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JUDICIAL RESPONSE TO THE RIGHT TO LIBERTY IN TERMS OF THE FUNDAMENTAL RIGHTS JURISDICTION OF THE SUPREME COURT (2000-2007)

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Editor's Note ... ...

This second Double Issue of the Review in 2011 evaluates the Supreme Court's response to violations of the right to be free from arbitrary arrest and detention in Sri Lanka during 2000-2007. Meant to be a companion volume to a similar treatment of the judicial response to Article 11 violations (right to be free from torture, cruel, inhumane or degrading treatment or punishment) that was published by LST in 2008, the instant analysis attempts to identify general patterns in the treatment of fundamental rights applications that allege the violation of the right to be free from arbitrary arrest and detention. It is not intended to yield conclusive quantitative findings.

Sri Lanka's Constitution of 1978 contains procedural safeguards against arbitrary arrest and detention under Articles 13(1) and 13(2). The authors of this paper, ***Madushika Jayachandra*** and ***Dinesha Samararatne*** discuss judicial interpretation of what constitutes "arbitrary arrest" and "arbitrary detention" and points to some progressive trends. The negative impact of emergency law and its undermining of procedural safeguards contained in the criminal procedure, evidence and penal statutes are examined. The analysis looks at past precedents relating to expansion of the right to be free from arbitrary arrest and detention as contained in Articles 13(1) and 13(2) of the Constitution and evaluates the response of the Court as against these precedents during the period under review.

Their overall findings are that judicial commitment towards the protection of the right to liberty had been timorous during the period under review. Aside from a few seminal judicial pronouncements, the jurisprudential contribution made by the Court to the development of fundamental rights jurisprudence regarding the right to be free from arbitrary arrest and detention appears unfortunately to be minimal.

The majority of fundamental rights applications filed during this period was concerned with arrests without warrant and most of those arrests had been based on a suspicion that the person was involved in a cognizable offence. The criterion employed by the Court in determining the reasonableness of a suspicion entertained by a law enforcement officer was varied.

Two exceptional cases involving national security stand out from the rest of the cases heard by the Supreme Court during this period. In those two cases the Court made unusually strong pronouncements regarding the right to be free from arbitrary arrest and detention and issued policy directives in that regard. However, despite frequent allegations of the abuse of power of arrest and detention by law enforcement authorities, a consistent body of principles governing arrests and detentions was not judicially developed during the period under review.

An unusual focus of this research was the examination of Bench Orders handed down by the Court in the context of the withdrawal of fundamental rights applications. The observation below is pertinent in this regard;

> *The question that arises on the above presented findings is the nature of the jurisdiction that is exercised by the Court under Article 126 and Article 17 i.e. whether the outcome of a fundamental rights application is entirely dependent on the petitioner and his intention to either pursue the application or not or whether the function of the Court's jurisdiction goes beyond its adversarial jurisdiction.*

The authors suggest recommendations at the conclusion of their research, including the development of guidelines in regard to the determination of fundamental rights applications specifically with regard to computation of compensation and grounds for dismissal.

Kishali Pinto-Jayawardena

JUDICIAL RESPONSE TO THE RIGHT TO LIBERTY IN TERMS OF THE FUNDAMENTAL RIGHTS JURISDICTION OF THESUPREME COURT (2000-2007)*

Madhushika Jayachandra & Dinesha Samararatne

Executive Summary

The Study examines the approach of the Supreme Court of Sri Lanka to the protection of core components of the right to liberty during the years 2000-2007. One major finding of the research is that when compared with arrests made under the General Law, the right to know reasons for arrest under Emergency Regulations and the Prevention of Terrorism Act No 48 of 1979 appears to have been undermined in the cases reviewed. Evidence suggests that there has been a tendency to presume the communication of reasons for arrest. In some instances, even in the acknowledged absence of a reasonable ground for arrest, violations of Article 13 (1) were not found on the basis of non-communication of reasons for arrest. A majority of detainees were not produced before a judge within a reasonable time and the Court's response to prolonged detentions under administrative detention orders was generally reticent.

An important component of the right to liberty is the right to seek legal assistance, independent medical examination and to inform members of the family upon arrest. Unequivocal judicial pronouncements on the important corollary right to inform family members upon arrest even in cases where the detainees were held *incommunicado*, were not evidenced. Despite blatant abuse of the Emergency Regulations provision permitting convictions based on confessions, the Court refrained from assuming a consistently proactive role in condemning the use of torture or cruel, inhuman or degrading treatment to elicit involuntary confessions. Some commendable input by the Court may be observed in relation to the development of minimum standards governing conditions of detention. However, these safeguards were seen to be displaced particularly in the enforcement of detention orders under Emergency Regulations.

According to the cases analysed for this Study, certain trends were identifiable with regard to the granting of compensation. Factors such as social standing impacted on the outcome in some cases. Further, the amount of compensation could vary depending on the judge making that determination. It must be noted however, that further research is necessary for a more definitive conclusion on these trends. A general observation on the issue of compensation with regard to violations of fundamental rights is that in theory, the amount is meant to be nominal; however in practice there appeared to be some confusion as to whether the monetary award is solely nominal or compensatory in part. During the period under review, the Supreme Court was liberal, and arguably progressive, in its interpretation of the rules of standing for fundamental rights applications. In contrast to that approach, during the

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* This Study is co-authored by researchers at the Law & Society Trust's Civil and Political Rights Programme, Madushika Jayachandra (LL.B.) (Hons) (Colombo), Attorney-at-Law and Dinesha Samararatne, (LL.B.) (Hons) (Colombo), (LL.M.) (Harvard), Attorney-at-Law. The research was conducted during the period, February 2009 – September 2009 under the direction of (Consultant) Head of Programme, Kishali Pinto-Jayawardena. The support of ARD Inc. for the conducting of the research is kindly acknowledged.

same period, the Supreme Court was definitely retrogressive in its attitude towards international human rights law standards as applicable to the interpretation of fundamental rights. A Divisional Bench opinion of the Court declared in 2006 that the ratification of the First Optional Protocol to the International Covenant on Civil and Political Rights by Sri Lanka was unconstitutional. Furthermore, in comparison to the judicial approach before the year 2000, there was minimal reference to international standards in judicial opinions with regard to the right to liberty.

A significant number of fundamental rights applications had been withdrawn by parties concerned, for different reasons. Previous jurisprudence of the Supreme Court suggested that the fundamental rights jurisdiction of the Court was different to the approach followed in other cases and that once the Court has been made aware of a possible violation of a fundamental right of an individual, the Court has a special role to play. That special role could, in certain cases, require the Court to continue to hear the matter, even where the petitioner wishes to withdraw the application. However, the general trend in the judicial opinion during the period 2000-2007 was to allow such matters to be withdrawn by petitioners. Based on its findings this Study recommends the improvement of accessibility to fundamental rights determinations by the Supreme Court, development of guidelines for the determination of fundamental rights applications, amendment of procedural rules that apply to fundamental rights applications in keeping with the progressive interpretations pronounced by the Court itself, reconsideration of the process of establishing evidence by affidavit in fundamental rights applications and specialised training for the judiciary and the bar.

1. Scope and Objectives of the Study

This Study focuses on the response of the Supreme Court of Sri Lanka to fundamental rights applications that allege the violation of the right to liberty in cases of arrests and/or detention during the period 2000 to 2007. The Supreme Court is the highest Court of the land and has been vested with an exclusive jurisdiction to entertain and determine fundamental rights applications under the Constitution.[1] Should the Court uphold a case on its merits, the Court is authorised to exercise a "just and equitable jurisdiction" in making appropriate orders in terms of Article 126 of the Constitution. The objective of this Study is to assess how effectively the Supreme Court has exercised that jurisdiction in relation to the right to be free from arbitrary arrests and detention guaranteed under Articles 13(1) and 13 (2) of the Constitution during 2000-2007.

The analysis in this Study is limited to a particular period as it was originally meant to be a companion volume to a 2008 publication of the Law & Society Trust which had examined violations of the freedom from torture and cruel, inhumane and degrading treatment (Article 11 of the Constitution) and the judicial response thereto in respect of fundamental rights applications filed in the Supreme Court during 2000-2007.[2] The instant Study focuses on the right to be free from arbitrary arrest and detention. This examination will therefore be important in establishing awareness on how effective (or not) the fundamental rights mechanism has been in Sri Lanka in responding to complaints regarding violations of the right to be free from arbitrary arrests and detention. Given the

[1] The Supreme Court is vested with this power under Article 17 and Article 126 of the Constitution of 1978, hereinafter "the Constitution."

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

varied aspects of the fundamental rights jurisdiction analysed in this Study, the scope is almost exclusively local. A comparative analysis of the different aspects of the judicial trends analysed in this Study warrants extensive research which the authors of the present Study have not been able to undertake within the scope of the present exercise.

Several general patterns emerged from the analysis of judicial decisions in respect of the hearing and determination of alleged Articles 13 (1) and (2) violations by the Supreme Court.[3] In the majority of decisions filed during 2000-2007, violations of Articles 13 (1) and (2) were alleged together with violation of Article 11.[4] However, violations of Article 13 (1) were upheld only in a relatively small number of judgments. While most of the cases concerned violation of rights in respect of arrests and detentions under the Penal Code,[5] a smaller number concerned actions of state agencies under emergency laws. The judicial approach was generally unreceptive towards the petitioner where he/she was alleged to have been arrested and detained under the Prevention of Terrorism Act No 48 of 1979[6] or Emergency Regulations.[7] Further, compared to the relatively expansionist approach followed by the Supreme Court in respect of alleged violations of the right to equality, the judicial approach followed in relation to alleged violations of freedom from arbitrary arrest and detention was far more restrictive.

The period was characterized by a few remarkably erudite and forceful judgments delivered by few judges on the one hand and a greater number of decisions by other judges manifesting a patent withdrawal from the minimum standards laid down by the Court itself in previous years on the other. Thus, the outcome of the cases appears to be dependent on the justices constituting the Bench. Also, there was little consistency demonstrated, thereby making the outcome of cases unpredictable. The handing down of dissenting opinions was less evident, thus illustrating the relatively less vibrant nature of the Court's jurisprudence as contrasted with the practices of the Court prior to 2000. In addition, a general finding of the Study was the systematic misuse of arrest and investigatory powers by the law enforcement authorities.

The methodology of this Study is primarily based on the analysis of both reported and unreported cases pertaining to violations of Article 13 (1) and Article 13 (2). All the reported cases during 2000 – 2007 where violations of Article 13 (1) and Article 13 (2) were alleged, have been analysed for this Study totalling to 19 cases.[8] A total of 42 unreported cases where violations of the right to liberty under Article 13 was alleged, were also analysed for this Study bringing the total number of cases

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[3] The violation of Article 13 (1) does not automatically lead to a violation of Article 13 (2). See *Channa Pieris and Others v. Attorney-General and Others,* [1994] 1 Sri L.R. 1, where Justice Amerasinghe at pp. 98-99 held that "The fact that Article 13 (1) is violated does not necessarily mean that Article 13 (2) is therefore violated. Nor does the violation of Article 13 (2) necessarily suggest that Article 13 (1) is violated. Arrest and detention as a matter of definition, apart from other relevant considerations are "inextricably linked". However, Articles 13 (1) and 13 (2) have a related but separate existence." See also *Thavarasa and Two Others v. Gunasekera and Others,* [1996] 2 Sri L.R 357. Also see Amerasinghe A.R.B., *Our Fundamental Right of Personal Security and Physical Liberty,* (Sarvodaya Vishva Lekha Publication, 1995), at p. 171.

[4] "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 11 of the Constitution.

[5] Hereinafter "the PC."

[6] Hereinafter referred to as "the PTA."

[7] Hereinafter referred to as "ERs." ERs are enacted under the Public Security Ordinance No. 25 of 1947 (hereinafter referred to as PSO).

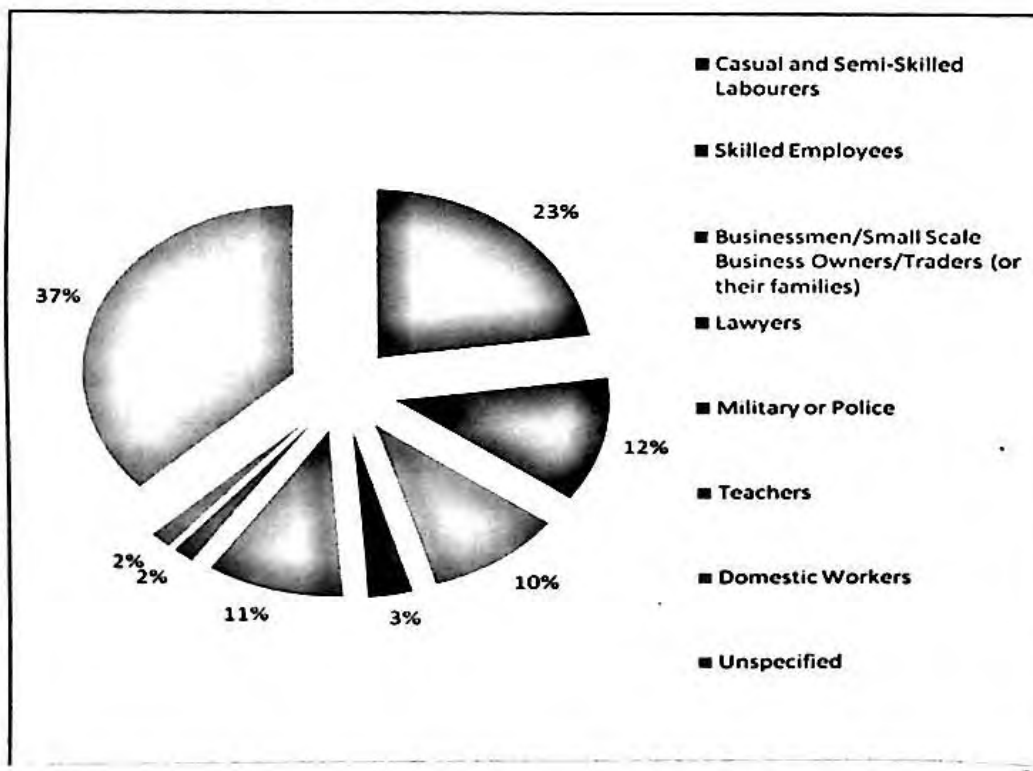
[8] Please see the Reference List for a detailed list of the reported cases.

analysed to 57.[9] However, the unreported cases for the same period and for violations of the same fundamental rights have been identified only as far as the records of the unreported cases could be obtained. Therefore, it must be noted that the quantitative analysis presented in this Study is not conclusive but is rather an indication of possible overall trends. Conclusive findings could not have been reached due to the practical difficulties in obtaining all the case records relevant for this period.[10]

Additionally 51 Bench Orders given in relation to the right to liberty have also been analysed for the Study to inquire whether there were any patterns to the issuance of those orders during the period under review.[11]The chart below attempts to provide a background of the petitioners in the cases that were analysed. The social standing of those petitioners can be gathered to some extent by the type of their employment.

As evident in the chart below, almost one quarter of the petitioners were either casual or semi-skilled labourers. It must be noted that in a significant percentage, (i.e. 37% of the petitioners) the petitioners' type of employment was not evident. Therefore, the existing data can only be taken as a general indication as to the types of petitioners who filed the cases under scrutiny.

Chart 1: Social Standing of Petitioners



[9] Please see the Reference List for a detailed list of the unreported cases. The unreported cases are on file with the authors.

[10] There is no right of access to public documents in Sri Lanka, therefore Court records cannot be accessed as a matter of right. Decisions of the Supreme Court are available on Sri Lanka's digital law library, Law Net but at the time of writing, no unreported decisions were available. Most of the unreported case records used in this Study have been collected through official and informal means.

[11] Please see the Reference List for a detailed list of the Bench Orders.

In the main, the Study seeks to identify patterns in the judicial response to the right to liberty through seven different aspects. One is the approach of the Court in defining the nature of arbitrary arrest and detention both under the general criminal law and ERs. Second, a detailed analysis is undertaken regarding the approach of the Court to the core components of the right to liberty including the right to know reasons for arrest. Third, the awards of compensation made by the Court are scrutinized. Fourth, the attitude of the Court to the procedural requirements relating to a fundamental rights application is considered while the fifth aspect is the receptivity of the Court to principles of international human rights law in interpreting the right to liberty. Sixth, the Study analyses 51 bench orders to ascertain patterns if any in the judicial attitude demonstrated in those orders. Finally, an attempt is made to identify trends where possible in relation to the ethnicity and gender of the petitioner.

Based on that sevenfold analysis, several findings are presented and recommendations are made as to how the judicial response to the right to liberty can be made more dynamic and progressive.

2. International Standards on the Right to Liberty

This section seeks to present an overview of the principles recognized in international human rights law[12] with regard to the protection of the right to liberty. The following is by no means an exhaustive analysis but is meant to provide the framework within which the analysis of the judicial response of the Sri Lankan Supreme Court to the right to liberty during the period under review is to be considered.

The protection of liberty is an essential component of the right to life and is fundamental for the realization of all other human rights. It is a right that has been recognized even prior to the development of IHRL as known today. For instance, in 1215, it was declared in the Great Charter of Freedoms that;

> *"No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."*[13]

A similar standard has been articulated in the Declaration of Independence of the United States and such right was recognized as inalienable under the same.[14]

2.1. The Right to Liberty under International and Regional Treaty Law

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[12] Hereinafter "IHRL."

[13] Ch. 39, Magna Carta, 1215, accessed at http://www.constitution.org/eng/magnacar.htm.

[14] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." The United States Declaration of Independence of 1776, accessed at, http://www.ushistory.org/declaration /document/index.htm.

The right to liberty was enshrined in the Universal Declaration of Human Rights[15] immediately after the end of World War II.[16] Even though the Declaration did not have binding legal effect at the time it was adopted, the UDHR is considered to be customary international law today and is considered to be the foundational document in modern IHRL.[17]

Binding legal effect was given to the rights recognised in the UDHR, through the two covenants adopted in 1966 i.e. the International Covenant on Civil and Political Rights[18] and the International Covenant on Economic, Social and Cultural Rights. Along with the more narrowly phrased freedom from arbitrary arrest, detention and exile,[19] the right to liberty was reflected respectively in Article 6(1)[20] and Article 9[21] of the ICCPR.

Even though IHRL only guards against unlawful and arbitrary deprivation of liberty and does not act as an absolute bar, it has been argued that the wide acceptance of the rights to life and liberty throughout the world has indisputably made these rights *jus cogens*[22] from which no derogation is

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[15] Hereinafter "the UDHR."

[16] "Everyone has the right to life, liberty and security of person", Article 3, UDHR.

[17] "As to the legal significance of the UDHR, it is worth keeping in mind that the Declaration is a resolution of the General Assembly and not a convention subject to the usual ratification and accession requirements for treaties. Nevertheless, the UDHR carries legal weight far beyond an ordinary resolution or even other declarations coming from the General Assembly." And "...many states have incorporated or drawn on the UDHR as a model for their constitutional and other legislative acts. Both the International Court of Justice and national courts have relied on the UDHR in their decisions." Eide. A., et al, (Eds.) "The Universal Declaration of Human Rights, A Commentary," (Scandinavian University Press, 1992), at p. 7.

[18] Hereinafter "the ICCPR." adopted on 16th December 1966, entered into force on 23rd March 1976, accessed at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[19] "No one shall be subjected to arbitrary arrest, detention or exile." Article 9, ICCPR.

[20] "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 6(1), ICCPR.

[21] "1.Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Article 9, ICCPR.

[22] Para. 11 of the United Nations Human Rights Committee's General Comment No. 29 on States of Emergency (Article 4) supports the proposition that right to liberty is a peremptory norm by its comment that "States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of... peremptory norms of international law, for instance... through arbitrary deprivations of liberty...", CCPR/C/21/Rev.1/Add.11, 31.08.2001, accessed at, http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/SFILE/G0144470.pdf. See also para. 8 of the United Nations Human Rights Committee's General Comment No. 24 on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant which states that "... provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the

permissible. Articles 9 (2) to 9 (5) [23] of the Covenant guarantees several ancillary procedural rights which enhance the protection afforded under Article 9 (1).[24] It is therefore accepted that deprivation of liberty is permissible in so far as it is done in accordance with procedure established by law that conforms to the requirements of procedural justice.

Several other subsequent international instruments also embody this fundamental freedom. For instance, Article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment imposes an obligation on the States to

> *"...keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."* [25]

That provision recognises that one instance where the right to be free from torture can be violated is when the right to liberty is also violated. Hence, the Convention requires constant revision of the legal framework under which the right to liberty can be restricted.

Two other recent conventions that enshrine the right to liberty are the Statute of the International Criminal Court (Rome Statute)[26] and the International Convention for the Protection of All Persons from Enforced Disappearance.[27] Article 55 of the Rome Statute recognizes the freedom from arbitrary arrest and detention as one of the rights of persons during an investigation.[28] The emphasis, once again, is that, the right to liberty can only be restricted by procedure established by law.

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subject of reservations. Accordingly, a State may not reserve the right... to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons...," CCPR/C/21/Rev.1/Add.6, 04.11.1994.

[23] "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him"; Article 9 (3) – "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment"; Article 9 (4) – "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"; Article 9 (5) – "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." *Ibid* Article 9 (2).

[24] The United Nations Human Rights Committee has found violations of Article 6 by the Sri Lankan State in Individual Communications submitted to the Committee under the First Optional Protocol to the ICCPR – see *Vadivel Sathasivam and Parathesi Saraswathi v Sri Lanka*, CCPR/C/93/D/1436/2005, adoption of views 8-7-2008, as well as violations of Article 9 - see *S. Jegatheeswara Sarma v Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 16-07-2003.

[25] Adopted on 10.12.1984, accessed at, http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

[26] Rome Statute of the International Criminal Court, adopted on 17th July 1998, entered into force on 01st July 2002, accessed at, http://www.un.org/children/conflict/keydocuments/english/romestatuteofthe7.html.

[27] Adopted on 20th December 2006, accessed at, http://untreaty.un.org/English/notpubl/IV_16_english.pdf. The treaty entered into force in December 2010.

[28] "In respect of an investigation under this Statute, a person... shall not be subjected to arbitrary arrest or detention; and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute", Article 55, Rome Statute of the International Criminal Court.

Under the International Convention for the Protection of All Persons from Enforced Disappearance, the prohibition on unlawful arrest and detention has been expanded to include a prohibition on enforced disappearance. For instance, Article 2 of the Convention includes arbitrary arrest and detention within the definition of "enforced disappearance" as follows;

> *"For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."*

Article 17 of the Convention enshrines further protection against deprivation of liberty, including the obligation to enact legislation to ensure due process in the deprivation of liberty of persons. [29]

The regional conventions on human rights also recognise the right to liberty. The European Convention on Human Rights recognizes the right to liberty and identifies the instances in which the liberty of persons can be restricted.[30] The American Convention on Human Rights[31] also recognises

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[29] "1. No one shall be held in secret detention.
2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
(a) Establish the conditions under which orders of deprivation of liberty may be given;
(b) Indicate those authorities authorized to order the deprivation of liberty;
(c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
(e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;
(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful." Article 17, International Convention for the Protection of All Persons from Enforced Disappearance.

[30] "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest of detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into a country or of a person against whom action is being taken with a view to deportation or extradition.

the right to liberty and the Inter-American Convention on Forced Disappearance of Persons 1994 extended this right to include the right to be free from enforced disappearance.[32] The African Charter on Human and Peoples' Rights of 1981[33] and the Arab Charter on Human Rights of 1994[34] also recognise the right to liberty respectively. Those legal standards are relevant in that, it signifies the universal acceptance and endorsement of the right to liberty.

2.2. The Right to Liberty under Soft Law Instruments

Several instruments of soft law have also recognised the right to liberty at the international level. Those instruments articulate the right as it relates to particular groups, such as detainees, prisoners and

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2. Everyone who is arrested shall be informed promptly in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c. of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation." Article 5 of the European Convention on Human Rights of 1950.

[31] "1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established before hand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such a threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit orders of a competent judicial authority issued for nonfulfillment of duties of support." Article 7 of the American Convention on Human Rights 1969.

[32] "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees." Furthermore, Article 11, "Every person deprived of his liberty shall be held in an officially recognised place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law. The State Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities." Article 2 of the Inter-American Convention on Forced Disappearance of Persons 1994.

[33] "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Article 6 of the African Charter on Human and People's Rights 1981.

[34] "Everyone has the right to liberty and security of person and no one shall be arrested, held in custody or detained without a legal warrant and without being brought promptly before a judge." Article 8 of the Arab Charter on Human Rights adopted on the 15th of September 1994, not yet in force..

juveniles.[35] For instance, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[36] provides the following definitions of the terms "arrest", "detained person" and "detention".

> *""Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;*
>
> *"Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;...*
>
> *"Detention" means the condition of detained persons as defined above."*

Principle 2 of the Body of Principles further stipulates that,

> *"Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."*[37]

In addition to the treaty law discussed in the previous section, the soft law as reflected in declarations, principles etc are useful in ascertaining the general meaning of these terms and their relationship to individual liberty. However it must be noted that, once soft law is elevated to treaty law, it is the standard as articulated in treaty law that would be applicable.

2.3. Applicability of International Human Rights Law to Sri Lankan Law

The Sri Lankan legal system is dualist, i.e. the international obligations accepted by the State enters the domestic legal system, only through domestic legislation which is also known as enabling legislation. However, irrespective of the enactment of enabling legislation, Sri Lanka continues to bear responsibility at the international level to give effect to the obligations it has accepted through treaty law. From the above discussed treaties, Sri Lanka is party to the ICCPR, but not to the Rome Statute or the Convention for the Protection of All Persons from Enforced Disappearance.[38]

Therefore the relevance of the above presented international standards is twofold. On the one hand, those principles of international human rights law provide the benchmark against which legal standards and judicial response in Sri Lanka can be measured. On the other hand, the legal standards contained in the treaties to which Sri Lanka is a part, amounts to a legal obligations of Sri Lanka, under principles of international law. Consequently the State has the obligation to ensure that those standards are respected and protected within its territory, and that responsibility extends to ensuring

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[35] See for instance, the Declaration on the Protection of All Persons from Enforced Disappearance, adopted on 18th December 1992, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted on 24th May 1989, accessed at, http://www.unhchr.ch/html/menu3/b/54.htm, Standard Minimum Rules for the Treatment of Prisoners, adopted on 30th August 1955, accessed at, http://www.unhchr.ch/html/menu3/b/h_comp34.htm, Basic Principles for the Treatment of Prisoners, adopted on accessed at, 14th December 1990, http://www.unhchr.ch/html/menu3/b/h_comp35.htm, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, accessed at, adopted on 14th December 1990, http://www.unhchr.ch/html/menu3/b/h_comp37.htm also affords protection for individual liberty in specific contexts.

[36] Adopted on 09th December 1988, accessed at, http://www.unhchr.ch/html/menu3/b/h_comp36.htm.

[37] *Ibid.*

[38] Adopted on 20 December 2006, and entered into force in December 2010.

that the domestic laws and their enforcement is in harmony with Sri Lanka's treaty obligations. Treaty obligations under international law are also to be considered as guidelines for judicial interpretation of Constitutional provisions.

A case in point is the ICCPR Act of 2007 that was enacted by Sri Lanka.[39] As discussed elsewhere in this Study, the Supreme Court in the case of *Nallaratnam Singarasa* v *Attorney General,*[40] ruled that the accession by the Sri Lankan President to the First Optional Protocol of the ICCPR was unconstitutional. In an effort to clarify to the international community that Sri Lanka continued to respect its obligations under the ICCPR, the Government enacted a law that purportedly gave domestic legal effect to the ICCPR.

However, the Act only gives legal effect to selected rights recognised under the ICCPR – right of access to public services,[41] certain rights of the Child,[42] guarantees of due process,[43] and the right to be recognised as a person before the law.[44] The Act also prohibits the propagation of war.[45] The other rights recognized in the ICCPR such as the right to life, were not given effect to, even though that right has not been recognised in any other legal instrument in Sri Lanka.

Subsequently, due to certain conditions related to tariff concessions provided by the European Union, the European Union required a guarantee from the Sri Lankan government that the ICCPR was given full effect in the Sri Lankan domestic law.[46] As per the Constitution, the President sought the opinion of the Supreme Court as to whether the domestic law guaranteed those rights.[47]

Even though as pointed out above, the ICCPR Act, was merely a recognition of selected rights of the ICCPR, the Supreme Court, in its determination, concluded as follows;

> *"... the legislative measures...and the provisions of the Constitution and of other law, including decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political Rights contained in the International Civil and Political Rights and adhere to the general premise of the Covenant that individuals within the*

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[39] International Covenant on Civil and Political Rights (ICCPR) Act, No 56 of 2007. Please also see in this regard, the Special Determination of the Supreme Court No 3 of 2007 as reproduced in Parliamentary Debates (Hansard), Volume 168, No 17, 3rd April, 2007, at pp. 699 – 701. In that determination, the Supreme Court upheld the constitutionality of the proposed bill.

[40] *Nallaratnam Singarasa v. Attorney General and Others,* S.C. SpL (LA) No. 182/99, S.C. Minutes 15th September 2006.

[41] Section 6 of the Act.

[42] Section 5 of the Act, including the right to acquire nationality and right to legal assistance from the State, in criminal proceedings affecting the child.

[43] Section 4 of the Act.

[44] Section 2 of the Act.

[45] Section 3 of the Act.

[46] Sri Lanka has been a beneficiary of the General System of Preferences scheme (GSP) of the European Union, under which scheme reduced tariffs are granted to several imports from Sri Lanka to the European Union. In applying for that concession, Sri Lanka must establish that is has ratified and implemented specified human rights treaties and labour rights treaties, including the ICCPR. See, Annex III, Council Regulation (EC) No 980/2005 of 27 June 2005, available at, http://www.mongolchamber.mn/documents/EU_GSP_2006_2008.pdf.

[47] Under Article 129(1) of the Constitution.

territory of Sri Lanka derive the benefit and guarantee of rights as contained in the Covenant."[48]

A detailed analysis of the above given conclusion of the Supreme Court cannot be undertaken within the confines of this Study. However, the determination of the Supreme Court reflects the prevailing attitude in Sri Lanka with regard to its obligations under IHRL. The provisions of the ICCPR Act highlight the manner in which the executive merely pay lip service to its obligations under international law.

3. Legal Framework for Arrest and Detention in Sri Lanka

3.1. Constitutional Safeguards against Arbitrary Arrests and Detention

There is no express guarantee of right to liberty in the Sri Lankan Constitution similar to the right to liberty recognised under the ICCPR.[49] However the Fundamental Rights chapter of the Constitution contains the following two provisions, which recognize limited procedural safeguards against arbitrary arrest and detention.

Article 13 (1) -

> "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

Article 13 (2) -

> "Every person held in custody, detained or otherwise deprived of personal liberty 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."

In terms of these two constitutional articles, deprivation of liberty is permissible under certain circumstances in so far as such deprivation is carried out in accordance with the "procedure established by law."[50] Personal liberty in this narrow sense is not an absolute right and ensures merely that the due process will be followed before one is deprived of his/her liberty. In a broader sense, the right to liberty shares the common underlying premise of inviolability of bodily integrity and security

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[48] Supreme Court Reference No. 1 of 2008, S.C. Minutes 17th March 2008.

[49] See section 2.1 of the Study for a discussion in that regard.

[50] See *Chandra Kalyanie Perera and Another v. Captain Siriwardena and Others*, [1992] 1 Sri L.R. 251 where Justice K.M.B.B.Kulatunga at p. 260 held that "In terms of Article 13 (1) of the Constitution, any arrest has to be "according to procedure established by law." See also, Amerasinghe A.R.B., *supra* note 3, at p. 81.

of the person along with the right to life and freedom from torture and cruel, inhuman or degrading treatment. [51]

Articles 13 (1) and (2) encompass a number of procedural rights. According to Justice S. Sharvananda, a former Chief Justice of Sri Lanka, those two articles confer three rights upon a person arrested: the right to be informed of the reasons for arrest, the right to be produced before a judge and the right not to be detained in custody beyond the permitted period without the authority of the court. [52] However, if the right to be free from arbitrary arrest and detention is to be vindicated the right to legal representation, right to compensation and right to minimum custodial facilities should also be considered as integral parts of Articles 13(1) and (2).

Whether a deprivation of liberty amounts to a violation of the aforementioned constitutional guarantees should be determined only after an evaluation of both the law providing for such deprivation and the manner of deprivation. The mere existence of a law, conferring power on an enforcement authority to arrest and detain is insufficient to satisfy the requirement of "procedure established by law." It is essential that the exercise of such power should not be arbitrary.[53]

In Sri Lanka the procedure to be followed in depriving liberty varies depending on the circumstances under which the deprivation takes place. The procedure applicable in ordinary circumstances is laid down in the Code of Criminal Procedure Act (CCP)[54] while the procedure governing arrests and detentions under emergency circumstances is to be found in the Prevention of Terrorism Act (PTA), and ERs, which are enacted under the Public Security Ordinance.[55]

3.2. What Constitutes Arbitrary Arrest?

Under ordinary circumstances a person may be arrested in two ways - with or without a warrant by virtue of the CCP. Peace officers and private persons are empowered under the CCP to arrest persons in certain stipulated circumstances. [56] A person can only be arrested without a warrant under specific grounds set out in the CCP.[57] However, as will be discussed later the categories of persons with

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[51] For instance, "...the meaning of personal liberty is very wide and it comprehends all the rights which go to constitute all the necessities of life", Khan S.L.A., *"Justice Bhagwati on Fundamental Rights and Directive Principles"*, (1st Ed., Deep & Deep Publications Pvt. Ltd., 2001), at p. 71.

[52] See Sharvananda S., *"Fundamental Rights in Sri Lanka (A Commentary)"*, (Arnold's International Printing House Private Limited, 1993), at pp.140-141.

[53] Manfred Nowak commenting on Article 9 of the ICCPR, which recognizes the right to liberty and security of person, observes that "It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily", Nowak M., "U.N. Covenant on Civil and Political Rights", (CCPR Commentary, N.P. Engel, 1993), at p. 172. Also, see Sharvananda S., *"Fundamental Rights in Sri Lanka (A Commentary)"*, (Arnold's International Printing House Private Limited, 1993), at p. 142.

[54] Act No. 15 of 1979. Hereinafter "the CCP."

[55] Public Security Ordinance No. 25 of 1947 (as amended). Hereinafter "PSO."

[56] "Peace officer" includes police officers and *Grama Niladharies*, Additional Secretary appointed by a Government Agent in writing to perform police duties. Section 2, CCP.

[57] "Any peace officer may without an order from a Magistrate and without a warrant arrest any person
(a) who in his presence commits any breach of the peace;

authority to arrest are broadened at times of emergency to include officers of armed forces and Secretary to the Ministry of Defence.

Arrest has been defined in Sri Lankan criminal law to include *"keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody..."*[58] Thus, an arrest can take place not only by seizure of a person, but even by words spoken or other conduct.[59] Though, in general, 'arrest' for the purposes of Article 13 (1) means apprehension of criminal suspects, deprivation of liberty for any other purpose is also deemed as an arrest.[60] On the other hand, not every detention or delay would constitute an arrest. According to the Court in *Mahinda Rajapakse v. Kudahetti*;[61]

> *"(a person) ...must establish that there was an apprehension of his person by word, deed and an imprisonment, confinement, durance or constraint by placing him... in the custody, keeping, control or under the coercive directions of an officer of justice or other authority..."*

Any arrest, whether in pursuance of a warrant or not, is detrimental to liberty. However, such an arrest can only be challenged if it is contrary to procedure established by law.[62] An arbitrary arrest generally takes place where a person has been deprived of liberty without any reason for arrest, when a person arrested has not been informed of the reasons for his/her arrest or when force has been used disproportionately during arrest.

(b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
(c) having in his possession without lawful excuse any implement of house-breaking;
(d) who has been proclaimed as an offender;
(e) in whose possession anything is found which may reasonably be suspected to be property stolen or fraudulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing;
(f) who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody;
(g) reasonably suspected of being a deserter from the Sri Lanka Army, Navy or Air Force;
(h) found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence;
(i) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of having been concerned in any act committed at any place out of Sri Lanka, which if committed in Sri Lanka would have been punishable as an offence." Section 32 (1), CCP.

[58] Explanation to Section 23 (1), CCP.

[59] Amerasinghe A.R.B., *supra* note 3, at p. 75.

[60] *Ibid.* at p. 77.

[61] [1992] 2 Sri L.R. 223, at p. 243. In this case the petitioner was travelling out of the country and was detained at the airport. Even though he was asked to leave behind certain documents that he was carrying on himself, he was permitted to leave the country. The Court held that such detention did not amount to a violation of Article 13(1) as the petitioner's freedom of movement was not restricted.

[62] Amerasinghe A.R.B., *supra*, note 3, at p. 90.

The purpose of issuing a warrant is to obtain the appearance of a person before the Court and not to secure his or her presence before the police.[63] As observed by Justice R. Dheeraratne in *Mahanama Tilakaratne v. Bandula Wickramasinghe, Senior Superintendent of Police and Others;*[64]

> *"Issuing a warrant is a judicial act involving the liberty of an individual and no warrant of arrest should be lightly issued by a Magistrate simply because a prosecutor or investigator thinks it necessary."*

According to Manfred Nowak the word "arrest" refers to the act of depriving personal liberty and generally covers the period up to the point where the person is brought before the competent authority.[65] Although deprivation of liberty is a necessary element of an arrest, actual confinement need not be proved.[66]

In the period prior to 2000 the judicial interpretation of "what constitutes arrest" was progressive. Even though the Court was earlier of the view that deprivation of liberty can amount to arrest only if a person is seized in relation to an offence,[67] the Court subsequently abandoned that approach and adopted a more flexible approach in considering "what constitutes arrest." In the case of *Withanage Sirisena and Others v. Ernest Perera and Others*[68] and in the case of *Weeragama v. Indran and Others*[69] the Court opined that even if a person was deprived of his/her liberty only for the purpose of obtaining information related to a criminal offence, such an act could amount to an arrest that is in violation of Article 13(1).

Moreover as per the case of *Piyasiri and Others v. Nimal Fernando, ASP and Others*[70] the act of deprivation of liberty can include not only the traditional forms of detention but also the lack of freedom of movement and the further threat of deprivation of liberty as can be inferred from a given context.

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[63] See *Mahanama Tilakaratne v. Bandula Wickramasinghe, Senior Superintendent of Police and Other,* [1999] 1 Sri L.R. 372, per Justice R. Dheeraratne, at p. 381.

[64] *Ibid* at p. 382.

[65] Nowak M., *supra* note 53, at p. 169.

[66] Prof. Williams G., *"Requisites of a Valid Arrest"*, [1954] Criminal Law Review 6, at pp. 11-15, as cited in Amerasinghe *supra* note 3, at p. 75.

[67] See in this regard the case of *Kahawalaye Somawathi* v *Gamini Weerasinghe and Others,* S.C. App. 227/88, S.C. Minutes 20th Nov. 1990.

[68] S.C. App. 14/90, S.C. Minutes 26th August 1991.

[69] S.C. App. 396, 397/93, S.C. Minutes 24th February 1995.

[70] [1988] 1 Sri L.R. 173. The following observations were made by the Court. "After the petitioners were signaled to stop by the police officers near the Seeduwa Police Station, they were, till they appeared in the Magistrate's Court the next day, under the coercive directions of the 1st respondent. Surrounded by police officers, some of whom were in uniform, it would have been foolhardy, to say the least, for any of the petitioners to have attempted to exercise their right to the freedom of movement. Custody does not today, necessarily import the meaning of confinement but has been extended to mean the lack of freedom of movement brought about not only by detention but also by threatened coercion the existence of which can be inferred from the surrounding circumstances." as cited in Amerasinghe, *supra* note 3, at p. 79. Also see in this regard the case of *Namasivayam v. Gunawardena* [1989] 1 Sri L.R. 394. The petitioner in that case was using public transport when he was requested to accompany a police officer to a police station. The Court held that the act of requesting the petitioner to accompany the police officer to the police station amounted to a deprivation of liberty as the petitioner was prevented from continuing his journey.

Therefore, in the words of Amerasinghe J.,

> *"...arrest consists in the seizure or touching of a person's body with a view to his restraint; words alone may however be sufficient to bring about an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under a compulsion and he thereafter submits to that compulsion...it mattered not whether the purpose of such arrest was to enable the petitioner to be available and ready to be produced to answer an alleged or suspected crime, or to assist in the detection of a crime, or in the arrest or prosecution of an offender or some such or other purpose of the officer making, or authority ordering, the arrest."*[71]

From the above analysis it is evident that the judicial interpretation of the meaning of arbitrary arrest had generally been progressive and purposive in past years. The approach had been characterised by an emphasis on the actual implications of an act resulting in the deprivation of liberty rather than by a technical application of the law.

3.3. What Constitutes Arbitrary Detention?

The word "detention" denotes a state of deprivation of liberty following an arrest or imprisonment.[72] Retaining a person without sufficient cause or beyond the prescribed period or under inhumane conditions generally amounts to arbitrary detention. Detention, as in the case of arrests, can only be a result of procedure established by law.[73] For instance, Justice T.S. Fernando in *Kolugala v. Superintendent of Prisons*[74] observed that;

> *"It is not unreasonable to assume that the legislature had good cause to provide that the detention of a citizen in the custody of the police beyond a specified period should come under the surveillance of judicial authority."*[75]

Police custody should end either by release of the arrestee (on the basis that the arrestee was found to be innocent), release on police bail or by production of the arrestee before a judge, who will decide whether the arrestee should be released or submitted to pre-trial detention.

The role of the judicial authority is very significant. The judge in that context is vested with the authority of determining whether the detention is lawful. However, as evident from the following observation of Justice S. Sharvananda, unless the judge applies a "judicial mind" to that task, the judge can easily undermine the critical role that is required of the judiciary in such cases.

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[71] Amerasinghe, *supra* note 3, at p. 81.
[72] Nowak M., *supra* note 53, at p. 169.
[73] See *ibid* Article 13(2).
[74] (1961) 66 N.L.R. 412.
[75] *Ibid.* at p. 416.

"This safeguard will be illusory if the Magistrate was to act, mechanically, acting on the version of the police only. This safeguard mandates the Magistrate to apply a judicial mind to see whether the arrest of the person produced before him is legal, regular and in accordance with the law... Policemen should not be made judges of the legality of their own arrests."[76]

3.4. Arbitrary Arrests and Detentions under Emergency Regulations

Obtaining information as to the nature, manner and number of arrests and detentions that take place under emergency law is extraordinarily difficult due to the shadowy nature of what takes place, from the moment that a suspect is arrested up to his/her *incommunicado* detention in unauthorized places of detention. The following observation is pertinent in this regard;

"Data concerning arrests made during the year under the emergency regulations were fragmentary and unreliable. Overall, several thousand individuals were detained at least temporarily..."[77]

The PTA empowers any 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 on his behalf) to arrest, without a warrant, any person connected with any unlawful activity prescribed under the provisions of the same Act.[78]

The ERs relevant to the period under review conferred extensive powers of arrest on military officers as well as police officers in relation to vague and general offences as does the PTA (it must be noted that ERs referred to in this Study would be those relevant to the period under scrutiny, i.e. 2000-2007, some provisions in those regulations were relaxed in the early part of 2010).[79]

3.5. Judicial Response to Arbitrary Arrest and Detention 2000-2007

3.5.1. Overview of Arrests 2000-2007

In looking at the period post 2000, it was evident that an overwhelming number of arrests among the cases under review had been made without a warrant. As depicted in the following pie-chart in 93% (53 fundamental rights applications) of the cases, suspects had been arrested without a warrant. Only

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[76] See Sharvananda S., *supra* note *52*, at p. 141.

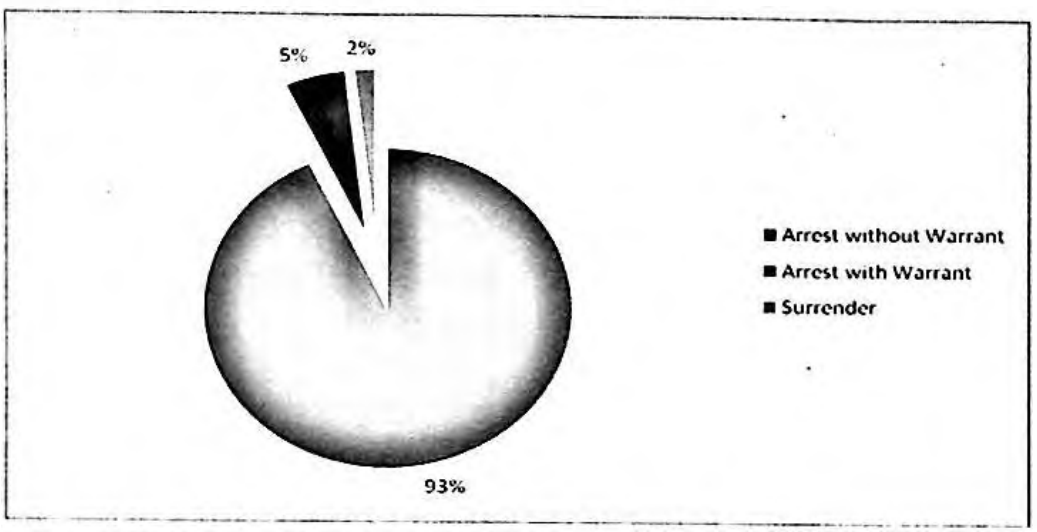
[77] United States Department of State, *2008 Country Reports on Human Rights Practices - Sri Lanka*, 25 February 2009, available at: http://www.unhcr.org/refworld/docid/49a8f151c.html, [accessed 11th April 2009].

[78] Section 6(1) of the Act.

[79] During the period in review, Emergency (Miscellaneous Provisions and Powers) Regulation No 1. of 2005 as contained in Gazette No. 1405/14 of 13.08.2005 (EMPPR 2005) allowed arrest on the basis of preventive detention (Regulation 19). Regulation 20(1) of EMPPR 2005 conferred powers of search, seizure, arrest and detention on any public officer, any member of the Sri Lanka Army, Air Force or (unjustifiably broadly) 'any person authorised by the President' in respect of any person who is concerned with or has committed *inter alia*, an offence under the Emergency Regulations.. Reasonable grounds must exist for such suspicion.

3 applications (5%) involved arrests with warrants and in 1 application (2%) the petitioner had surrendered himself.

Chart 2: Number of Persons arrested with and without warrants



A minimal judicial contribution to the development of principles governing arrests made with warrants could be observed, since most of the allegations examined for the purpose of this Study were made in relation to arrests without warrants. It emerged through the analysis of decisions that the receipt of a reasonable complaint or credible information or the existence of a reasonable suspicion that the person is concerned in any cognizable offence was the ground most commonly used by the arresting authorities to justify arrests.[80]

Judicial decisions examined for this research demonstrated that the power of arrest and detention continued to be abused by police and army officers. However, there appears to have been minimal sustained assessment of the procedural principles that the police and army should have followed in relation to such arrests let alone a progressive development of the same. Judicial reliance on precedent appeared also to be minimally evidenced despite the plethora of cases in this regard as demonstrated in the preceding sections.[81] Only a small number of decisions reiterated settled legal principles. The only exceptions to this trend were two cases where the Court analysed the right to liberty from the broader perspective and made several policy considerations in that regard.[82]

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[80] *Ibid* Section 32 (1) (b).

[81] For example, Justice K.M.B.B.Kulatunga in *Mallawarachchi v. Seneviratne, O.I.C. Police Station, Kollupitiya and Others,* [1992] 1 Sri L.R. 181, at p. 188 laid down the applicable procedural rules in detail after discussing *Christie v. Leachinsky* [1947] 1 All ER 567, [1947] A.C 573. The other decisions in this respect are too numerous to cite.

[82] Those two cases are, *Ceylon Workers Congress v. Mahinda Rajapakse,* S.C. (FR) Application No. 428/2007, S.C. Minutes 19th December 2007 and *V.I.S. Rodrigo v. Imalka, S.I. Kirulapona and Others,* S.C. (FR) Application No. 297/2007, S.C. Minutes 03rd December 2007. See section 3.5.3. for a discussion of these cases.

3.5.2. Judicial Assessment of Reasonable Suspicion Justifying Arrest Without a Warrant

In cases where an arrest is made without a warrant, it is necessary to establish that such arrest was carried out on the basis of a reasonable suspicion. That principle was laid down for instance in the case of *Muttusamy v. Kannangara,*[83] by Justice Gratiaen as follows;

> *"A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officer's own knowledge or on statements by other persons in a way which justify him in giving them credit."*

The same test of reasonableness has been employed in other jurisdictions.[84] In the period under review, the use of that test has been minimal. It was applied in the case of *Vinayagamoorthy, Attorney-at-Law (on behalf of Wimalenthiran) v. The Army Commander and Others;*[85]

> *"In deciding whether the arrest was in accordance with "procedure established by law" the matter in issue is not what subsequent investigations revealed but whether at the time of the arrest the person was committing an offence, or that there were reasonable grounds for suspecting that the person arrested was concerned in or had committed an offence."*

The majority of decisions decided during the period 2000-2007 seem not to have applied this criterion of reasonableness in dealing with alleged violations of Article 13 (1). Rather, the approach of the Court seems to have been unpredictable, particularly in relation to the process whereby the Court concludes as to which version of facts are to be relied on in a given case. For instance, in *Chaminda Caldera and Another v. Somasiri Liyanage, IP and Others,*[86] two petitioners who arrived at the Seeduwa police station accompanying another with stab injuries to make a complaint, were arrested without any basis and were detained and subjected to inhuman and degrading treatment. The respondent police officers defended their actions on the basis that the petitioners and the person who stabbed the petitioner arrived at the police station almost at the same time and the police officers had to intervene to stop the altercation which ensued between the two parties. The Court accepted the respondent's version and held that;

> *"However, in the absence of any reliable evidence coming from an independent source supporting the version of the petitioners, it is more probable that the 1st to 3rd respondents had to intervene to stop the altercation..."*[87]

The question is however as to how the Court determined that the notes of investigation are more reliable in coming to the above conclusion given the several inconsistencies in the notes of

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[83] (1951) 52 N.L.R. 324, at p. 327. See also *Corea v. Queen,* (1954) 55 N.L.R. 457 and *Malinda Channa Pieris and Others v. Attorney-General and Others,* [1994] 1 Sri L.R 1.

[84] See *Maneka Gandhi v. Union of India,* A.I.R. 1978 S.C. 567, per Justice Bhagwati, at pp. 623-624; Fox, *Campbell and Hartley v. UK,* [1991] 13 EHRR 157.

[85] [1997] 1 Sri L.R 114.

[86] S.C. (FR) Application Nos. 62/1999 and 63/1999, S.C. Minutes 06th February 2001.

[87] *Ibid.*

investigation as pointed out by the counsel who appeared for the petitioners. In fact, the Court itself noticed these inconsistencies as remarked below;

> *"Considering the apparent inconsistencies and the submissions made by the learned President's Counsel for the petitioners, I am of the view that this matter should be examined by the Hon. Attorney General in order to ascertain whether investigations are necessary by a special unit of the Police Department."*[88]

In the case of *Priyantha Atukorale and Another v. Inspector M.A.D.D.S. Mallawarachchi and Others,*[89] on the other hand, the Court was willing to accept the petitioner's version on a balance of probabilities. There, a team of police officers walked into the Food Centre operated by the petitioners and carried out arbitrary arrests without any basis. Similarly, in *M.K. Prasanna Chandralal, Attorney-at-Law (on behalf of Dalkadura Arachchige Nimal Silva Gunaratna) v. ASP Ranmal Kodituwakku and Others,*[90] the Court accepted the petitioner's version of the date of arrest as opposed to the respondent's version which was much later. The judicial view was inclined towards the petitioner due to the verification of his case both by complaints made by members of his family and lodged with the relevant authorities as well as by the evidence of an independent witness inside the police station and of an investigating officer.[91]

3.5.3. Article 13 in the Context of National Security and Public Interest

In two cases that alleged violations of Article 13 during the period under review, the Supreme Court sought to address the tension between national security on one hand and the right to liberty of individuals on the other. The Court considered both cases to be in the public interest and made unprecedented orders and policy directives.

In *V.I.S. Rodrigo v. Imalka, S.I. Kirulapona and Others,*[92] commonly known as the "Checkpoint Case" the petitioner was stopped at a checkpoint. The petitioner produced his temporary driving licence on the request of the officer and he refused to hand it back purportedly on suspicion that it was forged. The petitioner alleged that the refusal was because he failed to provide the police officer with a bribe when asked to do so. Later when the petitioner went to the relevant police station to make a complaint in that regard, he was arrested on the false ground that his driving licence was forged

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[88] *Ibid.* These investigations did not, however take place. The disregarding of judicial orders has long been a common feature in these cases.

[89] S.C. (FR) Application No. 395/2002, S.C. Minutes 17th October 2003.

[90] S.C. (FR) Application No. 565/2000, S.C. Minutes 16th November 2006.

[91] The *Chandralal* case is analysed in *"Sri Lanka State of Human Rights 2007"*, under *Judicial Protection of Human Rights*, where the following observation was made, "...the fact that the virtual petitioner was credibly suspected of involvement in the offences in question did not appear to have precluded the Court from declaring that his very arrest was unconstitutional. In contrast, in *KPT Kumara v. Silva*, judicial abstention from finding a violation of Article 13(1) was based on the very fact that the petitioner was an individual against whom there had been a justifiable suspicion of involvement in crime. Here too, there had been a dispute between the petitioner and the respondents regarding the date of arrest; however, the Court preferred to consider this in the context of the question of whether there had been unlawful detention in violation of Article 13(2), rather than in relation to Article 13(1), and decided in the negative, consequent to accepting the respondents' version of the date of arrest." Pinto-Jayawardena, Kishali, *Judicial Protection of Human Rights*, in, *"Sri Lanka: State of Human Rights 2007"*, (Law & Society Trust, 2008), at p. 71.

[92] S.C. (FR) Application No. 297/2007, S.C. Minutes 03rd December 2007, per Chief Justice Sarath N. Silva.

despite the fact that he had produced the receipt issued by the Commissioner of Motor Traffic. The entire process of arrest and detention was condemned by the Court in the strongest possible terms.[93] For instance the Court observed:

> *"...a reasonable ground of suspicion is essential to warrant a search. There is no provision of law which permits arbitrary action in stopping and searching persons who travel on our public roads in the exercise of the fundamental right to the freedom of movement. This Court has repeatedly held that the Rule of Law is the basis of our Constitution. Waging war against the State is the severest of offences punishable with death in terms of Section 114 of the Penal Code...The members of the Armed Forces called out by the President...have the fullest power to maintain public order and to take action against those who are waging war and committing other related offences. But, when action is directed against persons who are not thus engaged in war and committing related offences, every precaution and safeguard has to be taken to minimise the resultant hardships. It is paramount that any restriction of the fundamental rights guaranteed by the Constitution should only be as 'prescribed by law'."*[94]

The Court went on to make policy directives and ordered *inter alia* that permanent checkpoints within the capital should be removed. Moreover the Court observed that the "power to search, seize, arrest and detain should be exercised" only in terms of the ERs and that officers exercising such powers should bear in mind the rights of citizens to freedom of movement and equality under the Constitution.[95] In coming to this conclusion, then Chief Justice Sarath N. Silva, writing for the Court, relied extensively on the case of *Sarjun v. Kamaldeen* where the Court had made similar observations regarding the need to balance national security interests with that of the right to liberty of the individual.[96] In that case, the Court held unequivocally that halting of vehicles on public roads by the police or armed forces amounts to an arrest and can only be carried out on the basis of reasonable suspicion.[97]

In the case of *Ceylon Workers Congress v. Mahinda Rajapakse*[98] the Supreme Court considered an application made by a political party, which claimed that party members and others were being arrested and detained in violation of their right to liberty under Article 13. The Court, considering this case as a matter of public interest, required the production of, *inter alia* a list of persons detained as a result of a particular search operation in Colombo.[99] The Court not only declared the detention to be

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[93] *Ibid* at p. 12-13.
[94] *Ibid.*
[95] Article 14(1)(h) and Article 12(1) respectively.
[96] S.C. F.R. 559/03, S.C. Minutes 31st July 2007 as cited in the judgment.
[97] As per the observations made by the Court, "The presence of armed Police and Security personnel who place illegal obstructions is a common sight on our roads. These officers as manifest in the facts of this case do not appreciate that roads constitute public property and that every citizen is entitled to the freedom of movement guaranteed by Article 14(1)(h) of our Constitution being the Supreme Law of the Republic. Any interruption of the exercise of such freedom by Police/security personnel would amount to an arrest and has to be justified on the basis of a reasonable suspicion of having committed an offence." *Ibid* at pp. 10-11.
[98] S.C.(F.R.) 428/07, S.C. Minutes 19th December 2007.
[99] When such a list was submitted to Court it was revealed that there were 361 persons on detention orders and 102 persons in remand.

unlawful but made several policy directives including directing the Attorney-General to appoint a committee which would monitor the status of persons arrested and detained particularly under ERs.

The above discussed cases were clearly exceptional judgements delivered by the Court particularly in considering the policy directives that were issued. However, whether particular principles can be extracted from those judgements, and whether those judgements are useful in the progressive development of the right to liberty in Sri Lanka, may be contested. This Study perceives those two judgements not as part of a progressive judicial trend but rather as two exceptional cases. It is also too early to evaluate whether those cases have made a significant contribution to the overall jurisprudence related to the right to liberty.

3.5.4. Judicial Response to Arrests under Emergency Regulations

In most decisions examined in this Study, where the petitioner is a person arrested under ERs or the PTA, judicial consideration of the reasonableness of the basis of arrest was not evident. In the main, the Court preferred the respondent's version of the reasons for arrest despite clear denial by the petitioner of any involvement in any offence.

In some cases, it was judicially acknowledged that the criterion applicable in determining the legality of an arrest is reasonableness; two instances in this regard being *Kandasamy Konesalingam v. Major Muthalif, O.I.C., JOOSSP Army Camp and Others,*[100] and *S. Konesalingam v. Godewitharana, Sub Inspector of Police and Others.*[101] However, in the latter case, after referring to the significance of applying the criterion of reasonableness, the Court opted to accept (without further scrutiny) the reasons stated in the detention order[102] holding therefore that the petitioner's fundamental rights guaranteed under Articles 13 (1) and (2) were not violated. This decision contrasts with earlier judgments (i.e. before 2000) where the Court had called for evidence to be placed before the Court regarding the arrest and had thereafter determined whether, (on that evidence), the arrest was reasonably and objectively justified. For instance in *Subbash Chandra Fernando v. Kapilaratne, O.I.C., Police Station, Gampaha and Others,*[103] Justice K.M.B.B.Kulatunga held that;

> *"...it must be kept in mind that it is an order which the Secretary is competent to make on the basis of his subjective satisfaction as to the existence of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing so... **Yet when such an order is challenged and the mere production of the order may not be adequate. This Court is competent to review the order applying 'the test of reasonableness in the wide sense'...** "(emphasis added)*

[100] S.C. (FR) Application No. 555/2001, S.C. Minutes 10th February 2003.
[101] S.C. (FR) Application No. 604/2000, S.C. Minutes 14th December 2001.
[102] Issued under Regulation 19 (2) of the ERs.
[103] [1992] 1 Sri L.R. 305, at p. 309.

In *Dissanayake v. Superintendent Mahara Prison and Others*[104] this same Justice observed as follows;

> *"Where the power to arrest without a warrant is couched in the language of Section 6 (1) of the Prevention of Terrorism Act, it is well settled that the validity of the arrest is determined by applying the objective test. This is so whether the arrest is under the normal law... Emergency Regulations... or under the Prevention of Terrorism Act..."*

Similarly, in another seminal decision in the early 1990's where a senior opposition politician was arrested under then prevalent emergency law on flimsy evidence, Justice A.R.B. Amerasinghe declared the arrest unconstitutional on the following reasoning;[105]

> *"The power of the Secretary given by Emergency Regulation 17 concerns the physical liberty of persons, including those who have not yet, nor ever committed an offence. It is therefore an exceedingly great power, indeed an awesome power that must be exercised with a corresponding degree of responsibility. There is public respect for the independence and impartiality of the Secretary, albeit tinged with latent reverential fear. The Secretary must fulfil public expectations and be independent and impartial.... in the matter before us, the Secretary in my view, abdicated his authority and signed the detention orders mechanically.....his decision was not reasonable in the sense that it was not supported with good reason and therefore it was not a decision that a reasonable person might have reasonably reached. His decision was not only wrong, but in my view, unreasonably wrong"*

The principles enumerated above by Justice Amerasinghe are specifically applicable to administrative detention orders made under the PTA or ERs. In the light of these standards, it may be queried as to whether the Court in *S. Konesalingam's Case* failed to review the acceptability of the reasons stated in the detention order. A similarly problematic judicial withdrawal is seen in *Pararasagegaram Balasekaram's Case*[106]and *Nithiyanathan Suthaharan v. Nilantha Buddhika Weeraratne and Others.*[107]

In *Sellathurai Shanmugarajah v. Dilruk, Sub Inspector of Police and Others*[108] the detention order produced by the respondent in support of their version and the reasons for arrest and detention mentioned therein were accepted by the judges without examining the reasonableness of those grounds. In the latter case, a 24- year- old cleaner of a van married with two children was arrested and detained under the PTA and was subjected to torture while held in detention. The respondents submitted two detention orders, one issued by the SSP and the other by the Minister of Defence. The Court, (referring to the detention order made by the Minister) merely stated that "The detention order

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[104] [1991] 2 Sri L.R. 247, at p. 256.
[105] *Sunil Rodrigo v. De Silva* [1997] 3 Sri L.R 265.
[106] *Pararasagegaram Balasekaram v. O.I.C., JOOSSP Army Camp and Others,* S.C. (FR) Application No. 547/1998, S.C. Minutes 08th May 2000.
[107] S.C. (FR) Application No. 802/1999, S.C. Minutes 06th March .2000.
[108] S.C. (FR) Application No. 47/2002, S.C. Minutes 10th February 2003.

clearly stated the reasons for the detention of the petitioner" and did not venture to question the substantial grounds for the detention.

In contrast, in an earlier decision delivered in 1999, *Gnanamuttu v. Military Officer Ananda and Others,*[109] where a person of Tamil ethnicity was arrested for the mere reason that he was not in possession of the "Police Registration Form" and was produced before a Magistrate based on allegations of suspected involvement in terrorist activities, the Court accepted the averments made by the petitioner in his petition that he had produced his National Identity Card and other documents in proof of his identity and proceeded to reject the version of the respondents.

The foregoing analysis shows a far more conservative approach followed by the Supreme Court judges and a change of judicial attitude during 2000-2007 in comparison to the less restrictive approach in the earlier period. One of the structural factors that contribute to this problem of inconsistency is that in fundamental rights applications, evidence is established through affidavits. This leaves less space for the Court to determine the true facts. Consequently there are different approaches that are evident in different determinations.

4. Judicial Responses Regarding Core Components of the Right to Liberty

4.1. Right to Know Reasons for Arrest

4.1.1. Overview of the Right to Know Reasons for Arrest in Sri Lankan Public Law

The right to know the reasons for one's arrest is a core component of the freedom from arbitrary arrest and the relevant legal standards can be found in both Criminal Law and Article 13 of the Constitution.[110] For an arrest to be lawful, the existence of a ground for arrest is insufficient unless it is communicated to the person arrested at the time of arrest.[111] Otherwise the petitioner's liberty is restrained for unknown reasons, against which the petitioner has every right to resist.[112]

As per the CCP, a person being arrested has the right to be informed of the "nature of the charge or allegation upon which he is arrested."[113] As indicated by Justice Amerasinghe, even the ERs do not recognize an exception to this requirement.[114] Other instances where the Criminal Law requires reasons to be given to a suspect include the requirement that the charge should be read and explained to the accused both at the preliminary inquiry[115] and in the summary trial by the Magistrate.[116] It is

[109] [1999] 2 Sri L.R. 213, per Justice Shirani Bandaranayake.
[110] Also see in this regard, Sharvananda S., *supra* note 52, at p. 141.
[111] Amerasinghe A.R.B., *supra* note 3, at p. 112-113.
[112] *Mallawarachchi v. Seneviratne, O.I.C. Police Station, Kollupitiya and Others,* [1992] 1 Sri L.R. 181, per Justice Kulatunga, at p. 189.
[113] Section 23(1) of the CCP.
[114] Amerasinghe A.R.B., *supra* note 3, at p. 114.
[115] Section 146 of the CCP.
[116] Section 182 of the CCP.

also relevant to note that under section 164, the charge should be "read to the accused in a language which he understands."[117]

Through judicial interpretation, the Supreme Court has required over the years that the reasons for arrest should be provided to the accused. For instance in the case of *Wickramabandu v. Cyril Herath and Others*[118] H.A.G. de Silva J. held that;

> *"...although a restriction of a right may be permissible... yet having regard to its nature, the curtailment of the right to be informed of the reason for arrest might amount to a denial."*

The right to know reasons for arrest does not require an explanation of the applicable law rather, the grounds for the arrest must be made known.[119] In the *Malinda Channa Pieris* case, it was held that the facts that have led to the arrest of the person must be explained so that the accused will be able to take measures to regain his liberty and/or prepare his defence.[120] On the other hand, a general explanation will fall short of the threshold. In *Senaratne v. Punya de Silva and Others,* [121] Justice A.R.B. Amerasinghe declared that;

> *"The constitutional right to be given reasons for arrest is not satisfied by giving any kind of explanation. A reason for depriving a person of his personal liberty within the meaning of Article 13 (1) of the Constitution must be a ground for arrest. There can be no such ground other than the violation of the law or a reasonable suspicion of the violation of the law."*

This requirement serves a useful purpose. Once the basis of arrest is known, the person arrested receives an opportunity to remove any mistake or misunderstanding as to the identity in the mind of the arresting authority.[122] Sharvananda J. in *Mariadas Raj v. AG and Another*[123] commented on its significance as follows;

> *"Article 13 (1) embodies a rule which has always been regarded as vital and fundamental for safeguarding the personal liberty in all legal systems where the Rule of Law prevails... The purpose of this rule is to afford the earliest opportunity to the arrested person to remove any mistake, misrepresentation or misunderstanding in the mind of the arresting official and disabuse his mind of the suspicion which actuated the arrest."*

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[117] Section 164 of the CCP. Similarly, under Section 196 and 204 of the CCP, an indictment should be read and explained to the accused. Also see in this regard, *Muttusamy v. Kannangara*, (1951) 52 N.L.R 324.

[118] S.C. (FR) Application No. 27/1988, S.C. Minutes 15.02.1988 as cited in Amerasinghe A.R.B., *supra* note 3 at p. 113.

[119] See in this regard *Fernando v. Attorney-General* (1983) 1 Sri L.R. 374 at 383.

[120] [1994] 1 Sri L.R. 1.

[121] [1995] 1 Sri L.R. 272, at p. 294.

[122] See *Gunasekera v. de Fonseka, Assistant Superintendent of Police and Two Others,* [1972] 75 N.L.R. 246, per Justice H.N.G. Fernando, at p. 250.

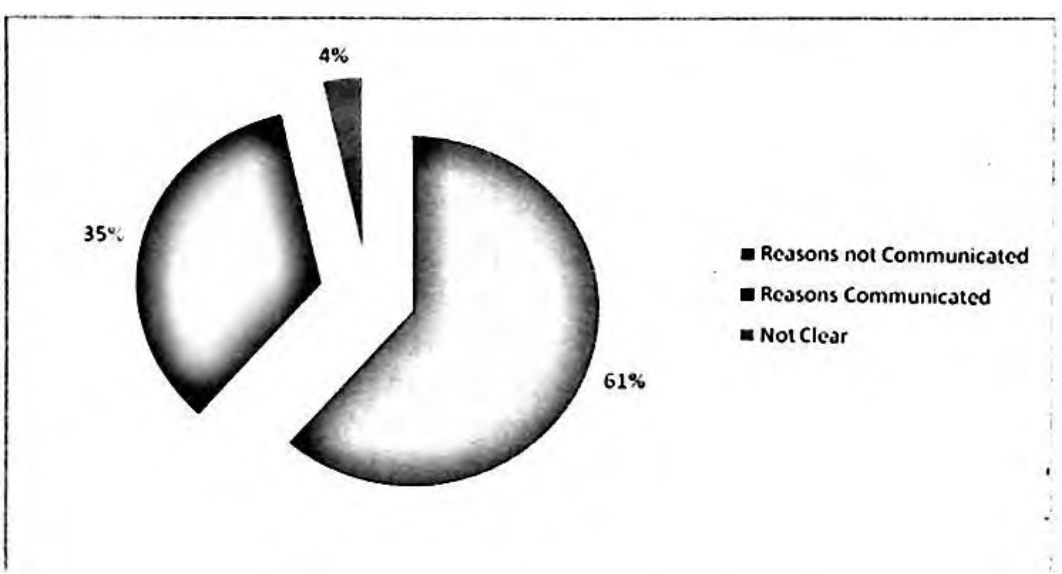
[123] 1982 (2) FRD 397, at pp. 402-404.

Moreover, for such communication to be meaningful, the grounds for arrest should be disclosed "...at the moment of arrest or where it is, in the circumstances excused, at the first reasonable opportunity."[124] Finally, as was observed in the *Wickramabandu* case[125] even though restrictions may be imposed on the right to reasons for arrest, that right cannot be suspended or taken away.

4.1.2. Judicial Attitude to the Right to Know Reasons for Arrest 2000-2007

In the review undertaken for this Study, the right to know the reasons for arrest had been generally overlooked in fundamental rights petitions heard during 2000-2007 compared to earlier decisions.[126] Though the Court considered the existence of grounds for arrest, the significant question as to whether those grounds were communicated to the person arrested at the time of arrest was not considered. Out of the 57 cases analyzed in the Study, reasons for arrest were not explained to the persons arrested at the time of the arrest in 35 fundamental rights applications amounting to 61% of cases. The reasons for arrest were communicated at the time of the arrest only in 20 fundamental rights applications (35%) of the total. In two of the applications, the question as to whether the reasons were actually communicated to the person arrested was uncertain (4%). However, there were very few judicial finding of violations of Article 13 (1) in these cases, despite the failure of the law enforcement officials to follow the prescribed procedure. The significance given to the right to liberty appeared to be in decline while the authority of the State to restrict the right to liberty even in violation of due process appeared to have been enhanced.

Chart 3: Reasons for Arrest Communicated/ Not Communicated



[124] *Mallawarachchi v. Seneviratne, O.I.C. Police Station, Kollupitiya and Others,* [1992] 1 Sri L.R. 181, per Justice K.M.B.B. Kulatunga, at p. 190.

[125] *Ibid.*

[126] See for instance *Mallawarachchi v. Seneviratne, O.I.C. Police Station, Kollupitiya and Others,* [1992] 1 Sri L.R 181, where Justice K.M.B.B. Kulatunga held at p. 188 that "*A policeman arresting without warrant upon reasonable suspicion must, in ordinary circumstances inform the person arrested of the true ground of arrest; if the citizen is not so informed but is nevertheless seized, the policeman apart from certain exceptions, is liable for false imprisonment.*"

A. Right to Know Reasons for Arrests under General Law

The impunity with which the State acts in certain arrests is also reflected in the observations made by the Court. *R.M.P. Prasanna v. Jude RPC and Others* is a case in point.[127] The petitioner, in that case, who was 21 years old was arrested without any basis by some police officers and was tortured. Justice C.V. Wigneswaran, writing for the Court, gave strong emphasis to the need to communicate reasons at the time of the arrest and held that;

> *"Under the circumstances it is to be inferred that the police were fishing for information... and had therefore not informed the reason for the petitioner's arrest." And "To be informed of the reason for one's arrest is an important right enjoyed by every citizen."* [128]

Similarly, in *Mohamed Haniffa Sithi Marliya v. R. Mallawa Kumara, O.I.C., Minor Offences Branch, Police Station, Nittambuwa and Others,*[129] the Court held that the petitioner's fundamental right guaranteed under Article 13 (1) was violated since she was not informed of the reason for her arrest. In *Sanjeewa, Attorney-at-Law (on behalf of Gerald Mervin Perera) v. Suraweera, O.I.C., Police Station, Wattala and Others,*[130] the Court upheld the grievance of an innocent person arrested on misconceived identity who was severely tortured by police officers on the basis that he was a criminal. No reasons were given for the arrest of that petitioner.

B. Right to Know Reasons under Emergency Regulations and PTA

The right to be informed of the reasons for arrest seems to have been undermined particularly in regard to arrests made under the PTA and the ERs, bypassing therefore the difference between the existence of a ground for arrest and the communication of reasons for arrest to the person arrested. Although neither the PTA nor the ERs require the reasons to be communicated at the time of the arrest, there is no express derogation from the unqualified constitutional duty to give reasons guaranteed under Article 13 (1). A violation of Article 13 (1) can be upheld on the sole basis of non-communication of reasons for the arrest notwithstanding the existence of a reasonable ground of arrest.

In a number of cases taken before the Court regarding arrests made under emergency rule, the issues as to whether the person arrested was informed of the reasons for the arrest and if the reasons were in fact communicated whether they were promptly communicated at the time of the arrest were not separately addressed. Generally, the contention of the petitioners that their arrests were unlawful as no reasons had been given, were not accorded much weight.[131] In cases where the existence of a ground

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[127] S.C. (FR) Application No. 106/2003, S.C. Minutes 11th December 2003.
[128] *Ibid.*
[129] S.C. (Spl) Application No. 293/1999, S.C. Minutes 21st September 2001.
[130] [2003] 1 Sri LR 317, per Justice M.D.H. Fernando.
[131] *Pararasagegaram Balasekaram v. O.I.C., JOOSSP Army Camp and Others,* S.C. (FR) Application No. 547/1998, S.C. Minutes 08th May 2000; *Nithiyanathan Suthaharan v. Nilantha Buddhika Weeraratne and Others,* S.C. (FR) Application No. 802/1999, S.C. Minutes 06th March 2000; *S. Konesalingam v. Godewitharana Sub Inspector of Police and Others,* S.C. (FR) Application No. 604/2000, S.C. Minutes 14th

for arrest was proved, the Court demonstrated reluctance to uphold a violation of Article 13 (1) on the sole basis of failure to communicate reasons.

For instance in the case of *Pararasagegaram Balasekaram v. O.I.C., JOOSSP Army Camp and Others*,[132] the petitioner established and the Court accepted that he was arrested when he was in Vavuniya and no reasons were given to him either for his arrest or subsequent detention. However, despite this finding of fact, the Court declined to uphold a violation of Article 13 (1) on the basis that reasons had not been communicated since there was a reasonable suspicion for the arrest.

In some other cases where a reasonable ground of arrest was found to be proved, it was judicially presumed that the reason for the arrest may have been communicated to the person arrested.

> ***"There is no basis to doubt the version of the 1st respondent that the petitioners were informed of the reasons for the arrest. In the circumstances I am of the view that there has been no infringement of the fundamental right guaranteed by Article 13 (1) of the Constitution."***[133] (emphasis added)

Ignorance of the question as to whether reasons were communicated or not at the time of the arrest was more evident in cases where there was no finding of a reasonable ground for the arrest. The moment that the lack of a ground for the arrest or the presence of an insufficient ground for the arrest is proved, the Court upheld a violation of Article 13 (1) without going into the issue as to whether the same right had been infringed by non-communication of reasons at the time of the arrest. This raises an important point to ponder as to whether the amount of compensation a particular victim is entitled to should be higher in cases where Article 13 (1) was found to be violated on two bases, namely on the non-existence of a reasonable ground of arrest and on the non-communication of reasons for the arrest.

In some cases where no reasonable ground for the arrest was found yet the Court seems to have presumed that the reasons have been communicated without engaging in a separate inquiry as to whether the reasons were communicated in fact. This, also, raises an interesting point as to how a valid reason can be communicated at the time of the arrest if there was no reasonable ground for the arrest. For instance, Justice M.D.H. Fernando in the case of *Weerawansa v. The Attorney General and Others* makes a statement to the effect that,

> ***"It is probable that the petitioner was told the reason for arrest, namely that he was suspected of "unlawful activity". However, neither the alleged informant's disclosures... nor Hasheem's statements gave rise to a reasonable suspicion of "unlawful activity". I hold that the petitioner's arrest was not in accordance with the procedure established by law (i. e. section 6 (1) of the PTA), and that the 2nd***

December 2001; *Sellathurai Shanmugarajah v. Dilruk, Sub Inspector of Police and Others*, S.C. (FR) Application No. 47/2002, S.C. Minutes 10th February 2003.

[132] *Ibid.*

[133] *Amarasena and Another v. Jayaratnem, O.I.C., Mt. Lavinia Police Station and Others*, [2003] 1 Sri L.R. 385, at p. 389.

respondent procured the infringement of his fundamental right under Article 13 (1)".[134] (emphasis added)

The above comment gives rise to the issue as to whether the communication of some reason for the arrest would suffice the guarantee of the right to be informed of reasons for the arrest. One significant exception to this judicial trend is the case of *Yogalingam Vijitha v. Wijesekara, Reserve Sub Inspector of Police and Others*,[135] which concerned a woman of Tamil ethnicity who had been subjected to extreme sexual torture and where varying reasons were given by the police for the arrest. In that case, the Court dismissed the respondent's reason for the arrest that the petitioner was a member of the Liberation Tigers of Tamil Eelam, observing that there was not an "*iota of evidence to support this claim.*"[136] This case is noted for its strong judicial pronouncements and well reasoned articulation of legal principles governing arrests under emergency rule. Unfortunately, that judicial approach remains in the minority.

4.2. Production before a Judge, Extension of Detention and Administrative Detention

4.2.1. Standards under General Public Law

The constitutional mandate under Article 13(2) is that any person deprived of his liberty must be brought before a judge of the "*nearest competent court.*"[137] This condition has been interpreted by the Court to be a mandatory one, as was observed in the case of *Nallanayagam v. Gunatilake and Others:*

> *"Article 13 (2) embodies a salutary principle safeguarding the life and liberty of the subject and must be exactly complied with by the executive."*[138]

Specific applications of this constitutional mandate can be found in the CCP. According to Section 37 of the CCP, a peace officer cannot detain in custody or otherwise confine a person arrested without a warrant for a longer period than 24 hours. This 24 hour time period is calculated exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

This has been judicially interpreted in the following manner;

> *"...the twenty-four hour limit is the maximum time for production. Where in all the circumstances of the case it was unreasonable to delay production before the*

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[134] *Weerawansa v. The Attorney-General and Others*, [2000] 1 Sri LR 387, at p. 399, judgment of Justice M.D.H.Fernando.

[135] S.C. (FR) Application No. 186/2001, S.C. Minutes 23rd May 2002.

[136] *"...thus it is seen that the respondents have given different reasons at different times in regard to the reasons for the arrest of the petitioner. Further although in the affidavits of the respondents they have claimed that the petitioner was a member of the LTTE Suicide Squad there is not an iota of evidence to support that assertion. On the other hand the record reveals that no proceeding had been instituted against the petitioner in any Court under any law and she has been discharged from custody." Ibid* at pp. 19-20.

[137] Article 13 (2) of the Constitution.

[138] *Nallanayagam v. Gunatilake and Others*, [1987] 1 Sri L.R. 293, per Justice P. Colin-Thome, at p. 298.

Magistrate, the person making the arrest would be acting in contravention of Article 13 (2)."[139]

With a view to facilitating the investigation process, the proviso to Section 2 of the Code of Criminal Procedure (Special Provisions) Act[140] empowers a Magistrate to extend this period for a further 24 hours on production before him of the person arrested and on a certificate filed by a police officer not below the rank of the Assistant Superintendent of Police. In respect of persons arrested with a warrant, the person executing the warrant of arrest should, without unnecessary delay, bring the person arrested before the court before which he is required by law to produce such person.[141]

Apart from the requirement that production should take place within the stipulated time, production also needs to be real and effective. M.D.H. Fernando J. in *Ekanayake v. Herath Banda and Others*[142] observed that,

> "Production does not mean being shown or exhibited to a judicial officer, nor does it connote mere physical proximity: production requires at least an opportunity for communication..."

Prolonged/excessive detention was considered in the case of *Don Percy Edward Jayanethi v. Sarath Perera and Others, O.I.C., Police Station, Deniyaya and Others,*[143] where the petitioner was arrested at 12.35 p.m. and kept in police custody for few hours and later released. Justice T.B.Weerasuriya considered the question as to whether such detention was unnecessary and held that the petitioner should have been released soon after his statement was recorded at 12.35 p.m. The duration of detention was taken into account as an important factor in determining the compensation that should be awarded to the petitioner.

Similarly, in *Mohamed Haniffa Sithi Marliya v. R. Mallawa Kumara, O.I.C., Minor Offences Branch, Police Station, Nittambuwa and Others,*[144] the overnight detention of a female suspect without any basis was held to be in violation of Article 13 (2). The decision in *Faiz v. AG*[145] where it was held that prolonged detention even within the stipulated time is not permissible was applied with approval in this case. Further, the case of *Brahmanage Arun Sheron Suranga v. Priyasen Ampawila, Inspector of Police and Others,*[146] where ten hours of excessive detention was held to amount to a violation of Article 13 (2) is illustrative of the same point. In *R.M.P. Prasanna v. Jude RPC and Others,*[147] where the petitioner was arrested on 22nd January 2003 at around 5.00 p.m. and produced before the Magistrate two days later at around 10 a.m. Justice C.V.Wigneswaran held that the deprivation of liberty for over 24 hours constituted a violation of Article 13 (2).

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[139] *Abasin Banda v. S.I. Gunaratne and Others* [1995] 1 Sri L.R. 244, per Justice A.R.B.Amerasinghe, at p. 254.
[140] Act No. 42 of 2007.
[141] Section 54 of the CCP.
[142] S.C. (FR) Application No. 25/1991, S.C. Minutes 18th December 1991 as cited in Amerasinghe A.R.B., *ibid.* at p. 157.
[143] S.C. (FR) Application No. 84/2002, S.C. Minutes 24th February 2003.
[144] S.C. (Spl) Application No. 293/1999, S.C. Minutes, 21st September 2001, per Justice M.D.H. Fernando.
[145] [1995] 1 Sri L.R. 372, at p. 379.
[146] S.C. (FR) Application No. 553/2002, S.C. Minutes, 27th May 2005.
[147] S.C. (FR) Application No. 106/2003, S.C. Minutes, 11th December 2003.

4.2.2. Special Regime under Emergency Regulations and PTA

The PTA as well as the ERs declared under the PSO[148] provided for a separate set of rules applicable in states of emergency with regard to production of arrested or detained persons before a judicial authority during the period examined. These statutes and regulations have governed the country for the better part of three decades and have effectively displaced the ordinary law. They vest enormous powers on the law enforcement officials in respect of arrest and detention of persons, which powers, despite international principles to the contrary, have been commonly abused.[149] For these reasons arrests under ERs warrant separate consideration.

In reference to the alleged violations of liberty that were taken before Court, the context of then prevalent emergency law through the ERs and the PTA provided for derogation from the general rule of production before a Magistrate within 24 hours and in addition, expressly authorized administrative detention. Administrative detention amounts to *"...detention of a person without trial and conviction by a court, but merely on suspicion in the mind of an executive authority."*[150]

Under Regulation 19 of Emergency (Miscellaneous Provisions and Powers) Regulation (EMPPR) 2005, the Secretary to the Ministry of Defence may order the preventive arrest and detention of a person for up to one year with the initial production before a Magistrate not later than thirty days after arrest. [151] Detention thereof may be in a "place of detention" authorised by the Inspector General of Police[152] which may not necessarily be prisons, but may be police stations or undisclosed detention centres. Suspects may be preventively detained under the PTA for up to 18 months without judicial scrutiny.[153]

Though prohibitive clauses seeking to shut out the authority of court to review administrative detention orders are currently in place under the PTA [154] as well as in terms of the ERs[155] such clauses have been held to be unconstitutional by the Sri Lankan courts.[156]

Moreover the Court has articulated principles relevant to determining that the executive even under emergency does not possess unfettered powers to restrain the liberty of persons. Thus, it has been stated time and time again that the validity of a preventive detention order made by the Secretary to

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[148] *Supra*, note 55.

[149] See for instance, Amnesty International, *Amnesty International Report 2008 - Sri Lanka*, 28 May 2008, available at, http://www.unhcr.org/refworld/docid/483c27b2c.html, [accessed 15 April 2009].

[150] Khan S.L.A., *"Justice Bhagwati on Fundamental Rights and Directive Principles"*, (1st Ed., Deep & Deep Publications Pvt. Ltd., 2001), at p. 114.

[151] The now suspended amending Regulation 2008 extended this period to a further period of six months where it appears that the release of such person would be detrimental to the interests of national security and such suspect shall be produced before a Magistrate every sixty days.

[152] Regulation 19(3) EMPPR.

[153] Section 9(1) of the PTA allows for a ministerial detention order to be made under Section 9(1) of the Act which can be extended for a period not exceeding three months at a time, up to eighteen months. No judicial scrutiny is required.

[154] Section 10, PTA.

[155] Regulation 19(10) EMPPR 2005.

[156] See for instance, *Perera v. AG* [1992] 1 Sri L.R. 199, *Wickremebandu v. Herath* [1990] 2 Sri L.R. 348, *Karunatilleke v. Dissanayake* [1999]1 Sri L.R. 177.

the Ministry of Defence must be determined by the test of reasonableness.[157] Thereafter, even if the law sanctions detention for a particular period, prolonging detention unnecessarily even during that period is in violation of Article 13 (2).[158]

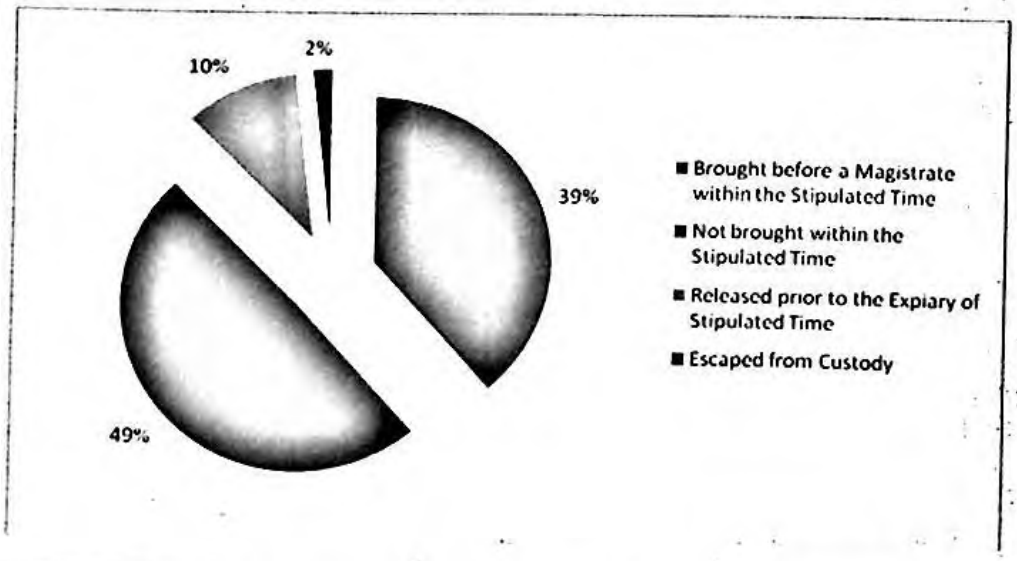
In this regard, the following observation made by Fernando J. in *Sevakumar v. Douglas Devananda and Others*[159] is noteworthy.

> *"...Emergency Regulations 18 and 19 do not compel, but merely authorize, detention for a period 'not exceeding ninety days...' This does not mean that detention for the full period of ninety days is either mandatory or proper... If in the circumstances there has been unreasonable delay in release, it is no answer that the specified time limits have not been exceeded."*[160]

4.2.3. Judicial Response during 2000-2007

In the cases analysed during this period, a significant number of persons had not been produced before the Magistrate within the stipulated period. Persons arrested were released without delay only in 6 cases out of the total number of 57 cases examined. In 49% (28 fundamental rights applications) of cases during this period, suspects arrested and detained had not been brought before the Magistrate within the stipulated time whereas in 39% of the cases (22 fundamental rights applications), the suspects had been produced within the legal time limit. Suspects duly released subsequent to interrogation were evidenced only in 10% of the cases (6 fundamental rights applications) and in one application amounting to 2% the arrested person had escaped from custody.

Chart 4: Production of Persons Arrested before a Magistrate



[157] See *Subbash Chandra Fernando v. Kapilaratne, O.I.C., Police Station Gampaha and Others,* [1992] 1 Sri L.R. 305, at p. 309.
[158] *Ibid.*
[159] S.C. (FR) Application No. 150/3, S.C. Minutes 13th July 1994.
[160] It must be noted that the emergency regulations referred to by the Court were the regulations issued in 1994 which are similar in substance to the emergency regulations in force at the time of writing this report i.e. the regulations issued in 2005.

A common trend in those cases was that persons were held in custody for prolonged periods under administrative detention orders, without being promptly presented before a judge. In the majority of such cases, persons were either initially arrested without a basis or on an unreasonable suspicion and later produced before a Magistrate based on fabricated charges justified by purported 'confessions' taken while in custody. In spite of that trend, and the constitutional mandate that requires suspects to be produced before a competent judicial authority in several applications,[161] the Court appears to have been reticent in effectively scrutinizing the abuse of basic rights of liberty under the cover of emergency law.

Given that context, the critical observations made by the UN Special Rapporteur on Torture, Manfred Nowak regarding the permissibility of administrative detention under emergency law are pertinent to note;

> *"Suspects can also be held by security forces for up to a year under "preventive detention" orders issued by the defence secretary. A suspect detained under the ER may not be produced before a magistrate for up to 30 days. Not only police officers and soldiers, but also so-called "public officers" and those specifically authorized by the President may make arrests under the ER. In addition, the ER allows joint operations of arrest between the army and the police without clarifying the respective responsibilities of these two forces."*[162]

4.3. Right to Seek Legal Assistance, Independent Medical Examination and Right to Inform Members of the Family upon Arrest

The Constitution stipulates that "Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court."[163] However, there is no constitutional guarantee of the right to legal assistance/representation upon arrest. No safeguards are provided even under the law of Criminal Procedure. The insufficiency of the existing safeguards in the CCP was commented upon by the UN Special Rapporteur on Torture, Manfred Nowak, as follows;

> *"...the Code lacks fundamental safeguards such as the right to inform a family member of the arrest or the access to a lawyer and/or a doctor of his or her choice for a person arrested and held in custody. The Code does not specify the*

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[161] See for instance, *Pararasagegaram Balasekaram v. O.I.C., JOOSSP Army Camp and Others*, S.C. (FR) Application No. 547/1998, S.C. Minutes 08th May 2000 and *Tharmalingam Thuvarahan v. O.I.C., Police Station, Nelliady and Others*, S.C. (FR) Application No. 17/2003, S.C. Minutes 29th August 2005.

[162] Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: mission to Sri Lanka*, 26 February 2008, A/HRC/7/3/Add.,available at http://www.unhcr.org/refworld/docid/47d683cf2.html, [accessed 11 April 2009], at para. 43.

[163] Art. 13(3) of the Constitution.

interrogation conditions and is silent about the possibility of the presence of a lawyer and an interpreter during the interrogation."[164]

In contrast, Article 22 (1) of the Indian Constitution guarantees the right of a person arrested to consult and to be defended by a legal practitioner of his choice. Reforms to the Constitution in order to include this right appear to be necessary.[165] Former Justice Dr. A.R.B. Amerasinghe points out the advantage of having such a guarantee when he states that;

> *"Many a person would be saved needless anxiety and harassment, and law enforcement officers are likely to make less mistakes, if this is permitted."*[166]

Also, there is no recognition of a right of a person arrested to communicate with his/her family members and inform them of the arrest.[167] For instance in *M.K. Prasanna Chandralal, Attorney-at-Law (on behalf of Dalkadura Arachchige Nimal Silva Gunaratna) v. ASP Ranmal Kodituwakku and Others,*[168] the petitioner was held *incommunicado* for three days, during which days his family members were not allowed to visit him. Even when his family members were permitted to see him they were not allowed to speak to him. However, the Court confined itself to a holding that the petitioner's right to liberty and right to be free from torture have been violated and failed to recognize the existence of a corollary right to inform members of the family upon arrest. This approach is problematic. The judicial function of the Court is not only to come to a finding as to whether a fundamental right has been violated or not, but also to identify and elaborate the specific aspects of the right that has been violated. That function assumes greater importance in the Sri Lankan context where, for instance, the right to seek an independent medical examination and to inform members of the family upon arrest have not been well established.

Under the ERs the arresting officer is required to inform the family members of the detainee, the fact of the arrest. Where it is not possible for the arresting officer to issue the relevant document, the regulations provide an exception but require that at the least an entry should be made in the information book regarding the arrest. As per the regulation, the failure to comply with the aforementioned requirement is a punishable offence.[169] In practice however most of the arrested persons are held *incommunicado* and their whereabouts are concealed from family members as was observed in the case of *Ceylon Workers Congress v. Mahinda Rajapakse.*[170]

4.4. Confessions made to Police Officers and the Applicability of Presumption of Innocence

The constitutional guarantee in this regard is found in Article 13(5) of the Constitution;

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[164] Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: mission to Sri Lanka,* 26 February 2008, A/HRC/7/3/Add., at para. 36, available at http://www.unhcr.org/refworld/docid/47d683cf2.html, [accessed 11 April 2009].

[165] Constitution of India, 1950, http://india.gov.in/govt/documents/english/coi_part_full.pdf.

[166] Amerasinghe A.R.B., *supra* note 3, at p. 118.

[167] *Ibid.*

[168] S.C. (FR) Application No. 565/2000, S.C. Minutes 16th November 2006.

[169] Reg. 19 (9) and (10) of the Emergency Regulations, *ibid.*

[170] S.C. (FR) 428/07, S.C. Minutes 19th December 2007.

"Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person."

The effect of the presumption of innocence is to impose the burden of proof on the prosecutors to prove the liability of the accused. Section 4(1)(f) of the recently enacted ICCPR Act of 2007[171] reproduces the prohibition set out in Article 14 (3) (g) of the ICCPR relating to the accused not being compelled to testify against himself or to confess guilt. The impact of those statutory/constitutional provisions is however negated by Article 15(1) of the Constitution which expressly declares that 'the exercise and operation of the fundamental rights declared and recognised by Articles 13(5)... shall be subject to such restrictions as may be prescribed by law in the interests of national security.' [172]

The general evidentiary rule is that the confessions made to police officers are inadmissible. However, a confession made to a police officer above the rank of an Assistant Superintendent of Police is admissible under Section 16 (2) of the PTA and in terms of the prevalent ERs promulgated under the PSO.[173] Under these exceptional circumstances the burden of proving the involuntary nature of the confession shifts to the accused. Thus, unless and until the accused proves to the satisfaction of the Court that the confession was made involuntarily it is deemed to be made voluntarily. This is inconsistent with the presumption of innocence, which presumes the accused to be innocent until the charges are proved by the prosecutors.

Although inherently, this is an impossible burden to satisfy as practices of torture to elicit confessions invariably take place in secret locations and attended only by the abusers. In one particular complaint taken before the United Nations Human Rights Committee in terms of the individual communications procedure under the First Optional Protocol to the ICCPR, the Committee called upon the government to amend Section 16 (2) of the PTA to ensure that the burden of proving the involuntariness of the confession is not vested in the accused.[174] This recommendation has not yet been implemented.

In a majority of the cases analysed, the persons arrested were subjected to some form of torture or cruel, inhuman or degrading treatment during attempts to elicit involuntary confessions. The case of *R.M.P. Prasanna v. Jude RPC and Others,*[175] is a case in point.

"The petitioner, 21 years of age, complained that he went to Pothuwatawana junction at about 5pm on 22.1.2003 in order to meet his friends. While with his friends he was arrested by the 2nd respondent and three other policemen unknown at around 6pm. Without giving reasons for arrest he was taken by jeep to Koswatta Police Station, where he was taken to a room behind. 2nd respondent was joined by 1st respondent in that room. 2nd respondent then took a shoe lace and tied the petitioner's thumbs together, inserted a coir rope between the thumbs and hung the

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[171] *Supra,* note 39..
[172] Article 170 of the Constitution defines 'law' to mean an Act of Parliament or a law enacted by any legislature prior to the commencement of the Constitution (Article 170 of the Constitution).
[173] EMPPR 2005, Regulations 63 and 41(4).
[174] *Nallaratnam Singarasa v Sri Lanka,* CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004.
[175] S.C. (FR) Application No. 106/2003, S.C. Minutes 11th December 2003.

petitioner to the beam of the roof with the assistance of the 1st respondent. Thereafter, the 2nd respondent assaulted the petitioner with a hose pipe on his soles, legs and thigh. Again the hose pipe was used to assault the petitioner's hands, back and shoulders. Finally, the 1st respondent gave two blows to the head of the petitioner with the same hose pipe. Thereafter, the petitioner was stripped and the 1st respondent squeezed the petitioner's testicles and penis severely. Thereafter, the petitioner was put into a police cell at around 9 p.m., on 22.01.2003. Next-day evening on 23.1.03 the petitioner was forced to place his signature to a typed statement. The contents were not read over or explained to him. At 10 a.m. on 24.01.03 the petitioner was produced before the Marawila Magistrate under a 'B' Report. The petitioner was then enlarged on Bail by the Magistrate."[176]

In upholding the violations of Articles 11 and 13 in the above case, no stern judicial observations were made regarding the grave nature of the violations of the petitioner's right to liberty. The Court made a general observation as follows:

> "With the setting up of the National Police Commission, I trust that it will initiate urgent and effective action to reverse the culture of violence that bedevils far too many police investigations in this country."[177]

In *Yogalingam Vijitha v. Wijesekara, Reserve Sub Inspector of Police and Others*,[178] the petitioner was deemed to have been detained on suspected acts of terrorism. That petitioner was subjected to extreme sexual violence and coerced to sign a confessionary statement. In this instance however, the Court took an unequivocally harsh viewpoint of the brutal torture that the petitioner had been subjected to;

> *"...the policemen who were torturing her had asked her to place her signature on some statements prepared by them and when she refused to sign, one policeman had shown a plantain flower soaked in chilli powder and had said that it would be introduced into her vagina unless she signed the papers. When she refused to sign she had been asked to remove her blouse and cover her eyes with it and had been asked to lie on a table. Whilst she was lying down on the table four policemen had held her hands and held her legs apart and the plantain flower had been inserted by force into her vagina and had been pulled in and out for about 15 minutes. She had experienced tremendous pain and a burning sensation. She had become unconscious*

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[176] *Ibid.* at p. 3.

[177] *Ibid.* at p. 11. A National Police Commission was established under the 17th Amendment to the 1978 Constitution and under this amendment, the Constitutional Council was supposed to nominate the members of the Commission. However, from 2006 to 2010, up until the enactment of the 18th Amendment to the Constitution, the President and the relevant political party representatives failed to form the Constitutional Council and the President made direct appointments unconstitutionally to the Commission, defeating the very purpose for which it was created, that is to act as an independent overseeing body to alleviate the extreme politicization of the police service. The 18th Amendment to the Constitution passed in September 2010 replaced the Constitutional Council with a Parliamentary Council. According to the Amendment, the President may seek the "observations" of that body, but is free to make independent decisions with regard to appointments to key public offices including to the Police Commission.

[178] S.C. (FR) Application No. 186/2001, S.C. Minutes 23rd May 2002.

and after a few minutes she had been asked to lie on the table...after some time some sheets of paper typed in Sinhala had been brought by them and she had been asked to place her signature on them. Being unable to bear the torture she had signed them. The contents of the documents she had signed had neither been read nor explained to her."[179]

The above extract from the judgment speaks for itself. The provision under the ERs for convictions based on confessions is clearly being abused and the continuation of that provision under Sri Lankan law is a most blatant violation of the right to liberty.

4.5. Observations regarding Minimum Guarantees of Rights of Detainees

It is now accepted in IHRL that prisoners have the right to minimum guarantees regarding the conditions of their detention.[180] The Sri Lankan Constitution does not include an express constitutional guarantee in that regard. However, the Sri Lankan Courts have developed minimum standards in this regard through the interpretation of Article 13 along with other minimum standards found in general criminal law.[181] For instance, it is now recognized that it is a fundamental principle that persons arrested should be detained only in authorized places of detention.[182] Yet, this salutary safeguard has been displaced by ERs,[183] which provided for suspects to be kept in unauthorized places of detention. In the cases analysed in this segment, there were several instances where persons were kept in custody at places not permitted by law. Detainees were not provided with basic needs such as adequate food, water, sanitary facilities, air and light.

In the case of *Manjula Janaki Gamage v. Gamini Jayasena, O.I.C., Police Station, Nagoda and Others,*[184] despite the petitioner's repeated requests for either food or water during the period of detention, she was denied these basic necessities and was unnecessarily handcuffed to the iron bars outside the male police cell. In *M.K. Prasanna Chandralal, Attorney-at-Law (on behalf of Dalkadura Arachchige Nimal Silva Gunaratna) v. ASP Ranmal Kodituwakku and Others,*[185] the petitioner was held *incommunicado* for three days handcuffed to a bed without any food, water or access to toilet facilities.

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[179] *Ibid.* at pp. 5-6.

[180] See for instance, *Standard Minimum Rules for the Treatment of Prisoners*, adopted at the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1955. Those standards are in four parts, A, B, C and D. Part A applies to all types of prisoners, whether tried or untried and includes minimum guarantees regarding food, hygiene and medical services.

[181] "Detention must be at Authorized Places only: Persons who are taken into custody must be detained at places authorized by law for that purpose. In normal circumstances, a person who may be detained at a police station should be produced before a Magistrate within a reasonable time and not later than twenty-four hours after the arrest, and if further detention is necessary, he would, on the orders of the judge be detained at a Prison established under the Prisons Ordinance. A person arrested under the Emergency Regulations, however, may need to be detained elsewhere – e.g. an army detention camp – and he may not be required to be produced before a Magistrate within a short time. Nevertheless, the law requires that such person be held at an authorized place." Amerasinghe A.R.B., *supra note 3,* at p. 109.

[182] *Ibid.*

[183] Regulation 19(3) of EMPPR 2005.

[184] S.C. (FR) Application No. 280/1998, S.C. Minutes 24th October 2000.

[185] S.C. (FR) Application No. 565/2000, S.C. Minutes 16th November 2006.

Inhumane conditions of detention were most often accompanied by torture where arrests and detention under emergency law were concerned. An illustrative example is *Yogalingam Vijitha v. Wijesekara, Reserve Sub Inspector of Police and Others*,[186] where, after the petitioner was subjected to sexual violence, the respondents inserted a plantain flower soaked in chilli powder into her vagina and she was not allowed to wash her genital region despite the victim crying in pain. This case was only one of the applications where inhumane detention conditions were accompanied by torture.[187]

The above discussed cases illustrate that gross violations of minimum guarantees for detainees continued to be a problem during the period under survey. The more disturbing issue is that, even though in some cases the Court had taken the matter very seriously and imposed heavy fines on the perpetrators, this serious issue continued to persist. [188]

5. Judicial Response to Questions of Redress and Reparation Regarding Violations of the Right to Liberty

5.1. General Issues

The Supreme Court has been given a broad mandate in providing relief in fundamental rights applications.

> *"The Supreme Court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition..."*[189]

Granting compensation has been a popular mode of relief among the judges. Apart from the above given constitutional mandate, there are no other guidelines or minimum standards that must be observed by Court in granting relief. However, it has been suggested that Article 126 does not confer absolute discretion on the Court in granting compensation, and that a measure of proportionality is required.

> *"...the amount of compensation awarded should be reasonably proportionate to the loss/damage suffered by the petitioner (whether physical and/or mental). If this vital*

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[186] S.C. (FR) Application No. 186/2001, S.C. Minutes 23rd May 2002.

[187] For similar violations of minimum guarantees, see, *Manickam Thavarasa v. O.I.C., STF Camp, Thrukkovil and Others* S.C. (FR) Application No. 09/2002, S.C. Minutes 16th September 2002; *Velu Arasadevi v. H.P. Kamal Priyantha Premathilake and others*, S.C (FR) Application No. 401/2001, 24th February 2002; *Pararasagegaram Balasekaram v. Officer-in-Charge, JOOSP Army Camp, and Others*, S.C (FR) Application No. 547/98, 03rd May 2000; *Nithiyanathan Suthaharan v. Nilantha Buddhika Weeraratne, 2nd Lieutenant, Officer in Charge, Army Camp, Mavadivempu, and others*, S.C (FR) Application No. 802/99, S.C. Minutes 06th March 2000.

[188] For instance, in the case of *Yogalingam Vijitha*, S.C. (FR) Application No. 186/2001, S.C. Minutes 23rd May 2002, the Supreme Court ordered that compensation of Rs 250 000 be paid to the victim who had been subjected to sexual violence and torture in custody.

[189] Article 126(4) of the Constitution.

element of proportionality is missing, the relief ordered by the Court may not meet the "just and equitable test" as laid down in Article 126(4) of the Constitution."[190]

During the period under review, in some cases, insignificant or inadequate amounts of compensation not commensurate with the injury suffered by the petitioner was awarded. It is a moot point whether the phrase "just and equitable in the circumstances"[191] is thereby violated. Certainly there is a resultant lack of certainty and the award of compensation in a given case becomes unpredictable. Moreover, general guidelines cannot be ascertained with regard to the determination of the amount of compensation payable.

As pointed out by Justice Amerasinghe, the Court is faced with two obstacles in addressing the question of compensation.

"Firstly, the Court endeavours to dispose of the matter expeditiously...and therefore, where serious personal injuries are caused an assessment has to be made before there is stabilization. Secondly, the Court is left to make its own assessment on the basis of cryptic medical reports that merely describe the injuries, but do not indicate whether they are disabling, and if so, whether they are temporary or permanent, and, in either case, what extent of disability has been caused. Evidence on relevant matters such as the income of the petitioner, past and future loss of income, past and future medical and other expenses resulting from the injury, the effect on the enjoyment of amenities, shortening of life, post-traumatic neurosis, and other relevant matters are not placed before the Court. The evidence that is available is not tested by cross-examination."[192]

Another approach that is available to the Court is to grant a *solatium* as opposed to compensation. In the case of *Saman* v. *Leeladasa*[193] the Supreme Court applied its mind to this issue. The majority, i.e. Chief Justice Ranasinghe and Justice Amerasinghe took the view that the fundamental rights petition is a *sui generis* action. Ameresinghe J., was of the view that the determination of the amount of compensation within this jurisdiction is not for punishment or for deterrence but rather as a recognition of the harm inflicted on the victim. Court was also mindful that the burden of paying the compensation ultimately falls on the taxpayer and reasoned therefore that compensation should not be determined based on actual damage suffered.

"What is sought to be done by increasing the amount of the award is to give the petitioner the consolation of knowing that this Court acknowledges the seriousness of the harm done and that it has tried to establish some reasonable relationship between the wrong done and the solatium applied."[194]

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[190] Atapattu, S., *"Judicial Protection of Human Rights"* in *"Sri Lanka: State of Human Rights 2002,"* (Law & Society Trust, 2001), at p. 167.
[191] Article 126 of the Constitution.
[192] Amerasinghe A.R.B., *supra* note 3, at p. 63.
[193] [1989] 1 Sri L.R. 1.
[194] Amerasinghe A.R.B., *supra* note 3, at p. 43.

Justice Fernando, in this case, took a different view on this issue. His Lordship opined that principles of Common Law should apply in determining vicarious liability and also in determining the amount of compensation that should be awarded.

The difference of judicial opinion on this issue has been captured as follows;

> *"The award of compensation as opposed to a mere solatium following the declaration of a violation of a fundamental right could be open to debate in as much the concept of compensation as understood in the ordinary law (such as in the areas of delict, contract or property) is based on certain criteria that must be established.*
>
> *On the other hand, it could be argued that, if the proper concept in the case of a fundamental rights violation ought to be a solatium, then it cannot vary, resulting in the same quantum having to be awarded in the case of a violation of the right to have been called for an interview at one extreme, and a violation involving the right to life at the other. That would be an illogical and insensitive result for the law to reach. Thus, the concept of award of compensation as opposed to a grant of a mere solatium, is defensible. The quantum must be left in the hands of the Court, which must be relied upon to award the same, based on both qualitative as well as quantitative considerations."*[195]

For the purpose of this analysis, however, it is pertinent to reiterate that the determination of the amount of compensation that should be paid to a victim of a fundamental rights violation was, at best, unpredictable. On the other hand, it must also be noted that the pursuance of a fundamental rights action does not preclude a person from pursuing a delictual (tortious) action for damages, which will not be barred by a plea of *res judicata*.

The analysis undertaken in this section does not intend to make conclusive observations, given that it has not been possible to review all the applications in which compensation has been awarded by the Court from 2000 to 2007. What this section does seek to highlight is the inconsistency that is evident in compensation awards.

A clearly evidenced fact from this review was that the amount of awards of compensation depended most on the particular judge of the Court writing the opinion in issue. High awards of compensation were almost inevitably handed down by judges possessing a strong rights consciousness.

5.2. Whether Social Standing of a Petitioner had a correlation to Compensation Awards

Determination of the amount of compensation seems to have been influenced by the social standing of the petitioner. It was revealed from the analysis that petitioners with a higher income have been generally awarded a larger sum even though they may not have been detained for long periods or

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[195] De Almeida Guneratne, J., *Judicial Protection of Human Rights*, in, *"Sri Lanka: State of Human Rights 2004,"* (Law & Society Trust, 2005), at p. 121.

subjected to physical violence. This trend could have been welcomed as a positive development if the Court was concerned with the actual loss of income and attempted to quantify such loss.

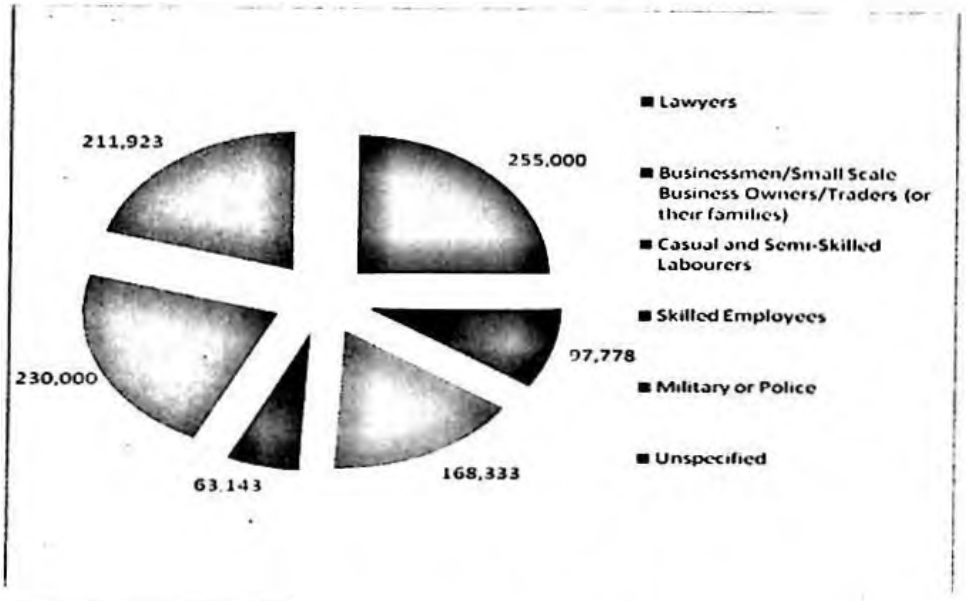
However, it was found that there is no such principle requiring the Court to consider the loss of income and instead the Court seems to be unsystematically awarding higher awards of compensation according to a petitioner's social standing, which is judged according to his or her occupation and level of income.

Thus, a person engaged in an occupation which has a high recognition within the society and earns a high income, becomes entitled to a higher award of compensation than a person who has a relatively low social standing such as a labourer. For instance, an Attorney-at-Law arrested and kept in custody for several hours was held to be entitled to Rs. 500,000/- as compensation in the case of *Wagaachige Dayaratne v. T.E. Anandaraja, Inspector General of Police and Others.*[196] Similarly, in *Senasinghe v. Karunatilleke, Senior Superintendent of Police, Nugegoda and Others,*[197] the petitioner, an Attorney-at-Law who was injured with rubber bullets, was awarded Rs. 210,000/- by way of compensation.

In contrast, persons belonging to the middle class and low income groups as well as mid level occupations including teachers were awarded comparatively lesser amounts of compensation even though they had been detained for prolonged periods of time.

For example, in the case of *Priyantha Dias v. Ekanayake, Reserve Police Constable and Others,*[198] a teacher who was arrested, assaulted and tortured was awarded a comparatively lower amount of Rs. 30,000/- as compensation and in *Samarakkody Arachchige Don Siripala v. S.I. Nandana Wijesinghe and Others,*[199] a casual labourer who was arrested and detained by police officers was held to be entitled to an equally low award of Rs. 50,000/-.

Chart 5: Average Compensation Based on Social Standing of the Petitioner (in Sri Lankan Rupees)



[196] S.C. (FR) Application No. 337/2003, S.C. Minutes 17th May 2004.
[197] [2003] 1 Sri L.R 172.
[198] [2001] 1 Sri L.R. 224.
[199] S.C. (FR) Application No. 213/2001, S.C. Minutes 31st May 2002.

The findings, therefore, suggest that the amount of compensation is dependent to a degree on the social standing of the petitioner, rather than on the nature of the violation. The relevance of social standing to compensation for violations of fundamental rights is a moot point. However, as evident in the examples above, in comparing the amounts of compensation granted a rationale for the variations cannot be identified. This is problematic as it suggests that the amount of compensation is determined without any reasonable basis. The award of compensation is not guided by any rule or principle.

6. Judicial Response to Procedural Limitations that Apply to Fundamental Rights Applications

Article 17 read with Article 126 of the Constitution establishes the procedural framework for making fundamental rights applications.

Article 17

> *"Every person shall be entitled to apply to the Supreme Court, as provided by article 126, in respected of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled to under the provisions of this Chapter".*

Article 126

> *" (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any questions relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognized by Chapter III...*
> *(2) Where any person alleges that any such fundamental right...relating to such persons has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.*
> *(3)The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable...*
> *(4)The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference."*

Article 17 by itself is recognized as a fundamental right in some of the early decisions in that it guarantees the justiciability of the rights recognized in Chapter III of the Constitution. [200] As evident in a plain reading of Article 126 subsection (2), the procedure is restrictive. On one hand there is a one

[200] See for instance, *Nalika Kumudini, Attorney-at-Law on behalf of Malsha Kumari v. Nihal Mahinda, O.I.C., Hungama Police and Others,* [1997] 3 Sri L.R 331, at p. 341.

month time limit for the filing of applications and on the other, the *locus standi* (status of a petitioner who is permitted to come before Court) is restricted to either the victim or his/her attorney-at-law. The following sub-sections will analyze the general approach of the Supreme Court to those procedural aspects and compare them with the particular approach of the Supreme Court, during the period under scrutiny.

6.1. The One Month Time Limit

Even though a plain reading of Article 126 (2) requires that an application must be filed within one month of the alleged violation, judicial interpretation has given a more meaningful and practical interpretation to that requirement. The prevailing judicial view is that, the period of one month begins to run only when the aggrieved party is free of any disability that would have otherwise prevented him/her from filing the application.[201] Delay due to reasons such as arrest, detention and threats have been taken into consideration by the Court and have not been counted within the one month time limit. In adopting this expansive interpretation, the Court has reasoned that, if such reasons for delay were taken into account, the actual purpose of the provision would be defeated; that is to say that a perpetrator could avoid liability for his conduct by ensuring that the victim is detained or incapacitated for more than one month, thereby preventing the filing of a fundamental rights application.

In this regard, in the case of *Saman v. Leeladasa and Another*[202] Justice M.D.H. Fernando writing for the Court observed that;

> *"The period of time necessary would depend on the circumstances of each case. Here, the petitioner was hospitalized... until his release, and was thus prevented from taking immediate action to petition this Court for redress: an impediment to the exercise of his fundamental right under Article 17 to apply to this Court caused by the very infringement complained of."*

A similar approach was adopted by (then) Chief Justice Sharvananda in *Namasivayam v. Gunawardena*[203] who stated that;

> *"To make the remedy under Article 126 meaningful to the applicant, the one month prescribed by Article 126 (2) should be calculated from the time that he is under no restraint. If this liberal construction is not adopted for petitions under Article 126 (2) the petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory. It could be rendered nugatory or frustrated by continued detention."*

This trend was continued by the Supreme Court during the period under scrutiny. As a general rule, the Court refrained from applying the time bar strictly and was willing to consider the particular

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[201] *Yogalingam Vijitha v. Wijesekara and others*, SC (FR) App. No. 186/2001, 23.08.2002; *Saman v. Leeladasa and another*, [1989] 1 SLR, 1; *Namasivayam v. Gunawardena* [1989] 1 SLR 394 at 400.
[202] [1989] 1 Sri L.R. 1, at p. 10.
[203] [1989] 1 Sri L.R. 394, at p. 400.

circumstances of applications. For instance, in the case of *Yogalingam Vijitha v. Wijesekara, Reserve Sub Inspector of Police and Others*[204] which was an application that alleged torture in police custody, although an Attorney-at-Law visited the petitioner while she was in detention, the petitioner was not free to communicate with the lawyer and was told by her interrogators that she would be subjected to further torture if she revealed her abuse to the lawyer. Giving due consideration to those facts, the Court held that the one month time limit only began to run when the petitioner was free of restraint and after she had managed to secure a copy of the medical examination report in support of her allegations. Moreover, it could be said that there were no recorded instances during this time where the Supreme Court refused to grant leave to proceed in a fundamental rights application on a mechanical application of the one month rule.

6.2. The Application of the Rules of *Locus Standi*

A progressive judicial interpretation on the rules of standing under Article 126 was developed only as late as 2003. Unlike the developments made regarding the one month rule, the Supreme Court has not only been reluctant to expand this rule, but has also affirmed its strict application, in the period before 2003. The case in point is *Somawathie v. Weerasinghe*[205] where the majority of the Court affirmed the strict applicability of this rule. It was held that next of kin may be permitted to make a fundamental rights application *only* if it is supported by an affidavit from the victim. However, Justice Kulatunga in his dissenting opinion[206] held that such an application should be allowed if the victim's freedom to have prompt recourse to Court by himself or by an Attorney-at-Law is impeded due to circumstances beyond his control. By the year 2003, this dissenting view, was adopted as the norm by the Supreme Court.

The majority holding in the *Somawathie* case, continued to be the applicable standard regarding standing in fundamental rights applications up until the case of *Sriyani Silva (Wife of Jagath Kumara-Deceased) v. Iddamalgoda, O.I.C., Police Station, Payagala and Others.*[207] It was held by the Court that in cases where a victim had been arbitrarily arrested, detained and subsequently tortured to the extent that the victim dies, the victim's dependants have standing before Court.

Both in the initial leave to proceed order[208] as well as in determining the merits of the case,[209] the Court upheld a deceased's wife's right to file a fundamental rights petition.[210] The *dicta* of the Court in this case, reflect the desire of the Court to move beyond the legalistic restrictions that could obstruct the vindication of fundamental rights of persons. In the initial leave to proceed order Justice Shirani Bandaranayake laid out the reasoning of the Court as follows;

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[204] S.C. (FR) Application No. 186/2001, S.C. Minutes 23rd May 2002.
[205] [1990] 2 Sri L.R 121.
[206] *Ibid* at p. 133.
[207] *Sriyani Silva (Wife of Jagath Kumara-Deceased) v. Iddamalgoda, O.I.C., Police Station, Payagala and Others,* [2003] 1 Sri LR 14.
[208] [2003] 1 Sri L.R 14.
[209] [2003] 2 Sri L.R. 63.
[210] It must be noted that Justice Edussuriya dissented in this case and held that where upon a plain reading of Article 126 and in examining the legislative intent relevant to that Article, the only conclusion that the Court could come to was that in fundamental rights applications, only the victim or his attorney-at-law has standing before Court.

"Considering the constitutional provisions, Chapter III of our Constitution ...guarantees a person, inter alia, freedom from torture and from arbitrary arrest and detention (Articles 11, 13(1) and 13(2) of the Constitution). Consequently, the deceased detainee, who was arrested, detained and allegedly tortured and who met with his death subsequently, had acquired a right under the Constitution to seek redress from this court for the alleged violation of his fundamental rights. It could never be contended that the right ceased and would become ineffective due to the intervention of the death of the person, especially in circumstances where the death in itself is consequence of injuries that constitute the infringement. If such an interpretation is not given it would result in a preposterous situation in which a person who is tortured and survives could vindicate his rights in the proceedings before this court, but if the torture is so intensive that it results in death, the right cannot be vindicated in the proceedings before this court. In my view a strict literal construction should not be resorted to where it produces such an absurd result. Law, in my view, should be interpreted to give effect to the right and to suppress the mischief. Hence, when there is a causal link between the death of a person and the process which constitutes the infringement of such person's fundamental rights anyone having a legitimate interest could prosecute that right in a proceeding instituted in terms of Article 126(2) of the Constitution. There would be no objection in limine to the wife of the deceased instituting proceedings in the circumstances of this case."[211]

This progressive interpretation was subsequently followed in the case of *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others v OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others.*[212] In that light, it could be said that in the time period 2000-2007, the liberalization of the rules of standing for bringing fundamental rights applications has been a significant milestone in Sri Lanka's fundamental rights jurisprudence.

7. Judicial Response to Principles of International Human Rights Law in Interpretation of the Right to Liberty

The reference to and the use of IHRL principles by the Supreme Court, in determinations of fundamental rights applications, has generally been considered to be a progressive method. The rationale being that, in referring to contemporary principles of IHRL, the Courts will be able to judicially incorporate contemporary human rights standards and provide a dynamic interpretation to the rights guaranteed under Chapter III of the Constitution.[213] This section will analyse the Court's attitude, during the period under survey, to incorporation of and/or reliance on principles of IHRL, in developing existing judicial interpretations of rights related to liberty and security.

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[211] [2003] 1 Sri LR 14, at p. 21.

[212] S.C. (FR) No 700/2002, S.C. Minutes 26th July 2004.

[213] See in this regard the case of *Bulankulama v. Secretary, Ministry of Industrial Development* [1994] 2 Sri LR 90, where Justice Amerasinghe introduced principles of international environmental law related to sustainable development to Sri Lankan environmental law, through direct judicial incorporation.

In general, Sri Lanka's Supreme Court has been receptive to and relied on IHRL principles in determining fundamental rights applications related to arbitrary arrest and detention.[214] For instance in the case of *Sirisena v. Perera,* the Court adopted a expansive interpretation of the meaning of 'arrest' on the basis of, *inter alia,* the right to freedom from arbitrary arrest and detention of the ICCPR.[215] In that case, the Court held that arrest includes not only a deprivation of liberty upon suspicion of having committed an offence, but also *any* arbitrary deprivation of liberty.[216]

During the period 2000-2007, the instances where international standards have been used in judgments are rare. Moreover, the Supreme Court, in a Divisional Bench decision took a definite and retrogressive decision in terms of the relationship between international human rights mechanisms and domestic law.[217]

The judges who continued to refer to IHRL standards in determining fundamental rights applications relating to liberty and security were in the minority.[218] In *Weerawansa v. Attorney-General and Others*[219] preventive detention in terms of PTA Section 9(1) by ministerial order, ostensibly on the basis that there was "reason to believe or suspect" that such person is concerned in unlawful activity, was held to be a violation of the right to liberty by the Court. In coming to that conclusion, the Court emphasized the importance and relevance of the ICCPR in the expansion of constitutional rights relating to liberty at the domestic level.[220] Fernando J, made the following observation in this regard;

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[214] For example see the case of, *Mallawarachchi v. Seneviratne, O.I.C., Police Station, Kollupitiya and Others* [1992] 1 Sri L.R 181, at pp. 187-188. The petitioner in this case was arrested by police officers attached to the Kollupitiya Police Station when he was pasting posters and he claimed that he was not informed of the reason for his arrest. Justice K.M.B.B.Kulatunga while holding that "it is obligatory to give to the person arrested the reason for his arrest at the moment of arrest or where it is, in the circumstances excused, at the first reasonable opportunity. This is to enable the person arrested to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority at the earliest possible opportunity and thus regain his freedom," referred to articles 9 (1) and (2) of the ICCPR to highlight the significance of freedom from arbitrary arrest including the right to know reasons for arrest guaranteed under Article 13 (1) of the Sri Lankan Constitution.

[215] Article 9 of the Constitution.

[216] *Sirisena v. Perera,* [1991] 2 Sri L.R 97.

[217] *Nallaratnam Singarasa v. Attorney General and Others,* S.C. SpL (LA) No. 182/99, S.C. Minutes 15th September 2006.

[218] A limited number of decisions during this period explicitly brought in international law principles in expanding the freedom from torture and cruel, inhumane and degrading treatment or punishment, among them most notably, *Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others* [2003] 2 Sri L.R 63; *Sanjeewa, Attorney-at-Law (on behalf of Gerald Mervin Perera) v. Suraweera, Officer-in-Charge, Police Station, Wattala* and others [2003] 1 Sri L.R 317, both being judgments of Justice Mark Fernando. Also, see *Shahul Hameed Mohammed Nilam and Others v. K Udugampola and Others,* SC (FR) Applications Nos 68/2002, 73/202, 74/2002, 75/2002, 76/2002, S.C. Minutes 29th January 2004 and *Wewalage Rani Fernando and Others v. O.I.C., Minor Offences, Seeduwa Police Station and Others,* S.C. (FR) Application No. 700/2002, S.C. Minutes 26th July 2004, both being judgments of Justice Shirani Bandaranayake.

[219] *Weerawansa v. The Attorney-General and Others,* [2000] 1 Sri LR 387, at pp. 408-409, judgment of Justice M.D.H.Fernando.

[220] Also note in this regard, the observation made by Dr. D. Udagama, in *Judicial Protection of Human Rights,* in, *Sri Lanka: State of Human Rights 2001,* "The rule of interpretation recognised in the judgement has been consistently applied in the United Kingdom: that where Parliament does not legislate expressly to the contrary, it is presumed to have acted in compliance with the international obligations of the State. As Sri Lanka has followed the United kingdom in adopting a dualist legal system, the adoption of this rule of interpretation is a salutary development: it helps bring domestic laws in line with Sri Lanka's international

(a) *"A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.*

(b) *Should this Court have regard to the provisions of the Covenant [i.e. the ICCPR]? I think it must. Article 27(15) [of the Sri Lankan Constitution] requires the State to 'endeavour to foster respect for international law and treaty obligations in dealings among nations'. That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes."*[221]

Subsequent judicial decisions, however, have not followed this approach. A retrogressive step regarding the applicability of international treaty law to Sri Lankan domestic law was taken in the case of *Nallaratnam Sinharasa v. Attorney General and Others* in 2006.[222] This was an application that sought to activate the revisionary jurisdiction of the Supreme Court regarding a conviction under the PTA, in consideration of a communication made by the Human Rights Committee, under the First Optional Protocol to the ICCPR.[223] In responding to the reference to the Communication by the Human Rights Committee, the Divisional Bench of the Supreme Court held that the accession by the President to the First Optional Protocol to the ICCPR was unconstitutional and contrary to the President's powers in terms of the Constitution.

This decision raised questions as to the general applicability of other international human rights treaties to Sri Lankan domestic law as well.[224] A careful reading of the judgment written by the then Chief Justice Sarath N. Silva, reveals that this particular finding of the Court turned on the imputation of a judicial function on the Human Rights Committee, whereas, under the First Optional Protocol, the Committee is empowered only to make *recommendations* to States after considering individual applications.

Therefore, in terms of the use and reliance on IHRL standards the trend has been retrogressive during the period 2000-2007. Considering that the *Singarasa* judgment was issued by a Divisional Bench, it seems that this trend will continue into the foreseeable future.

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obligations and also affords to its people the safeguards recognised by international law." Udagama, D., *Judicial Protection of Human Rights*, in, *"Sri Lanka: State of Human Rights 2001,"* (Law & Society Trust, 2002), at p. 169.

[221] *Weerawansa v. The Attorney-General and Others*, [2000] 1 Sri LR 387, at pp. 408-409.

[222] *Nallaratnam Singarasa v. Attorney General and Others*, S.C. SpL (LA) No. 182/99, S.C. Minutes 15th September 2006, per Chief Justice Sarath N. Silva rejecting the Communication of Views handed down by the United Nations Human Rights Committee consequent to a Individual Communication filed by a detainee who had been convicted by the High Court and affirmed later by the appellate courts of *inter alia*, attempting to overthrow the Government. Singarasa pleaded that his conviction was purely as a result of a confession which he had been forced to sign under torture. In *Nallaratnam Singarasa v. Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004), the Committee ruled that there had been a violation of the Covenant and directed the State to provide Singarasa with an effective and appropriate remedy, including release or retrial and compensation and bring its domestic law in conformity with the Covenant.

[223] Sri Lanka ratified the First Optional Protocol to the ICCPR in 1997. Also see, *Nallaratnam Singarasa v Sri Lanka* Communication No. 1033/2001: adoption of views 23rd August 2004.

[224] Please see Section 2.3. for a discussion regarding developments subsequent to the *Singarasa* judgement.

8. Judicial Response to Applications for Withdrawal of Petitions Relating to the Right to Liberty

A total of 51 bench orders issued by the Supreme Court regarding fundamental rights applications were reviewed in this part of the inquiry.[225] Those applications were made mainly under Article 13 but included applications that were also made under Article 11. The objective of this review was to study patterns, if any, in the response of the Court to requests by the petitioner to withdraw fundamental rights applications relating to the right to liberty. The Bench Orders were issued between 2002 – 2006. Those orders were collected only so far as it was able to get copies of such orders. Therefore, they can only be considered as a random sample.

In 39 orders out of the 51 that were reviewed, the Court dismissed the application based on the petitioner's application to withdraw.[226] The common reasons for withdrawal were release or acquittal

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[225] S.C. (F/R) Application No.423/2001 decided on 01st March 2002, S.C. (F/R) Application No. 673/2001 decided on 04th March 2002, S.C. (F/R) Application No. 672/2001 decided on 04th March 2002, S.C. (F/R) Application No.62/2002 decided on 08th March 2002, S.C. (F/R) Application No.335/2001 decided on 11th March 2002, S.C. (F/R) Application No.480/1999 decided on 11th March 2002, S.C. (F/R) Application No.99/2002 decided on 15th March 2002, S.C. (F/R) Application No.98/2002 decided on 15th March 2002, S.C. (F/R) Application No.370/2001 decided on 18th March 2002, S.C. (F/R) Application No.529/2001 decided on 18th March 2002, S.C. (F/R) Application No. 40/2002 decided on 18th March 2002, S.C. (F/R) Application No.52/2002 decided on 18th March 2002, S.C. (F/R) Application No.336/2001 decided on 22nd March 2002, S.C. (F/R) Application No.65/2002 decided on 25th March 2002, S.C. (F/R) Application No.164/2002 decided on 27th March 2002, S.C. (F/R) Application No.67/2002 decided on 01st April 2002, S.C. (F/R) Application No.63/2002 decided on 05th April 2002, S.C. (F/R) Application No.61/2002 decided on 05th April 2002, S.C. (F/R) Application No.105/2002 decided on 29th April 2002, S.C. (F/R) Application No.347/2002 decided on 29th April 2002, S.C. (F/R) Application No. 620/2001 decided on 29th March 2002, S.C. (F/R) Application No.169/2002 decided on 01st August 2002, S.C. (F/R) Application No. 314/2002 decided on 02nd August 2002, S.C. (F/R) Application No.303/2002 decided on 19th August 2002, S.C. (F/R) Application No.302/2002 decided on 19th August 2002, S.C. (F/R) Application No. 283/2002 decided on 19th August 2002, S.C. (F/R) Application No. 463/2002 decided on 20th August 2002, S.C. (F/R) Application No.464/2002 decided on 20th August 2002, S.C. (F/R) Application No. 412/2002 decided on 26th August 2002, S.C. (F/R) Application No.382/2002 decided on 26th August 2002, S.C. (F/R) Application No.39/2002 decided on 26th August 2002, S.C. (F/R) Application No.38/2002 decided on 26th August 2002, S.C. (F/R) Application No. 383/2002 decided on 26th August 2002, S.C. (F/R) Application No. 437/2002 decided on 26th August 2002, S.C. (F/R) Application No.57/2002 decided on 26th August 2002, S.C. (F/R) Application No.18/2002 decided on 26th August 2002, S.C. (F/R) Application No.448/2002 decided on 02nd September 2002, S.C. (F/R) Application No.447/2002 decided on 02nd September 2002, S.C. (F/R) Application No.449/2002 decided on 02nd September 2002, S.C. (F/R) Application No.13/2002 decided on 19th September 2002, S.C. (F/R) Application No.387/2009 decided on 25th September 2002, S.C. (F/R) Application No.561/2000 decided on 30th September 2002, S.C. (F/R) Application No. 435/2002 decided on 30th September 2002, S.C. (F/R) Application No. 182/2002 decided on 22nd September 2003, S.C. (F/R) Application No.283/2005 decided on 07th December 2005, S.C. (F/R) Application No.266/2004 decided on 12th December 2005, S.C. (F/R) Application No.265/04 decided on 12th December 2005, S.C. (F/R) Application No. 475/2005 decided on 28th March 2006, S.C. (Spl.) Application No.33/2004 decided on 31st March 2006, S.C. (F/R) Application No.235/2006 decided on 21st August 2006, S.C. (F/R) Application No.29/2006 decided on 28th August 2006.

[226] S.C. (F/R) Application No.423/2001 decided on 01st March 2002, S.C. (F/R) Application No. 673/2001 decided on 04th March 2002, S.C. (F/R) Application No. 672/2001 decided on 04th March 2002, S.C. (F/R) Application No.62/2002 decided on 08th March 2002, S.C. (F/R) Application No.99/2002 decided on 15th March 2002, S.C. (F/R) Application No.98/2002 decided on 15th March 2002, S.C. (F/R) Application No.529/2001 decided on 18th March 2002, S.C. (F/R) Application No. 40/2002 decided on 18th March 2002, S.C. (F/R) Application No.52/2002 decided on 18th March 2002, S.C. (F/R) Application No.336/2001 decided on 22nd March 2002, S.C. (F/R) Application No.65/2002 decided on 25th March 2002, S.C. (F/R) Application No.67/2002 decided on 01st April 2002, S.C. (F/R) Application No.63/2002 decided on 05th April 2002, S.C.

of the petitioner or the commencement of the prosecution of the petitioner – before the Magistrate's Court or the High Court. It seems that fundamental rights applications are perceived by the parties to the application and by Court only in relation to remedying the unlawful arrest or detention. The main issue before the Supreme Court should be whether or not there was a violation of a fundamental right *irrespective* of whether the petitioner has been subsequently released or prosecution initiated. In practice, however, as evidenced by the bench orders, the fundamental rights applications are perceived only in relation to the immediate outcome of the alleged arrest or detention. In 4 other cases, the Court dismissed the application, based on a settlement that had been reached by the parties and in one case, based on an undertaking by one of the parties.[227] For instance, in the case of *S Akila Chathuranga v. Sergeant Caldera and Others,*[228] the Court issued the following order from the Bench.

> *"Counsel for the petitioner submits that the parties have resolved this matter and the Horana Police will take action to withdraw the prosecution in the Magistrate's Court...Considering that the petitioner has not suffered any serious injuries, we are of the view that the settlement arrived at is reasonable and there is no basis to proceed with this matter."*

The question that arises on the above presented findings is the nature of the jurisdiction that is exercised by the Court under Article 126 and Article 17 i.e. whether the outcome of a fundamental rights application is entirely dependent on the petitioner and his intention to either pursue the application or not *or* whether the function of the Court's jurisdiction goes beyond its adversarial jurisdiction. Prior to the year 2000 the Supreme Court had addressed this issue and held in several cases that the Court will not automatically dismiss an application on the basis that the petitioner wishes to withdraw such an application.

For instance, in the case of *Porage Lakshman v. Rohan Fernando and Others*[229] the petitioner alleged the violation of Articles 11 and 13 and subsequently sought to withdraw his application. The Court in that application had information that suggested that the withdrawal was due to intimidation by the

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(F/R) Application No.61/2002 decided on 05th April 2002, S.C. (F/R) Application No.105/2002 decided on 29th April 2002, S.C. (F/R) Application No.347/2002 decided on 29th April 2002, S.C. (F/R) Application No. 620/2001 decided on 29th April 2002, S.C. (F/R) Application No.169/2002 decided on 01st August 2002, S.C. (F/R) Application No.303/2002 decided on 19th August 2002, S.C. (F/R) Application No.302/2002 decided on 19th August 2002, S.C. (F/R) Application No. 283/2002 decided on 19th August 2002, S.C. (F/R) Application No. 412/2002 decided on 26th August 2002, S.C. (F/R) Application No.382/2002 decided on 26th August 2002, S.C. (F/R) Application No.39/2002 decided on 26th August 2002, S.C. (F/R) Application No.38/2002 decided on 26th August 2002, S.C. (F/R) Application No. 383/2002 decided on 26th August 2002, S.C. (F/R) Application No. 437/2002 decided on 26th August 2002, S.C. (F/R) Application No.57/2002 decided on 26th August 2002, S.C. (F/R) Application No.18/2002 decided on 26th August 2002, S.C. (F/R) Application No.448/2002 decided on 02nd September 2002, S.C. (F/R) Application No.447/2002 decided on 02nd September 2002, S.C. (F/R) Application No.449/2002 decided on 02nd September 2002, S .C. (F/R) Application No.387/2009 decided on 25th September 2002, S.C. (F/R) Application No.561/2000 decided on 30th September 2002, S.C. (F/R) Application No. 435/2002 decided on 30th September 2002, S.C. (F/R) Application No.335/2001 decided on 11th March 2002, S.C. (F/R) Application No. 182/2002 decided on 22nd September 2003, S.C. (Spl.) Application No.33/2004 decided on 31st March 2006, S.C. (F/R) Application No.235/2006 decided on 21st August 2006.

[227] S.C. (F/R) Application No.29/2006 decided on 28th August 2006, S.C. (F/R) Application No. 475/2005 decided on 28th March 2006, S.C. (F/R) Application No.164/2002 decided on 27th March 2002 and S.C. (F/R) Application No.480/1999 decided on 11th March 2002.

[228] S.C. (F/R) Application No.29/2006 decided on 28th August 2006.

[229] [1990] 1 Sri L.R. 318.

respondents. On that basis, the Court refused the application to withdraw and warned the respondents. Subsequent events justified the concerns that the Court had – the petitioner was abducted and was missing. The Court eventually held that the petitioner's fundamental rights had been violated and that the respondents should pay the compensation to Court, to be held on behalf of the petitioner.

In the case of *W. M. Herath Banda v. Sub-Inspector of Police, Wasgiyawatte Police Station*[230] the Supreme Court adopted a similar approach in considering the withdrawal of the fundamental rights application. The Court observed that while it may dismiss applications based on the request of the petitioners for withdrawal, it cannot be done automatically; rather applications for withdrawal must be considered on a case by case basis. Accordingly, in that case the Court upheld the alleged violation of fundamental rights but did not order compensation as the parties had reached a settlement.

In the light of the above discussed cases, it is evident that the findings regarding the bench orders analysed are problematic. On a plain reading of the bench orders it seems as if the Court dismissed applications based on the application for withdrawal *without* applying its judicial mind to the facts at hand. Yet, the Court should be foremost concerned with the question as to whether or not a fundamental right has been violated in a given case. A fundamental rights application should be viewed by Court as a connected but also an independent cause of action.

If the Court is of the view that there is evidence to support an alleged violation, it should require that the action be continued irrespective of whether the petitioner has been indicted, released or even where the parties have reached a settlement. This raises a question as to whether the Court can persist the petitioners to proceed with the application and who will bear the cost of the suit if the petitioners are unwilling to bear it. It is suggested that if the petitioners wishes to withdraw a fundamental rights application there should be a mechanism to release the petitioners and for the Court to proceed with the hearing of the application against the alleged perpetrators in order to arrive at a finding as to whether they have violated fundamental rights.

In such an instance the final outcome of the case should not aim at awarding compensation to the petitioners but rather at making the perpetrators accountable for their wrongdoing through other means such as making directions to impose punishments after an appropriate inquiry. It is useful to incorporate a provision, which will enable the Court to order minimum participation of the petitioners if required. Whether parties to a fundamental rights action could reach a settlement between them and on that basis discontinue a fundamental rights action is another pertinent question. The cases of *Porage Lakshman*[231] and *Herath Banda*[232] both suggest that the fundamental rights jurisdiction is unique in that once the jurisdiction of the Court is invoked, the application could take a life of its own.

Moreover, protection of fundamental rights is considered to be so important that the Court can continue to make a holding on the merits of the application even where the parties concerned have reached a settlement, provided the Court is satisfied as to the existence of a violation of fundamental rights. But the standard whereby such a violation could be established should be an identifiable and predictable one. It must also be noted that if and when a Court determines that it would make a

[230] SC Application 270/93, S.C. Minutes 29th November 1993 as cited in Amerasinghe, *supra* note 3, at p. 61.
[231] *Ibid.*
[232] *Ibid.*

determination in these circumstances, the nature of its jurisdiction would shift from adversarial to inquisitorial. Whether the Court is equipped both in terms of procedural rules and training to conduct such a process could also be questioned. A related question would be the role of the Bar – both private and public – in such cases.

9. Patterns in the filing of applications based on Ethnicity and Gender of Petitioner

This section examines patterns in the filing of applications based on the ethnicity and gender of petitioners. It is conceded that data in terms of ethnicity and gender may not provide sufficient information about the contexts of each of the applications. However, the following analysis might be useful in providing a general sense for the significance (or the lack of it) of ethnicity and gender in fundamental rights applications regarding liberty and security.

9.1. Patterns based on Ethnicity

Ethnicity is a significant aspect in considering the right to be free from arbitrary arrests and detention, given the ethnic conflict that lasted for about 30 years in Sri Lanka. For instance, persons of Tamil ethnicity were more likely to be arrested on suspicion of terrorism, as opposed to persons of Sinhalese ethnicity.In analysing the case of *Konesalingam v. Major Mutalif,*[233] the following observation is relevant in this regard.

> *"The petitioner has been arrested and kept under detention on vague suspicion. As there was no material to substantiate the suspicion that he was a member of the LTTE, the fact that he was a member of the Tamil community appears to have been the reason for his arrest and detention. This is revealed by the forced confession that the perpetrators extracted from him.*
>
> *The assault, which was related to the petitioner's attempt to explain his innocence, revealed the prejudice of the perpetrators, who appeared to presume that as the petitioner was a Tamil, he was therefore a member of the LTTE...such attitudes on the part of law enforcement officers create a feeling among members of the Tamil community that they are persecuted by those very persons who are expected to protect and safeguard their fundamental rights..."*[234]

In this section, the analysis is focused on assessing whether there were patterns in the outcome of the fundamental rights applications regarding arrest, in relation to the ethnicity of the victim. Out of the 57 applications reviewed in this Study violations of Articles 13 (1) or/and 13 (2) were upheld in 36 applications. Accordingly, no infringement of those Articles was found in 21 applications. Out of the 36 applications, where violations of Articles 13 (1) or/and 13 (2) were upheld, violations were mostly

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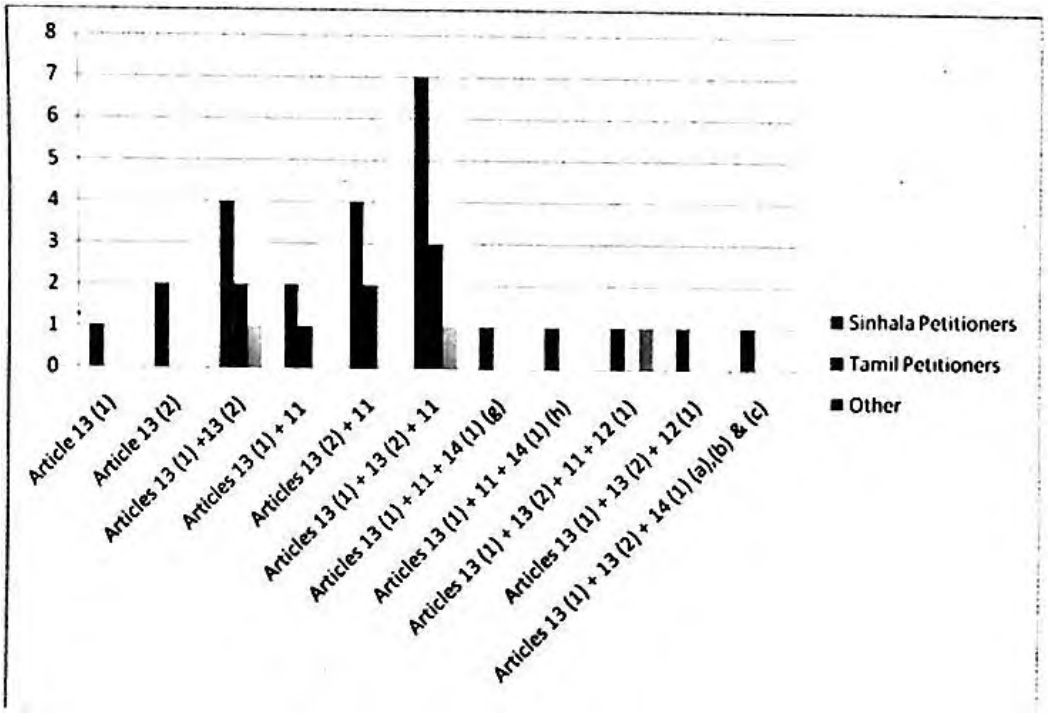
[233] *Kandasamy Konesalingam v. Major Muthalif, O.I.C., JOOSSP Army Camp and Others,* S.C. (FR) Application No. 555/2001, S.C. Minutes 10th February 2003.

[234] De Almeida Guneratne, J., *Judicial Protection of Human Rights,* in, *"Sri Lanka: State of Human Rights 2004,"* (Law & Society Trust, 2005), at p. 126.

upheld by Court, in cases where the petitioner belonged to the Sinhalese majority community as evidenced in chart 7 below.

Violation of Article 13 (2) combined with Article 11 was found in 4 fundamental rights applications where the petitioners were Sinhalese and in 2 applications where the petitioners were Tamils. Violation of all three Articles 13 (1), 13 (2) and 11 was upheld in 7 applications where the petitioners were Sinhalese and in 3 applications where the complainants were Tamils. Similarly, violation of both Articles 13 (1) and 13 (2) was upheld in 4 applications where the petitioners were Sinhalese and in 2 applications where the petitioners were Tamils. More data as to overall patterns regarding arrests and/or detention in general is required against which the fundamental rights applications arising from such arrests and/detention can be evaluated. For the present analysis, however, it is useful to note the general pattern of ethnicity in correlation to fundamental rights applications on violations of liberty and security.

Chart 6: Violations Upheld by the Court based on Ethnicity of the Petitioner

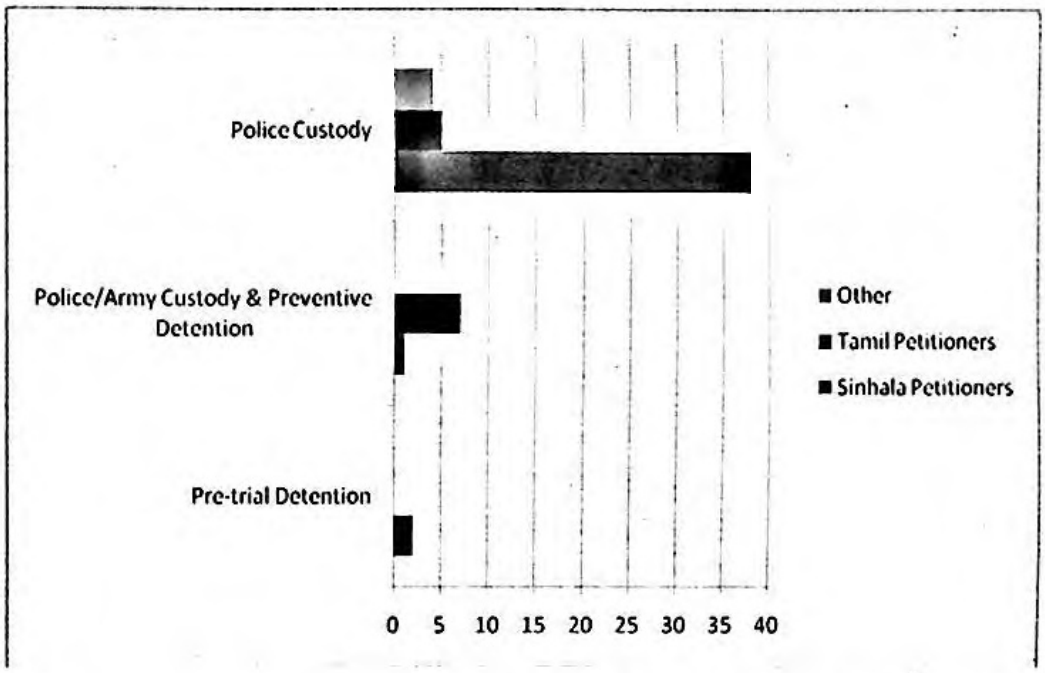


The type of custody challenged in the applications reviewed for this Study on one hand and the ethnicity of the petitioner on the other, seem to bear a correlation. For instance, the period of police custody was challenged in 38 fundamental rights applications where the suspects were Sinhalese ethnicity and in 5 applications where the suspects were Tamils.

This pattern was repeated in the reverse in the case of preventive detention orders, where 7 applications were by Tamils and only 1 petitioner was Sinhalese. It seems then, that more persons of Tamil ethnicity were subjected to preventive detention, and to violations of liberty and security under such detention during the period reviewed. That pattern is evident in chart 8 below. This finding is in keeping with the other general findings of this section which also suggested that the minority ethnic

group, i.e. the Tamils, seemed to be subject to more violations of liberty and security under arrests and/or detention.

Chart 7: Period/Order of Detention Challenged in the Applications



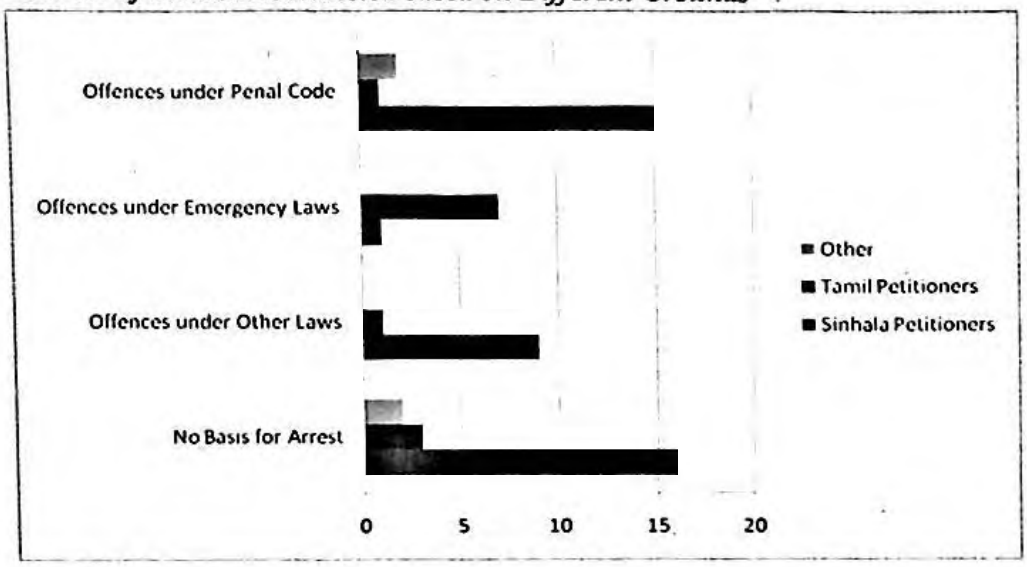
When looking at the grounds on which the arrest and/or detention took place in the fundamental rights applications under review, more persons of Sinhalese ethnicity were arrested without any basis under the general criminal law, while more persons of Tamil ethnicity were arrested under the PTA or ERs. In 15 of the cases, suspects of Sinhalese ethnicity had been arrested for involvement in offences under the Penal Code and in 1 case a person of Tamil ethnicity had been arrested under the ordinary law. Whereas suspects of Tamil ethnicity had been arrested for involvement in terrorist activities for offences under the PTA or ERs in 7 fundamental rights applications; here again (in the converse) a person of Sinhalese ethnicity had been arrested under emergency laws only in 1 case. In some instances, persons had been arrested based on a suspicion of involvement on offences under other laws such as the Explosives Act[235] and the Brothels Ordinance.[236] Accordingly, 9 Sinhalese and 1 Tamil had been arrested based on suspicions of commission of offences under other laws.

It was a striking factor that despite the high records of violations of Articles 13 (1) and (2) in respect of arrests made under ERs and the PTA as documented by activists during this period, petitions were filed invoking these violations in a relatively small number of cases (approximately 8 cases).

Several factors may be highlighted as reasons for this low incidence of invocation of the Court's jurisprudence, among them being the lack of confidence of minority ethnic groups in the law enforcement authorities and the judiciary, their perception that invocation of judicial remedies do not bring about positive results, the high financial cost and the vulnerability of such victims to intimidation by the perpetrators.

[235] Act of 1956 as amended.
[236] Ordinance of 1889.

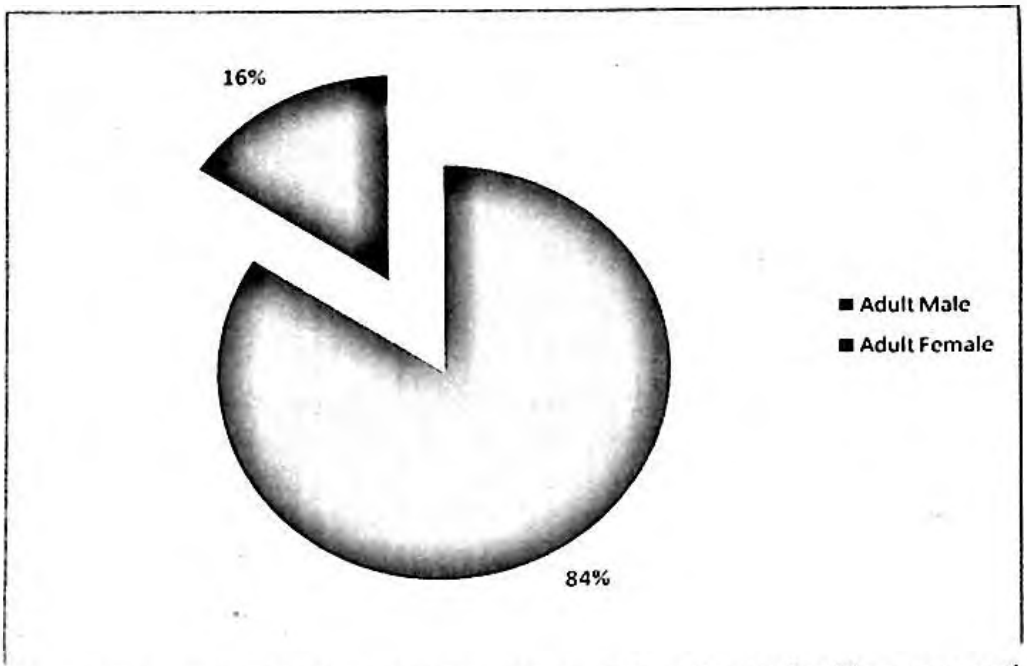
Chart 8: Number of Petitioners Arrested based on Different Grounds



9.2. Patterns based on Gender

As depicted in the chart below in 48 fundamental rights applications (84%) males had pursued relief for the deprivation of their liberty arbitrarily. In a relatively small number of cases i.e. amounting to 9 (16%), women had filed petitions, generally alleging sexual violence.

Chart 9: Number of Petitioners by Gender



This could be indicative of the fact that more men are arrested and/or detained in a manner that gives rise to violations of their right to liberty and women were not. On the other hand, the reason for this disproportion could be that women had not been subjected to arrest and/or detention as often as men were. Consequently, there were fewer instances of violations of their liberty under such circumstances. An alternative approach to this data would be to question whether this significant

number of applications by males was suggestive of the reluctance of women to make similar applications even though they too are subject to similar violations of right to liberty and security. Further analysis in this regard was not possible given the limitations as to the availability of data. Therefore it is difficult to identify any striking relationships between the gender of petitioners and the outcome of the fundamental rights applications regarding liberty and security.

10. Conclusion and Recommendations

This Study has attempted to provide some pointers to the response of the Supreme Court within its fundamental rights jurisdiction during 2000-2007, to violations of due process by authorities in carrying out and/or ordering of arrests and detentions, in so far as it is possible given the available data. It was demonstrated through a meticulous analysis of case law, (both reported and unreported), that the judicial response to violations of many aspects of the right to liberty was largely inconsistent with few extraordinarily strong pronouncements attempting to weigh the scales in favour of liberty rights as against the general conservative trend. Effective judicial intervention did not reduce the violations of liberty guarantees in general on the part of administrative authorities.

During the period under review, *Ceylon Workers Congress v. Mahinda Rajapakse*[237] indicated an instance where the Court considered the large scale violation of the right to liberty and made policy directives considering it to be a matter of public interest. Whether the *Ceylon Workers Congress* case can be relied on by future Courts is not clear given that the juridical basis for the "activist" judicial response in that case has not been fleshed out in that judgment.

The critical role played by the judiciary under Article 126 is paramount. That article vests the Court with a very broad jurisdiction, which will only be as assertive as the Court will make it out to be. Yet as was evidenced in the analysis of the fifty-one bench orders, applications affecting liberty rights were more often than not treated as a matter entirely between the two parties.

The Supreme Court is the highest judicial authority in the land and is empowered with the exclusive jurisdiction to determine applications that allege the violations of human rights. If and when the Supreme Court is not able to respond in a consistent, unequivocal and principled way to violations of rights, particularly, in relation to violations that seem to be systemic, persons are left with no other avenue through which they could assert their rights. Seen in that light, it is a matter of urgency that the Supreme Court strengthens and reinforces its authority under Article126 and revitalizes its fundamental rights jurisdiction. Studies of this nature, it is hoped, will provide an organizing moment for such efforts, by highlighting the serious gaps that exist.

In light of the above discussed conclusions of the study, this Study presents five recommendations.

Firstly, public access to fundamental rights decisions and relevant Bench Orders of the Supreme Court should be improved. Availability of those decisions is a pre-requisite for the exhaustive and rigorous analysis of the judicial response to violations of fundamental rights. Information regarding the cases should be made more available so that the judicial response is evaluated critically and in a

[237] S.C. (FR) 428/07, S.C. Minutes 19th December 2007.

constructive manner. At present due to the lack of access, academic analysis of those judgements is selective at best.[238] Such incomplete analysis has a negative impact on future Courts, in that, judges do not get any meaningful response by the legal community as to the work of the Court. The need for constructive, consistent and impartial response to the judgements of the Court acquires more significance when considering the fact that appeals do not lie from judgements related to fundamental rights. Only a revision can be sought from the Supreme Court and such revision cannot be sought as of a right but may be exercised at the discretion of the Court.

It must be noted that inaccessibility of judgements of the Appellate Courts is a general problem in Sri Lanka. Selected judgements are reported annually.[239] However, if a exhaustive study, as the one attempted in the present Study, is to be undertaken, access to all judgements decided, whether reported or unreported, is necessary. Obtaining such records is extremely difficult if not impossible within the existing system.

The second recommendation is that the judiciary should consider developing guidelines for the determination of fundamental rights applications specifically with regard to computation of compensation and grounds for dismissal. As evidenced in the Study, absolute discretion of the Court may not be desirable if one of the outcomes is that the judicial response in those cases is perceived to be subjective and unpredictable. By following an agreed set of guidelines, it might be possible for the Court to minimise subjectivity in determinations and establish more consistency especially in granting compensation in cases where violations have been upheld.

Thirdly, the procedural rules that apply to fundamental rights applications should be amended in keeping with the more progressive interpretation given to those rules by the Supreme Court. As it stands now, the rules regarding the time bar and standing have been liberalized by the Court and that interpretation is contrary to the plain reading of Article 126. Constitutional reform is required in this regard.

Fourthly, the process of establishing evidence by affidavit in fundamental rights applications needs to be revisited. On one hand it allows for expeditious determinations but on the other, it allows for subjectivity of the Courts and the advocacy skills of the Attorneys-at-Law appearing for the parties to play a greater role in the final outcome of the case, than in other instances of litigation. The exclusive reliance on affidavits for establishing facts in fundamental rights applications, therefore requires further study and analysis; as to its impact and possible reform.

Fifthly, the findings of the Study also suggest the need for rigorous training for both the judiciary and the private and public bar with regard to the fundamental rights jurisdiction of the Court and international human rights law. Such training would be helpful for the judges particularly to develop a

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[238] See "...as far as domestic jurisprudence is concerned during 2004 from this standpoint, though we saw deliberate efforts on the part of some judges to expand the canvas of the rights chapter of the Constitution, these developments were not necessarily uniform. Regrettably, academic analysis of such decisions, (either positively or negatively), has been sparse, raising grave concerns in regard to the vital interplay between academic discourse and judicial thinking which is an essential pre-requisite of a strong and energetic jurisprudence." Pinto-Jayawardena, Kishali, *Judicial Protection of Human Rights,* in *"Sri Lanka: State of Human Rights 2005"*, (Law & Society Trust, 2006), at p. 15.

[239] i.e. the Sri Lanka Law Reports.

dynamic interpretation of fundamental rights. Continued training in different aspects of the law, its interpretation, developments in other jurisdictions and at the international level will increase the capacity of the Court and thereby enrich the fundamental rights jurisprudence. The counsel of the Department of the Attorney-General and the members of the private bar who engage in fundamental rights litigation should also have the opportunity to train and update themselves in this area of law.

The above proposed recommendations would on one hand revitalize the legal discourse on fundamental rights in Sri Lanka and also provide the Court with better tools to perform their judicial functions.

List of References

Cases - Domestic

Fundamental Rights Decisions of the Supreme Court of Sri Lanka, where violations of Articles 13 (1) or/and 13 (2) were alleged, decided during the period 2000-2007 and analysed in this Study

Reported Cases

Abdul Lathif v. Deputy Inspector General of Police, Nuwara-Eliya and Others, [2005] 1 Sri LR 22

Abeyratne Banda v. Gajanayake, Director, Criminal Investigation Department and Others, [2002] 1 Sri LR 365

Amarasena and Another v. Jayaratnem, O.I.C., Mt. Lavinia Police Station and Others, [2003] 1 Sri LR 385

Danny v. Sirinimal Silva, Inspector of Police, Police Station, Chilaw and Others, [2001] 1 Sri LR 29

Kumara v. Silva, Sub-Inspector of Police, Welipenna and Others, [2006] 2 Sri LR 236

Nandasena v. Chandradasa, O.I.C., Police Station, Hiniduma and Others, [2006] 1 Sri LR 208

Priyantha Dias v. Ekanayake, Reserve Police Constable and Others, [2001] 1 Sri LR 224

Roshana Michael v. Saleh, O.I.C. (Crimes), Police Station, Narahenpita and Others, [2002] 1 Sri LR 345

Sanjeewa, Attorney-at-Law (on behalf of Gerald Mervin Perera) v. Suraweera, O.I.C., Police Station, Wattala and Others, [2003] 1 Sri LR 317

Seneviratne v. Rajakaruna, Sub Inspector, C.I.D. and Others, [2003] 1 Sri LR 410

Sirimawathie Fernando v. Wickremaratne, O.I.C., Police Station, Dehiwela and Others, [2001] 1 Sri LR 259

Sriyani Silva (Wife of Jagath Kumara-Deceased) v. Iddamalgoda, O.I.C., Police Station, Payagala and Others, [2003] 1 Sri LR 14, [2003] 2 Sri LR 63

Senasinghe v. Karunatilleke, Senior Superintendent of Police, Nugegoda and Others, [2003] 1 Sri LR 172

Weerawansa v. The Attorney-General and Others, [2000] 1 Sri LR 387

Wijenayake and Others and Amerasena and Others, [2000] 2 Sri LR 286

Wijeratne v. Vijitha Perera, Sub-Inspector of Police, Polonnaruwa and Others, [2002] 3 Sri LR 319

Wimaladasa v. Somadasa, Police Constable, Bribery Commissioner's Department and Others, [2000] 1 Sri LR 53

Unreported Cases

Anthonydura Sagara Wansanatha v. Inspector Samarakoon and Others, S.C. (FR) Application No. 837/1997, S.C. Minutes 26th January 2000

Brahmanage Arun Sheron Suranga v. Priyasen Ampawila, Inspector of Police and Others, S.C. (FR) Application No. 553/2002, S.C. Minutes 27th May 2005

Ceylon Workers Congress v. Mahinda Rajapakse, S.C. (FR) Application No. 428/2007, S.C. Minutes 19th December 2007

Chaminda Caldera and Another v. Somasiri Liyanage, IP and Others, S.C. (FR) Application Nos. 62/1999 and 63/1999, S.C. Minutes 06th February 2001

Danapala Maturage v. Quintus Reman, O.I.C., Special Crimes Investigation Branch, Mirihana Police Station and Others, S.C. (FR) Application No. 614/2003, S.C. Minutes 20th March 2007

Don Gamage Sunil Karunarathne v. Ranjit Kottachchi, IP and Others, S.C. (FR) Application No. 111/2002, S.C. Minutes 19th June 2002

Don Percy Edward Jayanethi v. Sarath Perera and Others, O.I.C., Police Station, Deniyaya and Others, S.C. (FR) Application No. 84/2002, S.C. Minutes 24th February 2003

E.M.K. Ekanayake v. Reserve Sub-Inspector Hewawasam and Others, S.C. (FR) Application No. 34/2002, S.C. Minutes 17th March 2003

Emil Franklin Kronemberg v. V. Kandasam SSP and Others, S.C. (FR) Application 58/99, S.C. Minutes 05th February 2001

Indika Chathurani Dias v. Harsha Amarasingha, Inspector of Police and Others, S.C. (FR) Application No. 444/2002, S.C. Minutes 19th December 2003

Jayakodi Arachchige Don Ajith v. Inspector Samudrajeewa and Others, S.C. (FR) Application No. 681/2000, S.C. Minutes 05th June 2002

Kandasamy Konesalingam v. Major Muthalif, O.I.C., JOOSSP Army Camp and Others, S.C. (FR) Application No. 555/2001, S.C. Minutes 10th February 2003

Kemasiri Kumara Caldera v. Somasiri Liyanage, Inspector of Police and Others, S.C. (FR) Application No. 343/1999, S.C. Minutes 06th November 2001

Kulasooriyage Aruna Shantha v. S.K. Walpola, SI and Others, S.C. (FR) Application No. 677/99, S.C. Minutes 17th October 2000

M.K. Prasanna Chandralal, Attorney-at-Law (on behalf of Dalkadura Arachchige Nimal Silva Gunaratna) v. ASP Ranmal Kodituwakku and Others, S.C. (FR) Application No. 565/2000, S.C. Minutes 16th November 2006

M.M. Sarath v. Inspector Munasinghe, O.I.C., Police Station, Pugoda and Others, S.C. (FR) Application No. 586/2000, S.C. Minutes 18th May 2001

M.W. Sarath Hemachandra de Silva v. Sub Inspector Karunathilake,Police Station, Thalathuoya and Others, S.C. (FR) Application No. 02/2002, S.C. Minutes 10th October 2003

Manickam Thavarasa v. O.I.C., STF Camp, Thrukkovil and Others, S.C. (FR) Application No. 09/2002, S.C. Minutes 16th September 2002

Manjula Janaki Gamage v. Gamini Jayasena, O.I.C., Police Station, Nagoda and Others, S.C. (FR) Application No. 280/1998, S.C. Minutes 24th October 2000

Mohamed Haniffa Sithi Marliya v. R. Mallawa Kumara, O.I.C., Minor Offences Branch, Police Station, Nittambuwa and Others, S.C. (Spl) Application No. 293/1999, S.C. Minutes 21st September 2001

Nayana Kumudinie Lasanthi v. Udaya Seneviratne, Inspector of Police and Others, S.C. (FR) Application No. 148/1999, S.C. Minutes 26th September 2001

Nithiyanathan Suthaharan v. Nilantha Buddhika Weeraratne, 2nd Lieutinant and Others, S.C. (FR) Application No. 802/1999, S.C. Minutes 06th March 2000

Pararasagegaram Balasekaram v. O.I.C., JOOSSP Army Camp and Others, S.C. (FR) Application No. 547/1998, S.C. Minutes 08th May 2000

Priyantha Atukorale and Another v. Inspector M.A.D.D.S. Mallawarachchi and Others, S.C. (FR) Application No. 395/2002, S.C. Minutes 17th October 2003

R.M.P. Prasanna v. Jude RPC and Others, S.C. (FR) Application No. 106/2003, S.C. Minutes 11th December 2003

Randeni Koralalage Sunanda Rohana v. The Inspector General of Police and Others, S.C. (FR) Application No. 263/1999, S.C. Minutes 22nd November 2000

Ranjith Kumara Kariyawasam v. B.L.V. de Kodituwakku, Inspector General of Police and Others, S.C. (FR) Application No. 492/2001, S.C. Minutes 21st October 2003

S. Konesalingam v. Godewitharana, Sub Inspector of Police and Others, S.C. (FR) Application No. 604/2000, S.C. Minutes 14th December 2001

Samarakkody Arachchige Don Siripala v. S.I. Nandana Wijesinghe and Others, S.C. (FR) Application No. 213/2001, S.C. Minutes 31st May 2002

Sellathurai Shanmugarajah v. Dilruk, Sub Inspector of Police and Others, S.C. (FR) Application No. 47/2002, S.C. Minutes 10th February 2003

Shaul Hameed Mohamed Nilam and Others v. K. Udugampola, Superintendent of Police and Others, S.C. (FR) Application Nos. 68/2002, 73/2002, 74/2002, 75/2002 and 76/2002, S.C. Minutes 29th January 2004

Subramaniyam Chandramohan v. O.I.C., Passara Police Station and Others, S.C. (FR) Application No. 364/2001, S.C. Minutes 28th November 2002

Tharmalingam Thuvarahan v. O.I.C., Police Station, Nelliady and Others, S.C. (FR) Application No. 17/2003, S.C. Minutes 29th August 2005

Ubeysinghe Weerabaddana Arachchige Neil Ajantha and Others v. Inspector of Police Koralalage and Others, S.C. (FR) Application Nos. 966/1997, 967/1997 and 968/1997, S.C. Minutes 03rd May 2001

V.I.S. Rodrigo v. Imalka, S.I. Kirulapona and Others, S.C. (FR) Application No. 297/2007, S.C. Minutes 03rd December 2007

Velu Arasadevi v. H.P. Kamal Priyantha Premathilake, Reserve Police Constable of the Police Force and Others, S.C. (FR) Application No. 401/2001, S.C. Minutes 24th January 2002

Wagaachige Dayaratne v. T.E. Anandaraja, Inspector General of Police and Others, S.C. (FR) Application No. 337/2003, S.C. Minutes 17th May 2004

Wanniarachchige Don Nihal Wijesiri v. Beneragama Widanalage Upali Kumara Munasinghe, Inspector of Police and Others, S.C. (FR) Application No. 623/2002, S.C. Minutes 16th December 2003

Wijeratne Mudiyanselage Don Laksiri and Others v. Gramarakshaka Ganegoda and Others, S.C. (FR) Application No. 51/2000, S.C. Minutes 26th November 2002

Yogalingam Vijitha v. Wijesekara, Reserve Sub Inspector of Police and Others, S.C. (FR) Application No. 186/2001, S.C. Minutes 23rd May 2002

Bench Orders

S.C. (F/R) Application No.423/2001 decided on 01st March 2002

S.C. (F/R) Application No.673/2001 decided on 04th March 2002

S.C.(F/R) Application No.672/2001 decided on 04th March 2002

S.C. (F/R) Application No. 62/2002 decided on 08th March 2002

S.C. (F/R) Application No.335/2001 decided on 11th March 2002

S.C. (F/R) Application No.480/1999 decided on 11th March 2002

S.C. (F/R) Application No. 99/2002 decided on 15th March 2002

S.C. (F/R) Application No. 98/2002 decided on 15th March 2002

S.C. (F/R) Application No.370/2001 decided on 18th March 2002

S.C. (F/R) Application No.529/2001 decided on 18th March 2002

S.C. (F/R) Application No. 40/2002 decided on 18th March 2002

S.C. (F/R) Application No. 52/2002 decided on 18th March 2002

S.C. (F/R) Application No.336/2001 decided on 22nd March 2002

S.C. (F/R) Application No. 65/2002 decided on 25th March 2002

S.C. (F/R) Application No.164/2002 decided on 27th March 2002

S.C. (F/R) Application No.620/2001 decided on 29th March 2002

S.C. (F/R) Application No. 67/2002 decided on 01st April 2002

S.C. (F/R) Application No. 63/2002 decided on 05th April 2002

S.C. (F/R) Application No. 61/2002 decided on 05th April 2002

S.C. (F/R) Application No.105/2002 decided on 29th April 2002

S.C. (F/R) Application No.347/2002 decided on 29th April 2002

S.C. (F/R) Application No.169/2002 decided on 01st August 2002

S.C. (F/R) Application No.314/2002 decided on 02nd August 2002

S.C. (F/R) Application No.303/2002 decided on 19th August 2002

S.C. (F/R) Application No.302/2002 decided on 19th August 2002

S.C. (F/R) Application No.283/2002 decided on 19th August 2002

S.C. (F/R) Application No.463/2002 decided on 20th August 2002

S.C. (F/R) Application No.464/2002 decided on 20th August 2002

S.C. (F/R) Application No.412/2002 decided on 26th August 2002

S.C. (F/R) Application No.382/2002 decided on 26th August 2002

S.C. (F/R) Application No. 39/2002 decided on 26th August 2002

S.C. (F/R) Application No. 38/2002 decided on 26th August 2002

S.C. (F/R) Application No.383/2002 decided on 26th August 2002

S.C. (F/R) Application No.437/2002 decided on 26th August 2002

S.C. (F/R) Application No. 57/2002 decided on 26th August 2002

S.C. (F/R) Application No. 18/2002 decided on 26th August 2002

S.C. (F/R) Application No.448/2002 decided on 02nd September 2002

S.C. (F/R) Application No.447/2002 decided on 02nd September 2002

S.C. (F/R) Application No.449/2002 decided on 02nd September 2002

S.C. (F/R) Application No. 13/2002 decided on 19th September 2002

S.C. (F/R) Application No.387/2009 decided on 25th September 2002

S.C. (F/R) Application No.561/2000 decided on 30th September 2002

S.C. (F/R) Application No.435/2002 decided on 30th September 2002

S.C. (F/R) Application No.182/2002 decided on 22nd September 2003

S.C. (F/R) Application No. 283/2005 decided on 07th December 2005

S.C. (F/R) Application No. 266/2004 decided on 12th December 2005

S.C. (F/R) Application No. 265/2004 decided on 12th December 2005

S.C. (F/R) Application No. 475/2005 decided on 28th March 2006

S.C. (Spl.) Application No. 33/2004 decided on 31st March 2006

S.C. (F/R) Application No.235/2006 decided on 21st August 2006

S.C. (F/R) Application No.29/2006 decided on 28th August 2006

Other Decisions of the Supreme Court of Sri Lanka decided during the period 2000-2007 and referred to in the Study

Kanapathipillai Machchavallavan v. OIC, Army Camp, Plantain Point, Trincomalee and Others [2005] 1 Sri LR 341

Kodituwakkuge Nihal v. Police Sergent Kotalawala and Others, [2000] 1 Sri LR 217

Nallaratnam Singarasa v. Attorney General and Others, S.C. SpL (LA) No. 182/99, S.C. Minutes 15th September 2006

Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others v. OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others S.C. (FR) Application No. 700/2002, S.C. Minutes 26th July 2004

Special Determination of the Supreme Court No 3 of 2007 as reproduced in Parliamentary Debates (Hansard), Volume 168, No 17, 3rd April, 2007, p. 699 – 701

Supreme Court Reference No. 1 of 2008, Supreme Court Minutes 17th March 2008

Fundamental Rights Decisions of the Supreme Court of Sri Lanka decided during the period 1978-2000 and referred to in the Study

Abasin Banda v. S.I. Gunaratne and Others, [1995] 1 Sri L.R. 244

Abdul Razak and Another v. *Dharmadasa, Chief Inspector of Police Katugastota and Others* [1999] 1 Sri L.R. 128

Abeywickrema v. *Gunaratna and Three Others* [1997] 3 Sri L.R. 225

Amal Sudath Silva vs Kodithuwakku, Inspector of Police & Others, [1987] 2 Sri L.R. 119

Ansalin Fernando v. *Sarath Perera, O.I.C., Police Station, Chilaw and Others* [1992] 1 Sri L.R. 411

Bulankulama v. Secretary, Ministry of Industrial Development [1994] 2 Sri L.R. 90

Chaminda v. Gunawardena, OIC, Police Station, Kataragama and Others [1999] 2 Sri L.R. 80

Chandra Kalyanie Perera and Another v. Captain Siriwardena and Others, [1992] 1 Sri L.R. 251

Dissanayake v. Superintendent Mahara Prison and Others [1991] 2 Sri L.R. 247

Ekanayake v. Herath Banda and Others S.C. (FR) Application No. 25/1991, S.C. Minutes 18th December 1991

Faiz v. AG [1995] 1 Sri L.R. 372

Fernando v. Attorney-General [1983] 1 Sri L.R. 374

Gnanamuttu v. Military Officer Ananda and Others [1999] 2 Sri L.R. 213

Gunawardena v. Perera [1983] 1 Sri L.R. 305

Joseph Perera v. *Attorney-General* [1992] 1 Sri L.R. 199

Kahawalaye Somawathi v. Gamini Weerasinghe and Others, S.C. Application No. 227/1988, S.C. Minutes 20th November 1990

Karunatilleke v. Dissanayake [1999] 1 Sri L.R. 177

Mahanama Tilakaratne v. Bandula Wickramasinghe, Senior Superintendent of Police and Other, [1999] 1 Sri L.R. 372

Mahinda Rajapakse v. Kudahetti [1992] 2 Sri L.R. 223

Malinda Channa Pieris and Others v. Attorney-General and Others, [1994] 1 Sri L.R. 1

Mallawarachchi v. Seneviratne, O.I.C. Police Station, Kollupitiya and Others, [1992] 1 Sri L.R. 181

Mariadas Raj v. AG and another 1982 (2) FRD 397

Nalika Kumudini, Attorney-at-Law (on behalf of Malsha Kumari) v. Nihal Mahinda, O.I.C., Hungama Police and Others, [1997] 3 Sri L.R. 331

Nallanayagam v. Gunatilake and Others, [1987] 1 Sri L.R. 293

Namasivayam v. Gunawardena [1989] 1 Sri L.R. 394

Padmanathan v. Sub-Inspector Paranagama, OIC, National Intelligence Bureau, Vavuniya and Others [1999] 2 Sri L.R. 225

Perera v. Attorney-General [1992] 1 Sri L.R. 199

Piyasiri and Others v. Nimal Fernando, ASP and Others [1988] 1 Sri L.R. 173

Porage Lakshman v. Rohan Fernando and Others [1990] 1 Sri L.R. 318

Ratnapala v. Dharmasiri [1993] 1 Sri L.R. 224

Saman v. Leeladasa and Another [1989] 1 Sri L.R. 1

Senaratne v. Punya de Silva and Others [1995] 1 Sri L.R. 272

Sevakumar v. Douglas Devananda and Others S.C. (FR) Application No. 150/1993, S.C. Minutes 13th July 1994

Sirisena v. Perera, [1991] 2 Sri L.R. 97

Somawathie v. Weerasinghe [1990] 2 Sri L.R. 121

Subbash Chandra Fernando v. Kapilaratne, O.I.C., Police Station, Gampaha and Others [1992] 1 Sri L.R. 305

Sunil Rodrigo (on behalf of B. Sirisena Cooray) v. Chandananda De Silva and Others [1997] 3 Sri L.R. 265

Thavarasa and Two Others v. Gunasekera and Others, [1996] 2 Sri L.R. 357

Vinayagamoorthy, Attorney-at-Law (on behalf of Wimalenthiran) v. The Army Commander and Others [1997] 1 Sri L.R. 114

W.M. Herath Banda v. Sub-Inspector of Police, Wasgiyawatte Police Station S.C. (FR) Application No. 270/1993, S.C. Minutes 29th November 1993

Weeragama v. Indran and Others, S.C. Application No. 396, 397/1993 S.C. Minutes 24th February 1995

Wickremebandu v. Herath [1990] 2 Sri L.R. 348

Withanage Sirisena and Others v. Ernest Perera and Others, S.C. Application No. 14/1990, S.C. Minutes 26th August 1991

Yapa v. Bandaranayake [1988] 1 Sri L.R. 63

Other Decisions of several Courts prior to the 1978 Constitution

Corea v. Queen, (1954) 55 N.L.R. 457

Gunasekera v. de Fonseka, Assistant Superintendent of Police and Two Others, (1972) 75 N.L.R. 246

Kolugala v. Superintendent of Prisons, (1961) 66 N.L.R. 412

Muttusamy v. Kannangara, (1951) 52 N.L.R. 324

Cases – Regional/ other Jurisdictions

Christie v. Leachinsky [1947] 1 All E.R. 567, [1947] A.C. 573

Fox, Campbell and Hartley v. UK, [1991] 13 E.H.R.R. 157

Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 567

McNabb v. U.S. [1943] 318 U.S. 332

Cases - International

Nallaratnam Singarasa v. Sri Lanka, Communication No. 1033/2001, adoption of views, 21st July 2004

S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, CCPR/C/78/D/950/2000, adoption of views, 16th July 2003

Vadivel Sathasivam and Parathesi Saraswathi v. Sri Lanka, Communication No. 1436/2005, CCPR/C/93/D/1436/2005, adoption of views, 08th July 2008

Constitutions/ Government Declarations

Constitution of India, 1950, http://india.gov.in/govt/documents/english/coi_part_full.pdf

Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 (with amendments)

Magna Carta, 1215, http://www.constitution.org/eng/magnacar.htm

United States Declaration of Independence, adopted on 04th July 1776, http://www.ushistory.org/declaration/document/index.htm

Statutes

Bail Act No. 30 of 1997

Code of Criminal Procedure Act, No. 15 of 1979 (as amended)

Evidence Ordinance No. 14 of 1895 (as amended)

International Covenant on Civil and Political Rights Act No. 56 of 2007

Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (as amended)

Public Security Ordinance No. 25 of 1947 (as amended)

Emergency Regulations and Directives

Emergency (Miscellaneous Provisions and Powers) Regulation No. 4 of 1994, Gazette Notification No. 843/12, 04th November 1994 (as amended)

Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005, Gazette Notification No. 1405/14, 13.08.2005 (as amended by Gazette Notification No. 1561/11, 05th August 2008)

Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No. 7 of 2006, Gazette Notification No. 1474/5, 06th December 2006

Books, Articles and Reports

Domestic

Amerasinghe A.R.B., *"Our Fundamental Rights of Personal Security and Physical Liberty"*, Sarvodaya Vishva Lekha Publication, 1995

Atappattu, S., *"Judicial Protection of Human Rights"* in *"Sri Lanka: State of Human Rights 2002,"* Law & Society Trust, 2001

De Almeida Guneratne, J., *Judicial Protection of Human Rights,* in, *"Sri Lanka: State of Human Rights 2004,"* Law & Society Trust, 2005

de Chickera A. And Raheem M., *"Right to Liberty and Integrity of the Person"*, in, *"Sri Lanka: State of Human Rights 2007,"* Law & Society Trust, , 2007

Edirisinghe S., *"Emergency Rule,"* in *"Sri Lanka; State of Human Rights Review 2006,"* Law & Society Trust, 2007

Goonesekere R.K.W., *"Fundamental Rights and the Constitution-I,"* Law & Society Trust, 1998

Goonesekere R.K.W., *"Fundamental Rights and the Constitution-II,"* Law & Society Trust, 2003

Pinto-Jayawardena, Kishali and Kois, Lisa in *"Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response,"* Law & Society Trust, 2008

Pinto-Jayawardene, Kishali, *Judicial Protection of Human Rights,* in *"Sri Lanka: State of Human Rights 2005"*, (Law & Society Trust, 2006)

Pinto-Jaywardene, Kishali, *Judicial Protection of Human Rights,* in, *"Sri Lanka: State of Human Rights 2007"*, Law & Society Trust, 2008

Sharvananda S., "*Fundamental Rights in Sri Lanka (A Commentary)*", Arnold's International Printing House Private Limited, 1993

The Nadesan Centre, "*Arrest and Detention under the Current Emergency Regulations*", NC Legal Briefing, Fifth Edition, September 1999

Udagama, D, J., *Judicial Protection of Human Rights,* in, *"Sri Lanka: State of Human Rights 2001,"* Law & Society Trust, 2002

Regional/ Other Jurisdictions

Asian Human Rights Commission, "*Sri Lanka; State and Rights collapsing amidst growing violence and injustice,"* in "*The State of Human Rights in Eleven Asian Nations,*" Hong Kong, 2006

Khan S.L.A., *"Justice Bhagwati on Fundamental Rights and Directive Principles"*, First Edition, Reprint, Deep & Deep Publications Pvt. Ltd., 2001

United States Department of State, "*2008 Country Reports on Human Rights Practices - Sri Lanka*", 25.02.2009, http://www.unhcr.org/refworld/docid/49a8f151c.html

International

Abeyratne R.I.R., "*Freedom from Arbitrary Arrest and Detention in Sri Lanka: The Veeradas Case*", International and Comparative Law Weekly, Vol. 43, No. 3, Cambridge University Press, July 1994

Amnesty International, "*Amnesty International Report 2008 - Sri Lanka*", 28.05.2008, http://www.unhcr.org/refworld/docid/483e27b2c.html

Eide. A., et al, (Eds.) "The Universal Declaration of Human Rights, A Commentary," Scandinavian University Press, 1992

International Bar Association, "*Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary,*" 2001

International Commission of Jurists, "*Sri Lanka – Briefing Paper, Emergency Laws and International Standards*", March 2009

Joseph S., Schultz J. and Castan M., "*The International Covenant on Civil and Political Rights*", Cases, Materials and Commentary, Second Edition, Oxford University Press, 2005

Noorani A.G., "*Terrorism and Arbitrary Arrest*", Economic and Political Weekly, Vol. 25, No. 46

Nowak M., "*U.N. Covenant on Civil and Political Rights*", CCPR Commentary, N.P. Engel, 1993

Sebastian P.A., "*Armed Forces and Rule of Law*", Economic and Political Weekly, Vol. 29, No. 9

Williams G., Prof., *"Requisites of a Valid Arrest"*, Criminal Law Review, Vol. 6, 1954

United Nations Documents

Treaties, Declarations, Principles, etc.

African Charter on Human and Peoples' Rights of 1981, adopted 27th June 1981 entered into force 21st October 1986

Arab Charter on Human Rights of 1994 15th September 1994, not in force

American Convention on Human Rights of 1969 entered into force 18th July 1978

Basic Principles for the Treatment of Prisoners, adopted on 14th December 1990, http://www.unhchr.ch/html/menu3/b/h_comp35.htm

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, http://www.unhchr.ch/html/menu3/b/h_comp43.htm

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted on 09th December 1988, http://www.unhchr.ch/html/menu3/b/h_comp36.htm

Code of Conduct for Law Enforcement Officials, adopted on 17th December 1979, http://www.unhchr.ch/html/menu3/b/h_comp42.htm

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10th December 1984, http://www.unhchr.ch/html/menu3/b/h_cat39.htm

Declaration on the Protection of All Persons from Enforced Disappearance, adopted on 18th December 1992, http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.47.133.En?OpenDocument

European Convention on Human Rights adopted on 4th November 1950.

Inter-American Convention on Forced Disappearance of Persons 1994, entry into force 28th March 1996

International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20th December 2006, http://untreaty.un.org/English/notpubl/IV_16_english.pdf

International Covenant on Civil and Political Rights, adopted on 16th December 1966, entered into force on 23rd March 1976, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

Optional Protocol to the International Covenant on Civil and Political Rights, adopted on 16th December 1966, http://www2.ohchr.org/english/law/ccpr-one.htm

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted on 24th May 1989, http://www.unhchr.ch/html/menu3/b/54.htm

Rome Statute of the International Criminal Court, adopted on 17.07.1998, entered into force on 01st July 2002, http://www.un.org/children/conflict/keydocuments/english/romestatutcofthe7.html

Standard Minimum Rules for the Treatment of Prisoners, adopted on 30th August 1955, http://www.unhchr.ch/html/menu3/b/h_comp34.htm

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted on 14th December 1990, http://www.unhchr.ch/html/menu3/b/h_comp37.htm

Universal Declaration of Human Rights, adopted on 10th December 1948, http://www.un.org/Overview/rights.html

General Comments adopted by the United Nations Human Rights Committee

1. United Nations Human Rights Committee's General Comment No. 24, "*Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under article 41 of the Covenant*", CCPR/C/21/ Rev.1/Add.6, 04th November 1994
2. United Nations Human Rights Committee, General Comment No. 29, "*States of Emergency,*" CCPR/C/21/Rev.1/Add.11, 31st August 2001, http://www.unhchr.ch/tbs/doc.nsf/898586 b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf

Reports/Statements of Special Rapporteurs, Working Groups, OHCHR, etc.

1. Report by the Special Rapporteur on the Independence of the Judiciary in April 2003 to the UN Commission on Human Rights, E/CN.4/2003/65/Add.1, 25th February 2003
2. Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to Sri Lanka 1-8 October 2007, Nowak M., A/HRC/7/3/Add., 26th February 2008, http://www.unhcr.org/refworld/docid/47d683cf2.html

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