Catholicism voluntarily, sometimes as a means to access administrative positions, forcible conversions were common. These patterns continued during the Dutch colonial period.[245] Links were made to powerful Evangelical movements, through Protestantism, with the advent of the Dutch).[246]

During the British Era, some notable developments may be commented upon. Having taken control over the coastal areas in 1796 AD, and then, over the whole island in 1815 AD, notwithstanding, the undertaking given by the British in terms of the Kandyan Convention to maintain and protect Buddhism as successors of the Kandyan Kings had been observed more in the breach. The undertaking itself had been served by the 1840s' 'under the pressure from missionaries in the

---

[244] (1505-1656 A.D).
[245] (1656-1796 A.D).
[246] See: *K.M De Silva Religion, Secularism and State in Sri Lanka: A Historical Survey*, (Ethnic Studies Report, Vol XXI, No.1, January 2003 (ICES), at 3.

island and their links to the powerful Evangelical movements in Britain.'[247]

Pre-Independence Formation of Religious Associations- Among the first such organisations accorded statutory status was the Kandy Church Ordinance No 11 of 1842[248] followed by The Presbyterian Church (Kandy) Ordinance No 13 of 1845,[249] Presbyterian Church (Kandy) Ordinance No 13 of 1845, [250] The Episcopal Churches Ordinance No 12 of 1846[251] and the Non-Episcopalian Churches Ordinance No 5 of 1864.[252]Other similar statutes were enacted in later years.[253]These statutes did not have any provision that could be said to carry the seeds of religious conversion openly. Rather the enactments were designed to regulate their internal affairs among the several Christian denominations. However, other statutes could be said to have had more ambiguous aims, as reflected in the discussions below.

---

[247] *Ibid.*, at 1-41.

[248] Chapter 433, Vol. XV, (LESL) (1980 Revised).

[249] Chapter 430, Vol. XV, (LESL) (1980 Revised).

[250] Chapter 434, Vol. XV, (LESL) (1980 Revised).

N.B: The Episcopal Church being part of the world wide Anglican Communion though describing itself as being 'Protestant, Yet Catholic', organized after the American Revolution when it separated from the Church of England whose clergy are required to swear allegiance to the British Monarch as the Supreme Governor of the Church of England.

[251] Chapter 430, Vol. XV, (LESL) (1980 Revised).

[252] Chapter 431, Vol. XV, (LESL) (1980 Revised).

[253] Church of England Ordinance No 6 of 1885, Chapter 429, Vol. XV, (LESL) (1980 Revised) Dutch Reformed Church of Ceylon Ordinance No 9 of 1926 (Chapter 432, Vol. XV, (LESL) (1980 Revised), the new St. Andrews Church Ordinance No 16 of 1916 (Chapter 435, Vol. XV, (LESL) (1980 Revised), the Salvation Army Ordinance No 11 of 1924 (Chapter 436, Vol. XV, (LESL) (1980 Revised), the Roman Catholic Archbishop and Bishops of Ceylon Ordinance No 19 of 1906 (Chapter 441, Vol. XV, (LESL) (1980 Revised)), and the American Ceylon Mission Ordinance No 4 of 1908 (Chapter 439, Vol. XV, (LESL) (1980 Revised)), the Methodist Trust Association Ordinance No 54 of 1935 (Chapter 438, Vol. XV, (LESL) (1980 Revised)), the Ceylon Baptist Council Ordinance No 54 of 1944 (Chapter 448, Vol. XV, (LESL) (1980 Revised) leading to the Assemblies of God of Ceylon Ordinance No 53 of 1947.

The Ordinance of the Young Man's Christian Association of Colombo in its preamble declares it is an ordinance to incorporate the Young Man's Christian Association of Colombo. Section 3 of the Ordinance reads:

> The general objects for which the corporation is constituted are hereby declared to be to promote the spiritual, intellectual, social and physical welfare of the young men of Colombo, including promotion among them of science and literature, their instruction, the diffusion amongst them of useful knowledge, and the foundation and maintenance of libraries, and reading room, gymnasia and other features for the general use among the members.[254]

Both the Colombo Young Women's Christian Association Ordinance No. 23 of 1920[255] and the Kandy Young Women's Christian Association Ordinance No. 17 of 1924[256] contain similar wording.

The (Ceylon Branch) Ordinance No 8 of 1926[257] states its general objective within Section 3 (a) – (e).[258] In particular, Section 3 (b) identifies the promotion of the study of comparative theology in its widest form and assisting in bringing about the harmony of all religions.

Section 3 (a) of the *Saiva Paripalana Sabhai Ordinance*[259] declares that it is for the purpose of promotion and propagation of the Saiva Religion. This Ordinance, a pre-independence statute of 1931, had conferred a statutory right on a minority religious community to promote and propagate its religion. The Baadi Beeya Association

---

[254] Chapter 446 Vol. VIII, (LESL) (1980 Revised).
[255] Chapter 447, Vol. XV, (LESL) (1980 Revised) Section 3 – the reference being the 'young women of Colombo' and 'young women passing through Colombo'.
[256] *Ibid.*
[257] Chapter 456, Vol. XV, (LESL) (1980 Revised).
[258] Section 3 of the Ramakrishna Mission (Ceylon Branch) Ordinance No. 8 of 1926.
[259] Chapter 457, Vol. XV, (LESL) (1980 Revised).

established under an Ordinance of 1947[260] states in Section 3 (a) of that Ordinance[261] that the object of the corporation is to 'promote the study of the Islamic faith'. This is demonstrative of the right for a minority religious group to promote its own religion.

Where Buddhist associations were concerned, the first Buddhist Association statutorily established under colonialism was in 1927.[262] Unlike the statutorily recognised Christian, Hindu and Muslim organisations, this association only referred to the incorporation of the same, with no mention of the objective of the group. It was in 1947 that the Nugegoda Young Men's Buddhist Ordinance[263] was passed under which in terms of Section 3 (a) and (b) objects were spoken of, including 'the study and propagation of Buddhism' and 'the encouragement of the practical observance of Buddhism'.

6.1.2 Formation of Religious Associations in the Republican Era

Article 6 of the 1972 Constitution assigns to Buddhism the foremost place in the state specifies the obligation of the state to 'protect and foster' Buddhism.[264] A point to be observed in the context of the 1972 Constitution is the reference to Article 18 (1) (d)[265] referred to in

---

[260] Chapter 463, Vol. XV, (LESL) (1980 Revised) No. 15 of 1947

[261] *Ibid.*, Section 3.

[262] Chapter 399, Vol. XV, (LESL) (1980 Revised) No. 11 of 1927.

[263] Chapter 400, Vol. XV, (LESL) (1980 Revised) No. 54 of 1947.

[264] Article 6, 1972 Constitution of Sri Lanka reads:

> The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by Section 18 (1) (d).

[265] Article 18 (1) (d), 1972 Constitution of Sri Lanka

> Every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 6. Article 6 and Article 18 (1) (d) were merely declaratory in effect and were not legally enforceable rights.

In contrast, Article 9 of the 1978 Constitution pertains to enforceable state religion and religious rights:

> The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana*, while assuring to all religions the rights granted by Articles 10 and 14(1)(e).

Article 10 as referred to in Article 9, concerns the freedom of thought and religion.[266] Article 14 (e) addresses the freedom to manifest and practice one's religion.[267] These are the fundamental constitutional articles addressing religious belief and practice within the current constitution.

With reference to this framework, there are a number of key points worth considering. The first of these is the relationships between Article 9 and Article 14 (e). Article 9 (as well as Article 10) is one of the entrenched provisions specified in Article 83 (a). Article 14 (1) (e) on the other hand is not entrenched. The result of this is that the right to manifest or practice one's own religion, as outlined in Article 14 (1) (e), could be changed by legislation that is supported by a two-thirds majority in Parliament.

A second notable point is the relevance of placing Buddhism at the foremost place and its impact on religious tolerance. Article 9 emphatically rejects the idea of a secular state with its commitment to upholding the Buddhist *Sasana*. Article 14 (1) (e) however

---

[266] Article 10, The Constitution of Sri Lanka reads:

> Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

[267] Article 14 (e), The Constitution of Sri Lanka reads:

> Every citizen is entitled to – the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching

acknowledges the concept of tolerance expressed in a manner that distinguishes it from the Constitutions of other countries, mostly Islamic states.[268] Despite these strengths, the previously mentioned concern regarding the relationship between Article 9 and Article 14 (1) (e) demonstrates a clear limit to the concerns of minority rights,[269] highlighting the contradiction for a state which is expected to promote the Buddha *Sasana* whilst protecting other religions.

The next point of discussion is the relationship between Article 10 and Article 14 (1) (e). Under Article 10, the Constitution guarantees freedom of thought, conscience and religion, including the freedom to have or adopt a religion or belief. The pertinent point regarding this provision is that whether by legislation or any other measure, it would be impossible to impinge on another person's internal choice of religion. As a result, including Article 10 within Article 9 is ineffectual, as it provides no defendable right. Within the 1972 Constitution the right to the practice was addressed Article 18 (1) (d), but it was not an entrenched provision.

Following on from these points regarding the current constitutional framework are a number of additional articles relevant to the discussion. Provisions for equality before the law and a right to freedom from discrimination are outlined in Article 12.[270] Following

---

[268] See: the Constitution of Maldives and Pakistan.

[269] See: de Almeida Guneratne, *Religious Freedom of Minorities in Sri Lanka*, Law Students Muslim Majlis 2006, op.cit.

[270] Article 12, The Constitution of Sri Lanka reads:

> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds...
>
> (3) No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

this, in Article 14 (1) (a), (b), and (c), freedoms of speech and expression are provided for.[271]

These provisions however, must be read in light of Article 15 (2), (3), (4) and (7) where the Constitution identifies exemptions and restrictions to the rights expressed in Article 14.The freedoms of speech, assembly and association outlined in Article 14 are subject to maintaining racial and religious harmony. Article 15 (7) elaborates on this, also referencing Articles 12 and 14, stating that all the fundamental rights can be restricted for the purpose of 'securing due recognition and respect for the rights and freedoms of others...'

The commitment to religious tolerance is meanwhile outlined in the Statute Book of Sri Lanka where associations of both Buddhist and minority religious organisations have been established legislatively.[272] In constitutional theory at least therefore, it may be said that despite the important position afforded to Buddhism in the constitutional scheme, emphasis has been also on promoting religious tolerance and protecting the rights of minorities. These provisions demonstrate a constitutional commitment to religious tolerance, but not to state secularism. This is in contrast to the Soulbury Constitution (1948), particularly Section 29 (4) as discussed previously which afforded specific – and arguably entrenched - protections for minorities.

It is proposed now to examine several bills brought before the Supreme Court on the basis of containing the seeds of unethical or forced conversions and a resulting legislative attempt to ban these practices.

---

[271] Article 14, The Constitution of Sri Lanka reads:

Every citizen is entitled to-

(a) the freedom of speech and expression including publication

(b) the freedom of peaceful assembly

(c) the freedom of association

[272] See: Vol. XV (LESL) (1980 Revised).

6.1.3 *Bills challenged on the basis of unconstitutionality with Article 9 and Article 10*

In 2003 a challenge was lodged to a Bill entitled as being an *Act to Incorporate the New Wine Harvest Ministries*[273] under Article 121 (1) of the 1978 Constitution. The Bill had stated in its objects that it was for the purpose of:

> Conducting that Ministry, based on the Articles of faith and in order to spread, promote and make known the message of Jesus Christ, and;
>
> Undertaking and carrying on in the spirit of Articles of faith based on the teachings of Jesus Christ and in accordance with the Christian Faith and practice activities that would uplift the socio–economic conditions of the people of Sri Lanka.[274]

These were the main clauses in the Bill that had been objected to as being inconsistent with Article 10 of the Constitution.[275] It was argued by the petitioner that the economic dimension of the objects would enhance the financial capacity of the corporation to 'induce and allure persons of other religions and convert them to the faith that is sought to be spread.'[276] The notion of conversion by allurement had been addressed by an earlier determination of the Supreme Court in a Bill titled '*Christian Sahanaye Doratuwa Prayer Centre (Incorporation)*'.[277] Here, the petitioner objected to the Bill as its provisions included economic and commercial activities, which could be considered allurement and would infringe on the freedom of thought, conscience and religion of other persons.[278]

---

[273] S.C.S.D No. 2/2003, SC Minutes of 29.01.2003.
[274] *Ibid.*
[275] *Ibid.*, at 10.
[276] S.C.S.D No. 2/2003, at 10.
[277] S.C.S.D No. 2/2001, SC Minutes of 24.05.2001.
[278] *Ibid.*

In its decision, the Supreme Court referred to the principles laid down in the Indian decision in *Rev. Stanislaus v. State of Madya Pradesh.*[279] In India there had been state legislation in Madhya Pradesh (1968) and Orissa (1967) that prohibited the conversion of persons of one religion to another by force, fraud or allurement. The Supreme Court of India in *Rev. Stanislaus v. State of Madhya Pradesh*[280] considered the validity of the penal provision where a conviction had been entered against the appellant. The submission of the appellant was that the state legislation was invalid since it was inconsistent with Article 25 (1) of the Constitution which guaranteed to every person the freedom to 'profess, practice and propagate religion' this argument was rejected by the Supreme Court which held that, 'there can be no such thing as a fundamental right to convert any person to one's own religion'. The basis of the judgment, as stated by A.N Ray C.J, reads:

> It has to be remembered that Article 25 (1) guarantees 'freedom of conscience' to every citizen and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike.[281]

In the context of the *Prayer Centre* Bill, Counsel in opposition to the Bill highlighted that the Constitution of Sri Lanka did not guarantee a fundamental right to 'propagate' religion as the Indian Constitution did; rather that Article 14 (i) (e) provided for the right to manifest, worship, observe, practice religion or teaching. It was further pointed out that Article 10 guarantees to every person without restriction the freedom of thought and conscience including the freedom to adopt a religion of its choice. It was concluded that 'the reasoning of A.N.

---

[279](1977) SCR (2), at 611.
[280]*Ibid.*
[281]*Ibid.*, at 616.

Ray C.J, would apply with greater force to the relevant provisions of our Constitution.'[282]

Further arguing against the incorporation of the Prayer Centre, it was contended that the freedom guaranteed to every citizen by Article 14 (1) (e) of the Constitution to practice a religion and engage in worship and observance, alone or in association with others, should be taken as distance from the freedom guaranteed by Article 14 (1) (g) to engage in lawful occupation, trade business or enterprise. Ultimately, Article 10 providing the freedom to adopt a religion or belief of his choice assumes that the choice stems from the free exercise of thought and conscience without allurement distorting that choice.[283] The Court ruled that the Bill violated *inter alia* Article 10 of the Constitution.

Based on reasoning found in this determination in regard to the *Prayer Centre* Bill, the Supreme Court held, in the *New Wine Harvest Ministries* determination, that the objective of the Bill was inconsistent with Article 10 of the Constitution.

It is against this background, that the Bill '*Provincial of Teaching Sisters of the Holy Cross of the Third Order of Saint Francis of Menzingen of Sri Lanka*'[284] came before the Supreme Court being challenged on its constitutionality. Here, the Court unanimously held that where the objective of a group is to propagate non-Buddhists, this would be in violation of Article 9. The objection to the Bill was based on the argument that both the preamble and clause 3 of the Bill were aimed at propagating the Catholicism and to 'allure persons of other religions by providing material and other benefits such as medical facilities, education to children, care for disadvantaged members of the community with the aim of conversion and that the services were

---

[282] S.C.S.D No. 2/2001, at 23.
[283] *Ibid.*, at 23.
[284] S.C.S.D No. 19/2003, Sc Minutes of 25.07.2003.

taking advantage of the vulnerabilities of these disadvantaged members of the community.[285]

In its determination, the Supreme Court held that the Bill was inconsistent with Articles 9 and 10 of the Constitution and needed sanction if it was passed into law, as decreed by Article 83 (a) of the Constitution.[286]

The determination hinged on the absence of the word 'propagation' either in Article 10 or Article 14 (1) (e) of the Constitution in contrast to the Indian Constitution which contains the word 'propagation' notwithstanding which the Indian Supreme Court had held that what the Article grants is not the right to convert another person but to transmit or spread one's religion by an exposition of its tenets.[287] Again here, the thinking of the Court was that the Sri Lankan Constitution does not use the word 'propagate' and therefore a more restrictive interpretation is appropriate. The Court referred to the provisions of Article 9 to foster the *Buddha Sasana*, stating that when

---

[285] *Ibid.*, at 3.

[286] Article 83, The Constitution of Sri Lanka;

Notwithstanding anything to the contrary in the provisions of Article 82-

a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article.

b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to over six years,

shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80

[287] 1977 SCR (2), at 611.

there is no fundamental right to propagate; if efforts are taken to convert another person to one's own religion, such conduct could hinder the very existence of the *Buddha Sasana.*[288] The cumulative result of these judicial decisions was, as observed by Deepika Udagama in relation to the determination in the *Holy Cross* case, almost as if Sri Lanka had become a theocracy with the propagation of 'other' religions being taboo.'[289]

The Court's reliance on *Kokkinakis v. Greece*[290] in relation to its findings in the Holy Cross case that 'conversion by allurement has been dealt with as a method of improper conversion' invites scrutiny. The judges quoted a reference in that decision of the European Court of Human Rights (ECHR), to a report from the World Council of Churches which identifies improper proselytism as 'activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or need'

---

[288] S.C.S.D No. 19/2003.

[289] Udagama, Deepika, 'The Sri Lankan Legal Complex and the Liberal Project: Only Thus Far and No More' in Halliday, Karpik and Feely (eds) *Political Liberalism in the British Post-Colony*, op.cit. at229.

[290] *Kokkinakis v. Greece*, ECHR, 25 May 1993, Application no. 14307/88. See also, the later determination of the Supreme Court in the matter of a Bill titled 'Prohibition of Forcible Conversions of Religion', S.C. Determination 2/22/2004, at 9. SC Minutes of 06.08.2004 and 09.08.2004 for a similarly problematic reliance. In *Kokkinakis* the relationship between proselytising and the practice of a minority religion had been ruled on by the European Court of Human Rights where the petitioner Kokkinakis, had been convicted in Greece for proselytising when he approach people in their homes to talk about his religion. He argued in the European Court of Human Rights that the ruling infringed upon his right to manifest his religion. The Court held that the ruling had been a violation of Article 9 (2) of the European Charter of Human Rights which protects an individual's freedom to manifest his or her religion, and furthermore, that the Greek government had 'not managed to determine the nature of the applicant's attempt to intrude on the complainant's religious beliefs and that it's reasoning showed it had convicted the applicant 'not for something he had done, but for what he was'. The Court did note however that in democratic societies where a number of different religions co-exist, it may be necessary to place restrictions on the freedom to manifest one's religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

and 'the use of violence or brainwashing' and states that these activities were not compatible with respect for freedom of thought, conscience and religion of others.[291] However, having referred to this report, the ECHR had then stated that the Greek Court did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means and none of the facts they set out warranted that finding.[292] This aspect appears not to have had any bearing on the reasoning in the determination by Sri Lanka's Supreme Court.

These determinations had the result of firmly entrenching in Sri Lanka's constitutional jurisprudence, the fact that religious minorities have no fundamental right to 'propagate' their religious beliefs or seek to convert Buddhists through allurement. The definition of what precisely constitutes 'allurement' remained however open to doubt and was put forcibly in issue in 2004 when, riding the wave of the momentum put into motion by these determinations, the Prohibition of Forcible Conversion of Religion Bill sought to prohibit conversion from one religion to another by the use of force, allurement or by fraudulent means. In its preamble, it is significant to note the Bill made reference to Article 9 in stating 'Buddhists and non-Buddhists are now under serious threat of forcible conversion and proselyzing by coercion or by allurement or by fraudulent means.[293]

When the Bill was challenged before the Supreme Court, the petitioners opposing its contents argued primarily that any attempt to regulate manifestation and practice of religion guaranteed under Article 14(1)(e) through Article 15 (7) would 'in effect negate and nullify the contents of Article 10.' A particular point of contention was clause 8(a) of the Bill which defined 'allurement' to mean the offer of any temptation in the form of;

---

[291] *Ibid.*, at 16.
[292] *Ibid.*, at 16.
[293] S.C. Determination 2/22/2004, at 9.SC Minutes of 06.08.2004 and 09.08.2004.

(i) any gift or gratification whether in cash or kind
(ii) grant of any material benefit whether monetary or otherwise
(iii) grant of employment or grant of promotion in employment

This clause was objected to on the basis that it was unacceptably wide in scope and would encompass acts of benevolence and charity as well, apart from forced conversions.

While noting that the use of force and adoption of fraudulent means are already found in the Penal Code for different offences, the Court recommended amendments to sub-clauses of clause 8 relating also to definitions of force and fraudulent means. The Court however agreed that clauses 3(a) and 3(b) (and necessarily clause 4 (b) which sought the enforcement of the earlier clauses) requiring the 'convert', the facilitator and the witness to such a ceremony, to notify the Divisional Secretary of the fact of such conversion from one religion to another, is inconsistent with Article 10 as it would be 'a restraint on his freedom of thought, conscience and religion.' Interestingly and as a useful precedent for future challenges to clauses of this nature, clause 6 which sought to empower the Minister to 'make rules and regulations for the enforcement and carrying out of provisions of the Act' was ruled by the Court to violate Article 76 (1) of the Constitution as it was deemed to be 'overly broad and ambiguous' in its prescribed purpose.

Of particular note meanwhile was the judicial response to a later Bill titled 'The Nineteenth Amendment to the Constitution' where a state religion was attempted to be introduced. The Court opined that a state religion was 'repugnant to guarantees of freedom of religion, the right to profess one's religion, and the right to equality and non-discrimination.'[294] The result of these rulings is, as put by Udagama, a

[294] S.C Determination No. 32/2004.

confused state of affairs where the state is to give preference to the religion of the majority, yet is considered to be secular.[295]

6.2 Religious Rights of Minorities and the Right to Voluntary Religious Conversions

6.2.1 The 1972 Constitution of Sri Lanka

As observed earlier, religious rights of minorities, as was the case with other rights though contained in the 1972 Constitution, were not justiciable. Although the Constitutional Court had jurisdiction to determine the constitutionality of a bill, it had no power to strike down once a bill passed into law.[296] In 1978 the Constitutional Court was called upon to declare that certain provisions of the Local Authorities (Imposition of Civic Disabilities) (No2) Bill were inconsistent with the Constitution and could not pass into law without the Constitution itself being amended.[297] The Court rejected this contention, referring to the relevant provisions of the Constitution, particularly to the terms of Article 54 (2),[298] holding:

---

[295] Udagama, Deepika; *ibid*, at 230.

[296] Article 48 (2) read with Article 49 (3), 1972 Constitution of Sri Lanka.

[297] Decisions of the Constitutional Court of Sri Lanka Vol. 6.at 33.

[298] Article 54 (2), 1972 Constitution of Sri Lanka reads:

> (2) Any question as to whether any provision in a Bill is inconsistent with the Constitution shall be referred by the Speaker or, when he is unable to perform the functions of his office, the Deputy Speaker to the Constitutional Court for decision if:
>
> > (a) the Attorney-General communicates his opinion to the Speaker under section 53, or
> >
> > (b) the Speaker receives within a week of the Bill being placed on the Agenda of the National State Assembly a written notice raising such a question signed by the leader in the National State Assembly of a recognised political party; or

> The only matter which can be referred to this Court is the question as to whether any provision in a Bill is inconsistent with the Constitution or not. The functions and duties of this Court begin and end there. It is not our function or duty to advise the Speaker as to whether it is within the legislative competence of the National State Assembly to proceed with the Bill in the form in which it is or not.[299]

In sum and under that constitutional scheme, judicial power may be exercised on whether or not a provision is inconsistent with the constitution, but not in respect of declaring that a bill cannot be passed into law unless by amending the Constitution.

Nevertheless, there were a number of significant Constitutional Court sentiments in the context of religious minority rights during this period. One of these determinations is in reference the Places and Objects of Worship Bill. The Bill sought to prohibit the construction and establishment of a building for the purpose of being used as a place of public religious worship, except under the authority of a licence issued by the Director of Cultural Affairs.[300] It was argued that

---

(c) the question is raised within a week of the Bill being placed on the Agenda of the National State Assembly by written notice addressed to the Speaker and signed by at least such number of members of the National State Assembly as would constitute a quorum of the National State Assembly; or

(d) the Speaker or, when he is unable to perform the functions of his office, the Deputy Speaker takes the view that there is such a question; or

(e) the Constitutional Court on Being moved by any citizen within a week of the Bill being placed on the Agenda of the National State Assembly, advises the Speaker that there is such a question.

[299]Decisions of the Constitutional Court of Sri Lanka Vol. 6., at 33

[300]Decisions of the Constitutional Court of Sri Lanka, Vol. 1, at 27.

The Bill seeks to prohibit the construction and establishment of any building, statue or other object or the conversion of any building for the purpose of being used as a place of public religious worship except under the authority of a licence issued by the Director of Cultural Affairs and to provide for matters relating to the grant or refusal of applications for such licences and to provide for matters connected with or incidental to the aforesaid matters.

the Bill was inconsistent with the provisions of Article 18 (1)[301] and Article 6 of the 1972 Constitution.[302] While limited by the constitutional provisions as to the scope of its jurisdiction, when ruling on The Places and Objects of Worship Bill, the Constitutional Court observed on the theme of the right to religious freedom and its relationship with having religious structures:

> ...from the dim dawn of history, religion and religious practices ordained both by doctrine and tradition have played a large part in the lives of our people, so much so it has become difficult to say what is religion and what is religious practice as they are both intermixed...[303]

The Court found that every citizen had a fundamental right, individually or in community with others to worship in a building, either in private or in public and to erect a building for this purpose or to erect a statue or other object or to convert any building for this purpose.[304] However, the fundamental rights outlined in Article 18 were subject to the restrictions outlined in Article 18 (2),[305] therefore the ability to impose restrictions for certain reasons already exists in existing laws and as a result the Court ruled that there was no inconsistency in the Bill and the constitution.

---

[301] 18 (1) (d) freedom of thought, conscious and religion; 18 (1) (e) the right by himself or in association with others to enjoy and promote his own culture, and 18 (g) the right to freedom of speech and expression, including publication.

[302] Article 6, 1972 Constitution of Sri Lanka reads:

> The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by Section 18 (1) (d).

[303] Decisions of the Constitutional Court of Sri Lanka, Vol. I, at 31.

[304] Decisions of the Constitutional Court of Sri Lanka, Vol. I, at 32.

[305] Article 18 (2) reads:

> The exercise and operation of the fundamental rights and freedoms provided in this Chapter shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in Section 16.

The Constitutional Court made further comments on the manifestation of religious rights in its determination on the Church of Sri Lanka (Consequential Provisions) Bill. The Court stated:

> The word 'manifest', to our mind, guarantees to the individual not only things that are internal to a person in respect of religion but also his right visibly to worship, observe, practice and teach his religion. Generally, this could be done in buildings, churches and temples which are set apart for those activities. Necessarily, therefore, Section 18 (1) (d) is not limited to the mere belief in a particular doctrine.[306]

This viewpoint assigns to Article 18 (1) (d) both the right to religion and the right to worship, observance, practice and teaching, and as a result, the right to manifest one's religion is subsumed in a person's right to religion.

As earlier observed, Article 18 (1) (d) of the 1972 Constitution was not an entrenched provision; it did however seek to strike a common chord with all religions. Through striking that common chord, both in the terms of Article 18 (1) (d) and the interpretations of the Constitutional Court in the two determinations referred to above, the Court has come as close to the notion of 'secularism', affording parity of statutes in the context of religious freedom with the majority Sinhalese Buddhists.

6.2.2 *Right to freedom of thought, conscience and religion including the right to have or adopt a religion or belief of one's choice*

As observed earlier, the freedoms of thought, conscience and religion which are outlined in Article 10 of the current Constitution can be dissected into two parts:

i. freedom of thought, conscience and religion

---

[306] Decisions of the Constitutional Court of Sri Lanka Vol. 3 at 7.

ii. freedom to have or to adopt a religion or belief of his choice

The pertinent point to ask with reference to the first part is what is the practical application of this provision, namely, how can thought, conscience and religion be decided by anyone but the individual who holds them? The provisions of thought, conscience and religion were addressed in the Supreme Court's decision in *Premalal Perera v. Weerasuriya and others.*[307] In this case, the petitioner was a Buddhist railway employee who argued that a salary deduction from his pay towards the National Security Fund used for the purpose of war was against his religious beliefs.[308]

The Court stated in its decision:

> Beliefs rooted in religion are protected. A religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected. Unless the claim is bizarre and clearly non-religious in motivation, it is not within the judicial function and judicial competence to inquire whether the person seeking protection has correctly perceived the commands of his particular faith. The courts are not the arbiters of scriptural interpretation and should not undertake to dissect religious beliefs.[309]

This decision was concerned with a fundamental rights application, even so, the proposition of the Supreme Court would be equally valid to any religion as far as freedom of thought, conscience and religion is concerned, including the reason why the application failed.

6.2.3 Right to Adopt a Religion of Choice

Prima facie, the 'freedom of thought, conscience and religion' protected in Article 10 of the Constitution does not pose any problem

---

[307] [1985] 2 Sri.L.R 177.
[308] *Ibid.*
[309] *Ibid.*

in the context of minority religious rights. The second part of Article 10 provides for the right to adopt a religion or belief of choice.

The value of this provision can be understood by considering the question of whether anyone, be they a Christian Tamil, Burgher, Hindu, Muslim, non-Buddhist or Buddhist Sinhalese, could adopt a religious belief of their choice, irrespective of the ethnicity attached to the person at birth? Addressing this question requires looking at the constitutional provisions and legislation around religious conversions.

The previously stated constitutional provisions make it explicit that every citizen and every person referred to in Article 14 (2) has the freedom to convert from one religion to another. Confining the discussion to the religious fabric of Sri Lankan society, this would mean that whether one has been professing Christianity, Hinduism or Buddhism is possessed of the freedom, or right, to convert to any other religion irrespective of ethnicity at birth. That freedom then in consequence would include the freedom to manifest it in observance and practice. A unique feature of Islamic law is that such an adherent would have the right to contract a polygamous marriage. This will be used as an example for this discussion on the ability for an individual to change their personal religious beliefs and become a practicing member of the faith.

Article 10 does not find expression in Article 15 (7), that is 'the freedom to have or to adopt a religion or belief of choice' as distinguished from the freedom to 'manifest' the same 'in observance and practice', which is subject to the restriction imposed by Article 15 (7). The question then is how one can reconcile the freedoms and restrictions that come with these provisions. Examining the phrase 'restrictions as may be prescribed by law' provides insight into this question and the provisions of Article 16.[310]

---

[310] Article 16 (1), (2), The Constitution of Sri Lanka reads:

Examining the Penal Code and the Marriage Registration Ordinance helps answer this question. The Penal Code (an existing written law enacted in the year 1883) recognises bigamy as an offence in Article 36 (2) (b). Bigamy is also recorded in Section 18 of the Marriage Registration Ordinance no. 19 (1907) (MRO), and the procedure for the legitimate dissolution of a marriage is outlined in Section 19.[311] Further relevant provisions are found in provisions (1) and (2) of the MRO in Section 35.[312]

When read with Article 16 (1), (2) and Article 15(7), both the Penal Code and the relevant sections of the MRO survive the freedom for an individual to manifest his or her religion 'in observance and practice'. As a result, it can be concluded that this legislation only recognises a

---

(1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

(2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.

[311] Section 18, Marriage Registration Ordinance reads:

No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.

Section 19:

(1) No marriage shall be dissolved during the lifetime of the parties except by judgement of divorce a *vinculo matrimonii* pronounced in some competent court.

(2) Such judgement shall be founded either on the ground of adultery subsequent to marriage, or of malicious desertion or of incurable impotency at the time of such marriage.

(3) Every court in Sri Lanka having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on any such ground.

[312] Section 35, MRO reads:

(1) A marriage in the presence of the registrar shall, except as hereinafter provided, be solemnised between the parties at his office or station with open doors, and between the hours of six o'clock in the morning and six o'clock in the afternoon, and in the presence of two or more respectable witnesses, and in the following manner.

(2) The registrar shall address the parties to the following effect.

monogamous marriage and prohibits polygamy. This needs to be read with reference to Section 64 of the MRO.[313] Section 64 exempts marriages contracted under the Kandyan Marriages Ordinances[314] or the Kandyan Marriage and Divorce Act[315] and marriages contracted between persons professing Islam. [316] This therefore takes the definition of 'marriages' referred to in the MRO out of the equation, the phrase 'under the context otherwise required' qualifies the definition of marriage in the MRO to begin with *per se* and then expressly exempts marriages contracted under and by virtue of the Kandyan Marriages Ordinance or the Kandyan Marriage and Divorce Act and Marriages contracted between persons professing Islam.

It should be noted that Islam is not dependant on ethnicity and is a faith that comes from the conscience. A non-Muslim at birth has the option to convert to Islam during their lifetime for whatever motive, which could also include to get married under Islamic laws. No one, including the Court, would be in a position to conduct a 'motive investigation' as Brian CJ stated, 'the devil himself knoweth not the mind of man.'[317]

Consequently, it would then follow that a person who converts to Islam would be able to enjoy the resulting freedoms that come with the

---

[313] Section 64, MRO reads:

> In this Ordinance, unless the context otherwise requires- 'district' means administrative district; 'district registrar' in any section (other than Section 8 or Section 9) in which any power, duty or function of that officer is prescribed or referred to, includes an Additional District Registrar; 'marriage' means any marriage, save and except marriages contracted under and by the virtue of the Kandyan Marriage Ordinance, 1870, or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam."

[314] No. 03 of 1870.

[315] Chapter 132, Vol. IV, (LESL) (1980 Revised) No. 44 of 1952.

[316] Chapter 134, Vol. IV, (LESL) (1980 Revised) No. 13 of 1951 as amended.

[317] *Anon* (1477), Y.B. Pasch.17 Edw. IV, f.I, pl. 2.found in *Principles of the English Law of Contract and of Agency in Its Relation to Contract* (Oxford: Clarendon Press) 1959, at 41.

practices of the faith, regardless of their responsibility to their religious status at birth. For example, if there was a man who contracted a first valid marriage under the MRO on account of his or her ethnicity at birth who is unable to have the marriage dissolved due to the stringent grounds on which he could secure the dissolution, that man could convert to Islam and contract a second marriage as a bigamist. This would be a logical decision for the man to make. It should be noted that is only an option for a man as the Muslim Marriage and Divorce Act only provides for second marriages of men. Considering these matters however, contracting a second marriage could be seen as a sufficient reason for conversion given the fact that, there was and is no law prohibiting conversion[318] from one faith to another in Sri Lanka.

Under these circumstances the rights of a person who wishes to convert to a minority religion need to be considered, particularly to Islam. Granted, there is no law prohibiting a citizen from changing their religion, faith or belief. Nevertheless, it must be noted that, a person's initial obligations connected to that initial ethnicity in respect of another's rights must not and ought not be allowed to be adversely affected on account of a person's conversion unilaterally pursued.

These are issues that need to be addressed through an analysis of the judicial response. There are a number of cases that brought the issue of religious conversion and bigamy before the courts for consideration.

A. Reid v. Attorney General[319]

The Supreme Court of Ceylon (as known at the time of the incident) in *Reid v. Attorney General*[320] was confronted with a case that saw a man who was not a Muslim at birth convert to Islam for the purpose of being able to have a second marriage that he was unable to have under existing laws as a non-Muslim. In an appeal against the Supreme Court

---

[318] That is 'voluntary conversions' and not forced, through allurement etc.
[319] (1963) 65 NLR 97.
[320] *Ibid.*

ruling, the Privy Council[321] in *Attorney General v. Reid*[322] was called upon to respond to the decision. The issue that required the initial decision from the Supreme Court (Divisional Bench) in *Reid v. Attorney General* was whether a man who has contracted a marriage under the MRO could be said to have committed the offence of bigamy under Section 362 (B) of the Penal Code if, while his first marriage was subsisting, he converted to Islam and married again under the Muslim Marriage and Divorce Act.[323] The facts of the case read as follows:

> The appellant, when he was a Roman Catholic, married his first wife on 18th September, 1933, under the Marriage Registration Ordinance. While his wife was still living he marriage again under the Muslim Marriage and Divorce Act. He and his second wife became converts to Islam on 13th June, 1959 and registered their marriage under the Muslim Marriage and Divorce Act on 10th July, 1959.

When the case had initially come up for determination before the Supreme Court, it was noted that the earlier case of *Katchi Mohamad v. Benedict,*[324] provided some background. Katchi Mohamad was a Muslim at the time he contracted his first marriage, but later converted to Roman Catholicism and married a second time to a Roman Catholic woman, before the earlier marriage was dissolved.[325] The issue for the court was whether Katchi Mohamad could have been regarded as having committed bigamy under Section 362 (B) of the penal code. In its decision, the Court held unanimously that:

> A married man who belongs to the Muslim faith at the time of his marriage and who subsequently marries a second time, under the Marriage Registration Ordinance, a person not professing Islam, while his previous marriage is subsisting commits thereby the

---

[321] Being the Apex Court at the time prior to the Court of Appeal.
[322] (1966) 67 NLR 25.
[323] (1963) 65 NLR 97.
[324] (1961) 63 NLR 505.
[325] *Ibid.*

offence of bigamy within the meaning of Section 362(B) of the Penal Code.[326]

All three justices wrote separate judgements and it is necessary to examine, analyse and comment on each of them. Basnayake C.J adopted three key premises that can be summarised as:

i) Under our law it is legal for a Muslim to have more than one wife

ii) A Muslim could change his religion and become a Roman Catholic and when that happens he is no more a follower of the prophet and does not thereafter enjoy the rights and privileges of a Muslim

iii) The second marriage of the accused was solemnised under Section 17 of the Marriage Registration Ordinance as a Roman Catholic

Through this reasoning the Chief Justice concluded that the moment the accused became a Roman Catholic he was no longer entitled to have more than one wife and when he married a second time as a Roman Catholic he committed the offence of bigamy.[327] Gunasekara J agreed with the Chief Justice in dismissing the appeal of the accused stating: The argument that within the definition of 'marriage' in Section 18,[328] the expression 'no marriage' and 'a prior marriage' is to be understood to exclude marriages contracted between persons professing Islam and as a result the second marriage was valid even though the first subsisted *was not acceptable.*

The long title of the Marriage Registration Ordinance states that it is 'An ordinance to consolidate and amend the law relating to marriages other than the marriages of Muslims and to provide for the better registration thereof.' As a result, it was necessary to

---

[326] *Ibid.*
[327] (1961) 63 NLR 505, at 506.
[328] Section 17, MRO.

exclude marriages of Muslims from the consideration of the Ordinance when considering the validity of Muslim weddings. Reference to 'a prior marriage' does not occur in provisions relating to the necessities of a prior marriage or its registration. Furthermore, it cannot be understood to refer to only marriages contracted under the Ordinance. The context required that the marriage must mean 'any marriage' and not any marriage except a Kandyan or Muslim marriage. Responding to the Attorney General's submission inviting the court to consider that under the relevant Muslim law, a marriage is automatically dissolved by the renunciation of the Islamic faith. The accused had stated in his evidence that when he was baptised as a Roman Catholic and assumed the name Gunaratnam, it was only to change his name and not to abandon his Muslim faith.[329]

By this reasoning Gunasekara J. agreed with the Chief Justice that the accused was guilty of bigamy. T.S. Fernando J agreed with the previous two submissions, but provided different reasoning through the following four points:

i. The first marriage of the accused had not been dissolved under the MRO when he contracted the second marriage. His wife from his first marriage was a Muslim woman and had been registered under the Muslim Marriage and Divorce Ordinance No. 27 of 1929.
ii. The Muslim Marriage and Divorce Ordinance applied only to subjects of the Sovereign professing Islam.
iii. In view of the definition of 'marriage' in Section 64 of the MRO, the appellant could not have had contracted and solemnised the first marriage with a Muslim woman under the MRO.[330]

---

[329](1961) 63 NLR 505, at 507.

[330]Although there is no legal impediment to a person professing Islam registering under the provisions of the MRO his or her marriage to a person not professing Islam, the question here is whether the marriage of the appellant to Felicia Benedict was valid. Section 18 of the Marriage Registration ordinance enacted that 'no marriage

iv. Consequently, the argument that the accused (a Muslim) had not contracted a 'prior marriage' with his first wife (also a Muslim) at the time of that 'prior marriage' could succeed because: 'it seems to me, however, that the expression 'marriage' which occurs twice in Section 18 does not bear the same meaning in each instance. What is, in Section 18, declared not to be valid is a 'marriage' as defined in Section 64; but a marriage in the expression 'a prior marriage' in the same Section 18 is, in my opinion, not limited to a marriage as defined in Section 64, and the context requires that it be given its ordinary and natural meaning and interpreted as denoting any legally recognised .marriage. Otherwise, an acceptance of Mr. Senanayake's argument would mean that whereas Section 6 of the Kandyan Marriage and Divorce Act, No. 44 of 1952, renders invalid a marriage between two persons subject to the Kandyan law where one of the parties has contracted a prior marriage which, has not been lawfully dissolved or declared void, this consequence of the invalidity of the second marriage may be avoided by a Kandyan who has married another Kandyan under the Kandyan Marriage Ordinance or the Kandyan Marriage and Divorce Act by the simple expedient of resorting to a registration of his or her second marriage under the Marriage Registration Ordinance.'[331]

With this background, *Reid v. Attorney General*[332] came before the Supreme Court. The two justices deciding on the case requested that the Chief Justice refer the case to a fuller Court, noting that the converse position had arisen in *Katchi Mohomad v. Benedict*[333]. The Chief Justice proceeded to constitute a fuller court to determine the issues that had surfaced in *Reid v. Attorney General.* The ruling of *Katchi Mohomad v. Benedict*[334] can be applied to the question of

---

shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.

[331](1961) 63 NLR 505, at 509.

[332](1963) 65 NLR 97.

[333](1961) 63 NLR 505.

[334]*Ibid.*

whether or not the appellant in *Reid v. Attorney General*[335] could be guilty of bigamy under Section 362 (B) of the Penal Code, if while his first marriage, contracted under the MRO, subsisted he converted to Islam and married a Muslim under the Muslim Marriage and Divorce Act. The Court unanimously held that a man who had contracted a marriage under the MRO did not commit bigamy if while his marriage subsisted he converted to Islam and married another Muslim under the Muslim Marriage and Divorce Act.[336]

Basnayake C.J based his reasoning on what constitutes the offence of bigamy as contained in Section 362 (B) of the Penal Code.[337] Having noted that when the accused contracted the second marriage his first wife was living and therefore the first two elements in the offence were satisfied, he proceeded to examine the third element. Here, he considered that the second marriage should be regarded as being void by reason of its taking place during the life of the first wife in view of Section 18 of the MRO which was relied upon by the Attorney General.[338] The Section declares that no 'marriage' should be valid

---

[335](1963) 65 NLR 97.

[336](1963) 65 NLR 97.

[337] Section 362 (B), The Penal Code reads:

> Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> Exception: This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time: Provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge.

[338] Section 18, MRO reads:

where there is a prior 'subsisting marriage'. The Chief Justice examined the definition of marriage as for the purpose of Section 18, looking to Section 64 of the MRO.[339] Under this provision, the expression is defined as 'any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance 1870 or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam.'[340] Consequently, the Chief Justice reasoned:

> There is nothing in the context of Section 18 which renders the definition inapplicable. That section has therefore no application to marriages contracted under the Kandyan Marriage Ordinance 1870, the Kandyan Marriage and Divorce Act, and marriages contracted between persons professing Islam. Although Kandyan marriages are excluded from the definition and therefore from the ambit of Section 18, a Kandyan is not free to marry a second time while the first marriage is subsisting as Section 6 of the Kandyan Marriage and Divorce Act declares invalid a second marriage under the Act where the spouse of the previous marriage is alive and the marriage is subsisting. Now the appellant's second marriage was registered under the Muslim Marriage and Divorce Act. Although that Act is not specially mentioned in the definition, marriages contracted by persons professing Islam are excepted. Persons professing Islam can now marry only under the Muslim Marriage and Divorce Act. So that marriages under that Act are not marriages within the definition of the expression 'marriage' in the Marriage Registration Ordinance.[341]

No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.

[339](1964) 67 NLR 25, at 27.

'Now what is a marriage for the purpose of Section 18. That expression is defined in Section 64 and it means- 'any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance 1870 or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam.'

[340]Section 64, MRO.

[341](1963) 65 NLR 97, at 99.

Having noted that the procedural requirements relating to the second marriage had been observed, it was pointed out that there was close proximity of the date of the second marriage (16th July 1959) and the date of conversion to Islam (13th June 1959).[342] This aroused suspicion that the change of faith was with a view to overcoming the provisions of Section 18 of the MRO. However, it was concluded that, 'that circumstance does not affect the validity of the marriage'[343] Thus, Chief Justice Basnayake, with Justices Abeysundara and G P A Silva agreeing, concluded that, the accused was not guilty of the offence of bigamy and proceeded to quash the conviction and acquitted him.

B. Attorney General v. Reid[344]

The Attorney General appealed against the Divisional Bench of the Supreme Court ruling taking the case before the Privy Council in *Attorney General v. Reid*[345]. The Privy Council dismissed the Appeal and affirmed the said Supreme Court ruling. The reasoning for this was based on two rights- the right for an individual to change their religion;[346] and the right of an individual to change their personal law.[347] Having examined the relevant provisions of the MRO,[348] Section 362 (B) of the Penal Code and past precedents on religious conversions, the judicial committee of the Privy Council observed that in a pluralistic country like Sri Lanka which has a number of Marriage Ordinances and Acts, the citizens have an inherent right to change their religion and personal law and contract a valid polygamous marriage. It further stated that if such an inherent right is to be

---

[342] *Ibid.*
[343] *Ibid.*
[344] (1964) 67 NLR 25.
[345] *Ibid.*
[346] Therefore, the right to conversion specifically who opts to become a Muslim and identify himself with a minority religious group.
[347] (1964) 67 NLR 25, at 32
[348] Sections 18, 35 and 64, MRO.

abrogated it must be done by statute.[349] Having observed so the committee held:

> The Muslim Marriage and Divorce Act makes full provision for a male Muslim inhabitant of Ceylon to contract more than one marriage. Accordingly, the respondent was not guilty of the offence of bigamy, because the second marriage was not void within the meaning of Section 362 B of the Penal Code.[350] The judicial committee is seen accepting the appellant Counsel's view by implication that, if the marital rights of the first wife have been violated, as they have, then the MRO provides a remedy in Section 19.[351] However, there is nothing in any statute which renders the second marriage invalid, and nothing in the general law of the country which precludes the husband from altering his personal law by changing his religion and subsequently marrying in accordance with that law, if it recognises polygamy, notwithstanding an earlier subsisting monogamous marriage.[352]

Having accepted this, it becomes necessary to consider the rights of the other partner in the marriage, for example, the first wife who continues to be Sinhalese Buddhist subject to the Roman Dutch Law; or, a Kandyan Buddhist woman or a Tamil Hindu or Christian woman subject to the Thesawalamai or a woman belonging to the Burgher community. This query stems from the right to succession, principally to property, whether married community or not, depending on the initial personal law status attached to parties, and particularly if there is no last will left by the convert to Islam.

---

[349](1964) 67 NLR 25, at 32.
In a country such as Ceylon, where there are many races and creeds and a number of Marriage Ordinances and Acts, the inhabitants domiciled here have an inherent right to change their religion and personal law and so to contract a valid polygamous marriage. If such inherent right is to be abrogated it must be done by statute.
[350](1964) 67 NLR 25, at 25.
[351] That is to obtain a divorce *a vinculo Matrimoni* in some competent Court.
[352](1964) 67 NLR 25, at 29.

There are further implications in this situation for the status of children and the custody rights of minors from the first marriage and how these issues can be resolved upon a conversion to Islam.[353]The succession rights of these children need to be determined, particularly in the case where no last will was left by the deceased. These are additional questions that the Privy Council left unanswered but have been addressed in the present Constitution.[354]

It was found in propositions established in *Katchi Mohomed v. Benedict*[355]that if a man who initially was a Muslim and having so contracted a marriage under Muslim Law, which permits polygamy, converts to Christianity and contracts a marriage under the MRO which prohibits polygamy, he ceases to be a Muslim and therefore cannot enjoy the rights and privileges of a Muslim Law. As a result, he was not entitled to have more than one wife and when he married a second time as a Roman Catholic he committed the offence of bigamy. Although he stated that he was still a Muslim even at the trial, despite, the his change of name and marriage in church notwithstanding,[356] In any event on his own, such evidence constituted a rejection of the concept of even apostasy.[357]

> The expression 'marriage' in Section 18 of the MRO occurs in two different instances in reference to 'a marriage' and 'a prior marriage'. Marriage must be given its ordinary and natural meaning as denoting any legally recognised marriage. Therefore, when the appellant contracted a second marriage under the MRO as a Roman Catholic while his prior marriage was subsisting, he became guilty of the offence of bigamy.[358]Justice T.S. Fernando rejected Counsel's argument in *Katchi Mohamed v. Benedict* that the appellant had not committed the offence of bigamy stating: An acceptance of Mr.

---

[353] Which the Privy Council referred to citing *Skinner v. Orde* (14 Moo. Ind.App.309) but did not make a determination on.

[354]Which aspects and their impact will be commented upon later.

[355](1961) 63 NLR 505.

[356](1961) 63 NLR 505, at 506.

[357]*Ibid.*, at 507.

[358]*Ibid.*, at 508.

> Senanayake's argument would mean that whereas Section 6 of the Kandyan Marriage and Divorce Act, No. 44 of 1952, renders invalid a marriage between two persons subject to the Kandyan law where one of the parties has contracted a prior marriage which, has not been lawfully dissolved or declared void, this consequence of the invalidity of the second marriage may be avoided by a Kandyan who has married another Kandyan under the Kandyan Marriage Ordinance or the Kandyan Marriage and Divorce Act by the simple expedient of resorting to a registration of his or her second marriage under the Marriage Registration Ordinance.[359]

Consequently, it is to be noted that, the Court had not been called upon to address the original socio-religious status of parties in relation to their personal and religious law and faith respectively upon the impact of conversion of a non - Muslim to Islam, nor did T.S. Fernando, J address this.

In *Katchi Mohomedv. Benedict,*[360] Basnayake C.J. stated, 'when a Muslim becomes a Roman Catholic he is no more a follower of the prophet and does not thereafter enjoy the rights and privileges of a Muslim.'[361] If so, in the converse situation, where a Roman Catholic (or a non - Muslim at birth, to whom the law relating to monogamous marriage applies) who converts to Islam should be entitled to enjoy the rights and privileges of a Muslim in having more than one wife. It is this point that was answered by the Supreme Court (Divisional Bench) in the affirmative in *Reid v. Attorney General* but with no reference to third party rights (i.e. the first wife's rights). The Privy Council also agreed when ruling on *Attorney General v. Reid,* accepting the contention by implication that the rights upon conversion could not affect an earlier spouse's rights being therefore an implied qualification, though without a determination thereon.

---

[359] *Ibid.*, at 509.
[360] *Ibid.*
[361] *Ibid.*, at 506.

C. *Natalie Abeysundara v. Christopher Abeysundara and another*[362]

The ruling of the Supreme Court in *Natalie Abeysundara v. Christopher Abeysundara and Another* (1998)[363] calls into question the Court's position on Article 10 which protects the right to adopt a religion or belief of choice.

In this case, a woman contracted a marriage as a Christian under the MRO with a man who was also a Christian. The man later converted to Islam and married a second time under the Muslim Marriages and Divorces Act. The Court held that the man was guilty of bigamy under Section 18 of the MRO, basing its ruling on Sections 18, 19, 35, 64 of the MRO; Section 362 (B) of the Penal Code[364] and relying on academic views stating that once a person is born to a community, that person's community obligations cannot be unilaterally rejected. By doing this, the Court overruled the decision made by the Privy Council[365] in *Attorney General v. Reid*,[366] which provided a precedent that centred on the fundamental right of an individual to change his or her religion.

The facts in *Attorney General v. Reid*[367] and *Natalie Abeysundara v. Christopher Abeysundara and another*[368] are similar with one exception. While the Privy Council in *Attorney General v. Reid* exempted the first wife's right to divorce the accused *a vinculo matrimoni* under Section 18 read with Section 19 of the MRO, here the accused, having failed to obtain a divorce, had contracted the void second marriage after converting to Islam.

---

[362] [1998] 1 Sri.L.R. 185.
[363] *Ibid.*
[364] Section 362 (B), Penal Code.
[365] The Apex Court at the time prior to the Court of Appeal.
[366] (1964) 67 NLR 25.
[367] (1964) 67 NLR 25.
[368] [1998] 1 Sri.L.R. 185.

Indeed, there can be no quarrel with the decision that by a unilateral conversion to Islam, the respondent could not have cast aside his prior statutory liabilities and obligations from the prior marriage. These could be seen as:

- The liability or obligation to provide maintenance to that first wife.
- The liability to face an action for divorce *a vinculo matrimony* (which in the case, she did not pursuance although he had and failed in that quest)
- The liability or obligation to honour her rights to succession to property owned by him in the absence of him having divested all of his properties by transfer, gift, last will or otherwise.
- The liability or obligation in regard to custody of any minor children from that 'prior marriage' subject to the several criteria in the law pertaining to the custody of minor children.

However, this decision of the Supreme Court attracts critical scrutiny for several reasons. To begin with, the result of the Supreme Court ruling was that the appellant was a bigamist, as having 'made use of the loopholes in the law.'[369]However the Privy Council in *Attorney General v. Reid*[370] was seen responding to this same allegation in accepting Counsel's argument in that case that there was nothing in any statute which renders the second marriage invalid and nothing in the general law of the country which precludes the husband from altering his personal law by changing his religion in accordance with that law, if it recognises polygamy, notwithstanding an earlier subsisting monogamous marriage.[371] The upshot of that judicial exposition, was that, unless the law is changed by statute, such conversion would stand legitimate and moreover, such a convert cannot be regarded as a person who has committed the offence of bigamy.

---

[369]Vide: the order in M.C. Galle – No 6403 (ascertained from the Supreme Court brief).
[370](1964) 67 NLR 25.
[371] Mr. E.F.N Gratien, Q.C.

On this aspect, regrettably, the present Supreme Court does not comment, though it proceeded to overrule the decision of the Privy Council made in *Attorney General v. Reid.*[372] However, as earlier noted, those obligations of a person who converts to Islam, certainly could not have been circumvented by a conversion to Islam. While the Privy Council reflected on this issue in regards to first wife's right to seek a divorce *a vinculo matrimoni* and custody of infants of the first marriage, the Supreme Court failed to address these matters. The outcome of the Supreme Court ruling is that a man, who converts to Islam, compared with a person who was originally a Muslim that converted to Roman Catholicism and marries a second time under the MRO thereby rendering him a bigamist,[373] must still be regarded as a bigamist notwithstanding the fact that, he has exercised his right to change his religion when under the Roman Catholicism, he had been unable to obtain a divorce.

Granted the Supreme Court decision's ruling in *Premalal Perera v. The State*[374] that, 'religion, belief and faith' are matters internal to a person which no court could investigate into, could it be said that, the conversion of the accused to Islam was genuine or otherwise?

If such motive investigation was not a factor to be gone into, then, could the accused have been regarded as a bigamist and found guilty and in terms of Section 362 (B) of the Penal Code? The Privy Council in *Attorney General v. Reid*[375] acknowledged the inherent right of a person to change his religion and personal law which stood further exemplified by the present constitution of Sri Lanka on account of Article 10 read with Article 14 (1) (e).

Moreover, the rights of an earlier spouse have also been catered for and addressed in the Constitution. It is a matter of regret that, the

---

[372](1964) 67 NLR 25.
[373](1961) 63 NLR 505.
[374][1985] 2 Sri.L.R. 177.
[375](1964) 67 NLR 25.

Supreme Court in *Natalie Abeysundara v. Christopher Abeysundara and another*[376] failed to address these issues, holding that the accused had committed the offence of bigamy. The decision is however a positive ruling from the perspective of the first wife, ensuring that husbands are not able to forgo their responsibilities to their wife merely by changing their religion.

Neither Counsel who had appeared for the accused in *Natalie Abeysundara v. Christopher Abeysundara and another*[377], nor the Counsel appearing on behalf of the first wife in the dispute, or even Counsel who had appeared as *amicus curiae* who supported the argument that the accused was guilty of bigamy, had addressed the impacting provisions of the Constitution of Sri Lanka. Article 10 entitles every person to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his or her choice. The philosophy reflected in that entrenched provision is a clear rejection of the argument that once a person is born to a particular community, such person is tied to his personal law in all respects. As Islam is both a personal and religious law, with conversion the individual changes his personal law. Accident of birth cannot prevent a person's belief, faith conscience and religion is an inherent right of a person which stands elevated to a constitutional right decreed in Article 10. It is that right that is further exemplified in Article 14 (1) (e) entitling a convert to manifest the same. The 'exercise' of that right is only restricted as prescribed by law 'for the purpose of securing due recognition and respect for the rights and freedom of others' as stated in Article 15 (7).

This is to the extent that in *Natalie Abeysundara v Christopher Abeysundara and another*[378] the Supreme Court ruling was correct. However those rights, while they may ensue rights such as that to obtain a divorce from the convert; to claim maintenance; claim

---

[376][1998] 1 Sri.L.R. 185.
[377]*Ibid.*
[378]*Ibid.*

custody of a minor child or claim succession even to property belonging to the convert subject to his testamentary freedom and the right to alienate; there may be other areas as well where a person's original personal law renders him liable to others in exercising his fundamental right to change religions, and in the case of an individual's conversion to Islam this includes his right to contract a subsequent marriage restricted to the extent of an earlier spouse's rights as contemplated by Article 15 (7) of the Constitution.

If it is to be said that a person wishing to convert to Islam, could do so as far as his 'belief, faith, conscience and religion' are concerned but his original personal law will continue to apply where other matters are concerned, then as stated by the Privy Council in *Attorney General v. Reid*[379] it has to be done by statute. To take that argument further, it could only be achieved not through ordinary legislation but with a two-thirds majority in Parliament. Even that may not suffice with regard to the entrenched provisions in Article 9 and Article 10. Thus, it could be the case that a referendum would be needed.

Following from this discussion *Natalie Abeysundara v. Christopher Abeysundara and another*[380] is open to a number of criticisms. First, in implying there is a distinction between the inherent right of a person to convert to Islam and his original personal law, the Court's decision to overrule *Attorney General v. Reid* does not bear scrutiny. Second, the inherent right which now stands as a constitutionally guaranteed and entrenched right in terms of Articles 9, 10 and 14 (1) (e) subject to Article 15 (7) is an aspect that the Court had not addressed. Third, statutory interpretation is particularly the responsibility of a court when it involves interpretation of the Constitution,[381] but as pointed

[379](1964) 67 NLR 25.
[380][1998] 1 Sri.L.R.185.
[381]Article 125, The Constitution of Sri Lanka.

out above, their Lordships did not address the relevant provisions of the Constitution in their ruling.[382]

The Court's ruling in *Natalie Abeysundara v. Christopher Abeysundara and another*[383] is a problematic response to a person's inherent right to change his/her religion. This is a right which is both constitutionally granted and an entrenched provision. As long as a balance of that right could have been struck with regard to the rights of the woman, as envisaged in Article 15 (7) of the Constitution, it should not be so that the man be held a bigamist.

As a result of these concerns, there is a need for the Supreme Court to revisit the ruling in *Natalie Abeysundara v. Christopher Abeysundara and another*[384]. However, unlike in England, the Constitution of Sri Lanka does not provide for practice statements of the Supreme Court under Article 132 (3) of the Constitution. This could only be addressed if a similar case comes up for determination in the future. The only option that seems to be available is to initiate legislation to have the Supreme Court decision in *Natalie Abeysundara v. Christopher Abeysundara and another*[385]reviewed. By doing this, it could respond to the provisions of the MRO and the Penal Code and the judicial conflict arising from the Privy Council decision in *Attorney General v. Reid*. It could also address the present decision of the Supreme Court which has overruled *Attorney General v. Reid*[386] and therefore represents the current legal position which takes into consideration a non-Muslim's constitutional right to convert to Islam,[387] and takes into consideration the rights of the first wife as decreed in Article 15 (7) of the Constitution. These provisions were

---

[382]Specifically Articles 9, 10 and 14 (1) (e) subject to Article 15 (7).
[383][1998] 1 Sri.L.R 185.
[384]*Ibid.*
[385]*Ibid.*
[386](1964) 67 NLR 25.
[387]As permitted in terms of Articles 9, 10 and 14 (1) (e) of the Constitution of Sri Lanka.

not considered by the Supreme Court in *Natalie Abeysundara v. Christopher Abeysundara and another.*[388]

Possible Legislative Initiatives

Whether born a Sinhalese (low country or Kandyan), Buddhist, Christian, Hindu or as belonging to any other ethnic group, a convert to Islam from the time conversion is part of a minority group linked to a religion, faith or belief in conscience which he or she would thereon identify with. Accordingly, in such legislation express provisions must be made so that a man can partake in the religious practices of his newfound faith, without being sanction but with also consideration for his obligations to his first wife. In such legislation a provision could be added concerning the scenario where, if it could be shown by evidence, the conversion was disingenuous, as seen in the Supreme Court decision in *Katchi Mohomed v Benedict.*[389]It may be appropriate to mention the fact that, given the stringent grounds in the law relating to divorce applicable to non-Muslims at birth, the Law Commission of Sri Lanka [390] took the initiative to recognise the concept of a 'breakdown of a marriage' as a ground for divorce. Unfortunately that move could not be realised owing to certain forces that opposed it and due to the government also ignoring the matter.[391]

This situation presents a challenge for the government in responding to sensitivities of a minority religious group.

There are many conflicting issues that have been raised in this discussion. These cases represent the challenge of judicial and legislative bodies in responding to the rights of minorities, women and

---

[388][1998] 1Sri.L.R 185.

[389](1961) 63 NLR 505.

[390] At the time headed by a former Supreme Court Justice and Acting Chief Justice at time, the late Dr. A. R. B. Amasinghe, between 1994 - 2004.

[391] See: Jayantha de Almeida Guneratne, *Path to Law Reform*, the Law Commission as a Statutory Institution, (The Law Commission of Sri Lanka, Commemoration Journal) 2003, Saryodaya Vishwa Lekha Publication at 33-43).

operating under constitutional frameworks. It is an issue that is multifaceted and has been approached differently in international courts. Balancing the rights involved, as the Supreme Court observed in *Natalie Abeysundara v. Christopher Abeysundara and another*[392] is not an easy task.[393]

On the basis of the arguments outlined here, there are concerns about the fundamental rights of a man who exercises his right to adopt another religion, and then becomes guilty of an offence by acting within his rights under his new religion. That inherent right to change one's religion and manifest it must be acknowledged, subject however to the rights of the earlier spouse as provided in Article 15 (7) of the Constitution, and following upon the inherent rights permitted in Article 9, 10 and 14 (1) (e) of the Constitution.

6.3. The Right to Religious Worship

6.3.1 M. Sevvanthinathan v. V. Nagalingam and others[394]*- a minority caste's right to religious worship*

The concern of a minority caste's right to religious worship was examined in *M. Sevvanthinathan v. V. Nagalingam and others* (1960).[395]The petitioner filed a private prosecution in the Magistrate's Court claiming the accused had defiled the Saivite temple at Chankanai East knowing that the Vellala and other high caste Saivites would be likely to consider such a defilement as an insult to their religion; and that they had trespassed in the Saivite temple by entering the flagstaff mandapam, also with the knowledge that these actions would cause offence to the Vellala and the high caste Saivites. The

---

[392][1998] 1Sri.L.R 185.
[393][1998] 1 Sri.L.R 185, at 201.
[394](1960) 69 NLR 419.
[395](1960) 69 NLR 419.

petitioner argued that these offences were punishable under Sections 290[396] and 292[397] of the Penal Code.

The Magistrate acquitted the accused finding that while they did enter the temple and trespassed as alleged, and the temple was sacred had been built as a place of worship for Saivites, the case presented by the prosecution was not enough to hold that there was a defilement of the temple by the act of the accused entering. The Magistrate further found that the accused were denied their right to worship at the temple and that it could not be said that accused acted with the intention to insult the Saivite religion or wound the feelings of the Saivites.[398]

The petitioners appealed the decision in the Supreme Court making an application in revisions against the order of acquittal.[399] The Court acknowledged that the Magistrate had made an error in his finding that relates not to the proof of knowledge which was alleged, but to the proof of intention which was not alleged in the charges; and also

---

[396] Section 290, The Penal Code reads:

> Whoever destroys, damages, or defiles any place of worship, or any object held sacred by any class persons, with the intention of thereby insulting the religion of insult the any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[397] Section 292, The Penal Code reads:

> Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulture or any place set apart for the performance of funeral rites, or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[398] (1960) 69 NLR 419, at 420.

[399] The Attorney General in his discretion having refused to sanction an appeal

not allowing the accused to worship in the inner-courtyard did not amount to a denial of a right to worship at the temple because 'the only right which the accused had was alleged to be the right to worship in the outer-courtyard'.[400] Furthermore, the Court agreed with petitioners argument that Sections 2[401] and 3[402] of the Prevention of Social Disabilities Act (No. 21 of 1957) did not have the effect of giving followers of any religion the right to 'entering, being present in or worshiping at any place of worship which they did not have before the Act came into force.'[403] However, the Court dismissed the application on the basis that by entering the inner-courtyard of the temple it could not be said that the accused had defiled it; and accordingly, there had been no miscarriage of justice resulting from the Magistrate's order.

The Magistrate had come to the specific finding that the accused had been denied their right to worship at the temple. The Supreme Court did not approve or disapprove of that finding, instead focused on the observation that the accused had the right to worship in the outer-courtyard but not the inner. Properly construed, the Supreme Court is acknowledging the caste system in recognising a qualified right to

---

[400](1960) 69 NLR 419, at 420.

[401]Section 2, Prevention of Social Disabilities Act (No. 21 of 1957).

> Any person who imposes any social disability on any other person by reason of such other person's caste shall be guilty of an offence and shall, on conviction after summary trial before a Magistrate, be liable to imprisonment of either description for a term not exceeding six months or to a fine not exceeding one hundred rupees.

[402]Section 3 (b), Prevention of Social Disabilities Act (No. 21 of 1957).

> For the purpose of Section 2, a person shall be deemed to impose a social disability on any other person-
>
> (a) if he prevents or obstructs such other person from or in-
>
> (x)entering or being present in, any place to which the public have access whether on payment or otherwise, other than a temple, *devale*, *kovila*, church, mosque or other place of any religious worship

[403](1960) 69 NLR 419, at 420.

The Act penalised only the prevention or obstruction of the exercise of a right which was an existing right at the time the Act became law.

worship at a temple for persons not belonging to the *Vellala* and other higher castes.

Further to this, a reading of Sections 2 and 3 of the Prevention of Social Disabilities Act shows that had the petitioner been charged under the Act he would have been cleared of the charges. This demonstrates that the provisions of the Act had no bearing on the accused being charged under the Penal Code. However, it is pertinent to consider whether this legislation could have survived Section 29 of the Soulbury Constitution, which was in operation at the time, and perhaps why the legislature in 1971 amended Section 3 of the Social Disabilities Act[404] to include the provision:

> A person shall be deemed to impose a social disability if he prevents or obstructs such other person, being the follower of any religion, from or in entering, being present in, or worshipping at any place of worship, or any portion thereof, to which followers of that religion have or have had access.[405]

Employing the provisions of this amendment, it is likely that had the petitioner been charged under the amended Act, he would have been successfully prosecuted. Considering the decision took place in 1960, Justice T. S. Fernando's approach to the issue, perhaps, could not have been faulted. On the contrary, it could be argued that the Court be commended in recognising at least a qualified right to worship at a temple for a person not belonging to the Vellala and other higher castes, notwithstanding the provisions of Section 3 (a) (x) of the Prevention of Social Disabilities Act, which was in operation at the time of the Court's decision.

---

[404]Section 3, Prevention of Social Disabilities Amendment Act (No. 18 of 1971).
For the purpose of Section 2, a person shall be deemed to impose a social disability on any other person-
(b) if he prevents or obstructs such other person, being the follower of any religion, from or in entering, being present in, or worshipping at any place of worship to which followers of that religion have access.

[405]Section 3, Prevention of Social Disabilities Amendment Act (No. 18 of 1971).

Considering this however, seeing as the Court was proactive enough to observe that the accused had the right to worship at the temple in the outer-courtyard despite being of a lower caste, then it is questionable as to why the Court was inhibited in going further to approve the Magistrate's finding that the right to worship of the accused had been denied. A final point to be drawn from this case is an argument of the petitioner presented to the Court. Justice T. S. Fernando recapped the argument stating:

> It is no doubt true, as the petitioner's Counsel contended that the important question arising upon this application is what do people believe in as their religion. Whether a place is holy or not and whether a place that is holy has been defiled are also matters of belief. [406]

To explore this argument, it may be noted that a 'Saivite' is a person who believes in Lord Siva as his primary God, a sect of 'the Hindus, their origins lying in South India.'[407] In Sri Lanka during the pre-independent era the Saiva Paripalene Sabai Ordinance had been passed [408] which had led to the incorporation of association to primarily 'promote and propagate the Saiva religion.'[409] The Saiva religion is therefore a Hindu religion based on belief in Lord Siva as their primary God.

The question is then with *Vellala* and other high castes being the original adherence of the belief, could not a non-Vellala or a person belonging to such other high caste repose belief in Lord Siva? Setting aside the prospective of a motive investigation, based on such belief in Lord Siva, could a non-*Vellala* have been denied to a Saiva temple?

---

[406](1960) 69 NLR 419, at 421.

[407]As opposed to the '*Vaishas*' who another sect 'of Hindus' who believe Lord Vishnu as their primary God. The insights obtained in regard to this discussion through a conversation conducted with the Dean of the Faculty of Law, University of Colombo, Dr Thamilmaran is acknowledged.

[408]*Saiva Paripalene Sabai* Ordinance No.17 of 1931.

[409]Section 3 (a) of Ordinance No. 17 of 1931.

Could such a person be integrated to the *Saiva* community based on such belief notwithstanding his non-*Vellala*" antecedents?

The *Saiva Paripalene Sabai* Ordinance decrees as one of the several objectives, among other things, 'to establish Saiva temples'[410] but makes no reference that the temples are for the exclusive worship of the *Vellala* and other high caste adherents of the *Saiva* religion. The Ordinance had not been brought to the notice of the Supreme Court in this case. The Court refers to evidence given by an expert on the *Saiva* religion but the judgment does not reveal whether the expert witness had said that, it is a religion based on caste exclusively to be adhered to by the *Vellala* and other higher castes. If so, the question is raised as to how could the Magistrate's finding that the right to worship of the accused had been denied be substituted in effect by the Supreme Court in its observation that the accused's right was confined to access to the outer courtyard of the temple but not the inner courtyard. In sum, the Supreme Court at the time failed to positively and in an unqualified proactive sense to respond to the rights of minority castes among the Hindus in relation to their right to worship.[411]

6.3.2 *Shanmugam v. Kandiah*[412] *- limits to interference with a person's conscience or religious faith*

Here, the plaintiff was suing the defendants for a declaration that he was entitled to perform in a festival of the Sri Sithira Velauthar Temple at Sittandy and for a permanent injunction restraining the defendants from obstructing him in the performance. The defendants argued that the right did not exist. When the case was brought before the Court of Appeal the Court held:

---

[410]Section 3 (a) of Ordinance No. 17 of 1931.

[411]This reasoning must be read in the context however of the fact that this decision was delivered when the equality concept was not justiciable under the 1972 Constitution. Later, it was made justiciable under the 1978 Constitution, in terms of Article 12(1) and (2).

[412] (1983) Bar Association Law Reports 18.

> The right to worship in a temple is a civil right and the courts will protect it. If the question is not one of mere morality or spiritual religion but one of status giving the right to officiate in an office and to receive the traditional perquisites attached to the office, then the courts will interfere...On the plaintiff's own showing no perquisites of any kind, no emolument or pecuniary benefit attached to the conduct of the 12th Festival. The benefits of the performance of the Festival were purely spiritual. No civil right was therefore involved.[413]

Based on this ruling the Court of Appeal dismissed the plaintiff's action.

6.3.3 *Jeevakaran v. Ratnasiri Wickremanayake & Others*[414] - *Declaration of 'Religious Holidays'*

This is a judicial precedent that is important in the context of, *inter alia*, the right to equality as decreed under Article 12 of the Constitution and Article 14 (1) (e). The case was, an allegation based on a fundamental rights violation under these Articles of the Constitution.

The Antecedent (Background) Facts

Marking a departure from earlier legislation, the Holidays Act[415] declared the following as public holidays- every Full Moon Poya Day and every Sunday.[416]

---

[413] (1983) Bar Association Law Reports 18, at 23.
[414] [1997] 1 Sri.L.R. 351.
[415] No.19 of 1971.
[416] In addition, the following fourteen days were specified in the 1st Schedule to the Act- the Tamil Thai Pongal Day; Milad – Un – Nabi (Holy Prophet's Birthday); National Day; Maha Sivarathri Day; the day prior to the Sinhala and Tamil New Year's Day; the Sinhala and Tamil New Year's Day; Good Friday; May Day; the day following the Wesak Full Moon Poya Day; National Heroes Day; Id – Ul – Fitr

Section 4 of the Act gave the Minister the power to amend or vary the said schedule.

What occasioned an alleged Fundamental Rights violation application?

Under the statutory powers vested in the Minister, the said 1st Schedule was amended dropping the Maha Sivarathri Day and Id – Ul – Allah (Haj Festival Day). The petitioner in the case under consideration and another connected application[417] alleging that the Minister's act was in violation of their fundamental rights sought the restoration of the Maha Sivarathri Day (applicable to Hindu adherents) and the Haj Festival Day (applicable to Muslims).

Sum of the petitioner's complaint

The petitioner had contended that his religious consciousness and belief were infringed since, Maha Sivarathri was not going to be a public holiday he would not be able to observe his religious practices associated with his religion.[418] Further that manifestation of his religion or belief being essential to promote inter religious harmony, there was a violation of Articles 10 and 14 (1) (e) of the Constitution. Consequently, the 'sudden' denial of the holiday was against the petitioner's legitimate expectations and therefore was totally 'unreasonable... capricious' and was a denial of equal opportunity this being violation of Articles 12 (1) and 14 (1) (e) of the Constitution.[419]

(Ramazan Festival); Id – Ul – Allah (Haj Festival day); Deepavali Festival Day; and Christmas Day.

[417]FR Application No.SC/FR/624/96.

[418][1997] 1 Sri.L.R.351, at 354.

[419]Leave to proceed had not been granted on the alleged violating of Article 10 and 12 (2)

> 12(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds

The judicial response thereto may be summarised along with critical reflection as follows;

1. Re: Freedom of Worship (Article 14 (1) (e))

The Court held that, the petitioner's contention that the withdrawal of the Maha Sivarathri public holiday infringed his fundamental right of freedom of worship is untenable and proceeded to comment as follows:

> Although his affidavit does not satisfy me on that point, I will nevertheless assume that the religious observances, practices, rites and rituals (which I will collectively refer to as 'religious observances') which he described could not be duly performed on that day unless some part of the normal working hours was also used. If the State, or any employer for that matter, does not grant a holiday on a day of a religious significance does it mean that an employee's freedom of worship is impaired? To answer that question in the affirmative would be to blur the distinction between not facilitating the exercise of a fundamental right, and infringing it. In my view, the obligation created by Article 14 (1) (e) is to allow the citizen to practice his religion, but not to give him additional facilities or privileges which would make it easier for him to do so. While the State must not prevent or impede religious observances, it need not go further, and provide a holiday or other facilities for such observances.[420]

Reflection on the Court's ruling on the petitioner's contention based on Article 14 (1) (e)

To begin with, the petitioner's counsel had never contended that his right to religious worship had been infringed. His contention had been that the impugned action was 'unreasonable.....capricious etc.' and

---

[420][1997] 1 Sri.L.R.351, at 355, per Justice Mark Fernando.

was obnoxious to his legitimate expectations.[421] True, it must be said that, it was unfortunate that, the said contention had been limited to 'religious consciousness and belief,' which by no stretch of imagination, logic or law and the constitutional provisions, could have been linked to the right of one's religious practices associated with one's religion. However, despite that part of the submission which appears to have offered a ladle to the Court to approach the issue in the way it dealt with, could not the Court have gone on the aspects of right to observe one's religion and the practices associated with such observance and then, approached the issue as a minority religious group's right to observe his religion and not his right to worship in conscience and belief?

The Court draws a distinction between facilitating the exercise of religion as a fundamental right as excerpted above and thereafter comments.

> To take another example, while that Article might entitle Christians to obtain and use wine for the rite of communion, in which event the prohibition of such use would be an infringement, yet that Article certainly does not compel the State to provide wine free for use by Christians for that purpose. The essence of the freedom of worship is that the State (or even a private employer) must not prohibit or interfere with the citizen's practice of his religion, but is not bound to extend patronage or provide facilities for such practice. The position is no different in regard to other freedoms; while the freedom of speech may entitle a citizen to publish a newspaper or to operate a radio station, it does not entitle him to a grant of State land or funds for his enterprise; and the freedom of associations may entitle citizens

Yet the petitioner had not contended that the state was obliged in the context of the Constitutional provisions to provide any such 'other

---

[421] *Ibid.*, at 354.

facilities.'[422] The petitioner's grievance was the withdrawal of the '*Maha Sivarathri Day*', which had been in existence previously and whether such withdrawal was justified affecting a minority religious group drawing in its wake to the fold, the doctrine of 'legitimate expectations' as well. And it may be critically observed that the analogy sought to be drawn in regard to the provision of free wine for adherents of the Christian faith does not stand up to scrutiny.

Before leaving this part of the reflections on the Supreme Court ruling, it must be said that, the other contention of the petitioner that, by the withdrawal of the said day as a public holiday was an infringement of his right to manifest his religion or belief to promote inter-religious harmony and therefore there was a violation of Articles 10 and 14 (1) (e) of the Constitution, could not have been viewed favourably by the Court. To that extent, the Court's ruling remains justified.[423]

2. *Re: Right to equality (Article 12 (1))*

The petition had contended that, his right to equality in the context of his right to observe his religion had been infringed, by withdrawing (or denying) 'Mahasivarathri Day' as a public holiday by the Minister (which admittedly had stood as such prior to that).

The Supreme Court's response to petitioner's contention

Was the reduction of holidays discriminatory of followers of Hinduism and Islam? The Court gives the following reasons for answering that question in the negative – viz:

(i) The role and responsibilities in managing the national economy

---

[422] Scc: *ibid.* at 353.
[423] Vide :*Ibid.*, the Court's reasoning at 357.

(ii) Two special holidays had been granted to Hindus and Islam (Re: Mahasivarathri Day and Hadji)
(iii) Demands of international finance, trade and business
(iv) No jurisdiction in Court to review the statutorily declared holidays such as Sundays, Full Moon Poya days and other public holidays
(v) Minister's power by Section 4 to vary the 1st Schedule to the Act

Reflections on the Court's Ruling

Re: Reasons (1) to (4) - Perhaps, all those reasons given by Court, taken individually or collectively, *per se*, would bear scrutiny. However, the following questions may be raised.

Granted the role of the government in managing the national economy and the demand of international finance, trade and business could it be reasonably argued that that role and those demands would be facilitated by the mere reduction of two public holidays and transforming and declaring them to be special holidays? Could not the same have been met, if the government felt it was necessary by requiring two Saturdays to be working days in as much as they are not statutorily declared holidays? Would not such an initiative brought all religious adherents including Buddhists into the fold of the equally circumstanced criterion?

Re: Reason (5) - Consequently, given the inveterate principle in law that, power implies discretion but that, that discretion must be exercised reasonably, could the Minister's power under Section 4 – 1st Schedule to the Holidays Act have been regarded as a reasonable exercise of discretion in altering the status of the Mahasivarathri Day and the Hadji Holiday? Why target the said two days which till then had been granted as public holidays? Could not then the Court have reviewed the exercise of the Minister's discretion?

In the final conclusion, the Court's ruling that, the material adduced by the petitioner is quite insufficient to show that the elimination of these two holidays was unreasonable, arbitrary, capricious or for an improper purpose and that Article 12 (1) has not been infringed[424]may be justifiably critiqued. The reduction by the Minister in terms of his powers purporting to have been exercised under Section 4 of the Holidays Act may not be regarded as being for an improper purpose or as even as capricious but could fairly be regarded as 'unreasonable and arbitrary'.

[424]per Justice Mark Fernando (Wijetunga, J and (Dr) Gunawardena, J. agreeing, at 359

PART TWO

JUDICIAL PROTECTION OF MINORITY RIGHTS IN THE CONTEXT OF PUBLIC SECURITY

1. The Public Security Doctrine

1.1 Pre-Independence Conceptions

During colonial rule, the notion of 'minority' was a burgeoning idea. During this period, Sri Lanka (then Ceylon) underwent several periods of emergency. A notable instance was the declaration of emergency during the Sinhala and Muslim riots in 1915. In response to the unrest, the Proclamation of 5 August 1914 was issued, bringing into effect the imperial Order in Council of October 1896, which provided that all persons in the colony were subject to military law. A later proclamation committed the maintenance of order to the officer commanding the Armed Forces.

This early declaration of emergency had less to do with the state versus citizen paradigm. Instead, the declaration was meant to return order in the midst of a crisis *between* citizens—in this case, between communities. The matter was delved into in some detail in the case of *W.A. de Silva*.[425] De Silva was arrested on the orders of the General Officer commanding the troops during disturbances between the Sinhalese and the Muslims. He was later detained in an area where the proclamation was in force. The Supreme Court was first confronted with the question of whether the superior courts had the power to inquire into the existence of an actual state of war. The Court answered this question in the affirmative, holding that the courts not only possessed the right to inquire, but also the duty to inquire, into

---

[425] *Application for a writ of habeas corpus for the production of the body of W.A de Silva* (1915) 18 NLR 277.

whether an actual state of war exists or not.[426] Curiously, however, the Court was prepared to accept the Attorney-General's opinion stated from the Bar table that a state of war in fact existed. The Court observed: '[i]n view of all the circumstances, the utmost weight must be attached to a statement of that kind.'[427] Moreover, the Court preferred a conservative position on the more substantive issue in that it held that, despite a right and duty to inquire into the existence of a state of war, the courts lacked the power to review through a writ of *habeas corpus* the acts of military authorities in the exercise of their martial law powers. Hence the legality of acts of arrest and detention by military authorities under martial law were not justiciable. This case marked one of the earliest instances where the statutory framework during a period of emergency rendered state officials exempt from scrutiny. The immunity conferred on these officials as a result of the exclusion of judicial review of their actions no doubt sowed early seeds of impunity within the legal system.

Significantly, the Court 'divested itself from the duty of looking at a necessary nexus between the arrest and detention and alleged conduct that is harmful to the protection and maintenance of order and the defence of life and property.'[428] This approach, in many ways, set an unhealthy precedent with respect to the reviewability of executive action during a state of emergency.

More than a decade after the Sinhala-Muslim riots, the Ceylon (State Council) Order in Council of 1931, commonly referred to as the Donoughmore Constitution was promulgated. The new Constitution conferred on the Governor particular powers that he could assume in an emergency situation. According to Article 49, if the Governor was

---

[426] *Ibid.* Also see Kishali Pinto-Jayawardena & Jayantha de Almeida Guneratne, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times* (Law & Society Trust, 2011), at 13-17.

[427] 18 NLR, at 280. Note that it is not clear from the judgment whether the Governor's affidavit or his agent's affidavits contained any averment to that effect.

[428] Pinto-Jayawardena & de Almeida Guneratne, *op. cit.* at 17.

of the opinion that a state of emergency had arisen or was imminent, he could by Proclamation, take over control of any government department, subject to ratification of his decision by the Secretary of State. This regime of law provided the background for another landmark decision pertaining to emergency: the *Bracegirdle Case.*[429]

Unlike in previous cases, *Bracegirdle* was an instance where the individual was considered a threat to the power structures of the day. Despite this not being a case on the violation of minority rights *per se*, it provides a useful indicator of how the state would respond to political dissent. The statutory provision at issue in this case was Article III.3 of the Order in Council of 1896, which provided: '[t]he Governor may order any person to quit the Colony, or any part of or place in the Colony, to be specified in such order and if any person shall refuse to obey any such order, the Governor may cause him to be arrested and removed from the Colony, or from such part thereof, or place therein, and for that purpose to be placed on board of any ship or boat.' The Governor, acting upon such powers, ordered that Bracegirdle leave the colony within four days. The apparent reason for the Governor's order was that Bracegirdle had expressed controversial views on certain political and racial aspects of life in Ceylon.[430] The actual reason was that Bracegirdle strongly criticised imperialism and his remarks about the living conditions of the estate workers had outraged the elite colonial planting community.[431]Bracegirdle, was in no uncertain terms, a political dissenter.

Bracegirdle refused to comply with the order and was hence arrested by the police purporting to act under the authority of the Governor. A further order was issued to the arresting police officer by a Deputy Inspector General of the Criminal Investigation Department (CID) to place him on board any ship from Ceylon to Australia (his last place of residence). In the *habeas corpus* case that followed, the main

---

[429]*In re Mark Antony Lyster Bracegirdle* (1937) 39 NLR 193.
[430]Pinto-Jayawardena & de Almeida Guneratne, *op. cit.* at 17.
[431]*Ibid.* at FN 55.

argument of the Crown was that the Governor issued the order affecting the arrest in the public interest, which he had absolute power to do, and that the Court had no authority to inquire into the circumstances under which such order was issued. It was further contended that though the expression 'in terms of an emergency' appeared in the preamble to the 1916 Order in Council, the article in question (Article III.3 of the 1896 Order in Council) was clear and unambiguous.[432] Hence the Governor was not required to issue a proclamation of emergency in order to exercise his power. This was a clear instance where the executive branch sought to exploit the perceived immunities granted to it under the law in order to suppress dissenting voices.

The Court, however, categorically rejected the Crown's position and held that the Governor's powers were not absolute and that the power may be exercised only under emergency conditions.[433] Consequently, the Court ordered the release of Bracegirdle on the grounds that the Governor's order was made without authority, which rendered the arrest and detention illegal.

The constitutional implications of this judgment have been described as 'manifold'.[434] Although in *W.A. de Silva's case*[435] the court expressed the view that it had the power to inquire into whether a state of war or emergency existed, it in fact opted not to, accepting the *ipse dixit* of the Attorney-General. By contrast, in *Bracegirdle*, the Court not only inquired into whether such a state of affairs existed or not, but also reviewed the executive decision made thereon. Thus the case serves as an important early benchmark with respect to judicial review of the exercise of executive power.

---

[432] *Ibid.* at 19.
[433] 39 NLR, at 212, per Chief Justice Abrahams.
[434] S. Namasivayam, *The Legislatures of Ceylon 1928-1948* (1951); J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)* (1973), at 51.
[435] (1915) 18 NLR 277.

The conception of public security at the end of the colonial period was multifaceted. It appears—perhaps after the *Bracegirdle case*, that the courts did in fact have a role to play in interpreting emergency laws and preventing political victimisation. Independent courts, such as the one in *Bracegirdle* in fact took upon themselves to check executive power in such cases. Yet the enactment of the Public Security Ordinance, No. 25 of 1947 immediately prior to independence was to radically change the concept of public security in the country thereafter.

1.2 Post-colonial Discourse on Public Security

1.2.1 Legislative debates on the Public Security Ordinance

The context in which public security emerged as an executive and legislative priority warrants some discussion. Two important debates, both in relation to the Public Security Ordinance, No. 25 of 1947 (PSO), took place in this regard. The first took place in Parliament during the enactment of the PSO. The second took place during the first Southern insurrection, when Parliament debated the promulgation of Emergency Regulations. In both case, the discourse reveals a strong predilection towards the use of public security rhetoric to restrict—and often suppress—dissent.

The PSO is the first piece of legislation used in the post-independence period to declare a state of emergency. The Ordinance enabled the Governor General to declare a state of emergency and to make emergency regulations (ERs), as appear necessary or expedient 'in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.'[436] Under its current usage, the PSO vests the President with the power to

[436] See section 5 of the PSO.

issue a proclamation of emergency, which must then receive the approval of Parliament from month to month.

The context in which a far-reaching law of this nature was passed is fascinating. The Official Hansard of the State Council debate dated 10 June 1947 gives an insight as to why this piece of legislation was considered necessary just before the granting of independence to Ceylon. When moving the Bill in the State Council, Mr. Mahadeva, Minister of Home Affairs, stated:

> The recent events that have occurred in Ceylon have indicated that there have been attempts to paralyze food distribution, to derail our trains, to dislocate the post and telegraph services and to bring all rail and bus transport to a standstill. It must not be construed that these regulations are meant only for the arrest and detention of troublemakers. These are steps that have to be taken probably for the maintenance of services essential to the life of the community; that is, for the distribution of food, for the commandeering of property, and also for transport in order to maintain the distribution of food and carriage of people. In the ultimate resort it may be necessary to arrest and detain persons.[437]

Not all agreed with the Minster's sentiments. Dr. A.P. de Zoysa, a Member of Parliament (MP) from Colombo South, highlighted the problems with emergency laws of this nature in his address to Parliament. The Member commented:

> I am prepared to admit that a very sad state of affairs exists today. Instead of taking measures to prevent disorder, are we wise in passing a law of this nature? An unscrupulous Minister, and unscrupulous Prime Minister, could, in the future, make use of this very law to detain innocent people. At present our laws provide for emergencies.

---

[437] See Parliamentary Debates (Hansard) dated 10 June 1947.

> It is the Governor who has the power to act in an emergency. Why should we remove that power from the hands of the Governor and invest in a Minister? Ministers sometimes are members of political parties. They may be persons with their own prejudices and hatreds. But the Governor, in theory and in law, is placed above all that. It is therefore in the interest of the country, of good government to have the emergency powers vested in the hands of the Governor. If there is an actual state of affairs which threatens order and peace in the country, the simplest thing to do—it has been done in the past—is to declare martial law, and allow the military to manage the affairs. Instead of that, you want to create a petty dictator, and allow him to control the citizens of the country. The citizens will not tolerate that.[438]

Others such as Mr. W. Dahanayake, MP for Bibile, buttressed this view by pointing out that one of the objects of the Bill was to detain the leaders of the Trade Union movement in this country, who rightly considered the weapon of the general strike a just and reasonable weapon. Meanwhile, Dr. S.A. Wickremasinghe of the Communist Party observed:

> Is it not rather ironical that this piece of legislation should be brought up on the eve of the granting of that great power given to the people of this country under the wonderful Soulbury Constitution. Necessitated by strikes, there were certain demands by the workers and those demands have been repeatedly and consistently made for many years. We have sponsored the strike...The workers are striking, not because they do not want to work, but because they want to establish the right to have work for six days in the week. If you grant the minimum needs that these workers ask, I say with a full sense of responsibility, as representative of the Trade Union Federation, not only as a member of this

---

[438] *Ibid.*

> house, that all the workers will go back to work and legislation of this nature will not be necessary...[439]

The State Council debated the provisions of the Bill and a large number of amendments were suggested at the Committee stage, including vesting in the Governor General the power to declare a state of emergency. The PSO was nevertheless enacted with a majority of thirty-three votes in favour of the law and with seven votes opposing it.[440]

It appears that the initial object of the pre-independence piece of legislation was to meet the threat of a general strike organised by leftist trade unions.[441]However, validating the premonition of Dr. A.P. de Zoysa, successive governments have used the Ordinance to quell dissenting voices and respond to insurgencies. An early example is the 1961 declaration of emergency to control the activities of the Federal Party, which sought political reform and autonomy for the North.[442] This state of emergency continued even after agitation by the Tamil parties in the North had been suppressed—at times violently. Hence there is little doubt that the framework introduced by the PSO

---

[439] *Ibid.*

[440] Prameetha Abeywickrema, *Overview of Sri Lanka's Emergency Regime and Some Useful Historical Background Information* (Unpublished Manuscript)(2010).

[441] *Ibid.* at 1.

[442] The Federal Party or the 'Ilankai Thamil Arasu Katchi' Party led a *Sathyagraha* campaign i.e. a nonviolent direct action campaign, against the government in 1961. The campaign was mainly against the implementation of Sinhala as the official language in the Northern and Eastern provinces. For an in-depth discussion on the campaign, see S. Ponniah, *Sathyagraha: The Freedom Movement of the Tamils in Ceylon* (1963). The campaign must also be understood in the context of the Federal Party's struggle for greater autonomy for the North. This struggle culminated in two pacts with the government: the Bandaranaike–Chelvanayakam Pact of 1957 and the Senanayake–Chelvanayakam Pact of 1965. The above *sathyagraha* campaign took place partly in response to the failure of the first pact. The campaign thereafter led to negotiations between the Federal Party and the government, which resulted in the second pact. However, unfortunately, this pact was also unsuccessful.

contributed significantly towards exempting from scrutiny executive action purportedly taken under emergency laws.

Following the Southern Insurrection of 1971, the government issued ERs under the PSO to facilitate the swift suppression of the insurgency. Emergency rule in the 1970's commenced on 16 March 1971 following the arrest of *Janatha Vimukthi Peramuna* (JVP) leader Rohana Wijeweera on 13 March 1971. The JVP leader along with several other insurgents and activists were detained under the new ERs.[443] Such Regulations were specifically covered by section 9 of PSO, which rendered the acts of state officials acting in good faith under any ER immune from prosecution.[444] Hence the 1971 ERs and the immunities it carried for law enforcement officials heavily contributed towards the culture of impunity during the time.

A crucial question that arose during the time was whether the use of emergency powers was more drastic in nature or more prolonged in duration than the exigencies of the situation demanded.[445] Speaking in Parliament on 20 July 1971, Prime Minister, Sirimavo Bandaranaike referred to the fact that the government had information on certain activities of the JVP after her government came to power in 1970 and that the Cabinet had considered in the early part of 1971, the question of bringing a separate Bill which would have given the government wide powers to deal with those planning an insurrection to overthrow the government by violence.[446] This Bill would have empowered the government to detain in police custody without producing before a Magistrate a suspect for a month or two and would also have enabled investigating officers to take him from place to place for the purpose

---

[443] Emergency (Miscellaneous Provisions and Powers) Regulations, 16 March 1971.
[444] See discussion *infra*. Also see *Wijesuriya v. The State* (1973) 77 NLR 25 (Court of Criminal Appeal).
[445] See Abeywickrema, *op. cit.* at 20.
[446] Parliamentary Debates (Hansard), House of Representatives, Official Report, Vol.94, 20 July 1971, at col. 1835.

of furthering the investigation.[447] The Prime Minister informed the House that the cabinet took the view that a fundamental liberty of the subject should not be tampered with unless it was absolutely necessary to do so.[448] Yet this sentiment appears to have been mere rhetoric, as the immunities granted to law enforcement officials under section 9 of the PSO was very much part and parcel of the 1971 emergency regime.

The Prime Minister conceded that she was aware of excesses on the part of the armed services and police. However, she remained critical about organisations, such as the Civil Rights Movement of Sri Lanka, which had opposed the declaration of a state of emergency. The Prime Minister observed:

> Several persons including various self styled defenders of democracy, condemned the Government for declaring an emergency on the 16th March. They said that this was a pretext to do away with the liberties of the people and in order to camouflage the inability of the Government to deal with the problems of the country. They went out of their way to tell people that the Government was magnifying several small and sporadic incidents with ulterior motives in view and that democracy itself was not safe in the hands of this scheming set of people. I hope that these people would have realized at least by now the depth of their error. I might add if the Government, in fact, did not take the steps it had taken, some of those great defenders themselves may not have been here to defend anything anymore.[449]

---

[447] *Ibid.*
[448] *Ibid.* at col.1828.
[449] *Ibid.* at col. 1837.

The Civil Rights Movement of Sri Lanka forcefully criticised the ERs in their letter to the Prime Minister.[450] In the said letter, it was observed:

> In the first place it means that if the person is arrested in the street, without witnesses, his family can spend the whole fifteen days searching for him, without anyway of finding out what has happened to him. In the second place (and this is very important), it means that during this period of fifteen days he is kept in police custody, and not in fiscal's custody in prison, as would be the case after he was produced before a magistrate. During the fifteen days he is kept in the police station, he may be assaulted or otherwise ill treated, he has no access to outside world...the fact must be noted that police stations are just not meant for detaining persons for days on end.

Hence, as far back as 1971, civil society in Sri Lanka highlighted the likelihood of emergency laws resulting in a culture of impunity. The government explicitly acknowledged the possibility of excesses on the part of law enforcement officials acting under these emergency laws. Yet the government did nothing to amend the law or introduce safeguards against official impunity or political victimisation.

Soon after the initial declaration of emergency, the first Republican Constitution of 1972 was promulgated, further strengthening the hand of the government. The new Constitution conferred power upon the Prime Minister to advise the President to declare the existence or the imminence of a state of public emergency. While the President was

---

[450] Civil Rights Movement of Sri Lanka, *Letter to the Hon. Sirimavo Banadarnaike, Prime Minister on the restoration of certain rights and liberties of the people suspended since the declaration of the State of Emergency in March 1971*, dated 10December 1971, in the Civil Rights Movement of Sri Lanka, *"People's Rights" documents (1971-1978)*, at 21.

compelled to act on such advice, the Prime Minister was answerable to Parliament. The Proclamation did not, however, have to be approved by Parliament, the law merely providing that such Proclamation be forthwith communicated to Parliament. The new Constitution hence enhanced the scope for the head of government to exploit his or her powers pertaining to the declaration of emergency.

As evident from parliamentary debates on the PSO, the executive and legislative organs of government sought to restrict rights as far as possible in order to maintain power structures. Those that threatened those power structures became exposed to victimisation. In this context, an independent, principled counterpoint to underlying authoritarian tendencies became urgently needed. The judiciary, as the organ of government tasked with upholding constitutional values, was expected to deliver that counterpoint. The following two subsections examine the response and contribution of the judiciary to public security discourse during two constitutional eras.

1.2.2 Early judicial responses to public security

This section discusses early cases in Sri Lanka's constitutional history where the judiciary was confronted with difficult choices in balancing individual rights with public security considerations. The period of review covers the inception and germination of a jurisprudential phenomenon that may be broadly termed 'the public security doctrine'. The three cases examined in this section were selected largely on the basis that they were decided during the four critical junctures of Sri Lanka's public security discourse *before* the advent of counterterrorism in 1979. These junctures are, respectively, the attempted coup of 1962, the attempted coup of 1966 and the *Janatha Vimukthi Peramuna* insurrection of 1971. These cases largely reflect the judiciary's approach to public security before the introduction of the counterterrorism rhetoric discussed later in this study.

1.2.2.1 De Saram v. Ratnayake[451]

Following the coup d'état of 1962 under the leadership of Frederick De Saram, several persons were arrested and detained under the PSO. The relevant ERs were the Emergency (Miscellaneous Provisions and Powers) Regulations of 9January 1962.[452] Regulation 23(3) of these ERs provided that a person detained in pursuance of an order under Regulation 23(1) of the ERs shall be treated as though he were a civil prisoner within the meaning of the Prisons Ordinance.[453] The five petitioners in this case were amongst those arrested and detained and sought a writ of mandamus on the Commissioner of Prisons and the Permanent Secretary, Ministry of Defence & External Affairs to enforce Regulation 23(3) and grant them the rights guaranteed under the Prisons Ordinance. However, subsequent to the arrests in January 1962, a new Regulation was published on 6 February 1962.[454] The new Regulation provided that during its continuance all the provisions of Part IX of the Prisons Ordinance, No.16 of 1877 and the rules made under that Ordinance which relate to visits to, and the correspondence of, prisoners shall not apply to any person detained on an order made under Regulation 23 (1). While the first four petitioners filed applications before the new Regulation was promulgated, the fifth petitioner filed his application afterwards.

The Supreme Court noted that the rules under the Prisons Ordinance had been framed under Section 71 of the Ordinance, which makes it clear that the legislature realised that a prisoner should be allowed to receive visits from, and to communicate with, his relations, and friends and his legal adviser.[455] The state argued that a direction by the Permanent Secretary to the Acting Commissioner of Prisons dated 31

---

[451](1962) 63 NLR 522.
[452]As published in the Official Gazette No. 12,850 of 9 January 1962.
[453]63 NLR, at 523-524.

[454]As published in the Official Gazette No. 12,897 of 6 February 1962.
[455]63 NLR, at 524.

January 1962 had suspended the operation of these rules insofar as those held in detention upon an alleged conspiracy to overthrow the government were concerned.[456] The direction was purportedly made under the proviso to Regulation 23(3), which reads: 'Provided that the Permanent Secretary to the Minister of Defence & External Affairs may direct that any such rule shall not apply or shall apply subject to such amendments or modifications as may be specified in such direction.' The Court acknowledged that the rules referred to in the proviso were the rules made under the Prisons Ordinance.

However, the Court held that this direction was not made under Section 10 of the PSO, which only authorises the Governor-General or his representative to issue instruments dispensing with or suspending the application of a law. The Court accordingly held that ERs could not grant powers to an executive to dispense with or suspend the operation of a law. Sansoni J. opined:

> I feel bound to say that when the Permanent Secretary acts under that proviso, he is in effect exercising legislative power. The Regulation purports to invest him with that power and to authorise him to exercise it by dispensing with, or suspending the operation of a law, or by amending a law-the law in this instance being Regulation 23 (3). While the Public Security Act has conferred on the Governor-General power to make regulations and to amend, suspend or modify laws, it has not invested the Permanent Secretary with such power; and I doubt if the Governor-General can himself do so. A direction given by him under that proviso is very far removed, from an executive act.[457]

It was found that the new Regulation of 6 February 1962 in fact replicated the administrative direction dated 31 January 1962. The

---

[456] *Ibid.*
[457] *Ibid.* at 525.

Court intimated that the new Regulation complied with the statutory scheme under the PSO by which rights guaranteed to detainees under the Prisons Ordinance could be legitimately suspended.[458] However, since the first four petitioners had instituted proceedings seeking to vindicate their rights under the Prisons Ordinance, they had already acquired certain rights, which could not be retrospectively suspended by the Regulation of 6 February 1962.[459] Accordingly, the Court allowed their application for a writ of mandamus.

The Court opined that the position of the fifth petitioner was different. It held that the petitioner did not acquire a right merely because of his detention. He in fact needed to initiate proceedings before the Court to avail himself of the rights claimed under the Prisons Ordinance. Thus, the Court dismissed his application on the basis that he had not acquired any rights at the time the new Regulation of 6 February 1962 was promulgated.

Two observations may be drawn from the ruling. First, the Court used a positivist frame to analyse the rights at stake. In this context, it was not prepared to defer to executive will without strictly interpreting the limits of power. It in fact observed that '[i]n a matter which concerns personal rights and privileges, it is the duty of the Court to construe the relevant provisions strictly, and to see that all the prescribed conditions are observed.'[460] The Court's unwillingness to permit the

---

[458] *Ibid.*

[459] In reaching its decision, the Court relied on Section 6(1)(3) of the Interpretation Ordinance, No.21 of 1901, which requires express provision to be made in any written law which repeals in part or in full a former written law. Where no such express provision is made, the later written law can have no force or effect so far as rights acquired or proceedings already instituted are concerned. In the present case, the Court held that the Regulation of 6 February 1962 did not comply with the requirement of express provision contained in Section 6(1)(3) of the Interpretation Ordinance. Thus such a Regulation cannot in any way deprive those persons of the rights which were already vested in them. See 63 NLR, at 526.

[460] In reaching its decision, the Court relied on Section 6(1)(3) of the Interpretation Ordinance, No.21 of 1901, which requires express provision to be made in any written

deprivation of the rights of the first four petitioners was justified through a distinctly positivist frame. The laws themselves were strictly applied through a literal reading of the relevant provisions. The result of that literal reading happened to protect the rights envisaged.

The Court's use of a positivist frame would have been less objectionable had it found some interpretational approach to protect the rights of the fifth petitioner as well. The Court's reading of the law, however, was not beneficial to the fifth petitioner, who was held to have acquired no rights to visits, legal advice and correspondence, merely owing to his failure to invoke those rights through judicial proceedings. This was a deeply problematic interpretation of the law, as the petitioner did in fact *possess* those rights at the time of arrest and detention *before* the promulgation of the Regulation of 6 February 1962. The Prisons Ordinance already guaranteed those rights. Hence the Court did little to prevent the retrospective application of a draconian Regulation to a detainee who failed to invoke the Court's jurisdiction before the Regulation came into effect. Admittedly, the norm against retrospective legislation was yet to be judicially reinforced. Incidentally, the Privy Council acquitted these very detainees in a later landmark judgment in *Liyanage v. The Queen*[461] wherein it was observed: 'what is iniquitous about *ex post facto* laws is that they make that which was innocent before an offence.'[462]

---

law, which repeals in part or in full a former written law. Where no such express provision is made, the later written law can have no force or effect so far as rights acquired or proceedings already instituted are concerned. In the present case, the Court held that the Regulation of 6 February 1962 did not comply with the requirement of express provision contained in Section 6(1)(3) of the Interpretation Ordinance. Thus such a Regulation cannot in any way deprive those persons of the rights which were already vested in them. See 63 NLR, at 526.

[461] (1965) 68 NLR 265.

[462] *Ibid.* at 270.

Second, the Court had no interest in examining the rights at stake through a political lens. On the one hand, the judiciary may need to retain an apolitical approach to ensure independence and impartiality. However, on the other hand, political blindness or apathy is perhaps a dangerous judicial trait, as it could become blind or indifferent to the political manipulations of the executive and legislature and to the political victimisation of dissenters. Terri Jennings Peretti makes a compelling argument for an openly political court in the United States on the grounds of protecting and promoting political pluralism. She observes:

> The impartial, disinterested legal craftsman, on the other hand, may be criticized as interested only in the logical consistency or intellectual purity of a decision, and as one who is callous and indifference to the issues of fairness and justice, or to potentially harmful human and political consequences.[463]

She also cites J. Braxton Craven who describes 'sterile intellectualism' as a practice that takes 'delight' in 'construct[ing] painstakingly, with adequate display of erudition, an edifice of logic and precedent upon which justice may be sacrificed.'[464]

In the Sri Lankan context, it appeared that the Supreme Court in *De Saram v. Ratnayake*, did not consider the political victimisation inherent in the treatment of the detainees. Each of them was directly involved in action aimed at overthrowing the government and was, in no uncertain terms, a political detainee. It would not be completely unreasonable to even argue that the detainees—all Christians of a particular elite social class—were members of an emerging political minority. It is possible to speculate that the detainees self identified as

---

[463] Jennings Peretti,T., *Defense of a Political Court, Princeton University Press,* (1999), at 83.
[464] *Ibid.*

a politically marginalised group, which became foundational to their attempt to overhaul the structures of power at the time.[465]

The Bandaranaike government's response was neither surprising nor uncharacteristic of a political regime interested in maintaining the *status quo*. Yet in its zeal to maintain power structures and remove challenges to those structures, the government targeted a specific group through retroactive laws and regulations. It was up to the courts to protect the rights of the dissenters in the context of such a power struggle. Instead, the court, through its deference to the executive and legislature, tacitly endorsed the use of public security laws for the purpose of political victimisation.

1.2.2.2 The Queen v. Rev. H. Gnanaseeha Thero[466]

On 8 January 1966, as a result of prevailing disturbances, a State of Emergency was declared under the PSO. Accordingly, certain Regulations were promulgated authorising the Permanent Secretary to the Ministry of Defence and External Affairs to issue detention orders against those responsible for the disturbances. On 17 February 1966, consequent to some information relating to a conspiracy to overthrow the government, the police began searching for the 1st accused, one Henpitagedara Gnanaseeha Thero, a Buddhist clergyman.[467] Subsequently, eight persons belonging to the Army were placed in preventive detention under Regulation 26 of the ERs in operation then.[468] On 16 April 1966, the Permanent Secretary issued a detention order in respect of 1st accused.[469] He was arrested later that evening and placed in preventive detention. He thereafter made a statement at

---

[465] For a further discussion of this hypothesis, see D.B.S. Jeyaraj, '*Operation holdfast': The attempted coup d'etat of Jan 1962*, 27 November 2009, at http://dbsjeyaraj.com/dbsj/archives/1250.
[466] (1968) 73 NLR 154.
[467] *Ibid.* at 162.
[468] *Ibid.* at 163.
[469] *Ibid.* at 167.

the Technical Branch of the Criminal Investigation Department on 17 April 1966.

Two important questions fundamental to the application of public security laws to political detractors arose in this case. First, the question of the validity of the 1st accused's detention was raised before the Supreme Court Trial-at-Bar. It was observed that the detention order authorising the 1st accused to be taken into preventive detention under the ERs—and not in respect of any offence—was served after his statement was recorded at the Technical Branch. According to the 1st accused, however, it was served much later at the Magazine Prison some time after he was taken into detention.[470]

The Supreme Court observed that the Crown had maintained that the accused was not arrested in pursuance of any powers conferred by the Criminal Procedure Code.[471] It held that, since the offence was non-cognizable, the police officer had no authority to arrest a person suspected thereof without a warrant.[472] It accordingly opined:

> The liberty of the subject is a sacred right that courts of law have to safeguard and the least that a police officer who interferes with that right can do is to inform a person arrested of the reason therefore and no court should countenance a police officer acting in contravention of that requirement.[473]

The Court recognised the 'fundamental rule' [that]...a person is, *prima facie*, entitled to his freedom and is only required to submit to

---

[470] *Ibid.* at 170.
[471] *Ibid.*
[472] *Ibid.*
[473] *Ibid.* The Court cited the case of *Corea v. the Queen*(1954) 55 NLR 457, where Gratiaen J. opined: 'I...am very glad to re-affirm my conviction that in this country (as in England) a police officer who arrests private citizens with or without the authority of a warrant is equally obliged to notify the arrested person of the reason for interfering with his, personal freedom.'

restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.'[474]

Second, the question of the admissibility of confessions was considered. According to the submissions made by the defence, some of the accused persons (other than the 1st accused) who had refused to make statements were subjected to 'a softening process' after which certain confessions were obtained and repeated before a Magistrate.[475] An issue arose as to whether these were confessions permitted under the Section 134 of the Criminal Procedure Code No. 15 of 1898.[476] In determining the issue, the Court examined the 'unusual' procedure adopted by this interrogating team, which involved interrogations that commenced late in the evening of one day and continued throughout the night.[477] Three arguments made by the defence were taken into consideration by the Court in the following passage:

> It is firstly argued that this time was deliberately chosen as the fourth floor of the Secretariat at this hour was completely cut away from the public as every office and shop around it would have been closed and this seclusion was eminently suitable for the interrogators to practice any

---

[474] *Ibid.* In support of this position, the Court cited the House of Lords Case, *Christie v. Leachinsky* [1947] A.C. 573.

[475] *Ibid.* at 172.

[476] Section 134 reads: (1) Any Magistrate may record any statement made to him at any time before the commencement of an inquiry or trial.
(2) Such statement shall be recorded and signed in the manner provided in section 302 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.
(3) No Magistrate shall record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily; and when he records any such statement he shall make a memorandum at the foot of such record to the following effect:
I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.'

[477] 73 NLR, at 172.

> unlawful method they chose in obtaining confessional statements. Secondly, the loneliness of the place and the stillness of the hour and the complete helplessness of the interrogated surrounded by police officers in whose hands they were mere pawns would shatter their moral courage and resistance. Thirdly, the continued interrogation over long hours without sleep and perhaps without food in the night would have broken their physical resistance. Human nature being what it is, these suggestions seem to us to merit serious consideration.[478]

It was opined that '[t]he attack made by the defence...is one that is not without justification and is of the utmost relevancy to the limited question...whether the circumstances stated above are sufficient to raise a reasonable doubt ...as to whether the confessions made to the police and thereafter to the Magistrate by these accused were free and voluntary.'[479]

The 1st accused, by contrast, argued that he made his confession to the Magistrate only because of a promise made by the police that such a statement would result in his release.[480] While the Court rejected this position based on evidence to the contrary,[481] its overall analysis of the law determined the admissibility of the confessions *in toto*. This analysis is worth discussing in some detail.

First, the Court examined the nature of the detention of all detainees. The Court held that the Criminal Investigation Department 'fell into-the error' of thinking that the detainees were under arrest for the offence of conspiring to overthrow the government.[482] Moreover, the Department erred by thinking it could exercise all the rights and powers of an investigator under the-Criminal Procedure Code without

---

[478] *Ibid.*
[479] *Ibid.* at 173.
[480] *Ibid.* at 186.
[481] *Ibid.* at 184-185.
[482] *Ibid.*

regard to any of the restrictions, limitations and obligations placed upon investigators by that same law.[483] The Court observed that the accused were arrested and detained under the detention orders and not under the Criminal Procedure Code.[484] Hence they were taken into custody not for any offence but for preventive purposes, 'a procedure which, while it was perfectly legitimate under the Emergency Regulations, had no relation to the investigation of offences, arrest in respect of offences or proceedings in respect of offences as contemplated by the Criminal Procedure Code.'[485] Accordingly, the Court opined that the confessing accused were taken before the Magistrate were not under arrest for an offence or charged with an offence, but merely placed in detention meant to prevent them from committing an offence.

Second, the Court examined the powers of the Magistrate to hear confessions. It held that Magistrates could act upon Section 134 of the Criminal Procedure Code only in respect of proceedings pending in court at the time the power is exercised.[486] It cannot be exercised in respect of an offence relating to which no proceedings are pending in court.[487] In this context, the Court concluded that the Magistrate had no power to hear a confession in terms of Section 134 of the Criminal Procedure Code and held that all the confessions under consideration, including that of the 1st accused, were inadmissible as evidence.[488]

The Court's ruling was extremely important in the context of protecting the rights of political detractors at the time. Though the case did not relate to a minority group, it illustrated the ability of the Court to uphold legal protections even when the accused were attempting to overthrow the government. In this context, the decision

---

[483] *Ibid.*
[484] *Ibid.* at 189.
[485] *Ibid.*
[486] *Ibid.* at 193.
[487] *Ibid.*
[488] *Ibid.* at 208.

provides a critical point of departure from the subservience that the same Court was willing to display to the executive in *The Queen v. Liyanage.*[489]

However, another possible contributing factor, which in fact relates to the outcome in *Liyanage v. The Queen,*[490] needs to be considered. In that case, the Privy Council overturned the decision of the Supreme Court and set an admirable precedent with regard to the protection of basic rights of political detractors. Hence, in the aftermath of that somewhat embarrassing decision, the Supreme Court may have been less inclined to deliver a ruling at risk of being overturned by a higher court. In this context, the Privy Council's historic decision may have had some residuary influence on the thinking of the present Supreme Court. In fact, in the present case, the Supreme Court repeatedly cited English case law and made strong analogous references to the English legal system.[491] The ruling on the admissibility of the confessions was very much grounded in applicable English law principles. Such an approach may not have been purely coincidental, given that the decision in *Liyanage v. The Queen* also related to an attempted coup, only a few years before.

This hypothesis raises the question of how important the Court's legacy was to judges at the time. A comparison between the approach of the Court before and after Sri Lanka gained republican status will therefore be an interesting exercise, which this study undertakes in the next section.

1.2.2.3 Hidramani v. Ratnavale[492]

The 1971 *Janatha Vimukthi Peramuna* (JVP) insurrection presented a new challenge to the state in terms of retaining absolute control over

---

[489](1962) 64 NLR 313.
[490](1965) 68 NLR 265.
[491] 73 NLR, at *inter alia* 158, 159, 161 and 170.
[492](1971) 75 NLR 67.

power. The insurrection, led by Rohana Wijeweera, was largely aimed at overthrowing the Sirimavo Bandaranaike government and replacing it with a Marxist structure. In the ensuing crisis, the government declared a state of emergency on 16 March 1971 and sought to regain control of a rapidly deteriorating situation. The insurrection was quelled by June 1971, though emergency continued for another six years.[493]

The present case concerned the arrest and detention of a person on the orders of the Permanent Secretary to the Ministry of Defence and External Affairs under Regulation 18(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 6 of 1971.[494] The detainee's son filed a *habeas corpus* case to compel the state to bring the body of the detainee before the Court.

The circumstances of the detainee's arrest and detention as averred by the petitioner were extraordinary. According the petition, the detainee was arrested on and after 1 September 1971 and detained in the office of the Criminal Investigation Department (CID).[495] The CID had previously searched the office of the Company known as Hidramani Ltd., of which the detainee was Managing Director. The petitioner also averred that the detainee has been taken into custody 'not with a view to prevent him from acting in any manner prejudicial to public safety and/or to the maintenance of public order, but for the purpose of assisting and/or facilitating the investigation by the Criminal Investigation Department into certain alleged offences under the law and into certain alleged contraventions of the Exchange Control Act [No.24 of 1953] alleged to have been committed by certain other persons and/or the detainee.'[496] In essence, the petitioner alleged that

---

[493] For further discussion on the 1971 JVP insurrection, see Fred Halliday. 'The Ceylonese Insurrection' in Robin Blackburn, *Explosion in a Subcontinent: India, Pakistan, Bangladesh, and Ceylon* (1975).
[494] 63 NLR, at 525. See Gazette Extraordinary of 15 August 1971.
[495] *Ibid.* at 69.
[496] *Ibid.*

the emergency laws were being used to target his father. It was also brought to the attention of the court that in reply to an appeal made to the Prime Minister by the wife of the detainee, the Secretary to the Prime Minister stated in a letter dated 20 September 1971 that 'it would not be possible to release Mr. Hidramani as yet, since it has been reported that the necessary investigations are not yet over.'[497] Hence the question arose as to whether the detention was for preventive purposes, which the ERs permitted, or solely for investigative purposes, which the Regulations did not permit.

The respondents claimed that the Permanent Secretary acted in good faith with a view to preventing the detainee 'from acting in any manner prejudicial to the public safety and to the maintenance of public order.'[498] The Permanent Secretary filed an affidavit in which he referred to the widespread armed insurrection which commenced in April 1971 instigated by the JVP. He argued that he was satisfied, after considering the material placed before him by the police, that the detainee had taken part in certain foreign exchange smuggling transactions, which were under investigation. Accordingly, he concluded that the detainee should be prevented in future from engaging in similar transactions, which directly or indirectly helped to finance the insurgent movement.[499]

After hearing both parties, the Court held that Regulation 18(1) authorises the Permanent Secretary to make an order for the arrest and detention of a person if he is of the opinion that such order is necessary with a view to preventing that person from acting in any manner prejudicial to the public safety and to the maintenance of public order.[500] The Court understood the task at hand in the following terms:

---

[497] *Ibid.* at 75.
[498] *Ibid.* at 74.
[499] *Ibid.* at 82.
[500] *Ibid.* at 74.

> The fact that there had been, from the time of the arrest of the detainee, intensive interrogations and investigations is not controverted. Hence the question which this Court has ultimately to decide is whether the fact that such investigations actually took place, affords a ground for a decision by this Court that the purpose which motivated the making of the Detention Order by the Permanent Secretary was prima facie the facilitation of investigations and interrogations, and not prima facie the purpose of preventing the detainee from acting prejudicially to public order or public security.[501]

In a curious interpretation of the facts, the Court opined that the petitioner failed to establish a *prima facie* case against the good faith of the Permanent Secretary. Hence the onus did not shift to the Permanent Secretary to satisfy Court as to his good faith. The Court instead observed:

> Permanent Secretary has stated on oath in his affidavit that he acted in good faith because he had formed the opinion expressed in the Detention Order. He has also stated on oath, what has been repeated by the Attorney-General in Court, that the material upon which he formed his opinion cannot be disclosed in the public interest. These statements relate to matters the correctness of which the Court could ordinarily assume. In addition, however, the Permanent Secretary has stated that he is prepared to make the relevant material available for the perusal of the Court. Although we did not call for the disclosure of this material, I must regard the offer of disclosure as a mark of good faith.[502]

Accordingly, the Court presumed the good faith of the Permanent Secretary, instead of calling into question the preventive nature of the detention, as opposed to the manifestly investigative nature of the

---

[501] *Ibid.* at 76.
[502] *Ibid.* at 86.

detention. Interestingly, none of the *dicta* on the distinction between preventive and investigative detention from the *Gnanaseeha Thero case* were even considered by the court. Nor did the Court consider the fact that the ERs themselves made no reference to the violation of the Exchange Control Act as giving rise to a suspicion that the detainee is likely to act in a manner prejudicial to the public safety and to the maintenance of public order.[503] Instead, it concluded that a detention order issued by the Permanent Secretary in good faith was not justiciable.

This case was heard during a period in which the Supreme Court 'fell shy of reviewing decisions made in pursuance of executive fiat.'[504] In the present case, the Court displayed a distinct reluctance to question the executive on matters of security—particularly in the aftermath of the most significant attempt to overthrow the government to date. Hidramani was clearly a victim of executive overreaching in the context of state paranoia. The Court's role in such a context should have been to temper the executive's zeal to suppress a person who remotely fell within the category of a possible dissenter or opponent of the regime.

Yet, in this case, an altogether more mundane objective may have been driving the executive. Individual rights relating to the freedom from arbitrary arrests and detention, the presumption of innocence and due process often prevent law enforcement from proceeding unchecked during the investigation of offences. From an administrative point of view, such rights become encumbrances within the investigative process. Public security laws if misapplied could potentially facilitate unchecked investigations at the expense of these

---

[503] As opined in the *Gnanaseeha Thero case*, preventive detention involves taking the person 'into custody not for any offence but for preventive purposes, a procedure which, while it was perfectly legitimate under the Emergency Regulations, had no relation to the investigation of offences, arrest in respect of offences or proceedings in respect of offences as contemplated.' See 73 NLR, at 189.

[504] Pinto-Jayawardena & de Almeida Guneratne, *op. cit.* at 24.

rights. Hence the executive may find that public security laws provide an easy and possibly more convenient avenue through which investigations into offences could take place.

It is precisely for these reasons that the rule concerning preventive detention arose within the criminal justice system in the first place.[505] The risk of detention being used by law enforcement officials to hold and interrogate suspects for prolonged periods of time is perennial. Hence detention without charge is justified only if there is an overwhelming likelihood that the person in the future would commit an offence that prejudices public security. In all other cases, the normal criminal justice system would govern the investigation and prosecution of the suspect. The Court would then have the duty of ensuring that emergency laws are not misapplied for administrative convenience. Yet, the Supreme Court's jurisprudence of the early 1970s suggests that the Court failed to discharge this duty. Instead of upholding rights, the Court habitually erred on the side of caution. In doing so, it only succeeded in assisting the executive to abuse the emergency regime in the guise of maintaining public security. Individuals such as Hidramani were causalities of this abuse. More disturbingly, the precedent set by this power arrangement between citizen and state, brokered by the courts, would have a lastingly adverse effect on future events.

1.2.3 Public security doctrine as a means of suppressing minority voices

1.2.3.1 The new emergency framework

The three cases discussed in the preceding section involved the judiciary's response to public security during three critical points in

---

[505] For an in-depth discussion on the subject, see Paul H. Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' *114 Harv. L. Rev. 1429* (2000-2001).

history, where the government was at risk of being overthrown. The judiciary's response appeared to be largely deferential towards the executive. However, there was no discernible race consciousness that appeared to underlie the courts' reasoning.

In the late 1970's a new threat began to emerge in the form of 'Tamil separatism'. This threat was perhaps like none seen before it. For the first time in its short post-independence history, a large movement aiming to establish a separate state had emerged in Sri Lanka. This movement articulated its formal position in the Vaddukoddai Resolution of 14 May 1976, where Tamil leaders pledged to work towards the establishment of a separate homeland for the Tamil community of the North and East. The resolution was to mark a serious shift in the characterization of the threat to the Sri Lankan state. An ethnic dimension was to emerge, making the 'dissenting voice' distinctly Tamil and the 'state' it sought to challenge distinctly Sinhalese. The case discussed below informs us of this new dynamic and provides a useful contextual precursor to the language of counterterrorism that would emerge a few years later.

1.2.3.2 Amirthalingam Trial-at-Bar[506]

The quintessential case of political dissent during the 1972 constitutional era involved Appapillai Amirthalingam, the eventual leader of the Tamil United Liberation Front (TULF). By passing the Vaddukoddai Resolution on 14 May 1976, the party had expressed its intent to work towards the establishment of a separate state.[507] Amirthalingam, along with other Tamil political leaders, disseminated leaflets on the contents of the resolution, and was arrested under the prevailing ERs of the time.

---

[506]High Court Trial-at-Bar No 1 of 1976.S.C. Application No.658 of 1976 and S.C. Application No.650 of 1976.

[507]Vaddukoddai Resolution of 14 May 1976, at http://www.sangam.org/FB_HIST_DOCS/vaddukod.htm.

Amirthalingam was eventually indicted on 31 May 1976 on five charges of having contravened ERs, framed under the PSO, by possessing and disseminating documents alleged to be subversive literature. The trial was held in Colombo from 12 to 28 July 1976 before a High Court Trial-at-Bar specially established under the ERs.[508]

One of the preliminary objections taken up by the defence was that the ERs under which the accused were indicted were invalid insofar as they related to the constitution of the court. In a remarkable ruling, the High Court held that Regulation 59(1A) of Emergency (Miscellaneous Provisions and Powers) Regulation No.5 of 1976 was invalid.[509] The Court's reasoning was that the PSO under which the Regulations had been framed remained 'dormant', as it had not been 'activated' by the formal declaration of a state of emergency.[510] Only the issue of a proclamation by the President and a delegation of legislative power by the National State Assembly to make ERs under section 45(4) of the 1972 Constitution could have activated the PSO.[511] The Court opined that an explicit delegation of power and then a proclamation of a state of emergency by the President were necessary preconditions for the PSO to be regarded as a law deemed to be enacted by the National State Assembly.[512] Since neither of these conditions was met, the impugned Regulations were invalid. Accordingly, the accused was acquitted.

The state thereafter filed two applications in the Supreme Court seeking revision of the High Court's order.[513] The question before

---

[508] See Official Gazette No. 213/5 of 17 May 1976 and No.214/16 of 28 May 1976.
[509] See High Court Trial-at-Bar No.1 of 1976, Order of J.E.A. Soza J., HAG de Silva J. and Siva Selliah J. dated 10 September 1976.
[510] *Ibid.* at 54.
[511] *Ibid.*
[512] *Ibid.*
[513] S.C. Application No.658 of 1976and S.C. Application No.650 of 1976. The applications were filed in terms of section 354 read with section 348, section 11 and section 13 of the Administration of Justice Law No.44 of 1973.

Court was whether the ERs passed immediately after the new Republican Constitution became law and were valid.[514] The Court delivered two separate opinions, both concluding that the ERs were in fact valid. Both these opinions, and the underlined judicial attitudes they reflect, warrant discussion.

The defence (i.e. the respondent accused in the revision case before the Supreme Court) made the argument that the new Constitution marked an undoubted break in the legal continuity or a legal revaluation in Sri Lanka.[515] Moreover, under the 1972 Constitution, the National State Assembly (NSA) cannot abdicate, delegate or in any manner alienate the legislative power of the people other than the power to make subordinate laws as provided in Section 45(1) of the Constitution.[516] Section 45(4) of the Constitution, however, permitted the NSA to, as an exception, delegate to the President the power to make ERs in the interests of public security. The question then arose as to whether the PSO, passed prior to the Constitution, was a means through which the power to make subordinate legislation could be delegated. Both Samarawickreme J. and Thamotheram J., in their separate opinions examined the provisions of Article 134 of the 1972 Constitution to arrive at an answer to this question. Section 134 provided:

> (1) – Unless the National State Assembly otherwise provides, the Public Security Ordinance, shall, *mutatis mutandis*, and subject to the provisions of the Constitution and sub-section 2 of this section, be deemed to be a law enacted by the National State Assembly.
>
> (2) – Upon the Prime Minister advising the President of the existence or the imminence of a state of public emergency, the President shall declare a state of emergency. The

---

[514] Order of Thamotheram J in S.C. Application No.658 of 1976, at 3.
[515] *Ibid.* at 10.
[516] *Ibid.*

> President shall act on the advice of Prime Minister in all matters legally required or authorised to be done by the President in relation to a state of emergency.

Section 134(1) of the Constitution stated that the PSO would continue to be the law for the time being relating to public security. Counsel for the defence argued that Section 134(1) had the words 'subject to the provisions of the Constitution', and hence there needed to be a prior Act of the NSA actually delegating power to the President to pass ERs. The PSO, however, did not technically grant such a right, given the fact that Section 5(1) of the PSO only afforded the Governor General such powers.[517] However, the Court rejected this argument by holding that, by virtue of Article 134(1), the PSO was a law passed by the NSA.

Thamotheram J. delivered an order on the limited question of whether the ERs were valid. He was of the opinion that the conflict between Section 5(1) of the PSO and Section 45(1) of the Constitution was resolved in terms of Section 45(4) of the Constitution, which specifically authorised delegation of legislative power to the President. Hence it was held that there was no need for a separate specific act of delegation.[518]

The Court proceeded to analyse the constitutional framework in Section 45 of the Constitution in the following terms. First, the power to make ERs upon delegation by the NSA is limited by the requirement that the Regulations must be in accordance with the law for the time being relating to public security. Second, these Regulations can be valid only for the duration of emergency. Third, these Regulations must be in the interests of public security or any other object specified in Section 45(4). Finally, although this power extends to making Regulations that have the legal effect of overriding,

---

[517] *Ibid.* at 13. The PSO was subsequently amended by Law No.6 of 1978 to replace the word 'Governor-General' with 'President'.
[518] *Ibid.* at 15.

amending or suspending the operation of provisions of any law, the President cannot make any such Regulation to override any provisions in the Constitution itself.[519] According to Thamotheram J., as long as this framework was not violated by the President in declaring a state of emergency and promulgating ERs, the ERs would remain constitutionally valid.

The Court then considered the distinction between the powers flowing from Sections 2 and 5 of the PSO. It held:

> In this situation we must try to find what are the consequences which must flow from the declaration of a state of emergency under [Section] 134(2) and what are the consequences of a failure on the part of the President to do so? It must be remembered that the power to make regulations is to be found in [Section] 2(1) of the Public Security Ordinance and not in [Section] 134(2) which is a mere direction or instruction to the President as to what he should do on the advice of the Prime Minister.[520]

In this context, the Court rejected the High Court's argument that the PSO remained dormant until it was motivated by a proclamation declaring a state of emergency under Section 134(2) of the Constitution.[521] Thamotheram J. opined: 'If in fact the President has brought into operation Part II of the Public Security Ordinance otherwise than on the Prime Minister's advice, the regulations are invalid...but I am unable to see in the provisions of the Constitution any such direct and unmistakable connection with the duty of the President to declare a state of emergency and bring into operation Part II of the PSO in 134(2) itself.'[522]

---

[519] *Ibid.* at 46.
[520] *Ibid.* at 60.
[521] *Ibid.* at 61.
[522] *Ibid.* at 64.

Counsel for the defence also argued that there was no valid proclamation since the President had acted on his own opinion when the purpose of Section 134(2) was to make such opinion irrelevant.[523] The impugned proclamation, however, made no reference to Section 134(2), which suggested that it was in the opinion of the President—not the Prime Minister—that a state of emergency in Sri Lanka had been deemed to exist. Accordingly, the Court held that the form of the proclamation appeared to be defective.[524] However, according to Thamotheram J., the form alone did not matter. The important question was whether the President in fact acted on his opinion or on the advice of the Prime Minister. In an extraordinary interpretation of the facts, the Court *presumed* this to be the case and held that it was satisfied that the President has not acted on his opinion alone. Hence, the indictment was not to be treated as defective vitiating the charge against an accused person. It was opined:

> We have to look to the substance and not to the mere form. This court cannot declare that the emergency regulations are invalid merely because the old form was used, when it is satisfied as a fact that the President has acted constitutionally on the advice of the Prime Minister and correctly called into operation Part II of the Public Security Ordinance. Despite the fact that there was a failure to declare a state of emergency as required by 134(2) and that the form was an old form, the validity of the regulations have not been affected.[525]

Samarawickreme J. delivered a separate judgement in S.C. Application No.650 of 1976, by which the High Court's decision to acquit the accused was being challenged. The High Court had held that two conditions stipulated in Section 134(1) of the 1972 Constitution had to be met before the PSO could be deemed a law

---

[523] *Ibid.* at 70.
[524] *Ibid.*
[525] *Ibid.* at 71-72.

enacted by the NSA. First, the provisions of the Constitution must be satisfied. Second, the provisions of subsection 2 of the Section 134 must be complied with.[526] Samarawickreme J. rejected this reasoning and observed that in the Constitution, there is a total absence of any provisions relating to the mode of making and publishing a declaration of a state of emergency, its duration, its communication to the Parliament or its express effect of vesting any law making power. In view of this framework, the Court was of the opinion that Section 134(2) of the Constitution did not provide for 'a substantive declaration of a state of emergency and only refers to the occasion when it is incumbent on the President to make a declaration of a state of emergency provided for elsewhere.'[527] The relevant provisions for declaring a state of emergency were instead found in the law for the time being relating to public security—the PSO. Accordingly, it was held that Section 2 of the PSO empowers the President to make a declaration of a state of emergency when it is thought that any of the special conditions arising out of the existence or imminence of a state of public emergency referred to in that provision render it expedient to do so. The effect of the declaration, it was held, was that the President was vested with extraordinary lawmaking powers.[528]

Samarawickreme J. also examined the High Court's view that the PSO remained dormant until it was activated, and that it became a law deemed to be enacted by the NSA subject to the provision of the Constitution and sub-section 2 of Section 134.[529] Counsel for the defence argued that a proclamation by the President was insufficient as a declaration of a state of emergency under Section 134(2). The Court rejected this by once again reverting to the position that Section 134(2) did not provide for a substantive declaration of an

---

[526] Order of Samarawickreme J. delivered a separate judgement in S.C. Application No.650 of 1976, at 5.
[527] *Ibid.* at 26.
[528] *Ibid.* at 27.
[529] *Ibid.* at 30.

emergency.[530] Samarawickreme J. and Thamotheram J. concurred that the proclamation should have contained a reference to Section 134(2), as it stipulated conditions upon which a proclamation could be made.[531] However, the failure to refer to the Section did not affect the validity of the proclamation. Hence it was concluded that the findings of the High Court, that there was no valid declaration of a state of emergency and that consequently the ERs have no sanctity or validity in law, were erroneous.[532] Accordingly, the matter was sent back to the High Court for trial. Amirthalingam was subsequently acquitted by the High Court. The political context of the case rapidly changed with the impending general elections of 1977, at which the TULF subsequently secured a large portion of the Tamil vote. Amirthalingam eventually became Leader of the Opposition.

Despite the eventual outcome of the case, the infamous 1976 Supreme Court decision reversing the initial High Court acquittal set an extraordinary precedent. This was clearly a contentious case involving an individual who had openly campaigned for a separate state. Whether he had a democratic right to do so through non-violent means was never considered by the Court. Admittedly, this question was not before the Court; only the question of whether the ERs under which he was arrested and tried were valid. However, in dealing with the latter question, the Court deferred to the executive.

The High Court initially sought to procedurally resolve the issue by holding that the ERs had not been passed in accordance with the Constitution. This view gave the Supreme Court a fairly straightforward avenue through which it could have upheld the individual rights at stake without coming into direct conflict with the executive. In fact, both judges of the Supreme Court were in agreement that the President's proclamation was procedurally

---

[530] *Ibid.* at 34.
[531] *Ibid.* at 33.
[532] *Ibid.* at 44.

defective. Yet, both judges were willing to go beyond the letter of the law—in this case, the Constitution—in order to deem the ERs valid. It is perhaps for this reason that the ruling may be regarded as extraordinary in its deference to the executive.

1.2.3.3 The emergence of a new dispensation

The Court in *Hidramani v. Ratnavale*[533] and *De Saram v. Ratnayake*[534] before it, was extremely cautious to ground its reasoning on a strict interpretation of the law. In *De Saram*, the Court differentiated between the accused based on somewhat tenuous procedural grounds i.e. the accused became entitled to certain rights only on the invocation of the Court's jurisdiction. Problematic as this ruling might have been, the distinct positivism in the thinking of the Court was unmistakable. In *Hidramani*, the Court was more speculative as to the good faith of the state. However, in this case too, the Court did not venture beyond a literal reading of the provisions of the PSO. This 'positivist-literalist' trend was clearly departed from in *Amirthalingam's case*.[535] The Court in this case opted for a purposive interpretation of the provisions of the Constitution to *enable* rather than *check* the executive's seemingly unconstitutional actions. Despite acknowledging a defective proclamation, the Court opted to place substance over form to support the view that the executive had acted constitutionally. Should a Court bound to protect individual rights and check the exercise of unfettered power against such individual rights be applying a purposive approach to interpretation, which results in the restriction of individual rights? In doing precisely this, the Supreme Court turned its back on minority political rights and set the future stage for a highly polarised political discourse.

---

[533](1971) 75 NLR 67.
[534](1962) 63 NLR 522.
[535]High Court Trial-at-Bar No 1 of 1976, S.C. Application No.658 of 1976 and S.C. Application No.650 of 1976.

2. The Counterterrorism Era

2.1 The New Framework for Public Security

2.1.1 The 1978 Constitution

The conception of public security and the system that sustained it were overhauled in 1978. At the very inception, a tension between rights and security emerged within this new framework.

On the one hand, the 1978 Constitution specifically provides for an emergency regime by affording constitutional protection to the PSO. Article 155 of the Constitution deals with the subject of public security and provides that the PSO as amended and in force immediately prior to the commencement of the Constitution 'shall be deemed to be a law enacted by Parliament.' Since Article 80(3) of the Constitution precludes any challenge to the validity of an enactment of Parliament, the PSO cannot be challenged for its lack of compatibility with the Constitution. In this context, the textual ambiguities that plagued the Supreme Court in the *Amirthalingam case* appeared to have been neatly resolved through clearer language.

On the other hand, the new Constitution also includes a Fundamental Rights Chapter that guarantees a number of justiciable fundamental rights, including the freedom from arbitrary arrest and detention. Article 13(1) states that no person shall be arrested 'except according to procedure established by law' and that all persons arrested 'shall be informed of the reason for arrest.' Article 13(2) states that every person held in custody 'shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.' Article 17 provides that every person shall be entitled to apply to the Supreme

Court in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of the Fundamental Rights Chapter. Thus many subsequent landmark cases dealing with ERs happen to be fundamental rights cases. Some of these decisions are discussed in greater detail below.

Interestingly, this new rights chapter constitutionally brought the judiciary into the fray as the arbiter of the tension between rights and public security. In this context, the Constitution appeared to have provided a solution of sorts to the problem that it had created by constitutionalising the public security regime. In fact, Article 155(2) of the Constitution unequivocally states that the power of the President to make ERs under the PSO does not override the provisions of the Constitution, ostensibly inclusive of the chapter on fundamental rights. Article 155(2) provides:

> The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.

Hence it would appear that ERs cannot override the Fundamental Rights Chapter of the Constitution, though perhaps certain restrictions under Article 15(7) may be permitted. Yet, as discussed in this part of study, this solution relied on the establishment and maintenance of an independent judiciary, which evidently never quite transpired. In this context, the envisaged framework was undermined—strangely through the Constitution itself.

2.1.2 The Prevention of Terrorism Act

Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 was introduced by the then government as a *temporary* measure to deal with a particular phenomenon it viewed as a threat to the state. The preamble to the Act is fascinating, and remains one of the least discussed facets of the history of security laws in Sri Lanka. The preamble reads:

> WHEREAS public order in Sri Lanka continues to be endangered by elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, *accomplishing governmental change within Sri Lanka*, and who have resorted to acts of murder and threats of murder of members of Parliament and of local authorities, police officers, and witnesses to such acts and other law abiding and innocent citizens, as well as the commission of other acts of terrorism such as armed robbery, damage to State property and other acts involving actual or threatened coercion, intimidation and violence (emphasis added).

The intentions of the Act were clear. The Act aimed to preserve the *status quo* in terms of existing governmental structures. From a plain reading of the preamble, advocating 'the use of force' or 'the commission of crime' as a means of achieving this end, i.e. 'accomplishing governmental change in Sri Lanka', appears to be a prerequisite to labelling an act as an 'act of terrorism'. Moreover, the persons concerned must have 'resorted to' acts of murder or threats of murder, or any other act such as armed robbery, or damage to state property in order to fall within the scope of the Act. Thus there are at least three limbs to the scope of the Act and all these limbs must be satisfied in order for a person to come within the broad parameters of the Act. What is evident from the application of the PTA, however, is that the preservation of government was the overarching goal of public security laws—not the prevention of violence or the protection

of 'law abiding and innocent citizens'. Hence, even when the persons concerned fell within a broader framework of threatening the government and the prevailing power structures, they were quickly subsumed by the public security framework. The case of *Tissainayagam* and Sarath Fonseka's *White Flag case* discussed later in this study are both cases in point.

When the Prevention of Terrorism (Temporary Provisions) Bill was first tabled in Parliament, it was not perceived as a means of targeting minority groups. Interestingly, not even the TULF sought to forcefully challenge its enactment. The Bill was described as 'urgent in the national interest' and its enacted was expedited under Article 122 of the Constitution. Accordingly, the Supreme Court was afforded a mere twenty-four hours within which to determine on the constitutionality of the Bill.

As mentioned above, the new constitutional framework under the 1978 Constitution created a tension between rights and security and appointed the judiciary as the arbiter of this tension. The tension was originally conceived as a result of the constitutionalising of the PSO. However, with the introduction of the new PTA Bill, a new tension was created. Once again, the Court was the arbiter.

When the PTA Bill was referred to the Supreme Court, it was informed that the Cabinet had decided to pass the Bill with a two-thirds majority.[536] This was a significant move, as it foreclosed judicial scrutiny of the Bill in respect of its consistency with non-entrenched provisions of the Constitution. In terms of Article 84 of the new Constitution, any Bill could become law despite any inconsistency with constitutional provisions. If these provisions were entrenched provisions of the Constitution, such as Article 3, the impugned Bill would need to be enacted by a special, i.e. two-thirds, majority in Parliament *plus* a referendum. However, inconsistency

---

[536] See S.C. S.D No. 7/79, decided on 17 July 1979.

with any other provision of the Constitution was unproblematic, as it only meant that the Bill in question would need a two-thirds majority in Parliament. By specifically informing Court that the Bill in question would be passed by a special majority, any inconsistency with the Fundamental Rights Chapter of the Constitution became beyond the pale of judicial scrutiny, as the Chapter was not specifically entrenched. Hence the Court did not have to decide whether or not any of those provisions constituted 'reasonable restrictions' on Articles 12(1), 13(1) and 13(2), permitted by Article 15(7).[537] The only question before Court was whether the Bill was inconsistent with any entrenched provisions of the Constitution. In answering this question, the Court determined that the Bill did not require a referendum to be passed, as it was of the view that the Bill did not repeal or amend any entrenched provision in the Constitution. The PTA, passed with minimal fuss, was to become of the most draconian pieces of legislation to be passed by a Sri Lankan legislature. Initially intended as a 'temporary' measure, the Act was made permanent in 1981.[538] The International Commission of Jurists went on to describe the Act in the following terms:

> No legislation conferring even remotely comparable powers is in force in any other free democracy operating under the Rule of Law... such provision is an ugly blot on the statute book of any civilized country.[539]

---

[537] Article 15(7) of the Constitution provides: 'The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security. 'It is noted that the terms 'national security' is introduced into the discourse as an alternative to 'public security', while 'public order' is used to describe a state of stability and law abidance.

[538] Act No.30 of 1981.

[539] International Commission of Jurists, *Sri Lanka: A Mounting Tragedy of Errors* (1984).

After more than three decades of emergency rule, with only a short break during the initial operation of the ceasefire agreement, the PTA was instrumental in the suppression of individual rights. The specific impact on minorities is demonstrably seen in the spate of cases brought under the PTA during this period.

2.1.3 New Emergency Regulations

During the late 1970s and the decade that followed, the promulgation of ERs was mainly in response to acts of 'terrorism' by militant groups most of whom sought a separate state in the North and East of the country. The historical context of emergency acquired a high level of complexity following the advent of 'terrorism' in the country. Hence much of the subsequent discussion in this study must be understood in light of the government's concerted efforts to combat 'terrorism'.

This subsection deals with the emergency regime during the late 1970s and the 80s and thereafter the period leading up to the ceasefire agreement in 2002, when for a brief three-year period, the state of emergency in the country was lifted, largely owing to a Ceasefire Agreement between the government and the LTTE. However, following the assassination of Foreign Minister Lakshman Kadirgamar in 2005, the new ERs of 2005 were introduced.[540] Moreover, the *9/11* attacks and the 'global war on terror' certainly strengthened the rhetorical position of the government with respect to its own counterterrorism agenda. The 2005 ERs, and subsequent additions such as the 2006 ERs,[541] remained largely in force even after the end of military operations in May 2009.

---

[540]Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005.
[541]The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006.

The new Regulations had a distinct impact on minority rights protection. This impact was both substantive and procedural and served to undermine the role the judiciary could play in safeguarding individual rights. The new framework systematically eroded the usual safeguards designed to protect against abuse—such as the right to be produced before a judicial officer within twenty-four hours of arrest, and the inadmissibility of confessions made to a police officer. Regulations 19 and 20 of the 2005 ERs gave the armed forces powers of search, seizure, arrest and detention without warrant; police powers in dealing with prisoners; and the power to question a person in detention. These provisions, extensively analysed elsewhere,[542] established a framework through which the executive could, if it so wished, target persons and groups that threatened power structures.

Yet the 2005 ERs had another overarching feature that betrayed its orientation towards regime perpetuation. Regulation 33 states:

> Whoever without lawful authority or reasonable excuse, the proof whereof shall lie on such person, has in his possession, custody or control, any book, document or paper containing any writing or representation which is likely to be prejudicial to the interests of national security or to the preservation of public order or which is likely to arouse, encourage or promote feelings or hatred or contempt to the Government or which is likely to **incite any person directly or indirectly to take any step towards the overthrowing of the Government, shall be guilty of an offence** (emphasis added).

This expansion of the scope of the public security doctrine, i.e. from commission of violent acts to even passive and indirect acts aimed at overthrowing the government, revealed a distinct agenda to construct public security around preservation of the government, rather than

---

[542]Niran Anketell & Gehan Gunatilleke, *Emergency Law in the Context of Terrorism*, South Asians for Human Rights (2012).

preservation of law and order. The 'government' was now to be considered synonymous with the 'state'.

Other features of the PSO were also used throughout the period of emergency and also beyond it to suppress minorities. Section 12(1) of the PSO gives the President the power to call out the Armed Forces to maintain public order where he believes circumstances endangering public security have arisen in any area, or is imminent, and he believes the police are inadequate to deal with the situation. Upon the making of such an order, the armed forces are vested with the same powers of the police including the powers of search and detention. Even after the lapse of emergency in August 2011, the President has consistently called out the armed forces every month by way of Proclamation under Section 12 of the PSO. Such a Proclamation has legitimised the continued militarization of the country, particularly the North and East.

2.2 Judicial Responses to Counterterrorism

This section examines public security jurisprudence during the period between 1979 and 2009. Two aspects of the jurisprudence is analysed in some detail.

The first aspect concerns the judiciary's general approach to public security during the period. The cases discussed under this head mostly involve individuals arrested and detained under ERs or the PTA due to their involvement with the JVP or for carrying out other activities aimed at overthrowing or at the very least weakening the government. The JVP had launched its second insurrection in 1987 following the deployment of the Indian Peacekeeping Forces and the rise of Tamil separatism. The insurrection aimed to violently overthrow the United National Party government. During the two years in which the insurrection lasted, members of the JVP were allegedly responsible

for several acts of violence against civilians and civilian targets.[543] In this context, the insurrection fell well within the ambit of unlawful activities described under the PTA.

The second aspect involves the judiciary's approach to cases concerning individuals accused of being part of the Tamil militant struggle for a separate state. These cases have a distinct ethnic dynamic, as the individuals either arrested and detained, or prosecuted under public security laws happen to be Tamil. The two groups of cases are compared and contrasted for the purpose of highlighting the gradual emergence of race-consciousness within the judiciary during this period.

2.2.1 The judiciary's general approach to public security matters

This section of the study examines the judiciary's general approach to balancing public security considerations with the individual rights at stake. In some of the cases discussed below, judges have demonstrated a willingness to check the executive through progressive thinking. While these cases demonstrate the judiciary's capacity to apply objective reasoning in favour of individual rights, such progressive thinking was limited to cases that did not involve members of the minority community labelled as 'terrorists' by the administration. Hence the courts, at no point, sought to challenge the rhetoric of counterterrorism that had emerged during this period.

2.2.1.1 Susila de Silva v. Weerasinghe[544]

This case was a *habeas corpus* application in respect of a 47-year-old journalist and translator. The police took the journalist into custody in

---

[543] See Rohan Gunaratna, *Sri Lanka's Ethnic Crisis and National Security*, South Asian Network on Conflict Research (1998), at 353.
[544] [1987] 1 Sri L.R. 88.

1985. They alleged that they had received information that he was the secretary of the Samajawadi Janatha Viyaparaya, which is affiliated to the JVP, and that he was concerned in inciting persons to commit prohibited acts under the Emergency Regulations No. 8 of 1985.[545] Subsequently, the Minister of National Security issued detention orders under the PTA against the journalist.[546]

The petitioner, the wife of the detained journalist, contended that the police officer making the arrest had no firsthand knowledge of the detainee's alleged involvement in subversive activities. It was thus argued that the arrest was unlawful.

The Court of Appeal, however, rejected the petitioner's contention, and held that there was no such requirement to have firsthand knowledge, as knowledge may be acquired from the statements of others in a way that justifies a police officer giving them credit.[547] The Court concluded that the detention orders were lawfully made and that there was no reason to hold that they were motivated by malice or made for a collateral purpose.[548]

Yet the Court did not consider how the authorities formulated an opinion against the detainee in the first place. It is possible to argue that public disclosure of the information based on which the authorities had acted could be prejudicial to public security.[549] Yet the Court ought to have required such material to be disclosed at least *in*

---

[545] *Ibid.* at 89.

[546] *Ibid.* at 90. See section 9 of PTA, as amended by Act No. 10 of 1982.

[547] [1987] 1 Sri L.R., at 93 citing *Nanayakkara v. Henry Perera* [1985] 2 Sri L.R. at 383. Also see Pinto-Jayawardena & de Almeida Guneratne, *op. cit.* at 75. The authors posit that this position remains contrary to the principle later enunciated in *Sunil Rodrigo (On Behalf of B. Sirisena Cooray) v. Chandananda De Silva and Others* (1997) 3 Sri.L.R. 265. According to the later case, the Defence Secretary is required to place material before the Supreme Court to justify his actions in arresting and detaining a person.

[548] [1987] 1 Sri L.R., at 94.

[549] See Pinto-Jayawardena & de Almeida Guneratne, *op. cit.* at 75.

camera in order to assess whether the authorities had acted objectively.[550] The Court instead chose to defer to the opinion of the authorities, thereby relinquishing its responsibility to test the reasonableness of executive and administrative action.

This case represents early judicial attitudes to the question of political dissent in the context of emergency. The distinction between movements that came within the southern anti-government frame and those that fell within the counter-terrorism frame had not crystallised at this juncture. Hence the judiciary appeared to treat both types of cases with equal caution and displayed a high level of deference towards the executive.

2.2.1.2 Dhammika Siriyalatha v. Baskaralingam[551]

In this case, the police arrested a 37-year-old vegetable salesman without stating reasons and thereafter detained him without charges. The wife of the detainee filed an application for a writ of *habeas corpus* claiming that the arrest and detention had been orchestrated for a collateral purpose. It was contended that her husband had refused to testify in a criminal case where several accused had been indicted under the PTA.

The respondents justified the arrest and detention by referring to the provisions of Section 9 of the PTA, i.e. that the Defence Secretary had formed an opinion that 'he had reason to believe or suspect' that the detainee was 'connected with or concerned in unlawful activity.' It was also argued that the opinion formed in pursuance of ERs was beyond the scope of judicial review due to the operation of Section 8 of the PSO[552] and Regulation 8 of the applicable ERs.[553] The Court of Appeal noted that Regulation 17(1)(a) of the ERs provided:

---

[550] *Ibid.*
[551] C.A. (H.C.) 7/88, Court of Appeal Minutes, 7 July 1988.
[552] Section 8 of the PSO provides: 'No emergency regulation, and no order, rule or direction made or given there under shall be called in question in any court.'

> Where the Secretary to the Ministry of Defence is of the opinion with respect to any person that; with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of essential services it is necessary to do so; the Secretary may make order that such person be taken into custody and detained in custody.

In a somewhat unprecedented interpretation of these provisions, the Court noted that an 'objective state of facts' should prevail upon the authority before he is satisfied that issuing a detention order was necessary. The Court opined:

> The objective state of facts should render it 'necessary' to detain the person. The required objective state of facts is revealed, if the question is posed, why is it necessary to detain this person? The answer lies in the component 'with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of essential services'. Therefore, the objective state of facts must be such that if the person is not so prevented, he is likely to sit in a manner prejudicial to the national security or to the maintenance of the essential service. The existence of the objective state of facts can be deduced from the conduct of the person proximate from the point of time. Conduct in the wider sense of, is referable to acts done, words spoken, behaviour and association with others of that person, as coming to the knowledge of the Secretary (*sic.*).[554]

The Court also rejected the contention that both the PSO and the ERs ousted its jurisdiction, holding that '[i]t is now a well-accepted proposition of law that similar clauses do not apply where the

---

[553] This Regulation has the same effect as section 8 of the PSO.
[554] *Ibid.*

impugned order is illegal.'[555]The Court accordingly upheld the claims of the petitioner and declared the arrest and detention of the detainee to be illegal.

The case has been described as an 'admirable precedent' as far as the scope and availability of the writ of *habeas corpus* under the present Constitution are concerned.[556] However, two limitations remain in terms of the precedent that the case might offer. First, a judgment of the Court of Appeal is not binding on the Supreme Court. Hence there is nothing to suggest that the Supreme Court, when scrutinising a detention order while exercising its fundamental rights jurisdiction will be persuaded by the decision in *Dhammika Siriyalatha's case.* The case does, however, depart from the Court of Appeal decision in *Susila de Silva's* case discussed above. Second, the case did not involve a 'terrorist suspect' allegedly connected to the LTTE but merely a person from the majority community who was seen as uncooperative in ongoing investigations against persons suspected of committing offences under the PTA. As mentioned above, a distinction between Southern anti-government activities, and Tamil 'separatists' activities were slowly emerging in the discourse. In the present case, the Court of Appeal, therefore, was not hamstrung by considerations counterterrorism in the same manner it would have been in cases involving Tamil persons. Accordingly, the precedent set by *Dhammika Siriyalatha's case* is weak and fails to indicate any real commitment by the judiciary to uphold minority rights in the face of serious public security concerns.

2.2.1.3 Dissanayaka v. Superintendent Mahara Prison[557]

This case involved the arrest and detention of a university undergraduate suspected of committing offences under the PTA. At the time of his arrest the petitioner was an undergraduate in the

[555] C.A. (H.C.) 7/88, per Justice Sarath. N. Silva (as he was then).
[556] See Pinto-Jayawardena & de Almeida Guneratne, *op. cit.* at 76.
[557][1991] 2 Sri.L.R. 247

Faculty of Agriculture of the Peradeniya University. After his arrest, he was kept at the Galnewa Police Station and thereafter sent to the Boossa Detention Camp in terms of an order under Section 9(1) of the PTA.[558] On 12 February 1990, he was brought before the High Court of Colombo, in case No. 4068/89 and charged with possessing a gun and a cartridge. He was then remanded to Fiscal Custody at the Mahara Prison.[559]

Prior to being remanded, the petitioner submitted a complaint dated 26 December 1989 addressed to the Chief Justice regarding the conditions of his detention at the Boossa Detention Camp. Pursuant to this complaint, the Supreme Court afforded him the opportunity of filing a formal application for relief against the alleged infringement of his fundamental rights by reason of his arrest and detention. The petitioner also alleged that, prior to being remanded, he was blindfolded, assaulted and detained in a lavatory by the police.[560]

The Court also considered the account presented by the police, according to which the police had arrested the petitioner on 4 April 1989 and had found a gun and a cartridge in his possession.[561] Moreover, on 25 April 1989, an Assistant Superintendent of Police recorded a statement of the petitioner in terms of Section 16 of the PTA, in which the petitioner allegedly 'confessed' to joining the JVP in December 1988 and engaging in political activities in Galnewa.[562] Hence the petitioner was characterised as an insurrectionist, although even in his confession, he maintained that we was not involved in militant activity.[563]

---

[558] *Ibid.* at 250.

[559] *Ibid.* It is noted that the accused was originally suspected of involvement in a robbery of a roneo machine and a typewriter from the Galnewa Provincial Council Office, a triple murder on 15 February 1989, intending to cause violence to one Jayawardena and possession of a gun and a cartridge.

[560] *Ibid.* at 250.

[561] *Ibid.* at 252.

[562] *Ibid.* at 254.

[563] *Ibid.*

The petitioner, however, consistently maintained that he was arrested on 8 March 1989, which, according to the Court, was well supported by the affidavits of his parents, the extract from the *Divaina* newspaper and the affidavit of Mahinda Abeykoon, M.P. Kulatunga J., delivering the opinion of the Court, opined that the contents of the affidavits relied upon by the petitioner appeared to be 'intrinsically true'.[564] The petitioner also alleged that although the detention order dated 6 April 1989, directed his detention at Boossa, he was kept in continued detention at the Galnewa Police Station until 23 May 1989. The state alleged that there was inadequate security in Boosa until 23 May 1989, which had led to this decision.[565] The state also claimed that the place of detention mentioned in the detention order was only directory and that the continued detention of the petitioner at Galnewa was not unlawful.[566] However, the Court disagreed with this position and maintained that the place of detention and conditions thereof were mandatory, and 'non compliance cannot be excused save on exceptional grounds such as impossibility in giving effect to it'.[567]

Next, the Court considered the lawfulness of the petitioner's detention. It was noted that the primary purpose of detention under Section 9 of the PTA is to facilitate further investigation and interrogation of suspects.[568] Section 9, therefore, is not intended merely as a negative form of preventive detention, nor is it intended to be a punishment.[569] The Court drew an important distinction between investigative detention, authorised under the PTA, and preventive detention, usually authorised under ERs. It was reiterated that detention in aid of investigation would be strictly adjudged by the application of an objective test as opposed to the subjective test

---

[564] *Ibid.* at 258.
[565] *Ibid.*
[566] *Ibid.* at 259.
[567] *Ibid.*
[568] *Ibid.*
[569] *Ibid.* at 260.

applicable to preventive detention.[570] Since the petitioner was detained under Section 9 of the PTA, the question before Court was whether the entire period of his detention on extensions up to 12 February 1990 could be justified by the application of the objective test. The Court carefully considered the various averments made before it and concluded that the state had not disclosed any information on investigations conducted after 25 September 1989. Hence it was held that the Minister had exercised his power under Section 9 of the PTA merely to impose 'a negative form of preventive detention' or as a mere matter of expediency.[571] Hence, detention after this date was held to be 'an unwarranted exercise of statutory power which is *ultra vires* the enabling provisions of the law.'[572]

The Court did not order the release of the petitioner given the pending trial. However, it held that the petitioner's detention from 8 March 1989 to 25 May 1989 (in the Galnewa Police Station) and thereafter from 25 September 1989 to 12 February 1990 (in Boossa) constituted an infringement of his fundamental rights under Article 13(2) of the Constitution.[573] It accordingly directed the state to pay him a sum of Rs.14,000 as compensation.[574]

---

[570] *Ibid.* The Court cited authorities including *Senthilnayagam v. Seneviratne* [1981] 2 Sri.L.R. 187, 208, *Somasiri v. Sub Inspector Jayasena*.SC Application No. 147/88, SC Minutes of 1 March 1991 and *Wickremabandu v. Cyril Herat* [1990] 2 Sri.L.R. 348. Citing the latter case, the Court noted that, even in the case of a preventive detention order under Emergency Regulations made upon the subjective satisfaction of the Secretary/Defence, the power to make the order is not unfettered and that the test of reasonableness in the wide sense applies.

[571] *Ibid.* at 262.

[572] *Ibid.*

[573] *Ibid.*

[574] *Ibid.* at 264.

2.2.1.4 The Joseph Perera case[575]

This case involved the arrest and detention of three persons under Emergency (Miscellaneous) (Provisions & Powers) Regulation No. 6 of 1986during the lead up to the second JVP insurrection. The persons involved filed separate fundamental rights applications, which were heard together by the Supreme Court. Joseph Perera, the petitioner in application No. 107/86 claimed that that he was a member of the Revolutionary Communist League, and the organiser of the 'Young Socialist' movement in Chilaw. The Revolutionary Communist League, a political party, organised a lecture in Chilaw on 26 June 1986 on the proposed topic 'Popular frontism and free education'. It was to be delivered by L. D. Wijegunasinghe, a one-time lecturer in history at the University of Colombo, who was the petitioner in Application No. 109/86.[576] Two days prior to the meeting, Joseph Perera distributed to the public posters advertising the lecture and certain pamphlets.[577]

According to the petitioners, before the commencement of the lecture, a police party arrived, dispersed the audience and took into custody Joseph Perera, his brother Lorenz Perera, and L. D. Wijegunasinghe.[578] It was later revealed during judicial proceedings that on the morning of 26 June 1986, the police had received two complaints from two 'responsible' persons, namely, the Principal of St. Mary's College, Chilaw, and the Vice Principal of Ananda College, Chilaw, to the effect that a meeting was to be held with 'a view to creating unrest among the students in the area'.[579] The Principal of St. Mary's College also informed the police that he had received a warning letter on 23 June 1986 signed by 'Eelam Tigers' threatening

---

[575] *Joseph Perera Alias Bruten Perera v. The Attorney-General and Others* [1992] 1 Sri.L.R. 199.
[576] *Ibid.* at 206.
[577] *Ibid.*
[578] *Ibid.* at 209.
[579] *Ibid.* at 232.

to blow up the school. The Principal coupled this threat with the proposed meeting.[580]

A detention order was served on the three petitioners on 27 June 1986, and they were held at the Chilaw Police Station until 15 July 1986. The respondents sought to justify the arrest and detention on the basis of powers vested in the police by Regulations 18 and 19 of the ERs. The petitioners were detained on the basis that 'they had committed or were suspected to have committed an offence under Emergency Regulations 26(a) and 26(d) and 33 of the Emergency Regulations.'[581] The Magistrate thereafter ordered the petitioners to be remanded until 29 July 1986. The remand order was extended until 25 August 1986. However, the petitioners were released on bail on 7 August 1986.[582]

Since the questions involved in the three applications were of constitutional importance, a Divisional Bench of five Judges of the Supreme Court was constituted in terms of Article 132(3) of the Constitution. Four separate opinions were delivered by the Court.

---

[580] *Ibid.*

[581] *Ibid.* at 210. The relevant regulations state:

26. Any person who by words, whether spoken or written or by sign or visible representations or by conduct or by any other act -

(a) brings or attempts to bring the President or the Government into hatred or contempt, or excites, pr incites or attempts to excite or incite feelings of disaffection to, or hatred or contempt of the President or the Government; or

(d) raises or creates or attempts to raise or create discontent or disaffection among the inhabitants or Sri Lanka or any section, class or group of them, shall be guilty of an offence ...

33. Whoever without lawful authority or reasonable excuse, the proof whereof shall lie on such person, has in his possession, custody or control, any book, document or paper containing any writing or representation which is likely to be prejudicial to the interests of national security or to the preservation of public order or which is likely to arouse, encourage or promote feelings of hatred or contempt to the Government or which is likely to incite any person directly or indirectly to take any step towards the overthrowing of the Government shall be guilty of an offence.

[582] *Ibid.* at 209.

L. H. de Alwis J. opined that, 'on the completion of the investigation into this complaint by 15 July 1986, no offence under the Emergency Regulations could have been disclosed and the petitioners were entitled to be released from detention.'[583] However, he maintained that the original arrest on 26 June 1986 was in fact legal. Two other judges, Seneviratne J. and Wansundera J., agreed with this position. Seneviratne J., in his separate concurring opinion pointed to the wording in Regulation 18(1), which states:

> Any police officer arrest [may] without a warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any Emergency Regulation.

In the view of the majority of the Court, the initial arrests fell within the ambit of such reasonable grounds for suspicion and were hence lawful. Sharvananda C.J., with Autkorale, J. agreeing, differed with the majority by holding that even the initial arrest was unlawful. It was held that the pamphlets that led to the arrests of the petitioners needed to be scrutinised to determine whether they justified a reasonable suspicion. The respondents alleged that the pamphlets contained material which 'would have brought the Government into hatred and contempt in the eyes of the people.'[584] Sharvananda C.J., however, concluded that scrutiny of these documents did not demonstrate that they contain 'any objectionable matter from which it would be possible for any reasonable man to draw the conclusion that the petitioners had committed or attempted to commit offences under Regulations 26(a) and/or (d) and Regulation 33 and that it was necessary to arrest or keep them in detention.' [585] Accordingly, Sharvananda C.J. held that even the initial arrests were unlawful, as he

---

[583] *Ibid.* at 246.
[584] *Ibid.* at 220.
[585] *Ibid.*

was prepared to apply an objective standard with respect to the basis on which reasonable suspicion arose as a prerequisite for the arrests.

The majority of Court concluded that the respondents could only be faulted for the unlawful detention after 15 July 1986. It was held that in deciding on the validity of the arrest, the sole issue for the Court was 'the knowledge and state of mind of the officers concerned at the time of making the arrest.' [586] Considering the fact that two 'responsible' persons had made complaints, it was opined that a mere reasonable suspicion or a reasonable complaint of the commission of an offence sufficed in justifying the initial arrest.[587]

Yet, given that the pamphlets could not be reasonably characterised as subversive literature, the majority held that, on completion of investigations by 15 July 1985, no offence under the ERs could have been disclosed and detention after this date was illegal. [588] Accordingly, the Court ruled that each petitioner be paid Rs. 10,000 as compensation.

2.2.1.5 Ratawesi Peramuna Case[589]

This case involved the arrest of ten persons who were members of an anti-government movement named *Ratawesi Peramuna*. One of the senior members of the group, who was amongst those arrested, was the current Minister of Technology, Research and Atomic Energy, Champika Ranawake. The arrested persons subsequently filed ten fundamental rights applications, which were by consent considered together. They alleged infringements of their rights guaranteed by Articles 11, 13(1), 13(2), 14(1)(a) and 14(1)(c) of the Constitution.

---

[586] *Ibid.* at 236, as per Wanasundera J.
[587] *Ibid.*
[588] *Ibid.* at 238.
[589] *Channa Pieris and Others v. Attorney General and Others* [1994] 1 Sri.L.R 1.

The organisation was established in November 1991 under the leadership of Atureliya Rathana, one of the petitioners.[590] Rathana convened a meeting at the Kawduduwa temple on 27 February 1992 to discuss, amongst other things, the resurgence of the JVP and a new manifesto introduced by Champika Ranawake.[591] On an anonymous telephone call received at the Wadduwa Police Station that a meeting of the JVP was being held the police visited the temple and listen to the proceedings of the meeting while it was being held behind closed doors.[592] The police made notes of the discussions that were taking place and formed the opinion that the participants were engaged in a conspiracy to overthrow the government. The police thereafter arrested the suspects and detained them at the Wadduwa Police Station purportedly under Regulation 18 of the prevailing Emergency Regulations.[593]

The Supreme Court held that, despite the fact that rights guaranteed by Articles 12, 14(1)(h) and 14(1)(g) of the Constitution were not violated, the freedom from arbitrary arrest, guaranteed under Article 13(1), had in fact been violated. It was found that detention orders had been formally issued in respect of only two of the ten petitioners.[594] Amarasinghe J., delivered the opinion of the Court and opined that 'it is incumbent on the person making the arrest to precisely indicate the procedure under which the arrest was made.'[595] It was further held that a detention of a person in pursuance of Regulation 18 must be in a place authorised by the Inspector-General of Police or Deputy Inspector-General of Police, Superintendent of Police or Assistant Superintendent of Police. Accordingly, the detentions of eight of the

---

[590] *Ibid.* at 17.
[591] *Ibid.* at 19-20.
[592] *Ibid.* at 20.
[593] *Ibid.* at 21. See Regulation 18(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989.
[594] *Ibid.* at 29.
[595] *Ibid.*

petitioners were held to be unlawful and amounting to violations of Article 13(1) of the Constitution.[596]

The most significant element of the judgement, however, was its characterisation of the *Ratawesi Peramuna* as 'an anti-government organisation'. The Court had no qualms about this characterisation and was not for a moment deterred from upholding the individual rights at stake. Amaransinghe J. opined: '[l]egitimate agitation cannot be assimilated with incitement to overthrow the Government by unlawful means.'[597] The Court even went on to make this seemingly progressive observation:

> The call to "topple" the President or the Government did not mean that the change was to be brought about by violent means. It was a call to bring down persons in power by removing the base of public support on which they were elevated. If the throwing down was to be accomplished by democratic means, the fact that the tumble may have had shocking or traumatic effects on those who might fall is of no relevance. It is the means and not the consequence that have to be considered.[598]

The Court was hence willing to ascribe to the ERs a purpose that was far more restrictive than the broad purposes that would be later seen:

> The obvious purpose of Regulation 23 (a) is to protect the existing government not from change by peaceable, orderly, constitutional and therefore by lawful means, but from change by violence, revolution and *terrorism*, by means of criminal force or show of criminal force (emphasis added).[599]

---

[596] *Ibid.*
[597] *Ibid.* at 35.
[598] *Ibid.* at 37.
[599] *Ibid.* at 38-39.

This study will later examine cases under the 2005 ERs and the manner in which Amerasinghe J's interpretation of ERs *vis-à-vis* democratic rights eventually became undetectable in later jurisprudence. The reasons for the deterioration of the Court's willingness to check executive power are discussed at length later in this study. But certain clues in terms of the trajectory the judiciary would follow lie within the *Ratawesi Peramuna* case itself. The petitioners in this case clearly benefitted from a Courtthat was somewhat sympathetic to democratic movements seeking to exercise their legitimate rights to oppose and criticise the government. However, the Court was making a decision that was outside the emerging counterterrorism rhetoric, which by 1994 had taken full form. The caveat of 'terrorism' found in the Court's observation on the purpose of the ERs is therefore significant. While at the time 'terrorism' was interpreted to mean violence of some nature, which necessarily excluded the petitioners in the case, this caveat would eventually become open to wider interpretation in years to come. And thus, as discussed later in this study, the terminology of 'terrorism' became the medium through which a different standard was applied to 'anti-government' elements from minority communities, regardless of the presence of violence in their actions. The case of *Tissainayagam* illustrates this point perfectly. The label of 'terrorism' therefore was a critical point of departure as far as minority rights were concerned. If the individuals were not members of a minority community and sought to 'topple' the government, the question of means became critical. Violent means placed them within the public security framework, while non-violent means were treated as democratically permissible. Yet, if the individuals were members of a minority community, they were viewed from a counterterrorism lens, which often foreclosed the question of means. This double standard applied by the courts is evident throughout the counterterrorism era and is reinforced by the case discussed below in comparison to the cases discussed in the next section.

2.2.1.6 Weerawansa v. The Attorney-General[600]

The petitioner in this case was an Assistant Superintendent of Customs who filed a fundamental rights application alleging infringements of his rights guaranteed by Articles 13(1) and (2). The petitioner claimed that he was arrest and detained on 30 April 1996 by the Criminal Investigation Department (CID) purporting to act under Section 6(1) of the PTA. According to the CID, the arrests were made based on reliable information that the suspects had smuggled 'a large number of sophisticated weapons and a dismantled aircraft for the use of the LTTE.'[601] It was revealed that the petitioner was detained from 30 April 1996 to 2 May 1996 under Section 7(1) of the PTA, and from to 2 May 1996 to 2 October 1996 under two detention orders under Section 9(1) of the PTA. The petitioner was in CID custody throughout this period.[602] He was later transferred into the custody of the Customs on 2 October 1996 and then detained under a magisterial remand order from 3 October 1996 to 31 December 1996.[603]

Mark Fernando J. delivered the opinion of the Supreme Court and ruled that the detention order purportedly issued in terms of Section 9 of the PTA was invalid. In his judgment, Fernando J. examined in some detail the scope of detention under the PTA. He opined:

> The validity of his detention up to [2 May 1996] depends on whether there was compliance with section 7(1) of the PTA, which permits a person "arrested under section 6(1)" to be kept in custody for a period not exceeding seventy two hours. A "person arrested under section 6(1)" necessarily means a person arrested because he was "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful

---

[600] [2000] 1 Sri.L.R.387.
[601] *Ibid.* at 395.
[602] *Ibid.* at 392.
[603] *Ibid.*

> activity." That phrase does not include a person arrested for other reasons (e.g. under the Customs Ordinance), or for no reason: such persons will continue to enjoy the full protection of Article 13. A pre-requisite for detention under section 7(1) is a valid and proper arrest under section 6(1): an arrest in conformity with section 6(1), and not one which is contrary to that section, or which is only a pretended or purported arrest under that section.[604]

Section 6(1) of the PTA authorises 'a police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf...to arrest...without a warrant any person connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity.' Reviewing the evidence before Court, Fernando J., concluded that none of the evidence gave rise to a reasonable suspicion of 'unlawful activity'.[605]

Section 7(1) of the PTA provides: 'Any person arrested under subsection (1) of section 6 may be kept in custody for a period not exceeding seventy two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period...'

Interestingly, Fernando J. interpreted the PTA in light of the Court's previous interpretation of ERs in the *Ratawesi Peramuna case*. Fernando J. opined that the word 'under' in Section 7 of the PTA had the same meaning as 'in pursuance of' which was similarly interpreted (in relation to Emergency Regulations 18 and 19) by Amerasinghe, J, in the *Ratawesi Peramuna case*.[606] Accordingly, the Court held that the petitioner was not arrested 'under' Section 6(1) of the PTA and that the CID officers did not have the right to keep him in custody in terms

---

[604] *Ibid.* at 400.
[605] *Ibid.* at 399.
[606] *Ibid.* at 400.

of Section 7(1), but were obliged to comply with Article 13(2). Hence the petitioner's fundamental rights under Article 13(2) were held to be infringed.

The Supreme Court also endorsed the following test laid down by Justice Amerasinghe in *Farook v. Raymond*[607] to determine whether a Magistrate's subsequent remand order constituted a 'judicial act' and not an 'executive and administrative' act, and thus beyond the jurisdiction of the Court:

> If an officer appointed to perform judicial functions exercised the discretion vested in him, but did so erroneously, his order would nevertheless be "judicial". However, an order made by such an officer would not be "judicial" if he had not exercised his discretion, for example, if he had abdicated his authority, or had acted mechanically, by simply acceding to or acquiescing in proposals made by the police—of which there was insufficient evidence in that case.[608]

Hence the Court concluded that a detention order might only be issued if there were grounds for the Minister to have a belief or suspicion that the person concerned was involved in unlawful activity. Hence the abuse of the framework under the PTA through which detention orders could be summarily issued against person for administrative convenience was effectively countered in the judgment. Even today, such safeguards remain crucial to making the Minister accountable for issuing irregular detention orders under the PTA. However, as discussed in the next sections, such accountability became largely inconsequential when the individuals concerned belonged to a minority community.

---

[607] [1996] 1 Sri.L.R. 217.
[608] *Weerawansa* [2000]1Sri.L.R.,at 419.

2.2.2 Cases involving minorities

This section examines how the treatment of minorities labeled as 'terrorists' may be contrasted with the general attitude of the court to matters pertaining to public security. As discussed below, a double standard emerged during the counterterrorism era, whereby individuals from minority communities specifically Tamil persons were viewed from a counterterrorism lens as opposed to an anti-government lens.

The question explored in this section is whether this apparent dichotomy arises out of a distinction in means (i.e. violent or non-violent means) or was simply linked to the individual's ethnicity. The authors of this study are cautious not to attribute a race consciousness to the judiciary without careful consideration given to a number of limitations of this study. It is, for example, conceded that the cases analysed in this study are by no means exhaustive. Moreover, the cases are essentially reported cases, which leaves out of the scope of the study any unreported cases in which the judiciary may have upheld the rights of a minority petitioner despite serious public security concerns. Yet the cases that are analysed include notable Supreme Court, Court of Appeal and High Court cases involving individuals either arrested and detained, or prosecuted under public security laws between 1979 and 2009. Hence these cases do reflect an unmistakable trend and present a compelling account of this double standard. Having said this, there may be exceptions to the trend. However, even the exceptions, as discussed below in the cases of *Gnanamuttu, Padmanathan* and *Machchavallavan*, happen to be relatively non-contentious matters, where the threat to the state was minimal.

Prior to delving into these cases, it is perhaps appropriate to briefly mention the *Bindunuwewa case*. This cased does not directly involve an individual rights claim in the context of an arrest and detention or a prosecution under public security laws. Instead, it is an important

reflection of the judiciary's general attitude towards individuals of a minority community who are labelled as 'terrorists'.

This case involved the killing of twenty-six detainees and the injuring of fourteen others when the police failed to intervene in a mob attack at a detention centre in Bindunuwewa. Several police officers were subsequently indicted for two specific instances of illegal omissions: failure to 'arrest miscreants' and failure to 'take action' when certain Tamil detainees held in a detention centre in Bindunuwewa were attacked by a mob. The High Court ruled that the accused police officers on duty at that time were criminally responsible for the attacks on the detainees on the basis of illegal omission. The officers were accordingly found guilty of aiding and abetting the commission of offences set out in the indictment and of becoming members of an unlawful assembly.[609]

The case was later appealed and a Divisional Bench of the Supreme Court,[610] held that 'intentional actions' had to be proved on the part of accused police officers in order to find them liable. However, it was held that the manner in which the police responded in an emergency situation was left to the discretion of the most senior police officer present.[611] Having reviewed the evidence, the Court concluded that the evidence in respect of the illegal omissions or illegal acts on the part of the accused police officers was insufficient. Accordingly, the Court overturned the convictions and ordered the acquittal of the accused.[612]

---

[609] H.C. Colombo No. 763/2003.Police officers are under specific provisions of the law to prevent the commission of offences. Both Chapter VIII of the Criminal Procedure Code and section 56 of the Police Ordinance No. 16 of 1865 provide for such a framework.

[610] S.C. Appeal 20/2003 (TAB), Supreme Court Minutes, 21 May 2005.

[611] *Ibid.* at 24. Also see Police Departmental Order No. A19 Rule 29, which states: 'It will be appreciated that no rules or regulations can be drawn up for every conceivable contingency that may arise. The man on the spot that is the Senior Police Officer at the scene must decide what best he should do and use his judgment and discretion as the situation may seem to dictate.'

[612] S.C. Appeal 20/2003, at 20 and 30.

The final decision of the Court will not be scrutinised for the purpose of this study. However, the attitude of the judges warrants careful consideration. Impartial observers of the proceedings in the Supreme Court specifically censured the attitude of the judges. It was observed:

> ...[The Supreme Court] justices were openly hostile to the prosecution, and seemed to have decided beforehand that the accused were unfairly sentenced. One justice publicly reminded the courtroom to remember that the inmates who had died were members of the LTTE, suggesting that this might mitigate the guilt of the accused... The judgment of the Supreme Court calls into question its impartiality in dealing with cases related to the Tamil Tigers. The Court must put aside politics and personal feelings when dealing with criminal offences involving Tamils.[613]

The apparent attitude of the Court is precisely the attitude that underscores most judicial decisions during the counterterrorism era. In the *Bindunuwewa case*, the so-called 'terrorists' were the victims of crimes, and their status mitigated the guilt of those responsible for the crimes. Similarly, in the cases discussed below, the so-called 'terrorists' were presumed guilty until proven innocent. Hence the counterterrorism rhetoric appeared to have had a fundamental affect on the judicial mind—to the extent that individuals (victims and suspects alike) from a minority community were treated very differently when they were associated with the term 'terrorism'.

2.2.2.1 Senthilnayagam v. Seneviratne[614]

This case involved the arrest and detention of four persons by the police and Army. Each of the detainees brought *habeas corpus* applications before the Court of Appeal alleging that they were

---

[613] Human Rights Watch, *Sri Lanka: Failure of Justice for Victims of Massacre*, 2 June 2005. See Pinto-Jayawardena, *Still Seeking Justice*, *op. cit.* at 58.
[614] [1981] 2 Sri.L.R. 187.

unlawfully arrested and detained in violation of Article 13 of the Constitution. They argued that the detention orders issued by the Additional Secretary to the Ministry of Defence were invalid. They also claimed that they were tortured in custody.

The affidavits filed in support of the petitions were harrowing, particularly the affidavit of S. Senthilnayagam, filed on behalf of one of the detainees, S. Arunagirinathan. The detainee also filed an affidavit, which the judgment of the Court of Appeal paraphrased in the following terms:

> The corpus in his affidavit, affirmed on 28.7.1981, stated that he was not told the reason for his arrest. He stated that he was taken to the Army Camp at Elephant Pass after his arrest and detained there for two weeks. He was interrogated several times and tortured. His testicles were tied with a string and tugged. He was severely hit on his knuckles, buttocks and knees with a thick wooden rod. He was forced to sign a statement to escape being tortured further.
>
> Since 4.5.1981 he was detained at the Army Camp, Panagoda. He was informed that he was detained on the orders of the Minister only on 9.7.1981.
>
> On 21.7.1981 he was taken before a Magistrate blindfolded. He made a statement to the Magistrate in the presence of an assistant Superintendent of Police and another officer of the Criminal Investigation Department, but he did not tell the Magistrate- "some of the incriminating false aspects" he was asked to state by his investigators. On the following day, as a reprisal, he was handcuffed by both wrists to high railings on a door and window and was forced to stand erect with arms outstretched. He was kept in this position for long periods except for short spells of 4 to 5 hours each night to enable him to sleep, to have his meals and to attend to his ablutions.

> On 23.7.1981 he was forced to roll on the floor for a long time until his body ached. Thereafter, he was forced together with another prisoner to hold each other's ears and repeatedly squat and stand up for a long time until he could barely stand.
>
> On 27.7.1981 he was taken handcuffed to meet his lawyer. After the interview he was manacled in a standing position until bedtime.[615]

The contents of this affidavit along with the affidavits filed by or on behalf of the remaining three detainees were summarily dismissed by the Court due to certain inconsistencies in their claims. For instance, the Court only found evidence of 'non-grievous' assault in the case of Arunagirinathan. In support of this position, it relied on reports of the Judicial Medical Officers, Dr. Salgado and Dr. Ratnavadivel. Dr. Salgado examined the detainee on 28 May 1981 on which occasion the detainee had told him that he had been asked to hang on rails until he fainted prior to 28 May 1981, presumably at Elephant Pass.[616] However, the Court noted that, in his affidavit, the detainee averred that this torture took place at the Army Camp, Panagoda, from 22 July 1981, the day after he was taken before a Magistrate.[617] The Court also noted that, according to the detainee, he was tortured by a string being tied to his testicles and tugged.[618] However, he had made no complaint to Dr. Salgado and had told the doctor that his hydrocele was due to natural disease and not due to any traumatic event.[619] Accordingly, the Court rejected the detainee's version of events. The Court, however, acknowledged the presence of some violence being inflicted on the detainee. It accepted that two non-grievous contusions on the detainee's buttocks had been caused as a result of being beaten

---

[615] *Ibid.* at 189-190.
[616] *Ibid.* at 193.
[617] *Ibid.*
[618] *Ibid.*
[619] *Ibid.*

by a blunt weapon.[620] The Court also summarily dismissed the detainee's claim made in his second affidavit, dated 30 July 1981, in which he alleged that after he was taken from the Magistrate's Court back to the camp at Panagoda he was intimidated by an army officer, who 'pulled him by his verity and threatened to assault him severely for disclosing to Court that he was tortured.'[621] However, the Court noted that the remaining three detainees did not complain of mistreatment nor did they mention the mistreatment of Arunagirinathan in their affidavits. In this context, the Court thought it fit to 'attach little weight' to the allegation of torture.[622]

The Court's dismissal of the detainee's allegations of torture is astonishing, given the fact that clear evidence of assault by a blunt weapon was acknowledged. By placing weight on the absence of consistent complaints by the detainee, or corroborative evidence by other detainees, when in fact one of the allegations was that the detainee was threatened and punished for complaining (even once), the Court demonstrated a clear reluctance to censure the military's treatment of so-called 'terrorist' suspects. This was a domain the Court was simply unwilling to interfere in.

The thinking of the Court is perhaps best understood by examining its interpretation of the PTA. Assessing the objects of the Act, the Court observed:

> What is the mischief aimed at by this Act? Everybody knows that this Act is intended to rid this country of terrorism in all its recent, sophisticated manifestations. To achieve this end the Legislature has invested extreme powers in the Courts, the executive and the police, which they do not have in normal times, in the interests of national security and public safety. Conscious that these

---

[620] *Ibid.* at 194.
[621] *Ibid.*
[622] *Ibid.*

> powers are of an extreme nature the Legislature has laid down that this Act, certified on 20th July 1979, "shall be in operation for a period of three years from the date of its commencement" (Section 29) (emphasis added).[623]

The Court was fully aware of the prevailing environment in the country, where fear of terrorism was steadily growing. The use of vague terms such as 'everybody knows', would have, under normal circumstances, been highly inappropriate usage by a court of law. However, the Court took refuge in the temporal restrictions of this draconian regime of law and derived confidence in the fact that whatever extreme restrictions it was about to endorse would only be temporary. Once it had assured itself of the extreme but temporary nature of the PTA, the Court was willing to offer a maximum margin of appreciation to the executive. For instance, the Court adopted the broadest possible interpretation of Section 9 of the Act. As discussed above, the Supreme Court in the case of *Gnanasara Thero* maintained that detention orders under the then ERs could not be for the purpose of investigating offences, but only for the purpose of preventing the commission of offences.[624] Suspects could, however, be remanded under the Criminal Procedure Code, after which investigations could be conducted. However, the Court in the present case attributed an extraordinary scope of investigative as well as preventive purposes to detention orders issued under the PTA. Interpreting Section 9 of the Act,[625] the Court held:

---

[623] *Ibid.* at 204.

[624] (1968) 73 NLR 154, at 189.

[625] Section 9 of the PTA provides:

'(1) Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time:

Provided, however, that the aggregate period of such detention shall not exceed a period of eighteen months.

> The words "has reason to believe or suspect" in section 9 also envisage two categories of suspects: (a) Where the Minister has reason to believe that any person is connected with or concerned in any unlawful activity; and (b) Where the Minister has reason to suspect that any person is connected with or concerned in any unlawful activity.
>
> The primary purpose of detention under section 9 is to facilitate further investigation and interrogation of both categories of persons and their confederates in order to achieve the object of eradicating terrorism. Section 9 is not intended merely as a negative form of preventive detention nor is it intended to be a punishment. "Unlawful activity", as defined in Section 31, extends to persons not only on the periphery of criminal liability, but it also encompasses any person whose acts "by any means whatsoever" are connected with "the commission of any offence under this Act", and that, we hold, includes a person who has committed an offence under Act No. 48 of 1979.[626]

The petitioners in the case sought to challenge the detention orders on the basis that they failed to specify reasonable grounds for suspicion. The Court held that the first set of orders, which only stated that the grounds for detention were 'terrorist activity', did not comply with the requirements of the Act, as they did not fall under the definition of 'unlawful activity' in Section 31 of the Act. These detention orders were accordingly held to be invalid *ab initio*.[627] However, subsequent

---

(2) (a) At any time after an order has been made in respect of any person under subsection (1), the Minister may direct that the operation of such order be suspended and may make an order under subsection (1) of section 11.
(b) The Minister may revoke any such direction if he is satisfied that the person in respect of whom the direction was made has failed to observe any condition imposed or that the operation of the order can no longer remain suspended without detriment to public safety.'

[626] [1981] 2 Sri.L.R., at 205.

[627] *Ibid.*

detention orders specified the 'unlawful activity' (i.e. the abetment and conspiracy of the robbery of property, or harbouring and concealing a person suspected of having committed an offence under the Act). The Court held that these detention orders were *ex facie* valid and rectified the defects in the earlier detention orders.[628] The reasoning of the Court was that, since the Act authorised detention orders for investigative purposes, specifying the unlawful activity in the detention orders did not invalidated them. Accordingly, the Court dismissed all four applications for writs of *habeas corpus*.

2.2.2.2 *Kanthiah Thambu Chelliah v. Paranage Inspector of Police*[629]

The Court of Appeal decision in *Senthilnayagam v. Seneviratne* was later brought before the Supreme Court in appeal. The Supreme Court returned to the facts of the case to determine a finer point of law, i.e. whether a person could remain in detention once the commission of a specified offence is in fact disclosed.

In this case, it was recounted that on 25 March 1981, an armed gang ambushed at Neerveli two vehicles carrying currency to the value of Rs. 8.1 Million to the People's Bank in Jaffna. The petitioners were not members of this gang, but two of them, Arunagirinathan and Siva Selvan, assisted in concealing and disposing of the money.[630] A third petitioner, Kulasekerarajasingham was a close associate of two members of the gang who resided close to their home.[631] However, the fourth petitioner, Murugaiah, had harboured and concealed one member of the gang, and failed to report to the police that such person had committed an offence and that he was concerned in collecting explosives without authority. [632] The Court distinguished the

---

[628] *Ibid.* at 206.
[629] [1982] 1 Sr.L.R. 132.
[630] *Ibid.*
[631] *Ibid.* at 133.
[632] *Ibid.*

circumstances of the first three detainees with that of the fourth. Wimalaratne J. first sought to clarify the precise procedure laid down in the PTA in the following terms:

> This interpretation of the term "unlawful activity" finds support from the procedure required to be followed after arrest, which procedure is contained in section 7(1). Any person arrested under section 6(1) may be kept in custody for a period not exceeding 72 hours. This applies to both those who have committed or are suspected to have committed offences, as well as to those whose activities are only unlawful, though they do not amount to offences. The period of 72 hours in contrast to the normal period of 24 hours under which a suspect may be kept in custody, is to give the police more time to complete their investigations which will necessarily be protracted. If within that period there is material to establish a *prima facie* case against a person in custody, then such person has to be produced before a Magistrate who is obliged to remand him until the conclusion of his trial. If on the other hand there is no material to establish a *prima facie* case, then the procedure is either a release of that person from Police custody or detention by order of the Minister under Section 9.[633]

Accordingly, the Court held that, in the case of the first three detainees, there was no material to establish a *prima facie* case as yet. Hence the appropriate procedure was for investigations to continue and for detention orders to be issued under Section 9 of the PTA. Victor Perera J. in his concurring opinion accordingly held that even though the affidavits did not disclose that the first three detainees actually committed the offence, there was strong suspicion of their involvement. Hence the Minister was justified in making the detention orders.[634] However, both judges agreed that, in the case of the fourth detainee, an offence had already been disclosed, i.e. habouring a

---

[633] *Ibid.* at 150-151.
[634] *Ibid.* at 157

person suspected of committing an offence. Since a *prima facie* case could now be established, the fourth detainee could not be detained for unlawful activity but ought to be charged for the offence. Both judges, however, agreed that the detainee should not be released, but instead brought before a Magistrate in order to be charged and placed in remand custody until the conclusion of the trial.[635]

The Supreme Court's ruling established an important precedent in terms of the proper procedure to be followed under the PTA. Since detention without judicial supervision may give rise to greater prospects of torture and ill treatment, the caveat offered by the Court is no doubt an important one. The Court's ruling simply places a limitation on the powers of the law enforcement authorities to detain a person under the PTA indefinitely, i.e. that once an offence is disclosed, the person *must* be placed in fiscal custody. The main solace one might derive from the decision is, therefore, that the detainee is less likely to be tortured if the authorities are compelled to transfer him or her to fiscal custody. This caveat, however, had little bearing on the liberty of the person concerned, should the authorities place him or her under remand custody and choose to continue investigations indefinitely. The precedent set by the Court could be overcome easily if: first, the authorities continuously postpone the disclosure of an offence, thereby justifying prolonged detention; and second, subsequently place the person in remand custody for a prolonged period of time to facilitate investigations. This strategy is precisely what was adopted in the case of *Tissainayagam* discussed later in this study.

2.2.2.3 Fernando v. The Attorney-General[636]

The petitioner in this case sought a declaration stating that the police illegally arrested him while attending a peaceful assembly

---

[635] *Ibid.* at 162.
[636] [1983] 1 Sri.L.R. 374.

thereby violating his freedom from arbitrary arrest guaranteed under Article 13(1) of the Constitution. He also claimed that the police violated his fundamental rights of freedom of thought and conscience guaranteed under Article 10 of the Constitution.

On 15 December 1982, the petitioner participated in a one-day fast organised by the Sudhananda Young Men's Hindu Association of Vavuniya, the Gandiyan Organisation and other religious bodies to protest against the detention of three Christian clergymen, a doctor, a university lecturer and his wife at an Army Camp in Vavuniya.[637] The protest was held at the Ramaikulam St. Anthony's Church premises. According to the petitioner, the police entered the church compound, 'baton charging, assaulting, kicking and trampling the participants who were peacefully seated'.[638] He heard gunshots and tear gas shells landed in the compound, and he recalled that women and children were assaulted.[639] The petitioner claimed that he too was assaulted with a baton by the respondent policemen before and after being arrested.[640] That evening, the petitioner was produced before a Magistrate and released on bail.[641]

According to the respondents, the petitioner and others were members of an illegal procession. The respondents also claimed that when action was taken to disperse the protestors, they had resorted to violence against the police.[642]

The Supreme Court sought to examine only one question in determining the legality of the state's action: was the 'procession' illegal or not? Section 45(a) of the Referendum Act, No.7 of 1981 provides:

---

[637] *Ibid.* at 377.
[638] *Ibid.* at 378.
[639] *Ibid.*
[640] *Ibid.*
[641] *Ibid.*
[642] *Ibid.*

> No person shall, at any time from the date of publication of the Proclamation in respect of a Referendum and ending on the day immediately following the date on which the result of the poll taken at such Referendum is declared, conduct, hold or take part in any procession, other than a procession on May 1 in the year, or any procession for religious or social purposes.
>
> Every person who contravenes any of the preceding provisions of this section shall b guilty of an offence and shall, on conviction, after summary trial before a Magistrate, be liable to a fine not exceeding one hundred rupees, or to imprisonment of either description for a term not exceeding one month, or to both such fine and imprisonment.

The Court observed that a Referendum had been declared and polling was to take place on 22 December 1982. Hence the procession was illegal.[643] The Court, however, paid little attention to the petitioner's version of events, which suggested that the protest was in the form of a stationary hunger strike and not a 'procession'.

In any event, the position of the petitioner was that his arrest was illegal because at the time of the arrest, the police purported to act under ERs and had charged the petitioner under Section 12(l) of the Emergency (Miscellaneous Provisions and Powers) Regulations Part 3 of 1982.[644] The Court conceded that these Regulations were not in force at the time and 'the charge was to that extent incorrect'.[645] Yet the Court insisted that the basis disclosed at the time of the arrest did not make the arrest illegal if there was some other justification for the arrest. It contended that the procession remained illegal under the Referendum Act, and the petitioner was informed that he was part of

---

[643] *Ibid.* at 382.
[644] Published in Gazette No.219/21 of 20 November 1982.
[645] [1983] 1 Sri.L.R., at 382.

an illegal procession. The Court concluded that such disclosure was sufficient to make the arrest legal, as the police were not obliged to 'quote chapter and verse from statutes and legal literature to justify the arrest.'[646]

As mentioned in the introduction to this study, the attitude of the state in dealing with minorities is unlikely to have been racist in the simplistic sense of the term. The petitioner in the present case was a Sinhalese and a respected medical professional who had served at the Vavuniya Base Hospital for more than fifteen years. Yet his treatment by the Supreme Court places him within a curious realm, which perhaps was based on his characterisation as a supporter of the Tamil cause. Hence the Court's acrimony towards Tamil petitioners in the context of public security was very much linked to the aspirations of their cause, rather than merely to their ethnicity. This nexus explains why even certain Sinhalese petitioners faced similar difficulties before the Supreme Court when making individual rights claims. Simply put, they were seen as guilty by association.

2.2.2.4 Namasivayam v. Gunawardena[647]

The petitioner in this case alleged that on 28 July 1986, while he was travelling in a bus, he was arrested by the 3rd respondent, a police officer and was not informed of the reason for his arrest.[648] He alleged that he was severely assaulted at a security personnel camp at which he was detained until 4 August 1986. He was accused of being a member of a terrorist organisation referred to as TELE. (Tamil Eelam Liberation Extremists). The petitioner was thereafter taken to the Hatton Police Station before being transferred to the Gampola Police Station and kept there until 5 September 1986.[649] He was subsequently

---

[646] *Ibid.* at 383.
[647] [1989] 1 Sri.L.R. 394.
[648] *Ibid.* at 396.
[649] *Ibid.* at 397.

taken back to the Hatton Police Station and kept there until 18 September 1986.[650] On 18 September 1986, the petitioner was brought before the Hatton Magistrate and was remanded indefinitely.[651] The petitioner alleged that his fundamental rights under Articles 11, 13(1) and 13(2) of the Constitution had been violated.

The Supreme Court treated each of the allegations separately. On the question of freedom from torture guaranteed under Article 11, it held that the 'petitioner's averments stands uncorroborated by any medical evidence and has been denied by the Respondents.'[652] Thus the Court held that there was insufficient evidence to hold that any violation of Article 11 of the Constitution had taken place.

On the question of arbitrary arrest, the Court adopted a more progressive approach. Delivering the opinion of the Court, Sharvananda C.J. observed:

> In my view when the 3rd Respondent required the Petitioner to accompany him to the Police Station and took him to the Police Station, the Petitioner was in law arrested by the 3rd Respondent. The Petitioner was prevented by the action of the 3rd Respondent from proceeding with his journey in the bus. The Petitioner was deprived of his liberty to go where he pleased. It was not necessary that there should have been any actual use of force; threat of force used to procure the Petitioner's submission was sufficient. The Petitioner did hot go to the Police Station Voluntarily. He was taken to the Police by the 3rd Respondent, in my view the 3rd Respondent's action of arresting the Petitioner and not informing him the reasons for his arrest violated the Petitioner's fundamental rights warranted by Article 1 3(1) of the Constitution.

---

[650] *Ibid.*
[651] *Ibid.*
[652] *Ibid.* at 401.

Thus the Court was prepared to separate the issue of arrest and examine it in isolation to hold that a violation of fundamental rights had in fact taken place. Moreover, the Court's observations were important in terms of establishing the criteria for determining when a person is placed under arrest.

The Court, however, treated the question of whether the detention was legal quite differently. It noted that the respondents claimed that they took action under ERs and held the petitioner in detention due had a reasonable suspicion that the petitioner was involved in the activities of the TELE. The Court observed: 'Though the respondents have not placed before this Court any material to justify their suspicion, *yet it cannot be said that in the conditions prevailing in the country their suspicion was not reasonable.*'[653] Accordingly, the Court held that no violation under Article 13(2) had taken place.

This almost *laissez faire* approach to evaluating the legality of detention highlighted the Court's attitude towards resolving conflicts between individual liberty and public security when the label of 'terrorism' was involved. While its conclusion that the arrest was arbitrary reflected the Court's capacity to assess facts objectively, the Court's holding on the question of detention demonstrated total reluctance to engage the executive when the person concerned was a suspected terrorist. The reasoning also reflected the Court's gradual capitulation to the counterterrorism rhetoric, even at this early stage in its development and usage. The reference to 'conditions prevailing in the country' is a specific reference to the ongoing ethos in which terrorism and counterterrorism had pervaded all avenues of life. The extent of this pervasion was so significant that it appeared to suspend objective juridical reasoning. In place of such reasoning, courts were prepared to unquestioningly differ to the executive when it came to judgements on counterterrorism. As discussed throughout this part of study, the approach of the judiciary on matters of counterterrorism

---

[653] *Ibid.* at 402.

involving Tamil suspects may be contrasted with its general approach to public security cases. *Namasivayam's case* is a classic example of the former type of case, where the Court was simply unwilling to check executive authority.

2.2.2.5 Gnanamuttu v. Military Officer Ananda and Others[654]

The petitioner in this case was a 42-year-old Tamil occupied as a Civil Engineer. On 13 February 1998, the petitioner was arrested at an army checkpoint in Colombo after the bus in which he was travelling was stopped and the passengers ordered to disembark.[655] When the identity of the passengers was checked, the petitioner produced his National Identity Card, Driving Licence and a Student Identity Card issued to him by the Bandaranaike Centre for International Studies.[656] The Army, however, arrested the petitioner for not possessing a 'Police Registration Form' and detained him at the checkpoint. Thereafter, two policemen arrived at the scene and took the petitioner to the Cinnamon Gardens Police Station where he was kept in a room.[657] The petitioner was eventually produced before the Magistrate's Court, Hulftsdorp on the same day based on a police 'B Report', which stated that he was suspected of 'terrorist activities'.[658] The Magistrate directed that the petitioner could sign a personal bond and reappear in Court on 20 February 1998, and on that day, the Magistrate discharged him.[659]

After his release, the petitioner filed a fundamental rights application in the Supreme Court on the basis that his rights under Articles 12(1) and 13(1) of the Constitution were infringed. Shirani Bandaranayake

---

[654] [1999] 2 Sri.L.R. 213.
[655] *Ibid.* at 214.
[656] *Ibid.*
[657] *Ibid.*
[658] *Ibid.* at 216.
[659] *Ibid.* at 215.

J., delivering the opinion of the Court, opined that the documents produced by the petitioner were more than sufficient to ascertain his identity.[660] Hence there was no basis for the Army to have detained the petitioner, and no basis for the police to have produced him before the Magistrate's Court on a 'B Report'.[661] Accordingly, the Court held that the petitioner's fundamental rights had been violated, and that he was entitled to a sum of Rs. 50,000 as compensation.

2.2.2.6 Padmanathan v. OIC, National Intelligence Bureau, Vavuniya[662]

The petitioner in this case was employed as a driver for the Sri Lanka Red Cross Society. He was involved in transporting a Member Parliament, Jayalath Jayawardena and others to Madhu, an LTTE-controlled area to negotiate the release of a solider held by the LTTE.[663] The petitioner was thereafter arrested on 7 June 1990 under the PTA for allegedly having discussions with the LTTE leaders and concealing information relating to the murder of police officers and the collection of explosives.[664] He was brought to the CID office in Colombo and interrogated regarding his trip to Madhu. After three days in police custody, he was produced before the Colombo Magistrate on 10 June 1998 and remanded indefinitely. Subsequently, on 28 December 1998, the Attorney-General advised the police that there was insufficient evidence to initiate proceedings.[665] The petitioner, however, was released from remand only on 13 January 1999. He thereafter filed a fundamental rights application alleging the violation of his rights under Articles 13(1) and 13(2) of the Constitution.

---

[660] *Ibid.* at 216.
[661] *Ibid.* at 216-217.
[662] [1999] 2 Sri.L.R 225.
[663] *Ibid.* at 227.
[664] *Ibid.* at 233.
[665] *Ibid.* at 239.

Mark Fernando J., delivering the opinion of the Supreme Court, held in the petitioner's favour. He observed that the Magistrate could remand the petitioner only if he was of the opinion that the person was 'connected with or concerned in or reasonably suspected of being connected with or concerned' in any unlawful activity or an offence under the PTA or 'until the conclusion of the trial.'[666] In either case, there was no reason for the petitioner to be kept in detention beyond 28 December 1998, when the Attorney-General had specifically opined that there was insufficient evidence to prosecute the petitioner. Accordingly, the Magistrate should have ordered the release of the petitioner immediately upon receiving the Attorney-General's communication. [667] However, Fernando J. maintained that the detention was not by executive or administrative action, as it was the action of the Magistrate that was in dispute. Accordingly, no relief could be granted in respect of the remand order or the Magistrate's failure to order the petitioner's release.[668]

Yet Fernando J. made the following important observation in respect of the actions of the police:

> It was clear from a very early stage that there could be no trial of the petitioner. Although the Attorney-General's opinion was expressed and communicated only on 28.12.98, there is no doubt that the Police were aware (at the latest by 7.10.98) that a trial was not reasonably possible. An "act" includes an omission, and likewise "executive or administrative action" includes an omission to act, at least where there is a duty to act. Having obtained a remand order against the petitioner operative until the conclusion of his trial, it was the duty of the Police to notify the Magistrate as soon as it became clear to them that no trial was possible.[669]

---

[666] *Ibid.* at 238.
[667] *Ibid.* at 239.
[668] *Ibid.*
[669] *Ibid.*

In these circumstances, the Court observed that the activities of the Sri Lanka Red Cross, Vavuniya District Branch involved humanitarian activities on behalf of the government and the people of Sri Lanka. The petitioner was 'just a small cog in that machine.'[670] The Court thus held that 'the human resources available to the State to detect, investigate and prosecute crime...should have been devoted to that purpose rather than to the harassment of the petitioner.' [671] Accordingly, the Court granted the petitioner a declaration that his fundamental rights under Articles 13(1) and (2) were infringed, and directed the state to pay him a sum of Rs. 200,000 as compensation and costs.

This case, alongside the cases of *Gnanamuttu* and *Machchavallavan*, remains one of the few cases where the Court has granted relief in a public security matter despite the fact that the petitioner was a member of a minority community. However, unlike *Machchavallavan* discussed in the next subsection, the present case before the Court was not contentious, as the Attorney-General had already determined that the petitioner was no longer suspected for violating the PTA. The case was very similar to *Gnanamuttu's case*, where the petitioner had already been discharged by the Magistrate at the time of the judgement. In the present case too, the Court had the luxury of knowing the petitioner was no longer a suspect at the time of delivering its judgment. These circumstances released the Court from the burden of having to balance public security considerations with the rights of the individual. The ultimate decision in favour of the petitioner came at a time when he was no longer considered a threat to the state. The threat had, for all intents and purposes, passed, making the Court's task a simple one.

Padmanathan's case and the *Gnanamuttu' case* will remain admirable exceptions to the usual subservience of the Court to executive

---

[670] *Ibid.* at 240.
[671] *Ibid.*

authority in matters involving public security. Yet, these are only examples of the Court checking executive authority when the counterterrorism agenda had ceased to be relevant. In fact, in the later case of *Sukumar v. OIC, Joseph Army Camp, Vavuniya,*[672] Mark Fernando J. preferred to adopt a far more conservative approach where the petitioner was still in the custody of the state on suspicion of terrorism. The petitioner in this case was arrested on 19 May 2001 and was produced before the Magistrate of Vavuniya, who remanded him until the conclusion of the trial. However, until leave was granted in the application, no steps were taken to have the petitioner brought to trial, nor were steps taken to ascertain whether the Attorney-General consented to the release of the petitioner from custody in terms of the proviso to Section 7(1) of the PTA.[673]

At that stage, the Court was only willing to provide certain guidelines to the authority responsible for the arrest or detention. According to these guidelines, such authority must inform the Attorney-General *as soon as possible* of the fact of such arrest and detention in order to enable the Attorney-General to review the matter and to determine whether he should be further detained in custody.[674] These guidelines remain entirely unpersuasive given the fact that it fell squarely within draconian scope of the PTA.

In practice, the Attorney-General as an executive functionary, would almost never consent to bail in a PTA case. Such reluctance was perfectly demonstrated in *Tissainayagam's case*, where repeated applications for bail were refused on the basis that Section 7(1) of the PTA prohibited the Magistrate from considering bail applications.[675]Fernando J's 'guidelines' in *Sukumar's case* eventually

---

[672][2003] 1 Sri.L.R. 399.
[673]*Ibid.* at 400.
[674] *Ibid.*
[675] The Attorney-General of the time, Mohan Peiris was scarcely open to even considering bail, let alone consenting to it as per the personal experience of a co-

had little meaning in a context where the prerogative ultimately remained with the Attorney-General.

2.2.2.7 Nallaratnam Singarasa v. Attorney-General[676]

The petitioner in this case was charged under State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 and the PTA for attacking four army camps. He was accused of being a member of the LTTE. Singarasa's main contention was the confession based on which the state sought to prosecute him was obtained under duress. Section 16 of the PTA in fact made such statements before an Assistant Superintendent of Police admissible. Singarasa, however, produced a medical report showing evidence of assault.

At the end of the trial, the High Court returned a verdict of guilty. It accepted the confession as voluntary by relying upon the author's failure to complain to anyone at any time about the beatings. The Court also rejected the claim that the accused had not reported the assault to the Magistrate for fear of reprisals on his return to police custody. The approach of the Court was almost identical to the Court of Appeal's analysis of the petitioner's allegations of torture in *Senthilnayagam v. Seneviratne*, where the failure of the victim to consistently complain of torture was deemed fatal to his case, despite the presence of medical reports indicating assault, and despite the claim that the victim feared reprisals. In both cases, the judiciary appeared to be utterly disinterested in exploring the allegations of abuse in an objective manner.

Both the Court of Appeal and the Supreme Court refused to overturn the High Court's decision. The allegation against the accused, i.e. that

---

author of this study who was Junior Counsel in the High Court trial of J.S. Tissainayagan.

[676] *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, decided on 23 August 2004, CCPR/C/81/D/1033/2001.

he was part of the LTTE, had stigmatised him to the point that no Sri Lankan court of law was willing to objectively examine the allegation that he was denied the right to a fair trial and the right to be presumed innocent until proven guilty, both of which were guranteed under the Constitution.

Singarasa eventually turned to the United Nations Human Rights Committee by filing a communication under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The Committee expressed the view that that by placing the burden of proof (that his confession was made under duress) on the accused, the state violated Article 14(2), and (3)(g), read together with Article 2(3) and (7) of the ICCPR.[677] The Committee observed that the state should either release him or grant him a retrial.[678] Singarasa thereafter made a fresh application to the Supreme Court in 2005 seeking a revision of the conviction and sentence in 1995. The Court not only rejected the application, but in a bizarre interpretation of the Constitution and of international law, also declared that Sri Lanka's accession to the Optional Protocol was unconstitutional.[679]

2.2.2.8 Kanapathipillai Machchavallavan v. Officer in Charge, Army Camp Plantain Point, Trincomalee and Three Others[680]

Machchavallavan's case is perhaps one of the only cases decided during the counterterrorism era, where the Supreme Court took a bold

---

[677] *Ibid.*

[678] *Ibid.*

[679] *Nallaratnam Singarasa v. The Attorney-General* S.C. Spl. (LA) No. 182/99, decided on 15 September 2006. The Court held that accession was unconstitutional because it conferred judicial power on the Human Rights Committee in Geneva without parliamentary sanction. Also see International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (October 2012), at 163.

[680] [2005] 1 Sri LR 341, per Shirani Bandaranayake J.

stand in favour of the rights of Tamil persons despite overarching considerations of public security.

The appellant in this case sought two writs of *habeas corpus* from the Court of Appeal in respect of his two sons removed after a search and cordon operation by officers of the Army Camp at Plantain Point. The appellant's sons subsequently disappeared. The Court of Appeal referred the matter to a Magistrate, [681] which recommended that issuing the writs was not appropriate, as responsibility for the disappearances could not be proved against the respondents individually. [682] The Court of Appeal accordingly dismissed the applications.

On appeal, Shirani Bandaranayake J., delivering the opinion of the Supreme Court, observed that the evidence showed that the Army had removed the appellant's sons.[683] It was accordingly held that there was *prima facie* evidence of violation of fundamental rights contrary to Article 13(4) of the Constitution.[684] It was also held that the Court of Appeal should have referred the entire matter to the Supreme Court under Article 126(3) of the Constitution, given the fact that a violation of fundamental rights had been disclosed to it.[685] In conclusion, the Court held that the state was liable for the acts of the army officers and ordered the state to pay compensation and costs to the appellant.[686]

---

[681] Under Article 141 of Constitution, the Court of Appeal is authorised to 'require the body of such person to be brought up before the most convenient Court of First Instance and to direct the judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right.'

[682] [2005] 1 Sri LR, at 342.

[683] *Ibid.* at 357.

[684] *Ibid.*

[685] *Ibid.* at 346-347.

[686] *Ibid.* at 357. The Court also expanded on the jurisprudence on the payment of exemplary costs, holding that a respondent could be made to pay such costs if he or she is found individually responsible for the disappearance.

At face value, this judgment runs contrary to the general hypothesis of this study, which is that the judiciary has consistently failed to protect minority rights when public security was at stake. The appellant in the case, and his two sons, were most certainly Tamil. Thus, it would appear that the Court did well to protect the rights of members of the Tamil community, despite the fact that the complaint related to the domain of public security. Yet there are two explanations for the Court's seemingly radical departure.

First, this was not a straightforward case of arrest and detention, where the suspected terrorist was in the custody of the authorities. Instead, this was a case of enforced disappearance. The perceived threat to the state had already passed, presumably with the death the appellant's two sons. Hence the seemingly bold decision to direct the state to pay a sum of Rs. 150,000 each for the two disappeared sons of the appellant as compensation and costs, was not made at the cost of clashing with the executive in relation to a 'terrorist' suspect in the state's custody.

Second, the case was heard and decided by the Supreme Court during the operation of the ceasefire agreement, when the state of emergency had been momentarily lifted. In this context, the Court was not under the same pressures it would usually come under during times of emergency. It was, politically speaking, the ideal period for a reasonably progressive judgment. Hence the importance of the case should not be overestimated. In fact, the judgement of Shirani Bandaranayake J. was delivered on 31 March 2005. A few months later, on 12 August 2005, Foreign Minister, Lakshman Kadirgamar was to be assassinated by the LTTE and the country was to once again be plunged into a state of emergency. It is therefore not unreasonable to suspect that the Supreme Court would have been less inclined to hold in the manner it did in *Machchavallavan's case* had the matter been taken up after August 2005.

2.2.2.9 Edward Sivalingam's case[687]

This case involved a Methodist clergyman who was arrested in Vavuniya and detained in Colombo. His detention was purportedly under a detention order issued in terms of the 2005 ERs. In his Fundamental Rights application before the Supreme Court, he alleged that he was tortured while in custody and forced to sign a confession admitting the commission of prohibited acts. Hence he sought a declaration that his fundamental rights under Articles 11 and 13(1) and (2) had been violated.

The Supreme Court observed that the petitioner was in possession of an 'LTTE identity card', which indicated that he was 'favoured' by the LTTE. In a surprising deduction, the Court held that this card gave rise to a reasonable suspicion that justified the arrest. The Court reached this conclusion despite the petitioner's explanation that the alleged 'LTTE identity card' was merely travel pass issued by the LTTE for purposes of entry and exit from the territory controlled by them. The card itself bears the words 'travel pass' on its face.

The Court also ruled that the petitioner's failure to complain about incidents of alleged torture immediately after they occurred rendered his version of events doubtful. This swift dismissal of allegations of torture is wholly consistent with previous judicial pronouncement discussed above, including *Senthilnayagam v. Seneviratne* and *Singarasa's case*. In the present case, one of the medical reports submitted by the petitioner in fact revealed injuries that were consistent with beatings and torture. Yet the Court rejected the petitioner's claims and ultimately dismissed the application.

---

[687] *Edward Sivalingam v. Jayasekara* S.C. (F.R.) Application No. 326/2008, decided on 10 November 2010.

2.2.2.10 Tissainayagam's case (unreported)

This case involved the arrest, detention and eventual prosecution of the Editor of the North-Eastern Monthly magazine, J.S. Tissainayagam. The accused was arrested on 7 March 2008 by the Terrorism Investigation Division (TID) of the Sri Lanka Police. Following a lengthy detention, he was eventually indicted in the High Court under the PTA for *inter alia* inciting the commission of acts of violence or racial or communal disharmony by publishing certain articles in the North-Eastern Monthly in 2006 and 2007.[688] The entire case against the accused was therefore predicated on proving that the articles were published with the intention of 'causing the commission of acts of violence or racial or communal disharmony.'[689]

During his trial, Tissainayagam claimed that the so-called confession that the prosecution relied on was in fact an involuntary statement following harassment and threats while in detention.[690] The statement itself appeared to be doctored by the Police and the defence successfully led evidence on this matter.

The fundamental contention of the prosecution was that an article written by a Tamil journalist accusing a predominantly Sinhalese Army would incite the commission of acts of violence by Sinhalese readers against Tamils, or lead to racial or communal disharmony.

---

[688] See 'Jail Sentence for Dissident Sri Lankan Reporter Condemned', *CNN*, at http://edition.cnn. com/2009/WORLD/asiapcf/09/01/sri.lanka.journalist.One of the editorials relied on in the indictment was headlined: 'Providing Security to Tamils now will define northeastern politics of the future.' The excerpt specifically cited in the indictment reads: 'It is fairly obvious that the government is not going to offer [Tamil Civilians] any protection. In fact it is the state security forces that are the main perpetrator of the killings.'

[689] See Section 2(1)(h) of the Prevention of Terrorism Act No. 30 of 1981.

[690] See Law & Society Trust (LST), *Briefing Note on Tissainayagam Case: 17 September 2009 - Case of J.S. Tissainayagam*, at www.lawandsocietytrust.org/web/images/PDF/briefing%20note.doc.

This proposition, which is facially absurd, was accepted by the High Court. In August 2009, the High Court sentenced Tissainayagam to 20 years rigorous imprisonment, for arousing 'communal feelings' by writing and publishing articles that criticised the government's treatment of Sri Lankan Tamil civilians affected by the war, and for raising funds for a magazine in which the articles were published in furtherance of terrorism.[691]

The High Court disregarded the involuntary nature of the accused's statement and a host of other contradictions and discrepancies in the prosecution's case. Deepali Wijesundara J., who delivered the judgement, also disregarded the fact that no prosecution witnesses were summoned to establish the fact that the articles written by the accused could potentially incite ethnic disharmony. Instead, the judge relied on her own speculation as to the effects of the articles, and on a defence witness's concession that the articles were factually incorrect. The judge also disregarded the testimonies of three other defence witnesses, including MP Vasudeva Nanayakkara's evidence, on the basis that they 'held the identical political ideas' as the accused, and that their views 'cannot be compared with opinion of the general public'.[692]

Tissainayagam appealed the High Court ruling, and was granted bail in January 2010 pending the outcome of the appeal.[693] However, in May 2010, the government announced that President Mahinda Rajapaksa would pardon the journalist. [694] Thereafter, he was permitted to leave the country.

---

[691] See 'Convicted', *The Sunday Leader*, 6 September 2009, at http://www.thesundayleader.lk/archive/ 20090906/convicted.htm.

[692] *The Democratic Socialist Republic of Sri Lanka v. J.S. Tissainayagam*, H.C. 4425/2008, judgement of Deepali Wijesundara J., at 39. Also see evidence of Vasudeva Nanayakkara, H.C. minutes, dated 23 March 03.2009, at 12-13.

[693] See 'Sri Lankan Editor JS Tissainayagam Gets Bail', *BBC*, 11 January 2010, at http://news.bbc.co.uk/2/ hi/south_asia/8451413.stm.

[694] 'Sri Lankan president pardons convicted Tamil editor', *bbc.co.uk*, 3 May 2010, at http://news.bbc.co.uk/2/hi/south_asia/8657805.stm.

2.3 The Impact on Minority Rights

The final years of the war and the period following its conclusion witnessed a sharp rise in the number of arrests and detentions taking place both under ERs and the PTA.[695] The preventive detention provisions of the ERs and PTA effectively nullified the freedom from arbitrary arrest and detention. The balancing act between permitting preventive detention and ensuring civil liberties requires diligent judicial review of arrests and detentions in order to prevent abuse. As discussed above, unfortunately, the Supreme Court and the Court of Appeal declined to subject the grounds cited for detention to strict review. As a consequence, there has yet to be a single known final determination of the Supreme Court during the last five years holding that an arrest and detention of a Tamil petitioner from the Northern and Eastern Provinces was violative of the fundamental rights of the petitioner. This is notwithstanding the fact that the Supreme Court is inundated with petitions alleging illegal arrest and detention, and that young males from the North and East are particularly vulnerable to such arrest and detention.

It is difficult to directly attribute torture in custody to the emergency regime, as the pervasive use of torture in Sri Lanka is not limited to arrests and detentions made under public security laws. Yet there is little doubt that the framework for arrest and detention established under the PTA and ERs facilitates a culture of impunity. This culture of impunity is best reflected in the dismal conviction rate in respect of torture cases in Sri Lanka.[696] Such impunity necessarily creates the perfect conditions for an increase in acts of torture.

Moreover, specific provisions contained in the PTA and ERs relating to the admissibility of confessions certainly encourage the use of

---

[695] See Human Rights Watch, *Sri Lanka: Country Summary – January 2009*, at http://www.hrw.org/en/ node/ 79245.

[696] See Statement by Manfred Nowak Special Rapporteur on Torture at the 62nd Session of the General Assembly Third Committee Item # 70(b), 29 October 2007, at 7.

torture to extract confessions from persons accused of unlawful activities. As discussed above, this phenomenon is evident in a number of cases relating to the ERs and the PTA. For example, in both *Singarasa's case* and *Sivalingam's case*,[697] the accused alleged that their so-called 'confessions' were obtained under duress and through the infliction of torture.

In this context, it is clear that the counterterrorism era has left a deep and lasting effect on the individual rights of persons from the Tamil community. This effect, as will be explored in the next section, ushered in a new era and rights dispensation where the term 'rights' would be treated almost as if it were a misnomer when considered in the context of public security.

[697] *Edward Sivalingam v. Jayasekara* S.C. (F.R.) Application No. 326/2008, decided on 10 November 2010.

3. The Post-War Rights Dispensation

3.1 The *de facto* Emergency Regime

More than two years after the end of the war, the state of emergency was lifted on 29 August 2011, when the government announced that it would not extend emergency further. However, fresh regulations under Section 27 of the PTA were promulgated, basically replicating the now invalid ERs.[698]

The President, acting in his capacity as Minister of Defence, promulgated five new regulations:[699]

1. The Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011;

2. The Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) No. 2 of 2011;

3. The Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011;

4. The Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011; and

---

[698] The Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011, the Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organisation) No. 2 of 2011, the Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011, the Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011, and the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011, respectively published in Extraordinary Gazette Notifications 1721/2, 1721/3, 1721/4 and 1721/5 of 29 August 2011. For an in depth analysis of the PTA regulations, see International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (October 2012), at 56.

[699] See Extraordinary Gazette Notifications 1721/2, 1721/3, 1721/4 and 1721/5 of 29August 2011.

5. The Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011.

Section 27(1) of the PTA empowers the Minister of Defence to make regulations 'for the purpose of carrying out or giving effect to the principles and provisions' of the PTA. These purposes include arrests, seizures and searches,[700] remand orders,[701] detention and restriction orders,[702] detention during trial,[703] admissibility of certain statements as evidence against a person[704] and offences under the Act.[705] The regulations in no uncertain terms mimicked the ERs that had just been repealed as a result of the cessation of the state of emergency. Hence a perpetual state of emergency was created though subordinate legislation, which unlike the ERs which were subject to periodic parliamentary oversight,[706] entrenched the counterterrorism agenda within the public security framework in Sri Lanka. Some of the dire features of these regulations are briefly discussed below. Two examples may be cited to highlight the manner in which a *de facto* state of emergency was established under the new regulations.

PTA Regulations No. 4 of 2011 deals with detainees and remandees. and 'effectively facilitates the continuation of a *de facto* state of emergency'. The regulations provide:

> Any person who has been detained in terms of the provisions of any emergency regulation which was in operation on the day immediately prior to the date on which these regulations came into operation, shall forthwith on the coming into operation of these regulations, be produced before the relevant Magistrate, who shall take

---

[700] See section 6 of the PTA.
[701] See section 7 of the PTA.
[702] See section 9 of the PTA.
[703] See section 15A of the PTA.
[704] See section 16 of the PTA.
[705] See section 2 of the PTA.
[706] See Section 3 of the Public Security Ordinance No. 25 of 1947.

> steps to detain such person in terms of the provisions of the Criminal Procedure Code Act, No. 15 of 1979.[707]

As pointed out by the International Commission of Jurists, this provision 'converts the detention of all detainees under the previous Emergency Regulations in force on 28 August 2011 to 'detention' in terms of the provisions of the Criminal Procedure Code.'[708]

Regulations No. 5 of 2011 relate to surrendees' care and rehabilitation. Interestingly, any person who surrendered 'in connection with' specified offences or 'through fear of terrorist activities' was deemed to require rehabilitation. Hence any Tamil civilian, who came within the control of the government due to either of these circumstances, was first deemed a surrendee, and second deemed to require rehabilitation. This strange reasoning somewhat explains the government's thinking in interning close to 300,000 Tamil civilians in May 2009 regardless of whether they were a threat to public security. The later regulations appeared to retrospectively justify such internment. Government spokesmen, including the Sri Lankan High Commissioner to the United Kingdom, Chris Nonis, later characterised the mass displacement as warranting 'rehabilitation'. In an interview with the British Broadcasting Service, the High Commissioner claimed that '297,000 [Tamil] people have been rehabilitated' and in the same breath mentioned that 11,600 former LTTE cadres were being rehabilitated.[709] These sentiments perfectly capture the government's intention to conflate suspects under the public security laws and ordinary Tamil civilians under one banner of 'rehabilitation'. The question remains: what condition or

---

[707] See Regulation 2(1) of Regulations No. 4 of 2011.

[708] International Commission of Jurists (October 2012), *op. cit.*, at 58.

[709] See 'BBC World News Interviews Dr Chris Nonis, Sri Lankan High Commissioner to the UK', *youtube.com*, 9 August 2013, at http://www.youtube.com/watch?v=0ENGP5KS8ww.

ailment requires ordinary Tamil civilians to receive such 'rehabilitation'?

3.2 Judicial Pronouncements in the Post-war Era

3.2.1 The steady decline of judicial independence

The post-war period witnessed one of the most—if not the most—catastrophic declines in judicial independence in Sri Lanka's post-independence history.

In June 2009, a public interest petition was filed before the Supreme Court alleging that the government's holding of civilians within military run internment camps violated *inter alia* the freedom from arbitrary arrest and detention guaranteed by Articles 13(1) and 13(2) of the Constitution.[710] The petitioner pointed out that the holding of approximately 300,000 persons without permitting them to leave the camps amounted to arrest and detention, for which there was no provision in law. The official position of the government was that the detention of the *entire* IDP group was necessary on the grounds of national security, since remaining separatist elements had allegedly infiltrated this group.[711] The petitioner also pointed out that no detention orders were issued in respect of any of the detainees. The matter was supported for 'leave to proceed'[712] and order of Court was reserved. However, the Supreme Court has yet to deliver its decision on leave to proceed even four years after the case was filed. In the

---

[710] See S.C. (F.R) Application No. 457/2009, filed by the Centre for Policy Alternatives.

[711] 'LTTE Cadres Infiltrate Northern IDP ranks – Minister', *Official Website of the Government of Sri Lanka*, 28 August 2009, at http://www.priu.gov.lk/news_update/Current_Affairs/ca200908/20090828ltte_cadres_infiltrate_northern_idp_ranks.htm.

[712] Leave to proceed signifies a preliminary threshold in fundamental rights applications where the petitioner is asked to demonstrate a *prima facie* case in order for the matter to proceed.

normal course, decisions on leave to proceed are made as bench orders on the day assigned for support immediately after the hearing.

This case demonstrates the failure of the judiciary qua organ of state to protect, fulfill and ensure the rights of individuals coming before it. The case also illustrates an insensitive judicial response towards Tamil civilians who had not only suffered immensely during the war, but also faced discrimination at the hands of the state immediately after the war. The significance of the case cannot be overstated. In fact, the UN Secretary General's Panel of Experts found that the mass internment of civilians gave rise to credible allegations of crimes against humanity.[713] Nevertheless, the Court has thus far refused to intervene, and for reasons best known to it, has refused to even make a preliminary decision on the matter.

The Supreme Court's role in promoting the state's public security and counterterrorism agendas during the post-war era was also evident in several cases which challenged the PTA Regulations during this period. A brief discussion of the case, based on personal experience may be warranted.[714] It is noted that the application was dismissed without reasons before a bench presided by Chief Justice Shirani Bandaranayake.

The petitioners presented two important legal objections to the new regulations. First, the Supreme Court has previously held in *Thavaneethan v. Dayananda Dissanayake* [715] that, unlike ERs promulgated under the PSO, the PTA Regulations cannot restrict any fundamental right in terms of Article 15(7) of the Constitution.

---

[713] See *Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, at www.un.org/News/dh/infocus /Sri_Lanka/POE_Report_Full.pdf, at 44-45.

[714] *Centre for Policy Alternatives v. The Secretary of Defence and Others*, SC (F.R.) Application No. 453/2011, supported and dismissed on 13 October 2011. Since one of the authors of this study was personally involved as Junior Counsel in the latter application, this account takes into consideration, personal experiences in that regard.

[715] [2003] 1 SLR 74.

Second, Section 27 of the PTA specifically stated that such regulations can only be for the purpose of carrying out or giving effect to the principles and provisions of the PTA.

In this context, the petitioners argued that the new regulations violated certain fundamental rights enshrined in the Constitution, and were outside the scope of the PTA. One of the principal arguments made in Court by counsel for the petitioners was that the new PTA regulations violate a number of fundamental rights, including the right to equal protection of the law, the freedom from arbitrary arrest and detention, the right to a fair trial, the right to be presumed innocent until proven guilty and the freedom of speech and expression. For instance, it was argued that Regulations No. 4 of 2011, which converted detentions under the previous ERs into detentions in terms of the Criminal Procedure Code, served to strip Magistrates of all discretionary power to order the release of suspects on bail. Moreover, the regulations provided that persons remanded in respect of offences under the previous ERs would be considered as remanded in terms of the PTA.

It was pointed out that the Supreme Court in *Weerawansa v. Attorney General*[716] has previously held that the Minister can only detain a person under the PTA either upon personal knowledge or credible information that the person has committed an offense. Hence the PTA does not contemplate detention for the sole purpose of preventing persons from committing offenses in the future. However, detentions under the previous ERs could be for preventive purposes by order of the Defence Secretary. Thus the automatic conversion of detentions under ERs into detentions under the PTA would result in a person being placed under 'preventive detention' even under the PTA, thereby displacing previous jurisprudences on the subject. This development, it was argued, would amount to a clear violation of the rights guaranteed under Article 13 of the Constitution.

---

[716][2000] 1 SLR 387.

Owing to the compelling issues raised in the petition, the petitioner sought a declaration that the Minister of Defence, the Secretary of Defence, the Commissioner General of Rehabilitation, the Sri Lanka Police and the armed forces had infringed or were about to infringe the fundamental rights of the people. However, the Supreme Court refused to grant leave to proceed with the application and dismissed it. Given its obvious importance, an application was made for reasons to be provided for the decision. This application too was refused. The Chief Justice responded that the Court would not break its longstanding tradition to refrain from disclosing reasons when refusing leave to proceed in fundamental rights applications. The reasoning was peculiar given the fact that the Supreme Court presented lengthy reasoning for the dismissal of an application challenging Shirani Bandaranayake's own appointment to the Court in 1996.[717] Hence the Chief Justice could not have been unaware of previous instances where the Court did disclose reasons for refusing to grant leave to proceed.

The fact remained that the Court did not wish to clash with the government on the contentious issues of public security and counterterrorism. However, its reluctance could not be explained through judicial reasoning—hence the preference not to disclose any reasons for the decision to refuse leave to proceed in the case challenging the PTA Regulations. These regulations were part of the plan to retain strict control over any segment of society that could threaten prevailing power structures. The Court was least interested in checking this form of control. The Court was instead embarking on a dangerous political calculation aimed at remaining popular with an ultra populist regime. The calculation—or perhaps miscalculation—would allow public security and counterterrorism rhetoric to shape rights discourse in an almost irreversible manner.

---

[717] *Edward Francis William Silva, President's Counsel And Three Others v. Shirani Bandaranayake and Three Others* [1997] 1 Sri. L.R. 92.

3.2.2 Cases after the war (2009 to present)

3.2.2.1 Sarath Fonseka's case (The White Flag Case)

This case involved the indictment of the former Army General Sarath Fonseka under the 2005 ERs. Following a successful campaign to defeat the LTTE, Foneska's relations with government—particularly the President and his brother, the Defence Secretary—soured.[718] Subsequently, Fonseka emerged as a significant threat to the ruling regime by forming a new political alliance, the Democratic National Alliance, and running for the office of President in 2010.[719] Fonseka was, however, defeated in the presidential elections. The issue at the centre of the *White Flag Case* concerned a statement allegedly made by Fonseka during an interview with a journalist of the *Sunday Leader* newspaper, Frederica Jansz. In his testimony before the High Court, Sarath Fonseka stated that Jansz interviewed him on 8 December 2009, and that during the interview she questioned him about 'the allegation that LTTE leaders who were surrendering with white flags were...shot on orders given by the Defence Secretary to Brigadier Shavendra Silva.'[720] Fonseka was indicted under Regulations 28 and 29 of the 2005 ERs. Regulation 28 provides:

> No person shall, by word of mouth or by any other means whatsoever, communicate or spread any rumour or false statement which is likely to cause public alarm or public disorder.

---

[718] See H.C. Colombo 5311/2010, judgment of Deepali Wijesundara, President of the High Court Trial-at-Bar, and Zulfikar Razeen J, dated 18 November 2011 citing evidence of Sarath Fonseka.

[719] See Nihal Sri Ameresekere, *Politics, Justice and the Rule of Law*,AuthorHouse – Indiana, (2013), at 190 for a discussion on the events leading up to and subsequent to the presidential elections of 2010.

[720] See H.C. Colombo 5311/2010, judgment of Deepali Wijesundara J., President of the High Court Trial-at-Bar, and Zulfikar Razeen J., dated 18 November 2011.

Regulation 29 provides that 'giving information or commenting about...any matter likely directly or indirectly to create communal tension' was an offence. In his testimony before the High Court, Fonseka stated he had heard of such a story from two journalists who were on the war front. He stated, however, that he was unaware of anything beyond what he had heard from the journalists and that, as far as he knew, no one came forward with white flags and the Army had not shot dead any such persons.[721] The High Court, with a majority of two to one, convicted Fonseka of the specific charge under Regulation 28, i.e. spreading a false statement likely to cause public alarm or public disorder, and acquitted him of the remaining charges. In the majority decision, Deepali Wijesundara J. and Zulfikar Razeen J. reasoned that 'it [was] clear [Fonseka] wanted to create fear among the public and bring disrepute to the Government during the Presidential election.'[722] They also pointed to the evidence by the Defence Secretary and Major General Shavendra Silva, which the Court concluded was sufficient to establish beyond reasonable doubt that the statement made by Fonseka was false and was aimed to 'discredit the country'.[723] Both these witnesses simply maintained that no such orders were given. The Court ultimately returned a verdict of guilty based on the reasoning that Fonseka failed to deny the statement immediately after it was published indicating the deliberate nature of the statement. Moreover, the fact that Fonseka himself testified that no such orders were given to execute LTTE leaders demonstrated that he knew of the falsity of the statement.

Warawewa J. rejected the skewed logic of the majority in his dissenting opinion acquitting Fonseka. He maintained that the prosecution had failed to prove beyond reasonable doubt that Fonseka made a false statement.[724] He observed that the evidence given by

---

[721] *Ibid.*
[722] *Ibid.*
[723] *Ibid.*
[724] See H.C. Colombo 5311/2010, judgment of W.T.M.P.B Warawewa J., dated 18 November 2011.

Jansz was riddled with contradictions, thereby casting doubt as to whether Fonseka in fact made the statement attributed to him. The Judge also pointed out that Jansz's testimony lacked credibility because, for instance, she felt the terms 'wanted' and 'attempted' could be used interchangeably, thereby reflecting disregard for accuracy. He accordingly returned a verdict of not guilty and discharged Fonseka.

Sarath Fonseka's case is extraordinary for two of reasons. First, there is a distinct element of irony in prosecuting and convicting a 'war hero',[725] who championed the cause of the regime against terrorism, under the very ERs meant to target so-called 'terrorists'. However, the switch from targeting those who espoused separatism to those who merely challenged the power structures of the time is not wholly inconsistent with the aims of the Regulations. As pointed out above, the Regulations do not merely aim to suppress violent acts of anti-social behaviour as one might imagine public security or counterterrorism laws would aim to do. Instead, the Regulations have a distinct flavour of regime perpetuation. Regulation 33 for instance provides that 'incit[ing] any person directly or indirectly to take any step towards the *overthrowing of the Government*, shall be guilty of an offence' (emphasis added). The Regulations therefore do not merely aim to preserve the sovereignty and territorial integrity of the country; it aims to preserve the government in power. In this context, targeting a presidential hopeful with real potential to displace the regime should not come as a surprise. The Regulations were tolerated as a draconian but 'necessary' means of maintaining public security. Hence the clearly overreaching nature of the Regulations was also tolerated. When the so-called threat to public security was ended with the defeat of the LTTE, this overreaching nature of the Regulations came into full effect, as those who challenged the regime even through seemingly democratic means (such as running for the office of

[725] Gomin Dayasiri, 'War Hero to Fallen Idol', *Daily News*, 15 December 2009, at http://archives.dailynews.lk/2009/12/15/fea05.asp.

President), were targeted. The public security doctrine, which started as a tool to cautiously suppress dissent, had snowballed during the three decades of counterterrorism into a tool to brazenly suppress any form of political opposition. The *White Flag case* may therefore be contrasted with the *Ratawesi Peramuna* case discussed above. When the *Ratawesi Peramuna* case was taken up in the early 1990s, when the Supreme Court was willing to grant some level of democratic space for movements aiming to 'topple' the government, provided the movement was not linked to Tamil separatism. By the time the *White Flag case* was taken up in the post-war era, however, the judiciary had underdone a complete transformation. Hence judges were now equating any threat to the regime—even through democratic means—as a threat to public security.

Second, the Court's reluctant tolerance of executive overreaching during the counterterrorism era had now transformed into straightforward collusion. The majority in the *White Flag case* made no attempt to offer sophisticated judicial reasoning to justify their verdict. The judgment and the reasoning read very much like a blatant endorsement of the regime's own thinking. Sentiments such as 'discrediting the country' were relied upon to secure a conviction. Such sentiments do not reflect 'juridical' reasoning, but rather 'administrative' reasoning—a dichotomy extensively deconstructed and explained by Basil Fernando.[726] Hence the *White Flag case* reflects a critical change in the way in which courts now view themselves in the post-war political landscape. It appears that, in the eyes of the judiciary, the triumph over separatism and 'terrorism' had validated the executive's interpretation of public security beyond reproach. In such a context, the judiciary was no longer willing to challenge the executive on its interpretation of the parameters of public security. Sarath Fonseka, therefore, was now a victim of the edifice he had helped built.

---

[726]Basil Fernando, *The Rule of Law and Democracy in Sri Lanka*, Asian Human Rights Commission (March 2012).

Sarath Fonseka was eventually released from custody by virtue of a presidential act of remission. He filed an Application for Special Leave to Appeal in the Supreme Court to have his conviction overturned. However, the Application was withdrawn as a necessary condition for the remission of his sentence. In a letter dated 15 May 2012, the Secretary to the Ministry of Justice informed the Commissioner General of Prisons that the President, in his exercise of powers under Article 34 of the Constitution[727] had 'granted the remission of the balance of the sentences' to be served by Fonseka.[728] Accordingly, Fonseka was released through the perceived benevolence of the President.

3.2.2.2 Detention and rehabilitation of Jaffna University students

During submissions made on behalf of the petitioner in the constitutional challenge of the PTA Regulations examined previously, counsel had pointed to the risk of potential misuse of the PTA Regulations. These risks materialised in December 2012.

On the 27 November 2012, students of Jaffna University lit candles on *Maa Veerar Naal*, i.e. Heroes day traditionally celebrated by the LTTE to commemorate fallen members of their movement. Incidentally, the day also happened to be *Kaarthikai Vilakkeedu*, a Hindu festival where adherents lit candles. In retaliation to these observances, security forces stormed university premises late at night and thereafter entered female hostels intimidating students and damaging property. The following day, the students organised a protest march, which the police brutally suppressed, injuring many

---

[727] Article 34 (1) (d) provides: 'The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka...remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence.'

[728] See Amerasekere, *op. cit.* at 225.

protestors. [729] The Terrorist Investigation Division of the Police thereafter arrested several individuals including eleven students of the Jaffna University. While seven students were eventually released on 10 December 2013, the remaining four were detained under the PTA Regulations.[730]

The four students, Jaffna University Student Council President V. Bavananthan, Student Council Secretary Paramalingham Darshananth, Jaffna University Arts Faculty Union President Kanakasundaraswami Jenamejeyan and Science Faculty Union member Shamugam Solomon were charged under the PTA Regulations. The students were originally detained in Vavuniya and then transferred to the Welikanda Protective Accommodation and Rehabilitation Centre for 'rehabilitation'. Such rehabilitation was authorised under the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011.

It is noted that the Regulations contemplate rehabilitation of 'surrendees'. The objectives of the Regulations are set out in Regulation 2:

> The objective of these regulations shall be to ensure, that any person who surrenders after the coming into operation of these regulations is dealt with in accordance with the provisions of the Prevention of Terrorism Act, No. 48 of

---

[729] Amnesty International, *Two students released from custody*, 22 January 2013, at http://ua.amnesty.ch/urgent-actions/2012/12/347-12/347-12-2?ua_language=en; Asian Human Rights Commission, 'Sri Lanka: The clergy and civil society condemn the arrest and unlawful detention of four students from the University of Jaffna and call for their immediate release', 7 December 2012, at http://www.humanrights.asia/news/forwarded-news/AHRC-FST-056-2012. Also see Amnesty International, *Impunity persists for crimes under international law as Sri Lanka escalates attacks on critics*, Written statement at the 22nd Session of the UN Human Rights Council, 22 February 2013, A/HRC/22/NGO/166.

[730] D.B.S. Jeyaraj, 'Quiet Efforts of Jaffna University Vice-Chancellor Succeed in Two Undergrads Being Released After "Rehabilitation"', *dbsjeyaraj.com*, 23 January 2013, at http://dbsjeyaraj.com/dbsj/archives/15171.

> 1979, and that persons who have surrendered in terms of any emergency regulation which was in force at any time prior to coming into operation of these regulations, continue in terms of these regulations, to enjoy the same care and protection which they were previously enjoying.

Regulation 5 of the Regulations provides:

> (1) The officer or person to whom a person surrenders in terms of paragraph (2) of regulation 3, shall, within ten (10) days of such surrender hand over the surrendee to the Commissioner-General of Rehabilitation who shall assign such surrendee to a Centre. The Commissioner-General of Rehabilitation shall upon assigning the surrendee to a Centre, endeavour to provide the surrendee with appropriate vocational, technical or other training during his stay at the Centre.
>
> (2) The officer or any other person to whom a person surrenders in terms of paragraph (2) of regulation 3 shall inform the Secretary to the Ministry of the Minister in-charge of the subject of Defence, no later than ten (10) days of the surrender, that a voluntary surrender has been made and such person was handed over to the Commissioner-General of Rehabilitation in the manner set out in paragraph (1) of this regulation.

Hence the provisions of these Regulations were clearly misused to facilitate rehabilitation of students who engaged in peaceful protests in Jaffna. At no juncture was it claimed that the students were former members of the LTTE who 'surrendered', although there were some reports that V. Bavananthan surrendered to the TID on 7 December 2012. At least in the case of three students, there was no surrender, which raises serious doubts as to whether the matter came within the scope of the Regulations.[731] It is apparent that rehabilitation orders

[731] Amnesty International, *Two students released from custody*, 22 January 2013, at

were issued against the four students under Regulation 6 (1), which provides:

> The Secretary to the Ministry of the Minister to whom the subject of Defence is assigned, shall on being informed in terms of paragraph (2) of regulation 5 by the officer or person to whom the surrendee surrendered, that the surrendee has been handed over to the Commissioner-General of Rehabilitation, shall make an order authorizing the Commissioner-General of Rehabilitation to keep such surrendee for a period not exceeding twelve months in the first instance at the Centre to which he has been assigned. Such period will be computed from the date of handling over of such surrendee by the officer or person as the case may be, to the Commissioner-General of Rehabilitation.

Two of the students, V. Bavananthan and S. Solomon, were released from custody on 22 January 2013 after being 'rehabilitated' at the Centre.[732] The Jaffna Security Forces Commander, Major General Mahinda Hathurusinghe thereafter stated that the remaining students required further rehabilitation and would be released later.[733] The remaining students, P. Darshananth and K. Jenamejeyan, were eventually released on 13 February 2013 on the orders of President Mahinda Rajapaksa.[734] Once again, the President's benevolence was seen as a determinative factor in securing the release of the two students.

---

http://ua.amnesty.ch/urgent-actions/2012/12/347-12/347-12-2?ua_language=en.

[732] *Ibid.*

[733] See 'Two Jaffna undergraduates to be released soon', *The Nation*, 27 January 2013, at http://www.nation.lk/edition/news-online/item/15150-two-jaffna-undergraduates-to-be-freed-soon.html.

[734] Amnesty International, *Sri Lanka: Protestors Released*, 13 February 2013, at http://www.amnesty.org/fr/library/asset/ASA37/005/2013/fr/9593d1f0-9c24-4339-bc27-1bd01ddbc04f/asa370052013en.html.

The case demonstrates a critical departure from previous precedent where the courts were the for a for canvassing rights. The abject futility of such a course of action perhaps compelled the parents of the students to appeal directly to the executive. As seen in both Tissainayagam's and Sarath Fonseka's cases, the ultimate power to grant relief to the aggrieved lay with the President. In this context, it made far more sense for the parents of the students to explore the option of appealing to the President, rather than blighting their chances through pointless litigation. It was accordingly reported by Amnesty International that 'President Rajapaksa gave the order for release while chairing a District Development Committee meeting during a visit to Jaffna on 12 February, after the parents of the students made a personal appeal.'[735] The release of the students no doubt reinforces the executive's dominion over rights dispensation and signals the irrelevance of the courts.

3.2.2.3 Azath Salley's case

On 2 May 2013, Azath Salley, the General Secretary of the National Unity Alliance and the former Deputy Mayor of the Colombo Municipal Council was arrested by the police for purported offences committed under Section 120 of the Penal Code and Section 2(h) of the PTA. Salley had been strongly critical of the government owing to inaction in bringing to justice the persons involved in the attack on the Dambulla Mosque. In a letter to the President dated 26 April 2013, Azath Salley provided information regarding those responsible for the Dambulla Mosque, the Anuradhapura Mosque attacks and the imminent attack on the Kurugala Mosque. He also participated in several television debates and discussions, expressed strong views against the attacks on minority religious establishments and was critical about the fact that certain extremist groups including the

[735] *Ibid.*

Boddu Bala Senawa (BBS) was inciting racial and religious intolerance and disharmony.[736]

In the fundamental rights application filed before the Supreme Court, Salley's representatives argued that he was being held in custody in violation of his fundamental rights guaranteed by Articles 11, 12, 13(1), 13(2), 13(4) and 13(5) of the Constitution.[737] According to the petition, at the time of arrest on 2 May 2013, the family of Azath Salley and his Attorneys attempted to see him from or around 12.00 noon. However, his lawyers were permitted to see him briefly in the presence of CID officers at approximately 3.00pm. Several parliamentarians proceeded to the CID officer to meet him but the CID did not permit any one of them to see him. Mr. M.A. Sumanthiran, Attorney-at-Law, and National List MP for the TNA, was, however permitted to interview Azath Salley as his lawyer. Yet the entire interview was video recorded by a CID officer.[738] Moreover, the petition stated that Salley's family members were not permitted to see him or give him medicine, despite the fact that he was a diabetic patient, undergoing treatment for seven years.[739] Salley was then admitted to the National Hospital the next day. Even four days after the arrest, i.e. 6 May 2013, Azath Salley had not been produced before a Magistrate nor had a valid Detention Order been handed over to him. The reasons for his arrest and detention, however, began to emerge. One theory related to an interview he had given on 20 April 2013 to the Tamil Nadu bi-weekly magazine *Junior Vikatan*. Azath Salley was alleged to have stated that 'the Muslims too should launch an armed struggle against the state in the same manner in which Tamils conducted a campaign earlier...(and) that such a struggle would commence once necessary arms are procured.'[740] In the petition

---

[736] See Petition of Azath Salley in SC (F.R) Application No. 164/2013.
[737] *Ibid.*
[738] *Ibid.*
[739] *Ibid.*
[740] See 'Translation Of Azath Salley's Controversial Interview: "Muslims Will Also Take Up Arms', *Colombo Telegraph*, 8 May 2013, at

filed before the Supreme Court, however, Salley's representatives argued that he had been misquoted and that the magazine published a correction on 4 May 2013.

Due to the ensuing political negotiations that took place to broker Salley's release, he was compelled to issue an affidavit reportedly addressed to the President.[741] Salley was released on 10 May 2013 pursuant to this affidavit. The affidavit reads much like an apology, where the *victim* of discrimination and rights deprivation was made to communicate regret. In one of the paragraphs, Salley states: 'I have stood for and will continue to stand for the sovereignty and territorial integrity of Sri Lanka and for the equal rights of all communities. If anyone is misled by the interview published in the *Junior Vikatan* or if anyone has been disturbed, I express my regrets.' However, the affidavit is not without some reference to the overarching hegemonic structure that Salley was being subjected to. He observes: 'As a Sri Lankan Muslim, I don't advocate or support anyone to take up arms against the Republic of Sri Lanka as I am fully aware of the consequences and the costs of such a course of action as seen through the three decade war in Sri Lanka.'[742] This observation remains an interesting sentiment and appears to differ significantly from the sentiments expressed in respect of Salley's fidelity to the sovereignty and territorial integrity of Sri Lanka. Salley appears to draw a distinction between principle and political realism. In the first statement, he claims he is a person committed to a united Sri Lanka were all communities enjoy equal rights. In the second, he states that he is not an advocate of violence. However, he includes a caveat to the second sentiment. Instead of attaching a principle or value to his stand

---

https://www.colombotelegraph.com/index.php/translation-of-azath-salleys-controversial-interview-muslims-will-also-take-up-arms/

[741] *Ibid.*

[742] Excerpts of the Affidavit were reproduced in 'I was misquoted: Azath Sally', *dailymirror.lk*, 11 May 2013 at http://www.dailymirror.lk/top-story/29320-i-was-misquoted-asath-sally.html.

on non-violence, he states that he does not support such action because he is fully aware of the brutal consequences.

Azath Salley's affidavit thus captures the triumph of the Sri Lankan state's approach to dissent. Minorities have been made to realise that opposing this government is too costly. The war—particularly its last stages—has provided a critical illustration of what the cost is likely to be for dissenters or any kind—be they brutal and violent separatists such as the LTTE, or critical voices such as Tissainayagam or Salley. In one last sentiment of obedience—perhaps bordering on subservience—Salley puts the question of public security prioritisation over rights to rest:

> As a patriotic citizen of the Republic of Sri Lanka and who supports the sovereignty of Sri Lanka I will not support anyone who makes statements against Sri Lanka or its national security and I condemn such actions and statements.

As pointed out above in numerous post-war cases, the aggrieved party has sought the intervention of the President with some success. Asath Salley was also forced to submit to the new rights dispensation designed to elevate the executive to an arbiter of rights and demote the judiciary to an enabler of rights violations. In the rare contemporary cases where the Supreme Court's intervention has in fact been sought, the Court's response has been singularly alarming. The case of Ganesan Nimalaruban is perhaps the best illustration of this point.

3.2.2.4 Ganesan Nimalaruban's case

In July 2012, Ganesan Nimalaruban and Mariyadas Pevis Delrukshan two Tamil political prisoners died in state custody.[743] The two Tamil

[743] 'Ganesan Nimalaruban: A damning murder, funeral and silence', *Ground views*, 31 July 2012, at http://groundviews.org/2012/07/31/ganesan-nimalaruban-a-damning-murder-funeral-and-silence; Asian Human Rights Commission, *Sri Lanka: Truth and*

political prisoners were severely beaten by the Special Task Force (STF) of the Police following their involvement in a hostage taking incident at the Vavuniya Prison. Nimalaruban (age 28) succumbed to his injuries in hospital on 4 July 2013 and Delrukshan (age 34), who was in a coma for several days, also succumbed to the injuries he sustained as a result of the assault.[744]

Nimalaruban and Delrukshan and thirty-five other Tamil political prisoners protested the arbitrary transfer of prisoners from Vavuniya to Anuradhapura, where they believed their security was at serious risk.[745] No prosecutions against any of the STF officers involved in the incident ensued, leaving the grieving families of the two deceased detainees without even a semblance of justice.[746]

Nimalaruban's father thereafter filed a fundamental rights application dated 3 August 2012 before the Supreme Court. According to the petition, Nimalaruban was arrested by the Criminal Investigation Unit of the Vavuniya Police on 5 November 2009 while traveling on a

---

myth, 10 August 2012, at http://www.humanrights.asia/news/ahrc-news/AHRC-ART-071-2012/?searchterm=None.

[744] *Ibid.*

[745] See Charles Haviland, 'Parents of dead Sri Lankan Tamil prisoner 'denied last rites'', *BBC News*, 9 July 2012, at http://www.bbc.co.uk/news/world-asia-18770072.

[746] The author notes during the thirty-year civil conflict in the country, the failure to prosecute and convict perpetrators responsible for the death of Tamil detainees was not uncommon. At least three egregious incidents warrant mention. In July 1983, during race riots, Sinhalese inmates at the Welikada Prison massacred 53 Tamil detainees where, most gruesomely, Kuttamani a young Tamil political activist who was sexually assaulted and decapitated. On 11 December 1997, Tharamalingam, Sivanesan and Sharip were hacked to death by Sinhalese inmates during a prison riot in Kalutara. A further 17 Tamil prisoners were wounded in the attack. On 24 October 2000, a mob of Sinhalese villagers attacked a detention centre in Bindunuwewa, killing 26 young Tamil detainees, many of whom were former LTTE child soldiers. In each of the incidents, the authorities did little to intervene and prevent the slaughter. Disturbingly, not a single person was ever convicted for these heinous crimes. As discussed above, even the perpetrators of the Bindunuwewa killings, who were initially convicted, were eventually acquitted. See S.C. Appeal 20/2003 (TAB), Supreme Court Minutes, 21 May 2005.

motorcycle with a friend along Veppankulam Road, Vavuniya.[747] After being detained at the Criminal Investigation Unit, Vavuniya for two days, Nimalaruban was taken to the Vavuniya Police Station. Meanwhile a Detention Order under Regulation 19(1) of the 2005 ERs was issued by the Additional Secretary to the Ministry of Defence to detain Nimalaruban a period 30 days.[748] According to the petition, Nimalaruban was thereafter produced before the Magistrate's Court of Vavuniya and the Magistrate ordered that he be remanded.[749]

The matter was eventually decided by Mohan Peiris—who is currently functioning in the office of Chief Justice[750]—on 14 October 2013. The Court proceeded to dismiss the application, once again without reasons. Hence there is no official record of the proceedings or the exchange between counsel and Court. However, unofficial media reports cited by the Asian Human Rights Commission reveal startling judicial sentiments, expressed in open court while refusing leave to proceed in *Nimalaruban's case*.[751] Mr. Peiris is reported to have observed that 'if children are brought up well, they won't be involved in these types of activities', thereby displaying what appears to be prejudicial sentiments regarding a case which he was yet to hear.[752] He was also reported as saying that the prison authorities needed to use some type of force to quell the riot and rescue prison officers who

---

[747] The petition was reproduced by the Asian Human Rights Commission in: Asian Human Rights Commission, *Sri Lanka: Ganeshan Nimalaruban case: Chief Justice Mohan Peiris denies petitioner's lawyers right to see replies filed by Attorney General*, 22 May 2013.

[748] *Ibid.*

[749] *Ibid.* See Case No.B/2262/09 (Magistrate's Court, Vavuniya).

[750] The appointment of the Chief Justice remained impugned in light of two opinionsof the Court of Appeal and Supreme Curt which invalidated the impeachment of Chief Justice Shirani Bandaranayake. See S.C. Reference No.3/2012 and CA (Writ) Application No. 358/2012.

[751] Asian Human Rights Commission, *Sri Lanka: In Ganeshan Nimalaruban's case the de facto CJ holds that inquiry into a prison death will encourage prisoners to riot*, 15 October 2013, at http://www.humanrights.asia/news/ahrc-news/AHRC-STM-186-2013.

[752] *Ibid.*

had been taken hostage. He then reiterated that Nimalaruban was already a heart patient, and that that was the cause of his death.[753] The Asian Human Rights Commission correctly points out that, at this stage of the case, the Court 'did not have all the evidence that would be led by both parties and the *de facto* CJ was not in a position to make his judgement on the facts.'[754] Moreover, when Counsel for the petitioner pointed out that there was no material before Court to prove the victim's connection to the incident at the Vavuniya Prison, Mr. Peiris indicated that he had personal knowledge about the incident.[755]

Nimalaruban's case was not a case under the ERs or PTA, but under the fundamental rights jurisdiction of the Supreme Court. In fact, ironically, there was no proper indictment against him at the time of his death, as he was being held in remand by order of the Magistrate's Court of Vavuniya. The case remains one of the starkest examples of judicial capitulation to so-called public security concerns. In fact, in this particular case, the Court's role may be described as more than mere capitulation. When the matter was taken up in Court on 21 May 2013, prior to its dismissal, Mr. Peiris is reported to have stated: 'human rights are there to protect the majority and not the minority of criminals.' In effect, the Court was prepared to see Tamil political prisoners as criminals even before they had been tried by a court of law.

When Counsel for the petitioner requested access to certain documents filed by the Attorney-General's department, Mr. Peiris responded:

> The court is not a place to get documents for the petitioners. This is the way you all procure the evidence

---

[753] *Ibid.*
[754] *Ibid.*
[755] *Ibid.* Also see 'De Facto CJ Exposed Himself In The Worst Possible Manner In Courts', *colombotelegraph.com*, 14 October 2013, at https://www.colombotelegraph.com/index.php/dc-facto-cj-exposed-himself-in-the-worst-possible-manner-in-courts/

> and then circulate to the entire world to tarnish the image of the country. The executive submits confidential reports only for the eyes of judges particularly where national security issues are concerned.[756]

Indeed, *Nimalaruban's* case was not one of mere judicial capitulation to the will of the executive. This was a case of manifest failure of judicial responsibility in the suppression of individual rights. The long history of the Sri Lanka's judiciary in its failure to prevent the oppression of minorities and political dissenters had perhaps culminated in the worst incarnation of 'obedience' to the executive. This case therefore is a good example of the transformation of the judicial mindset from one that exemplifies a watchful guardian to one that is now akin to a deferential bystander.

---

[756] See Asian Human Rights Commission, *Sri Lanka: In Ganeshan Nimalaruban's case the de facto CJ holds that inquiry into a prison death will encourage prisoners to riot*, 15 October 2013, at http://www.humanrights.asia/news/ahrc-news/AHRC-STM-186-2013.

Conclusion

When multiethnic and multi-religious societies are confronted with challenges that test the limits of coexistence, governments may be tempted to resort to populism or political expediency. Sri Lanka's relatively short post-independence history is unfortunately riddled with examples of such compromises. Minorities have been victimised throughout this country's history. They have had nowhere to turn, except perhaps towards the only institution that is tasked with checking power: the judiciary. Sri Lanka's judiciary has been called upon time and again to vindicate minority rights in the face of overwhelming oppression by the other organs of government. This study has essentially sought to examine the judiciary's record in rising to and meeting this enormous challenge.

At the heart of the post-independence mandate of the judiciary to protect the rights of all communities was Section 29 of the Soulbury Constitution. As detailed in the introduction of this study, the fundamental thinking behind the protection of minority rights flowed from this constitutional provision. However, the contents of this provision were consistently undermined throughout the survival of that Constitution, and in 1972, were omitted altogether from the new Republican Constitution. The gradual undermining of Section 29, culminating in its ultimate omission, in many ways reflected the slow deterioration of minority rights in Sri Lanka.

The first Part of this study examined in detail the judiciary's response to issues of language rights, employment rights, land rights and other basic liberties including the freedom of religion. In each case, the specific treatment of minorities was juxtaposed with the general jurisprudence on the issue. In each case, barring a few exceptions, the judiciary's treatment of minorities was fundamentally different to the general dispensation on the issue. The unmistakably divergent treatment meted out to litigants from minority communities, in the very least, raises serious doubts over the objectivity and impartiality

of the courts. As a common trend, the judiciary appeared to have been unable to produce consistent jurisprudence across ethnic and religious lines on matters of language, employment, land and religious freedom. The cases analysed in this Part bear witness to this trend.

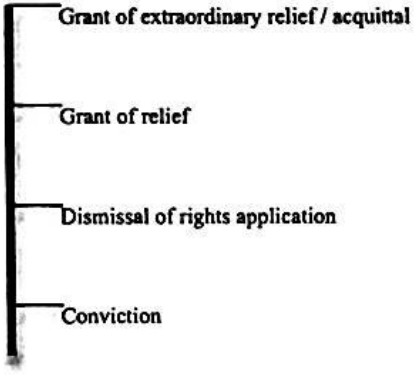
This trend brings us to the question of whether the courts too were partially to blame for the build up of minority frustrations in Sri Lanka. The meticulously documented history of the ethnic conflict in this country confirms that discrimination in terms of language, employment, land and religious freedom was perhaps the root cause of the crisis. The political space afforded to minority communities seeking equality and justice steadily diminished during the post-independence and republican eras. Thus one of the only democratic outlets for frustration was perhaps litigation before the courts. The judiciary's failure to consistently uphold the values of equality and justice no doubt exacerbated these frustrations. The rise of Tamil militancy in Sri Lanka, therefore, cannot be divorced from institutional failure, including that of the judiciary, to address genuine grievances. This study in the very least alludes to, if not proves, some level of institutional culpability on the part of the judiciary with regard to the slow burning crisis that eventually snowballed into ethnic conflict.

The second Part of this study deals with the judiciary's role in protecting minority rights in the context of public security. The significance of the disparity in judicial treatment is perhaps evidenced more strongly in the case of public security jurisprudence. Given its immediate relevance to public perceptions in regard to the integrity of the Court, we apply—perhaps for the first time—a quantitative analytical lens to quantify the measure of the judicial response.

This Part of the study examined in detail twenty-four landmark cases involving public security and evaluated the judiciary's response to the individual rights at stake. A quantitative analysis of the cases reveals a dispiriting transformation of the judiciary over the three distinct eras

examined in this Part. Each identifiable era was analysed in terms of a quadrant consisting of the court's decision in favour or against the detainee or accused (vertical axis) and the perceived political threat involved (horizontal axis). The twenty-four cases are located within these three quadrants.

The vertical axis operates on the following spectrum:



The above spectrum illustrates the judiciary's response to the individual's claims.

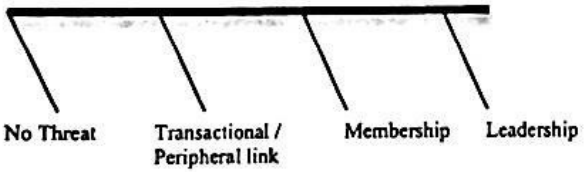
At one end of the spectrum lie convictions by the courts, despite strong claims of rights violations or procedural impropriety. These convictions demonstrate the judiciary's *active* role in the suppression of individual rights in light of public security considerations. Cases such as *Amirthalingam*, *Tissainayagam* and *Sivalingam* fall squarely within this category.

Next, dismissals of rights applications, i.e. either fundamental rights applications or *habeas corpus* applications, demonstrate the judiciary's reluctance to intervene to protect individual rights in light of public security considerations. In such cases, the judiciary's role is less direct. It is the judiciary's reluctance to check the executive that

permits the rights violation to continue or to be left unaddressed. Cases such as *De Saram*, *Navasivayam* and *Nimalaruban* fall into this category. Next, the granting of relief, demonstrates the judiciary's willingness to acknowledge the injustice caused to the individual. Such cases involve the judiciary intervening to check executive action and to order the release of the individual, often alongside the payment of some compensation. Cases such as *Padmanathan, Ratawesi Peramuna and Weerawansa* fall into this category.

At the other end of the spectrum lie extraordinary cases of judicial activism in favour of individual rights. These rare cases set important precedents for the future, where the individual's rights were upheld despite the public security considerations at stake. *Joseph Perera* and *Machchavallavan* are perhaps the only cases that fall into this category.

The horizontal axis operates on the following spectrum:



The above spectrum illustrates the actual threat the individual may have posed to the state from the perspective of the executive. There is some level of political speculation involved in locating cases within this spectrum. For instance, in *Tissainayagam's* case, the official reason for his conviction was that, by falsely accusing a predominantly Sinhalese Army of killing civilians, he incited retaliatory acts of violence by Sinhalese readers against Tamils, as he himself was a Tamil writer. As absurd as the contention was, the real reason for *Tissainayagam's* conviction was perhaps the peripheral

threat he posed to the state by writing on the war, and perhaps the unsubstantiated belief that he was funded by the LTTE.

At one end of the spectrum lie cases where it was revealed to the court that the individual was of no threat to the state whatsoever. Such revelation came from the executive's own decision-making, such as a decision to release the individual. The cases of *Padmanathan* and *Gnanamuttu* fall into this category.

Next, the executive may perceive a peripheral threat from the individual. Such threat is often linked to certain transactions the individual might have had with other individuals or groups committed to overthrowing the government. *Hidaramani*'s peripheral link to the JVP, or, as mentioned above, *Tissainayagam's* unsubstantiated transactions with the LTTE, justify locating these cases within this category.

Next, the executive may perceive a more direct threat from the individual owing to a belief (either proved or unproved) that the individual belonged to a group that was in some way committed to overthrowing the government or effecting a regime change. In this respect, the *Jaffna University Students' case* remains a 'hard' case, as it could be argued that the perceived threat to the state was peripheral since these students were merely involved in peaceful protests against unwarranted violence perpetrated against students in Jaffna. However, from the perspective of the executive, the students' alleged links to Diaspora elements that supported the LTTE[757] perhaps placed the students at a higher threat level than 'peripheral' or 'transactional'. Since the spectrum essentially speculates on the threat level from the perspective of the executive, it is perhaps more appropriate to place the case in the category of 'membership', i.e. the individual being a

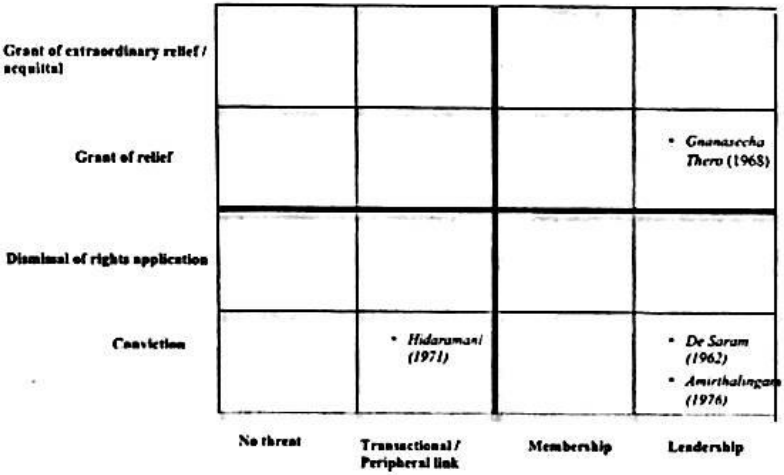
[757]D.B.S. Jeyaraj, 'Quiet Efforts of Jaffna University Vice-Chancellor Succeed in Two Undergrads Being Released After "Rehabilitation"', *dbsjeyaraj.com*, 23 January 2013, at http://dbsjeyaraj.com/dbsj/archives/15171.

member of a group or movement aiming to overthrow the government or effect a regime change.

At the end of the spectrum lie cases where the perceived threat level is at its highest. Such cases invariably involve individuals who are leaders of the initiative to overthrow the government, effect a regime change, or simply establish a separate state. Thus cases such as *De Saram* and *Amirthalingam* clearly fall into this category. The ambitions to overthrow the government need not be through violent means. Hence the *Ratawesi Peramuna case* and certainly the *White Flag case* fall into this category—given the fact that Sarath Fonseka posed a significant threat to the government and perhaps came closest to effecting a regime change in the post-war era.

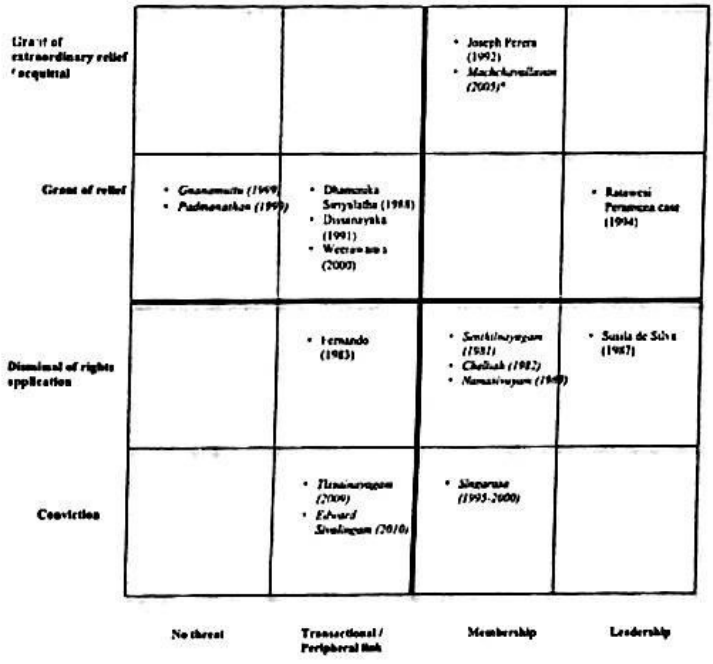
In the era in which the public security doctrine witnessed its inception and germination, i.e. 1947 to 1979, the judiciary's approach was largely contingent on the political contentiousness of the case. The judiciary appeared to be largely conservative in matters concerning public security. Yet it did not appear to be racially biased at the time. However, the most contentious case of the era, the *Amirthalingam Trial-at-Bar* involved a political minority and saw a regressive judgment being delivered by the Supreme Court whereby it rejected the legitimate claim of the accused that he had been deprived of procedural propriety. The following quadrant explains the judiciary's record *vis-à-vis* the outcome of the cases and the perceived level of threat the individuals posed to the state.

Quadrant 1



The next era, i.e. 1979 to 2009, was marked by the enactment of the PTA and witnessed the rise of counterterrorism as an overarching rhetoric in dealing with political dissent. The era saw a mix of progressive, conservative and regressive judgments involving public security. However, disturbingly, many cases involving Tamil individuals suspected of 'terrorism' ended in decisions against the individuals. The progressive judgments of the courts invariably involved petitioners from the majority community or petitioners who no longer posed any perceivable threat to the state. The quadrant below demonstrates a pattern that reveals this trend amongst judges. This trend significantly depreciated the credibility of the judiciary as an objective institution and set the stage for a new dispensation of rights.

Quadrant 2

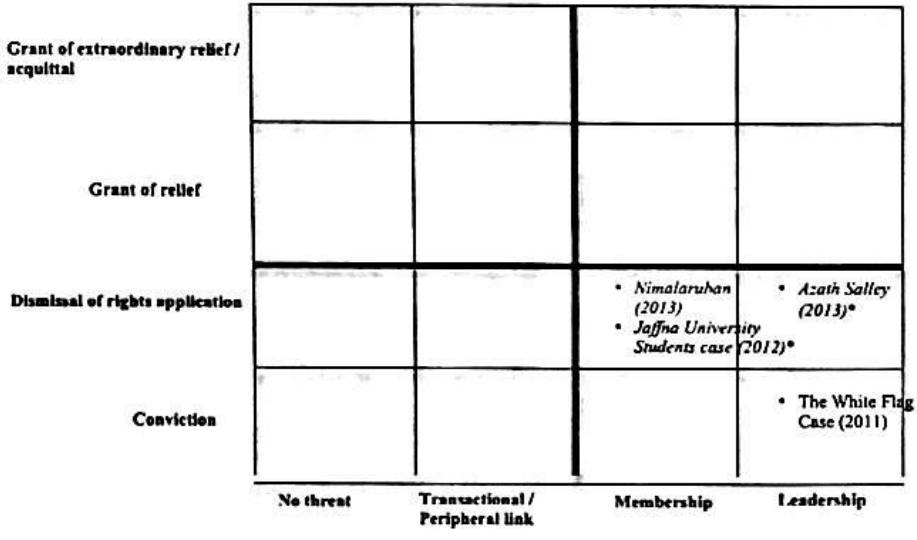


*As explained above, *Machchavallavan* was heard during the ceasefire period, where the counterterrorism agenda had been momentarily suspended. This may explain the unusual outcome of the case.

The final era examined in this Part of the study, i.e. the post-war era, witnessed a complete transformation in the rights dispensation in Sri Lanka. A judiciary, previously seen as cautious, then deferential, was now largely irrelevant. The judiciary in the post-war era was unwilling to vindicate rights in the face of public security regardless of the ethnicity of the individual concerned. The transformation of the judiciary to a political institution was completed at the end of the war, and a new populist rights dispensation—where the Executive President granted rights in his discretion—emerged to replace the role

of the judiciary. The following quadrant signals a complete absence of progressive judgments in the post-war era where public security was at stake.

Quadrant 3



*These cases did not have outcomes, since in the *Jaffna University Students case*, no rights cases were filed and in *Azath Salley's case*, the matter was withdrawn owing to his release. The authors speculate, however, that given the track record of the judiciary, and the general trajectory of judicial decision-making, the cases would have resulted in dismissals.

The significance of the three quadrants is perhaps the total absence of positive outcomes in cases involving Tamil individuals who posed any level of threat (even peripheral) to the state. Barring the extraordinary ceasefire era case of *Machchavallavan,* the authors were unable to find a single such case that fit the upper right quarter of a quadrant. Subject to the aforementioned limitations of this study, this observation reflects the lack of willingness on the part of the judiciary

over a period of more than sixty-years to uphold the rights of minorities when public security was at stake.

A real politik analysis of the judiciary's transformation might produce a compelling explanation. The Supreme Court, for instance, may have been guided by the political space afforded to it by the government of the day. In an era where its independence was preserved and independent decision-making was expected of it, the judiciary was willing to check the executive to some extent. Yet, progressive pronouncements were only deemed appropriate when the threat involved was relatively insignificant. Hence cases were judged on an individual basis during the pre-1979 era. However, with the introduction of 'counterterrorism' as a distinct and powerful rhetorical tool to suppress dissenting voices, the judiciary struggled to maintain its decision-making space. The country was at war, and the Supreme Court could not afford to be seen as sympathetic towards the 'enemy'. Hence a race-conscious judiciary emerged, where the courts accepted without question the routine classification of Tamil litigants as 'terrorists'. The courts were accordingly unwilling to return judgements that protected individual rights in the context of counterterrorism. The rhetoric was so compelling, not a single judge was willing to challenge it. A semblance of independence was cautiously retained due to several progressive judgements, particularly by Mark Fernando J. These judgements proved to be critical points of departure during the period. Yet they did not challenge the counterterrorism rhetoric that had governed the rights dispensation of the time. Members of the Tamil community accused of being 'terrorists' seldom benefitted from these progressive judgments. Even when Tamil litigants did receive some measure of relief, it was invariably after they were deemed innocuous and released from state custody.

The Rajapaksa regime succeeded in annihilating the LTTE, which almost irreversibly validated the public security doctrine. The triumph of the regime over 'terrorism' appeared to have settled—perhaps

permanently—the tension between public security and individual rights in favour of public security. The courts, once again responding to political realities of the day, were simply not prepared to challenge this resolution of the tension. The judiciary instead meekly accepted the PTA Regulations, which perpetuated a *de facto* state of emergency. It ultimately accepted a space where it could *never* challenge the executive's supreme authority over matters of public security.

Such a transformation may also be explained through a normative analysis. This normative explanation may clarify also the court's inability to generate strong and consistent jurisprudence with respect to language, employment, land and religious freedom—issues discussed in the first Part of this study. The independence of the judiciary requires a 'juridical' approach, which is foundational to the rule of law. If the 'juridical' is displaced by the 'administrative', then the very foundation of the law is undermined.[758]

On the one hand, 'juridical' may be defined as 'relating to judicial proceedings or to the administration of justice.'[759] Hence the judicial system is composed of those who are expected to gather information, analyse it and come to findings on the basis of legal notions and 'the manner in which the law is practised.'[760] The essence of the juridical is therefore this allegiance to the law and its processes. On the other hand, what is meant by 'administrative' is the manner of action of the executive.

---

[758]See Kishali Pinto-Jayawardena, Gehan Gunatilleke & Prameetha Abeywickreme, *From Immunity to Impunity: A Critique of Constitutional and Statutory Immunities in Sri Lanka, LST Review*, Volume 23, Issue 306 & 307, April & May 2013 for a discussion on the transformation of the juridical to the administrative in the context of official immunities granted under the Constitution and statutes.

[759] *Black's Law Dictionary*, (3rd Ed.), (2006), at 393. The following discussion of this point has originated from a useful reflection in Basil Fernando,*The Rule of Law and Democracy in Sri Lanka*, Asian Human Rights Commission (March 2012).

[760]Basil Fernando,*The Rule of Law and Democracy in Sri Lanka*, Asian Human Rights Commission (March 2012).

It is imperative to understand that those who have obligations under the juridical sphere and those who have obligations under the administrative sphere must think and act distinctly and separately.[761] In fact, the doctrine of separation of powers is founded on such thinking. A good example of this need is reflected in the case of arrest and detention. While the executive is likely to deal with arrest and detention from the perspectives of efficiency and expediency, the judiciary is compelled to uphold the rights of individuals and personal freedom when considering the same issue.[762] In the ensuing clash between notions of the juridical and the administrative, the executive may wish to modify the law so as to displace juridical notions and to replace them with administrative policies and considerations.[763] If the executive succeeds in this endeavour—as it did in promulgating the PTA Regulations—the juridical would be replaced with the administrative.

The judiciary's response to such endeavours depends largely on the level of independence it enjoys. While it is tempting to blame the judiciary for permitting the executive to discriminate in the areas of language, employment, land and religious freedom, and to abuse the public security regime, the lack of judicial independence must still be understood as a systemic problem. It is not altogether reasonable to criticise or even felicitate individual judges for their response to executive overreaching, without also criticising the legal education system, the integrity of the process of appointments and the security of judicial tenure. Each of these factors may be commented on briefly.

First, it is not mandatory for judges to obtain a degree in law prior to joining the judicial service. Hence a judge is expected to develop the skills of nuanced legal analysis and conceptual thinking through experience rather than through academic training. While the Judicial

---

[761] *Ibid.*
[762] *Ibid.*
[763] *Ibid.*

Service Commission (JSC) is empowered under Article 111H(2)(a) of the Constitution, to make 'rules regarding training of Judges of the High Court, the schemes for recruitment and training, appointment, promotion and transfer of judicial offices and scheduled public officers', it is unlikely that such training meets the academic standards of a university education in law and legal theory. Hence judges do not necessarily come from a tradition of learning in which the importance of broad notions and values, such as constitutionalism, the separation of powers and the rule of law, are impressed upon them. This *lacuna* has prevented judges from effectively responding to executive overreaching by drawing on such broad notions and values.

Second, political interference with the appointment of judges has been a historic point of fact under previous constitutions as well as under the present Constitution. In 2001, the Seventeenth Amendment to the Constitution endeavoured to correct this history by stipulating that a Constitutional Council, having in its composition individuals of eminence and integrity, should approve the selection of individuals appointed by the President to the appellate judiciary. Though this arrangement worked satisfactorily during the first term of the Council, the process broke down thereafter.

Thereafter, in 2010, the Eighteenth Amendment to the Constitution seriously compromised the integrity of the process through which judges are appointed. Article 41A(1) of the Constitution, read with Schedule II Part I of the Amendment, empowers the President to directly appoint the Chief Justice and the Judges of the Supreme Court, the President and Judges of the Court of Appeal, and the Members of the JSC, other than the Chairman. Interestingly, the exclusion of the Chairman of the JSC from the scope of the Article is redundant, as the Article 111D(2) provides that the Chairman of the JSC shall be the Chief Justice, who is in fact appointed directly by the President. The Eighteenth Amendment only requires that the President seek the observations of a Parliamentary Council in making such

appointments.[764] Incidentally, the JSC is vested with the power to appoint, promote, transfer, exercise disciplinary control and dismiss judicial officers and scheduled public officers under Article 111H(1)(b) of the Constitution. Given the fact that the President is empowered to appoint the members of the JSC under Article 41A(1) and Article 111D(1), the constitutional scheme effectively concentrates the power to control the appointment of the *entire* judiciary in one individual: the President. Such a scheme no doubt prevents the judiciary from being truly independent of the executive.

Third, the security of tenure of judges in Sri Lanka is subject to political control. While the JSC is responsible for the transfer, dismissal and disciplinary control of judges, it is no longer independent, and is clearly subject to political manipulation through the application of the Eighteenth Amendment. Moreover, judges of the Supreme Court do not enjoy life tenure. This position may be contrasted with the life tenure enjoyed by the Justices of the U.S. Supreme Court. Interestingly, the Court is divided on political lines, with judges being candid about their liberal or conservative inclinations. Yet, evidently, this division is more in terms of political ideology than in terms of political affiliation. Moreover, life tenure has enabled the Justices of the U.S. Supreme Court to maintain their positions despite regime change and even modify, over time, their respective positions on policy issues.[765] Hence, in the U.S. context, there is little doubt that security of tenure has assisted in the cultivation of an independent court. Such is certainly not the case in Sri Lanka.

---

[764] *Ibid.*

[765] For an in-depth discussion on the subject, see Kevin T. Mcguire, *Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court, Judicature* Volume 89, Number 1, July-August 2005; Steven G. Calabresi & James Lindgren, 'Term Limits for the Supreme Court: Life Tenure Reconsidered', 29 *Harvard Journal of Law and Public Policy* 769 (2006); Ryan W. Scott & David R. Stras, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi and Lindgren*, Maurer School of Law: Indiana University, Faculty Publications, Paper 363 (2007), at http://www.repository.law.indiana.edu/facpub/363.

All three of the above factors contribute to the level of independence the judiciary in Sri Lanka enjoys. If the independence of the judiciary is in fact compromised as a result of such systemic problems, it is inevitable that the judiciary will begin to act in compliance with executive will and fail to protect minority rights—both in the context of public security and in general.

What appears to be at the heart of the challenge faced in Sri Lanka is this apparent transformation of the juridical to the administrative. When those who are in the juridical sphere are compelled by political circumstances or by systemic compulsions to think and act in a similar manner to those who are dealing with the administrative sphere, the juridical is replaced with the administrative and the rights of individuals are imperilled. This unfortunate truth fundamentally defines the future challenge to reform institutions in Sri Lanka.

Table of References

1. Case Law

1.1. Domestic

- *Abdul Basir v. S.A.Puttalam* (1968) 66 NLR, at 219
- *Adiyapathan v. Attorney General* [1978-79-80] 1 Sri.L.R. 60
- *Amirthalingam Trial-at-Bar High Court Trial-at-Bar* No.1 of 1976, S.C. Application No.658 of 1976 and S.C. Application No.650 of 1976
- *Application for a writ of habeas corpus for the production of the body of W.A de Silva* (1915) 18 NLR 277
- *Athamlebbe v. Inspector of Police, Batticaloa* (1948) 49 NLR 234
- *Athukorala v. De Silva* [1996] 1 Sri.L.R 280
- *Attorney General v. Reid* (1966) 67 NLR 25
- Case No. B/2262/09 (Magistrate's Court, Vavuniya)
- *Channa Pieris and Others v. Attorney General and Others* [1994] 1 Sri.L.R 1
- *Charles Appu v. The Controller of Establishments* (1946) 47 NLR 464
- *Christie v. Leachinsky* (1947) A.C. 573
- *Coomaraswamy v. Shanmugaratne Iyar and Another* [1978 – 79-80] Sri.L.R 323
- *Corea v. The Queen* (1954) 55 NLR 457
- *De Saram v. Ratnayake* (1962) 63 NLR 522
- Decisions of the Constitutional Court of Sri Lanka Vol. 3 at 7 decision on *The Church of Sri Lanka (Consequential Provisions) Bill*
- Decisions of the Constitutional Court of Sri Lanka Vol. 6. at 31, decision on *Local Authorities (Imposition of Civic Disabilities) (No.2) Bill*

- Decisions of the Constitutional Court of Sri Lanka, Vol. 1, at 27 decision on *The Places and Objects of Worship Bill*
- *Dhammika Siriyalatha v. Baskaralingam* C.A. (H.C.) 7/88, Court of Appeal Minutes, 7 July 1988
- *Dissanayaka v. Superintendent Mahara Prison* [1991] 2 Sri.L.R. 247
- *Edward Francis William Silva, President's Counsel and Three Others v. Shirani Bandaranayake and Three Others* [1997] 1 Sri.L.R. 92
- *Edward Sivalingam v. Jayasekara* S.C. (F.R.) Application No. 326/2008, decided on 10 November 2010.
- *Farook v. Raymond* [1996] 1 Sri.L.R. 217.
- *Fernando v. The Attorney-General* [1983] 1 Sri.L.R. 374.
- *Gnanamuttu v. Military Officer Ananda and Others* [1999] 2 Sri.L.R 225
- H.C. Colombo 5311/2010
- H.C. Colombo No. 763/2003, S.C. Appeal 20/2003 (TAB), Supreme Court Minutes, 21 May 2005
- *Habeebu Mohamadu v. Lebbe Marikkar* (1947) 48 NLR 370
- *Hidramani v. Ratnavale* (1971) 75 NLR 67
- *Ibralebbe v. The Queen* (1963) 65 NLR, at 433
- *In re Mark Antony Lyster Bracegirdle* (1937) 39 NLR 193
- *Jeevakaran v. Ratnasiri Wickremanayake & Others* [1997] 1 Sri.L.R. 351
- *Joseph Perera Alias Bruten Perera v. The Attorney-General and Others* [1992] 1 Sri.L.R. 199.
- *Kanapathipillai Machchavallavan v. Officer in Charge, Army Camp Plantain Point, Trincomalee and Three Others* [2005] 1 Sri LR 341
- *Kanthiah Thambu Chelliah v. Paranage Inspector of Police* [1982] 1 Sri.L.R. 132
- *Kariapper v. Wijesinghe* (1965) 68 NLR 529
- *Karunatilleke v. Dissanayake* [1999] 1 Sri.L.R 157

- *Katchi Mohamad v. Benedict* (1961) 63 NLR 505
- *Kodakkan Pillai v. Mudanayake* (1953) 54 NLR 433
- *Kodeswaran v. Attorney General* (1969) 72 NLR 337
- *Lama Hewage Lal (Deceased),Rani Fernando (wife of deceased Lal) and others v. OIC, Minor Offences, Seeduwa Police Station and others* [2005] 1 Sri.L.R 40
- *Liyanage v. The Queen* (1965) 68 NLR 265
- *M. Sevvanthinathan v. V. Nagalingam and others* (1960) 69 NLR 419
- *Manel Fernando v. Minister of Lands* [2000] 1 Sri.L.R 112
- *Meera v. Dias* (1957) 58 NLR 571
- *Mowjood v. Pussadeniya and Another* [1987] 2 Sri.L.R. 287
- *Mudannayake v. Sivagnanasundaram* (1951) 53 NLR 25
- *Muttusamy v. Kannangara* (1951) 52 NLR, 324
- *Nalika Kumudini, AAL (on behalf of Malsa Kumari) v. N. Mahinda, OIC, Hungama Police & Others,* [1997] 3 Sri.L.R 331
- *Nallaratnam Singarasa v. Sri Lanka,* Communication No. 1033/2001, decided on 23 August 2004, CCPR/C/81/D/1033/2001
- *Nallaratnam Singarasa v. The Attorney-General,* S.C. Spl. (LA) No. 182/99
- *Namasivayam v. Gunawardena* [1989] 1 Sri.L.R. 394
- *Nanayakkara v. Henry Perera* [1985] 2 Sri.L.R. 383
- *Natalie Abeysundara v. Christopher Abeysundara and Another* [1998] 1 Sri.L.R. 185
- *Nesarasa Sivakumar v. Officer in Charge,* Special Task Force Camp, Chettipalayam and others, SC (FR) App. No. 363/2000, 1 October 2001
- *Padmanathan v. OIC, National Intelligence Bureau,* Vavuniya [1999] 2 Sri.L.R. 213
- *Perera v. Balabatabendi and Others,* SC (FR) No 27/2002, SCM 19.10.2004
- *Perera v. Iddamalgoda* [2003] 2 Sri.L.R 63
- Petition of Azath Salley in SC (F.R) Application No.164/2013

- *Premalal Perera v. Weerasuriya and others* [1985] 2 Sri.L.R 177
- *Public Interest Law Foundation v. the Attorney General and Others*, CA Application No 1396/2003, CA Minutes of 17.12.2003
- *Reid v. Attorney General* (1963) 65 NLR 97
- S.C. (F.R.) App. No. 186/2001, 23.08.2002
- S.C. (F.R.) Application No. 453/2011
- S.C. (F.R.) Application No. SC/FR/457/2009
- S.C. (F.R). Application No.SC/FR/624/96
- S.C. Reference No.3/2012 and CA (Writ) Application No. 358/2012
- S.C.S.D No. 19/2003, SC Minutes of 25.07.2003 decision on *Provincial of Teaching Sisters of the Holy Cross of the Third Order of Saint Francis of Menzingen of Sri Lanka'*
- S.C.S.D No. 2/2001, SC Minutes of 24.05.2001 decision on *Christian Sahanaye Doratuwa Prayer Centre*
- S.C.S.D No. 2/2003, SC Minutes of 29.01.2003 decision on *New Wine Harvest Ministries*
- S.C.S.D No. 7/79, decided on 17 July 1979, decision on *the Prevention of Terrorism Bill*
- *Saman v. Leeladasa and another* [1989] 1 Sri.L.R 1
- *Senadheera v. the Bribery Commissioner* (1961) 63 NLR 313
- *Senasinghe v. Karunatilleke* SC 431/2001, SCM 17/3/2003
- *Senthilnayagam v. Seneviratne* [1981] 2 Sri.L.R. 187
- *Shanmugam v. Kandiah* (1983) Bar Association Law Reports 18
- *Somasiri v. Sub-Inspector Jayasena.* SC Application No. 147/88, SC Minutes of 1 March 1991
- *Sunil Rodrigo (On Behalf of B. Sirisena Cooray) v. Chandananda De Silva and Others* [1997] 3 Sri.L.R. 265
- *Suntharalingam v. Attorney General* (1972) 75 NLR 126
- *Susila de Silva v. Weerasinghe* [1987] 1 Sri.L.R. 88
- *Thavaneethan v. Dayananda Dissanayake* [2003] 1 Sri.L.R. 74
- *The Bribery Commissioner v. Ranasinghe* (1964) 66 NLR 73

- *The Democratic Socialist Republic of Sri Lanka v. J.S. Tissainayagam*, H.C. 4425/2008
- *The King v. Nadarajah* (1945) 46 NLR 198
- *The King v. Thelenis Appuhamy* (1945) 46 NLR 304
- *The Queen v. Liyanage* (1962) 64 NLR 313
- *The Queen v. Rev. H. Gnanaseeha Thero* (1968) 73 NLR 154
- *Valliamma v. Trafford Hill Rubber Estates Ltd* (1960) 26 NLR 468
- *Ven. Ellawala Medananda Thero and others v. Kannangara, District Secretary, Ampara and others* [2009] 1 Sri.L.R 54
- *Victoria v. The Attorney General* (1920) 22 NLR 33
- *Weerawansa v. The Attorney-General* [2000] 1 Sri.L.R. 387
- *Wickremabandu v. Cyril Herath* [1990] 2 Sri.L.R. 348
- *Wijesuriya v. The State* (1973) 77 NLR 25 (Court of Criminal Appeal)

1.2. International

- *Alexander v. Sandoval* 532 U.S. 275 (US 2001)
- *Brophy v. Attorney General of Manitoba* (1895) A.C. 202
- *Dominique Guesdon v. France* Communication No. 219/1986, U.N. Doc. CCPR/C/39/D/219/1986 (1990)
- *Holden v. Premier Waterproof and Rubber Co. Ltd* (1930) 23 B.W.C.C. 460
- *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr* AIR (1973) SC 1461
- *Kokkinakis v. Greece* ECHR, 25 May 1993, Application no. 14307/88
- *Lawrence v. George Mathews* (1929) 1 KBD 19
- *Residents of Joe Slovo Community v. Thubelish Homes, Minister for Housing and Others* Case CCT 22/08 (2009)
- *Rev. Stanislaus v. State of Madya Pradesh* (1977) SCR (2

2. Statutes

- Administration of Justice Law No.44 (1973)
- Baadi Beeya Association No. 15 (1947)
- Ceylon Constitution Order in Council (1946)
- Workman's Compensation Ordinance (1935)
- Citizenship Act No 18 (1948)
- Civil Procedure Code No. 2 (1889)
- Colombo Young Women's Christian Association Ordinance No. 23 1920
- Constitution of the Republic of Sri Lanka (1972)
- Constitution of the Democratic Socialist Republic of Sri Lanka (1978)
- Courts Ordinance (1889)
- Criminal Procedure Code No. 15 (1898)
- Holidays Act No. 19 (1971)
- Judicature Act (1979)
- Kandy Church Ordinance No. 11 (1842)
- Kandyan Marriage and Divorce Act No. 44 (1952)
- Kandyan Marriages Ordinances No. 03 (1870)
- Land Acquisition Act No. 9 (1950) (as amended)
- Marriage Registration Ordinance No. 19 (1907)
- Muslim Marriage and Divorce Act No. 27 (1929)
- Nugegoda Young Men's Buddhist Ordinance No. 54 (1947)
- Police Ordinance No. 16 (1865)
- Prevention of Social Disabilities Act No. 21 (1957)
- Prevention of Terrorism (Temporary Provisions) Act No. 48 (1979) (as amended)
- Public Security Ordinance No. 25 (1947)
- Rent (Amendment) Law No. 10 (1977)
- Saiva Paripalana Sabhai Ordinance, Chapter 457, Vol. XV, (LESL) (1980 Revised)

- Soulbury Constitution (1947)
- Tamil Language (Special Provisions) Act No. 28 (1958)
- The (Ceylon Branch) Ordinance No 8 of 1926, Chapter 456, Vol. XV, (LESL) (1980 Revised)
- The American Ceylon Mission Ordinance No 4 of 1908, Chapter 439, Vol. XV, (LESL) (1980 Revised)
- The Ceylon Baptist Council Ordinance No 54 of 1944, Chapter 448, Vol. XV, (LESL) (1980 Revised)
- The Church of England Ordinance No 6 of 1885, Chapter 429, Vol. XV, (LESL) (1980 Revised)
- The Dutch Reformed Church of Ceylon Ordinance No 9 of 1926, Chapter 432, Vol. XV, (LESL) (1980 Revised)
- The Episcopal Churches Ordinance No 12 of 1846, Chapter 430, Vol. XV, (LESL) (1980 Revised)
- The Episcopal Churches Ordinance No 12 of 1846, Chapter 434, Vol. XV, (LESL) (1980 Revised)
- The Methodist Trust Association Ordinance No 54 of 1935, Chapter 438, Vol. XV, (LESL) (1980 Revised)
- The New St. Andrews Church Ordinance No 16 of 1916, Chapter 435, Vol. XV, (LESL) (1980 Revised)
- The Non-Episcopalian Churches Ordinance No 5 of 1864, Chapter 431, Vol. XV, (LESL) (1980 Revised)
- The Official Language Act, No. 33 of 1956
- The Ordinance of the Young Man's Christian Association of Colombo, Chapter 446 Vol. VIII, (LESL) (1980 Revised)
- The Penal Code (1883)
- The Presbyterian Church (Kandy) Ordinance No 13 of 1845, Chapter 430, Vol. XV, (LESL) (1980 Revised)
- The Roman Catholic Archbishop and Bishops of Ceylon Ordinance No 19 of 1906, Chapter 441, Vol. XV, (LESL) (1980 Revised)
- The Salvation Army Ordinance No 11 of 1924, Chapter 436, Vol. XV, (LESL) (1980 Revised)

3. Rules and Regulations under Emergency

- Emergency (Miscellaneous Provisions and Powers) Regulation No.5 of 1976
- Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989
- Emergency (Miscellaneous Provisions and Powers) Regulations No. 6 of 1971
- Emergency (Miscellaneous Provisions and Powers) Regulations of 6 February 1962
- Emergency (Miscellaneous Provisions and Powers) Regulations of the 9 January 1962
- Emergency (Miscellaneous Provisions and Powers) Regulations Part 3 of 1982
- Emergency (Miscellaneous Provisions and Powers) Regulations, 16 March 1971
- Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005
- Emergency (Miscellaneous) (Provisions & Powers) Regulation No. 6 of 1986The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006

- The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006
- The Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011
- The Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011
- The Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011
- The Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organisation) No. 2 of 2011
- The Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011

4. Official Records

- Parliamentary Debates (Hansard) dated 10 June 1947
- Parliamentary Debates (Hansard), House of Representatives, Official Report, Vol.94, 20 July 1971
- Sansoni Commission report, Sessional Paper VII – July, 1980

5. Books, Chapters, Papers and Articles

5.1. Domestic

- Abeywickrema, P., *Overview of Sri Lanka's Emergency Regime and Some Useful Historical Background Information* (Unpublished Manuscript)(2010).
- Amerasinghe, C.F. *'Sovereignty of the Ceylon Parliament Revisited'*, Colombo Law Review (1969).
- Ameresekere, N.S., *Politics, Justice and the Rule of Law*, AuthorHouse – Indiana, (2013), at 190 for a discussion on the events leading up to and subsequent to the presidential elections of 2010
- Anketell, N. & Gunatilleke, G., *Emergency Law in the Context of Terrorism*, South Asians for Human Rights (2012)
- Cooray, L.J.M., *Constitutional Government in Sri Lanka* (1984)
- Civil Rights Movement of Sri Lanka, *"Peoples Rights" documents(1971-1978)*
- Dayasiri, G., 'War Hero to Fallen Idol', *Daily News*, 15 December 2009, at http://archives.dailynews.lk/2009/12/15/fea05.asp.
- De Silva, Colvin R. *Safeguards for the Minorities in the 1972 Constitution* (1987)
- De Silva, K.M; *Religion, Secularism and State in Sri Lanka: A Historical Survey*, (Ethnic Studies Report, Vol XXI, No.1, January 2003 (ICES)
- de Almeida Guneratne, J., *Religious Freedom of Minorities in Sri Lanka* Law Students' Muslim Majlis, (2006), Issue 42, Meezan.

- de Almeida Guneratne, J., 'Judicial Response to Concept of Sovereign Power of the People in Sri Lanka', in *Pursuit of Justice, A Collection of Legal Essays in Memory of KC Kamalasabayason PC*, 2008.
- Edrisinha, R., Gomez, M., Thamilmaran, V.T. and Welikala, A., *Power Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: Centre for Policy Alternatives)
- Fernando,B., *The Rule of Law and Democracy in Sri Lanka*, Asian Human Rights Commission (March 2012)
- Gunaratna, R., *Sri Lanka's Ethnic Crisis and National Security*, South Asian Network on Conflict Research (1998)
- Goonesekere, R.K.W. & de Almeida Guneratne, J., *Constitutional Law*, Open University of Sri Lanka (OUSL), 1982
- Hoole, R., '*The Citizenship Acts and the Birth of the Federal Party*', University Teachers for Human Rights (Jaffna), *Sri Lanka, The Arrogance of Power; Myths, Decadence and Murder*, Wasala Publications, Colombo, (2001)
- Law & Society Trust (LST), *Briefing Note on Tissainayagam Case: 17 September 2009 - Case of J.S. Tissainayagam*, at www.lawandsocietytrust.org/web/images/PDF/briefing%20note.doc
- Namasivayam, S., *The Legislatures of Ceylon 1928-1948* (1951); J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)* (1973)
- Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times* (Law & Society Trust, 2011)
- Pinto-Jayawardena, K., Gunatilleke, G., & Abeywickreme, P., From immunity to impunity: A critique of Constitutional and statutory immunities in Sri Lanka', *LST Review*, Volume 23, Issue 306 & 307, April & May 2013
- Pinto-Jayawardena, K. & Kois, L., *'Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response'*, (Law & Society Trust, 2008)
- Pinto-Jayawardena, K., de Almeida Guneratne, J. & Gunaratne, R., *Not This Good Earth: The Right to Land, Displaced Persons and the Law in Sri Lanka*, (Law & Society Trust, 2013)
- Ponniah, S., *Sathyagraha: The Freedom Movement of the Tamils in Ceylon* (1963)

- Skanthakumar, B.*Official Languages Policy and Minority Rights in Sri Lanka: State of Human Rights 2007*, (Law and Society Trust, 2007
- Skanthakumar, B. (ed.), 'Language Rights in Sri Lanka – Enforcing Tamil as an Official Language,' (Law & Society Trust, 2008).

5.2. International

- Amnesty International, *Impunity persists for crimes under international law as Sri Lanka escalates attacks on critics*, Written statement at the 22nd Session of the UN Human Rights Council, 22 February 2013, A/HRC/22/NGO/166
- Amnesty International, *Sri Lanka: Protestors Released*, 13 February 2013, at http://www.amnesty.org/fr/library/asset/ASA37/005/2013/fr/9593d1f0-9e24-4339-bc27-1bd01ddbe04f/asa370052013en.html
- Amnesty International, *Two students released from custody*, 22 January 2013, at http://ua.amnesty.ch/urgent-actions/2012/12/347-12/347-12-2?ua_language=en
- Asian Human Rights Commission, 'Sri Lanka: The clergy and civil society condemn the arrest and unlawful detention of four students from the University of Jaffna and call for their immediate release', 7 December 2012, at http://www.humanrights.asia/news/forwarded-news/AHRC-FST-056-2012
- Asian Human Rights Commission, *Sri Lanka: Ganeshan Nimalaruban case: Chief Justice Mohan Peiris denies petitioner's lawyers right to see replies filed by Attorney General*, 22 May 2013
- Asian Human Rights Commission, *Sri Lanka: In Ganeshan Nimalaruban's case the de facto CJ holds that inquiry into a prison death will encourage prisoners to riot*, 15 October 2013, at http://www.humanrights.asia/news/ahrc-news/AHRC-STM-186-2013
- Asian Human Rights Commission, *Sri Lanka: Truth and myth*, 10 August 2012, at http://www.humanrights.asia/news/ahrc-news/AHRC-ART-071-2012/?searchterm=None
- *Black's Law Dictionary*, (3rd Ed.), (2006)

- Carlos R.; *Latinos and American Law: Landmark Supreme Court Cases* (University of Texas Press)
- Calabresi, S.G., & Lindgren, J., 'Term Limits for the Supreme Court: Life Tenure Reconsidered', 29 *Harvard Journal of Law and Public Policy* 769 (2006)
- Farmer, B.H. *Ceylon: A Divided Nation*, Oxford: OUP (1963)
- Halliday, F., The Ceylonese Insurrection' in Robin Blackburn, *Explosion in a Subcontinent: India, Pakistan, Bangladesh, and Ceylon* (1975)
- Human Rights Watch, *Sri Lanka: Country Summary – January 2009*, at http://www.hrw.org/en/ node/ 79245
- Human Rights Watch, *Sri Lanka: Failure of Justice for Victims of Massacre*, 2 June 2005
- International Commission of Jurists, *Authority without Accountability: The Crisis of Impunity in Sri Lanka* (October 2012)
- International Commission of Jurists, *Sri Lanka: A Mounting Tragedy of Errors* (1984)
- Jennings Peretti, T., *Defense of a Political Court, Princeton University Press*, (1999)
- Jennings, W.I., *The Constitution of Ceylon* Oxford: OUP (1953)
- Jennings, J.I. and Thambaiah, H.W., *The Dominion of Ceylon: The Development of its Laws and Constitutions* (1952)
- Mcguire, K.T., 'Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court', *Judicature* Volume 89, Number 1, July-August 2005
- Pinto-Jayawardena, Kishali *Still Seeking Justice in Sri Lanka; Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*, International Commission of Jurists, (2010)
- Robinson, P.H., 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' *114 Harv. L. Rev. 1429* (2000-2001)
- Scott R.W., & Stras, D.R., *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi and Lindgren*, Maurer School of Law: Indiana University, Faculty Publications, Paper 363 (2007), at http://www.repository.law.indiana.edu/facpub/363
- Halliday, Terence C., Lucien Karpik and Malcolm M. Feely, *The Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, (Cambridge University Press, 2013)

- Report by the United Nations Special Rapporteur on the Independence of the Judiciary, (April 2003), E/CN.4/2003/65/Add.1, 25 February 2003
- Report of the Human Rights Institute of the International Bar Association, (IBAHRI) '*Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary,* ' November2001 and *'Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka'* May 2009
- Udagama, Deepika, 'The Sri Lankan Legal Complex and the Liberal Project: Only Thus Far and No More' in Halliday, Karpik and Feely (eds) *The Fates of Political Liberalism in the British Post-Colony* (Cambridge University Press, 2013)

5.3. News Reports

- 'BBC World News Interviews Dr Chris Nonis, Sri Lankan High Commissioner to the UK', *youtube.com*, 9 August 2013, at http://www.youtube.com/watch?v=0ENGP5KS8ww
- 'Convicted', *The Sunday Leader*, 6 September 2009, at http://www.thesundayleader.lk/archive/ 20090906/convicted.htm
- Charles Haviland, 'Parents of dead Sri Lankan Tamil prisoner 'denied last rites'', *BBC News*, 9 July 2012, at http://www.bbc.co.uk/news/world-asia-18770072
- D.B.S. Jeyaraj, 'Quiet Efforts of Jaffna University Vice-Chancellor Succeed in Two Undergrads Being Released After "Rehabilitation"', *dbsjeyaraj.com*, 23 January 2013, at http://dbsjeyaraj.com/dbsj/archives/15171
- D.B.S. Jeyaraj, *'Operation holdfast': The attempted coup d'etat of Jan 1962*, 27 November 2009, at http://dbsjeyaraj.com/dbsj/archives/1250
- 'De Facto CJ Exposed Himself In The Worst Possible Manner In Courts', *colombotelegraph.com*, 14 October 2013, at https://www.colombotelegraph.com/index.php/de-facto-cj-exposed-himself-in-the-worst-possible-manner-in-courts/
- 'Ganesan Nimalaruban: A damning murder, funeral and silence', *Groundviews*, 31 July 2012, at http://groundviews.org/2012/07/31/ganesan-nimalaruban-a-damning-murder-funeral-and-silence

- *Hindi Not a National Language: Court;* found at http://www.thehindu.com/news/national/hindi-not-a-national-language-court/article94695.ece
- 'I was misquoted: Asath Sally', *dailymirror.lk*, 11 May 2013 at http://www.dailymirror.lk/top-story/29320-i-was-misquoted-asath-sally.html.
- 'Jail Sentence for Dissident Sri Lankan Reporter Condemned', *CNN*, at http://edition.cnn. com/2009/WORLD/asiapcf/09/01/sri.lanka.journalist.
- 'LTTE Cadres Infiltrate Northern IDP ranks – Minister', *Official Website of the Government of Sri Lanka*, 28 August 2009, at http://www.priu.gov.lk/news_update/Current_Affairs/ca200908/20090828ltte_ cadres_infiltrate_northern_idp_ranks.htm
- 'Sri Lankan Editor JS Tissainayagam Gets Bail', *BBC*, 11 January 2010, at http://news.bbc.co.uk/2/ hi/south_asia/8451413.stm
- 'Sri Lankan president pardons convicted Tamil editor', *bbc.co.uk*, 3 May 2010, at http://news.bbc.co.uk/2/hi/south_asia/8657805.stm
- 'Translation Of Azath Salley's Controversial Interview: "Muslims Will Also Take Up Arms', *colombotelegraph*, 8 May 2013, at https://www.colombotelegraph.com/index.php/translation-of-azath-salleys-controversial-interview-muslims-will-also-take-up-arms/
- 'Two Jaffna undergraduates to be released soon', *The Nation*, 27 January 2013, athttp://www.nation.lk/edition/news-online/item/15150-two-jaffna-undergraduates-to-be-freed-soon.html

6. United Nations Documents

- Manfred Nowak Special Rapporteur on Torture, Statement at the 62nd Session of the General Assembly Third Committee Item # 70(b), 29 October 2007
- *Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, at www.un.org/News/dh/infocus /Sri_Lanka/POE_Report_Full.pdf

We have titled this publication *the Judicial Mind* in Sri Lanka as the intention is not to dwell on political failures which have been conducive to the failure of the Rule of Law. Instead, the focus is unequivocally on the judicial role. A central point that has engaged us is the manner in which – historically – the judicial response to legal safeguards of extraordinary importance such as constitutional provisions securing language and religious rights and *habeas corpus* became deferential to the executive. This conservatism (if one may call it that) has gone far beyond merely succumbing to executive pressure.

Instead, as is argued, the judiciary has become a complicit partner of the executive by rationalising that rights must yield to the security of the state. In recent years, the judicial institution has moreover been plagued by the *internal* subversion of its independence, emanating from not only subservience to the executive but direct identification with the executive. Whatever exceptions pioneered by a few individual judges to this general rule have been marginalised to the extent that judgments delivered by the apex court have become a matter of indifference to the powerful. This has had immeasurably dangerous consequences for the polity in Sri Lanka's post-war years.

From the Preface...

Law & Society Trust
No. 3, Kynsey Terrace
Colombo 8
Sri Lanka

Tel: 94 11 2684845 / 94 11 2691228
Fax: 94 11 2686843
Email: lst@eureka.lk

ISBN 978-955-1302-59-7

Rs. 420/=