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"RULE BY LAW" REPLACING THE "RULE OF LAW"

A REVIEW OF THE POST-ARAGALAYA LEGISLATIVE AGENDA IMPACTING THE SOCIAL, POLITICAL AND ECONOMIC RIGHTS OF THE PEOPLE

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Editorial

"Rule by Law" replacing the "Rule of Law"

This edition of the LST Review focuses on the recent trend of the "Rule by Law" replacing the "Rule of Law". This trend is ominous, given that it is taking place in the aftermath of the Aragalaya (Peoples struggle) of 2022.

The Aragalaya demanded a "system change" – a fundamental change, a different type of politics, a different type of economy and a different society. It surely meant change to a better society.

What was the political, social and economic order that prevailed before the Aragalaya?

Sri Lanka has a centralised executive presidency which is unfettered by checks and balances. It is the perfect platform for an autocratic government. It has also been the platform for unfettered corruption (who can ignore the white elephant projects that litter our landscape and the numerous scams that came into the public domain) and uncontrollable foolishness (who can forget the fertiliser ban that crippled agriculture)? The chant "Gota Go Home" was hurled at the incumbent president but it could as easily be applied to his successor.

The frustrated population see their parliamentarians in an equally negative light. During the Aragalaya the chant was to "send the 225 home" as they see them as ineffective, motivated to stay in office to enjoy the perks of office rather than to represent their interests. Many are absent from sittings; others are either silent during important debates or incapable of making substantial contributions to improve legislation or public policy and they pliantly tow the party line without debate. A recent No-Confidence motion brought against the Minister of Health accused of corruption and incompetence was defeated

in Parliament, with his party closing ranks to support him but he was subsequently arrested and charged with corruption. Inequality in Sri Lanka is widening and after the economic crisis, the number of people falling below the poverty line has increased. Yet the government comes across as indifferent to their plight.

In the context of the economic crisis, the government sought the support of the International Monetary Fund and agreed to a structural adjustment programme which will involve cutting public expenditure social safety nets including expenditure on health, education and social services. Citizen protests are increasing as they do not see this burden being shared equitably. The government is increasingly viewing protests and citizen mobilisation against these measures as a security threat and not as an exercise of democratic rights. The government refuses to acknowledge that Sri Lanka faces an economic crisis because it has a governance crisis.

Under the guise of enacting economy-related measures, promoted as "unpopular but necessary" austerity measures to recover from the country's economic crisis. These include: The Inland Revenue (Amendment) Act No. 14 of 2023, the Aswesuma welfare benefit payment scheme, Microfinance Credit and Regulatory Authority Bill and a slew of labour reforms that strip workers of protection.

In addition, new dissent restricting legislation is accumulating. A draft Law on Non-Governmental Organisations (Registration and Supervision) was circulated. The Online Safety Act No. 09 of 2024 which drew widespread opposition domestically and internationally was enacted. The Anti-Terrorism was re-gazetted in September 2023 and tabled in parliament in January 2024. It is now awaiting the Supreme Court's determination. The process of parliament incorporating any determinations of the Court concerning a Bill is fraught with problems as the court cannot further review the amended Bill.

This LST Review details the challenges posed by the Anti-Terrorism legislation and highlights the general impact of the flurry of legislative activity undertaken by the government and its impact on the democratic rights of citizens. These far-reaching laws, pushed through without consultation and while restricting public debate are all dangerous signs of an undemocratic and illiberal state, advancing rule by law and not the rule of law. This is not a question of semantics. It cuts through to the core of our fundamental rights. The best response to a crisis is through the commitment to protect human rights but this is not the pathway that our government chooses to tread.

Economic Recovery by Austerity and Authoritarianism:

Trends in Law Reforms in Sri Lanka Between 2023-2024

ERMIZA TEGAL[*] and NAMASHYA RATNAYAKE[**]

This article describes some of the notable legal reforms in a way that highlights the two-pronged law reform agenda - laws that pass the economic burden on to the people and laws that arm the state with unprecedented anti-dissent powers

Introduction

Intolerance of dissent is a marked feature of the current Sri Lankan political culture. It was aptly demonstrated by the widespread and targeted arrests and use of violence, that took place in response to the 2022 peoples' protests ("Aragalaya"). The largely peaceful protests of 2022 resulted in the ousting of the incumbent President. Peaceful public protest is a routine and regular form of expression by people in Sri Lanka, and every event continues to draw a state response of surveillance, excessive police presence, use of water cannons, physical restraint and arrest of civilian protesters.

Since the dismantling of mass protests and occupation of the Galle Face Green in late 2022, the government, led by President Ranil Wickremasinghe, has actively engaged in a suppressive legislative agenda. Broadly, economy-related measures are promoted as "unpopular but necessary" austerity measures to recover from the country's economic crisis and new dissent restricting legislation is accumulating. The ostensible justification of dissent-curbing laws is that it is necessary for protecting women and children and to protect people from terrorism. These reforms combined leave a poor working population with heightened frustrations but with increasing fears of being critical of government policies which significantly deteriorate their quality of life. The preoccupation with law reform takes place in a context of a legitimacy deficit. The government has failed to hold scheduled local government elections[1], and the mass citizen

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protests of 2022 signalled the loss of confidence in all representatives in the legislature. This article describes some of the notable legal reforms in a way that highlights the two-pronged law reform agenda - laws that pass the economic burden on to the people and laws that arm the state with unprecedented anti-dissent powers.

National debt is shouldered by the poor while social and economic security is dismantled

The legal measures seen range from increase of indirect taxes[2], removal of subsidies on essentials such as electricity and fuel[3], reducing beneficiaries in the social protection system, restructuring domestic debt by reducing earnings on pension funds, attempting to introduce onerous criteria on community-based moneylending and microfinance while failing to respond to predatory lending. There have been proposals for labour reforms relaxing safeguards and social protections for working people. These legal measures were taken or floated in the context of increased poverty, increased cost of living and reduction of real incomes.

The **Inland Revenue (Amendment) Act No. 14 of 2023**[4] was a law that targeted the superannuation funds of working people. The government had publicly promised the people of Sri Lanka, for over a year, that domestic debt restructuring would not affect pension funds. However, in June 2023 the Cabinet of Ministers approved a scheme by which government treasury bonds purchased by the Employees Provident Fund (EPF) were to be restructured and in effect reduced future income to the Fund. This decision to restructure treasury bonds was to only affect superannuation funds and not private bondholders or banks holding the same bonds. The restructure required the voluntary participation of the superannuation funds. Nevertheless, participation was effectively coerced by the government tabling and passing the Inland Revenue Act No. 14 of 2023, which effectively threatened to impose a 30% tax on the fund (an increase from the 14% reduced tax in place) in the event it chose not to agree to restructure the bonds. Some experts have projected an almost 50% loss of earnings on the bonds to the fund which has a knock-on effect on future earnings as well. Thereby an already precarious household financial situation is rendered further vulnerable for working people of Sri Lanka who are retiring in the years to come.

The **Aswesuma welfare benefit payment scheme**[5] was introduced by President Ranil Wickremasinghe as a welfare scheme in response to the economic crisis and to replace the existing Samurdhi program which has drawn criticism for being too politicised. It has been famously declared a design for an "entrepreneurial state" instead of a "welfare state".[6] The new scheme was in fact developed much before the economic crisis and the opportunity to justify the change had merely presented itself during the crisis. The selection criteria for Aswesuma were gazetted in late 2020. The scheme was announced and enumerations completed by March 2023 and the government promised to start making payments by 1st of July 2023.

Under the criteria for Aswesuma eligibility, beneficiaries were also categorised and temporal limits were placed on payments. There was no consultation and transparency on the criteria applied, the categorisation of beneficiaries, the basis of time limits on benefits, the basis of the payment amount and the process to be adopted. The most pressing issue with the Aswesuma Scheme is its high exclusion errors. Critics attribute this to both the design of the program as well as its implementation (starting from the point of data collection). The verification process to identify beneficiaries was found to be coercive with excessive surveillance and data gathering, causing fear and fuelling social disharmony.[7]When the first list of selected beneficiaries was published by the government, there was a wave of protests. The response of the government was to call for appeals and objections. Those who

found themselves excluded were asked to apply in the second phase of applications which were open from February to March 2024.[8] Another concern is that community networks of support built around the previous Samurdhi welfare scheme were not replicated under nor transferred to the new system. Samurdhi beneficiaries have been left uncertain about what happens to their existing savings under the Samurdhi scheme. In times of economic crisis, it is usually necessary to widen social protections. However, the scheme introduced which is supported by the World Bank places new restrictions on beneficiaries. The long-term policy, as with all the other pieces of legislation under discussion here, remains missing.

The **Microfinance Credit and Regulatory Authority Bill**[9], in the pretext of "regulating" microfinance and safeguarding its low-income class of consumers from predatory lending practices, created an inflexible regulatory scheme and prohibitive and disabling conditions for informal, small and remote community-based credit organisations (CBOs). It excluded from regulation prominent institutions such as Finance Companies known for abuses such as exorbitant lending rates, extending multiple loans to individuals, and violent and intimidatory debt recovery practices. At a time when predatory lending is on the rise and people are economically struggling to survive, this Bill failed to effectively address the malpractices of exploiting the desperation of poverty and contributing to increasing household debt. The Bill was challenged before the Supreme Court as containing provisions inconsistent with the Constitution and the Court determined that some provisions were not consistent. After much advocacy by affected groups, the government announced it would withdraw the bill.[10] Much of the time and energy spent on designing and resisting the bill would have been averted if meaningful consultation with all stakeholders preceded its drafting. A comprehensive regulatory framework for microfinance is very much a necessity as the regulatory gaps continue to fail those affected.

In 2023 the Government advocated for comprehensive **labour reforms**. The President forecasted that reforms would 'change the economy going beyond the IMF recommendations.[11] The Labour Minister stated that the objectives of reform included 'boosting female workforce participation, attracting FDI, and robust social security'.[12] However, a closer look at government plans for reforms revealed piecemeal at different forums and raised serious concerns about the loss of employment-related social securities. These rights at risk included protections from arbitrary termination, protection of fixed work hours and other working conditions and protection of trade union formation. Reforms aimed at adopting negotiable work arrangements. The proposed reforms undermined the basic recognition in labour law of the inequitable relationship between employee and employer. An emerging concern for plantation workers is also the creeping informalization of plantation work with little state intervention to arrest exploitation.

These economic reform-related legal measures severely impinge on economic and social security and the rights of the people and make political freedoms all the more necessary to ensure that people can communicate their concerns and grievances.

Laws severely restricting freedom of expression, speech, assembly and association

It is important to note that there is no judicial review of post-enactment legislation in Sri Lanka. As such the legislative process must strive to ensure that the public, particularly stakeholders, are properly consulted, that the background and justification for the proposed law are well researched and transparent, and that expertise in finding the most suitable solutions for identified problems is explored. Proposed legislation has ambushed citizens and powers with the potential

to infringe rights are expanding. Below is a description of a few of the laws, enacted and proposed, that restricted freedoms of citizens.

The **Online Safety Act No. 09 of 2024**[13] drew widespread opposition domestically and internationally. It seeks to regulate content excessively by way of a five-member Commission which will effectively have a monopoly over what is true and safe in the digital public sphere. Where the Commission considers a "prohibited statement" to be made, it is empowered to take action against individuals, intermediaries and service providers. The Act, while duplicating offences in existing criminal laws such as the Penal Code, also broadens the application of these offences to a variety of legitimate communications and publications, and enacts a regime of penalties that is much harsher than in the Penal Code.

Civil society groups repeatedly raised concerns about the Act leading to self-censorship and having a chilling effect over particularly dissent and criticism of the government. Over 40 petitions were filed challenging the constitutionality of the Bill. The Supreme Court considered over 30 amendments that the State recommended to address concerns of constitutionality and required that the amendments be incorporated for the Bill to be passed by a simple majority in Parliament. The Bill was passed in Parliament on 24th January 2024, by a majority vote, with 108 votes in favour of the Bill and 62 against it. At the time the Bill was signed into law by the Speaker of Parliament several of the amendments that the Court had required be made to ensure consistency with the Constitution were not incorporated[14], raising questions on the constitutionality of this law.

An **Anti-Terrorism Bill** was first gazetted on 22nd March 2023[15] and after much domestic and international concern over the repressive nature of its provisions, was withdrawn on the 18th October 2023.[16] A second version of the Anti-Terrorism Bill was gazetted in September 2023[17] and tabled in parliament in January 2024.[18] The Bill was challenged by close to 30 citizens and organisations claiming that the Bill was inconsistent with the Constitution. This Bill is presently awaiting a determination from the Supreme Court on its constitutionality. The Bill broadly defines "terrorism" and "associated offences" to also capture legitimate acts of dissent. It brings into permanent criminal law a scheme of administrative detention and broad powers of arrests which could only have been justified in an emergency and strengthens executive power to restrict movement, rallies, and meetings, impose a curfew, proscribe organisations and declare places as prohibited places.

A draft **Law on Non-Governmental Organisations (Registration and Supervision)** was circulated on 30th January 2024 to a group of civil society activists and organisations. This was in the context of two years of a civil society collective requesting engagement and meaningful consultation in the development of an 'NGO law'. Despite submitting a draft law and a guiding principles document to the government, the proposed scheme involves mandatory registration, criminalization of non-registration, broad powers including police powers to the authority introduced to regulate NGOs. It further includes requirements that NGO activities conform to the government development agenda, do not engage in political activity, do not affect 'core cultural values', place caps on crowdfunding and prevent transfer of funds to unregistered groups. The scheme, if it becomes law, is likely to severely restrict non-governmental activity, mainly political dissent, advocating for legal reforms and working as voluntary collectives. The broad justification floated includes that the measures are required for fighting terrorism and monitoring NGO funds.

In a similar vein of restricting civic activity, the government has also floated legal reforms to control publications with a Broadcasting Regulations Authority Bill and control trade unions with a proposed uniform labour law.

Conclusion

It is alarming, to say the least, that this host of legal measures permanently affecting civil liberties and fundamental freedoms and negatively affecting the economic condition of the majority of the People are proposed and enacted with little opportunity for public debate, review and consideration of better democratic governance. There is an abject lack of consultation before or during the drafting of these legal measures, and a clear lack of connection between the design of the Bills and their purported benevolent aims.

Another common feature is the growth of the executive apparatus by each of the proposed laws with no stated policy and little guidance on how powers created are to be used. Similarly, there is a noticeable expansion of criminal law which bolsters the executive's ability to arrest, detain (and thereby subject to punishment by detention), search and seize, order surveillance and interfere with the freedoms and privacy of citizens of Sri Lanka. This "rule by law" replacing the "rule of law" is a dangerous trend.

Sri Lanka is caught in a vice of undemocratic representation. The People have signalled a loss of confidence in their representatives. These incumbent representatives have prevented the holding of local authority elections and are using the remnants of a previously secured parliamentary majority to rapidly enact legislation to curb dissent and maintain their power. These far-reaching laws are being pushed through without consultation and while restricting public debate. These are all dangerous signs of an undemocratic and illiberal state.

It is this undemocratic representation that is also responsible for designing and implementing far-reaching economic policies that are having a serious impact on the financial situation of the poor and working people of Sri Lanka. There is a real consequent impact on food security, access to health, education and well-being of families and their resilience to bear the impacts of the economic crisis and contribute to Sri Lanka's recovery.

Endnotes

[1] Local government elections have not been held since 2018. Elections scheduled for 2022 were postponed ostensibly because of the economic crisis.

[2] Value added taxes were increased from 12% to 15% by way of Extraordinary Gazette No. 2295 dated 31 August 2022, and thereafter further increased to 18% by Extraordinary Gazette No. 2363/22 dated December 19, 2023.

[3] There have been several rounds of increases between 2022 and early 2024. For electricity, tariffs were increased in August 2022, February 2023, July 2023, October 2023 and thereafter reduced in March 2024. Reductions in tariffs have been made more recently and must be read in the political context of appeasing a voting public in view of elections scheduled towards the end of 2024.

[4] The Bill was presented to Parliament on 08 August 2023 and passed on 8th September 08, 2023.

[5] Extraordinary Gazette of the Democratic Socialist Republic of Sri Lanka, No. 2328/13, April 21, 2023.

[6] "World Bank and IMF's targeted discourse against working poor of Sri Lanka" (DailyFT, 8 May 2023). Available at https://www.ft.lk/opinion/World-Bank-and-IMF-s-targeted-discourse-against-working-poor-of-Sri-Lanka/14-748032

[7] "Aswesuma 2nd phase: Deadline for applications extended" (Morning, 15 March 2024). Available at https://www.themorning.lk/articles/mKVKGXDhFVwR3YD3o58P

[8] "Aswesuma 2nd phase: Deadline for applications extended" (Morning, 15 March 2024). Available at https://www.themorning.lk/articles/mKVKGXDhFVwR3YD3o58P

[9] This Bill was published in the Gazette on October 30, 2023 and presented by the Minister of Finance, Economic Stabilization and National Policies to Parliament on 09th of January, 2024. Available at http://documents.gov.lk/files/bill/2024/1/450-2024_E.pdf

[10] "Treasury withdraws Microfinance Bill" (The Morning, 4th April 2024). Available at https://www.themorning.lk/articles/Z5JXBbKgu7p3z9gZeNFx

[11] "Sri Lanka's Labor Minister talks labor law reforms with exporters" (EconomyNext, 21st September 2023) Available at https://economynext.com/sri-lankas-labor-minister-talks-labor-law-reforms-with-exporters-132248/

[12] Ibid

[13] Placed on the Order Paper of Parliament on the 3rd of October 2023

[14] Sections of Sri Lanka's Online Safety Act appear non-compliant with court order: HRCSL (EconomyNext, 09 February 2024). Available at https://economynext.com/sections-of-sri-lankas-online-safety-act-appear-non-compliant-with-court-order-hrcsl-150529/

[15] The Gazette of the Democratic Socialist Republic of Sri Lanka, Part II of March 17, 2023 Supplement) (Issued on 22.03.2023).

[16] "Sri Lanka's anti-terrorism bill removed from parliament's order paper" (EconomyNext, 18/10/2023). Available at https://economynext.com/sri-lankas-anti-terrorism-bill-removed-from-parliaments-order-paper-135764/)

[17] The Gazette of the Democratic Socialist Republic of Sri Lanka, Part II of September 15, 2023 Supplement) (Issued on 15.09.2023).

[18] Placed on the Order Paper of Parliament on 10th January 2023.

An Analysis of Sri Lanka's Proposed Anti-terrorism Bill

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This article critically analyses the proposed ATB by examining Nipun's hypothetical fate under the proposed law

Introduction

Imagine Nipun, an engineer at the Ceylon Electricity Board (CEB), wishes to participate in strike action to protest a proposed policy to privatise the CEB. He decides to mobilise other engineers at the CEB to also strike, and they collectively plan to stage a protest outside the CEB. Nipun wishes to exercise his fundamental rights.

If Sri Lanka's proposed Anti-Terrorism Bill (ATB) is enacted, his actions may be treated as acts of 'terrorism'.

On 22 March 2023 the Minister of Justice published the ATB in the official gazette. Subsequently, on 15 September 2023 an updated version of the Bill was published, and this version was eventually placed on the Order Paper of Parliament in January 2024. Several petitions were then filed in the Supreme Court challenging the constitutionality of the ATB. On 20 February 2024, the Supreme Court issued its determination on the Bill.

This article critically analyses the proposed ATB by examining Nipun's hypothetical fate under the proposed law.[1] The first section of the article presents an overview of Sri Lanka's current anti-terrorism law, i.e., the Prevention of Terrorism Act, No. 48 of 1979 (PTA). The second compares the ATB with the PTA and assesses the constitutionality of some the ATB's key provisions. The article concludes that, if enacted, citizens such as Nipun may be punished under the new law for the legitimate exercise of their fundamental rights.

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Overview of the PTA

The PTA was enacted in 1979 as a temporary measure to deal with what the preamble identified as 'elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka'. The Prevention of Terrorism Bill was introduced in Parliament as 'urgent in the national interest' under the then article 122 of the Constitution, thereby affording the Supreme Court a mere twenty-four hours to determine the constitutionality of the Bill. When the Bill was referred to the Supreme Court, the Court did not have to decide whether or not any of those provisions constituted reasonable restrictions on the rights guaranteed by articles 12(1)[2], 13(1)[3], and 13(2)[4] of the Constitution, as it was informed that the Cabinet had decided that the Bill would be passed with a two-thirds majority in Parliament. The Supreme Court determined that the Bill did not require approval by the people at a referendum, as it was of the view that the Bill did not repeal nor amend any entrenched provision in the Constitution. The PTA was eventually enacted with a two-thirds majority, and accordingly, in terms of article 84 of the Constitution, it became law despite any inconsistency with any fundamental rights provisions in the Constitution.

At present, the PTA has five major flaws. First, it lacks a clear definition of 'terrorism', and this gap permits a broad range of acts to be considered 'terrorism' under the Act. Second, it permits a suspect to be detained for up to twelve months without a trial. Third, it dispenses with the requirement to produce a suspect before a Magistrate within 48 hours. Therefore, a suspect may be kept in custody for twelve months without production before a Magistrate. Fourth, the PTA denies bail to the accused once the indictment is served in the High Court. Finally, it makes confessions to police officers admissible as evidence, thereby incentivising the abuse of the suspects in custody.

These weaknesses have enabled the persecution of political opponents, journalists, lawyers, and human rights activists. Such weaknesses have enabled torture, arbitrary arrests, long-term detention, denial of fair trial rights, and the destruction of the livelihoods of innocent people. For example, recently, three Tamils arrested under the PTA in 2009 were found innocent and released by the High Court after being held in captivity for fourteen years. As a result of these grave injustices, civil society groups in Sri Lanka as well as the international community have repeatedly called for the repeal of the PTA. The ATB was drafted by the present government mainly in response to these calls.

Analysis of ATB in Light of the PTA's Weaknesses and Beyond

The proposed ATB attempts to address some of the weaknesses of the PTA. Yet it ultimately fails to achieve the overall aim of replacing the PTA with a better national security law. Instead, it produces new problems and leaves room for further abuse. This section will first analyse the ATB's provisions in relation to the PTA's weaknesses and assess the constitutionality of the relevant clauses in the ATB taking into consideration the determination of the Supreme Court. It will then examine certain additional problems in the ATB, which go beyond the PTA.

Lack of a clear definition for 'terrorism'

In clause 3(1), the ATB attempts to offer criteria for the offence of 'terrorism' by introducing specific 'intentions' that would convert certain ordinary offences into the offence of 'terrorism'. These intentions (some of which were removed in the updated version of the Bill) are:

a) intimidating the public or section of the public;

b) wrongfully or unlawfully compelling the Government of Sri Lanka, or any other Government, or an international organization, to do or to abstain from doing any act;

c) unlawfully preventing any such government from functioning[5];

d) violating territorial integrity or infringement of sovereignty of Sri Lanka or any other sovereign country; or

e) propagating war or advocating national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[6]

Clause 3(2) then goes on to list acts or illegal omissions that, if committed with the specific intentions listed in clause 3(1), would constitute the offence of 'terrorism'. These acts or illegal omissions include:

a) murder;

b) grievous hurt[7];

c) hostage taking;

d) abduction or kidnapping;

e) causing serious damages to any place of public use, a State or governmental facility, any public or private transportation system or any infrastructure facility or environment;

f) causing serious obstruction or damage to or interference with essential services or supplies or with any critical infrastructure or logistic facility associated with any essential service or supply[8];

g) committing the offence of robbery, extortion or theft, in respect of State or private property;

h) causing serious risk to the health and safety of the public or a section thereof;

i) causing serious obstruction or damage to, or interference with, any electronic or automated or computerized system or network or cyber environment of domains assigned to, or websites registered with such domains assigned to Sri Lanka;

j) causing the destruction of, or serious damage to, religious or cultural property;

k) causing serious obstruction or damage to, or interference with, any electronic analog, digital or other wire-linked or wireless transmission system including signal transmission and any other frequency-based transmission system;

l) being a member of an unlawful assembly for the commission of any act or illegal omission set out in paragraphs (a) to (k)[9]; or

m) without lawful authority, importing, exporting, manufacturing, collecting, obtaining, supplying, trafficking, possessing or using firearms, offensive weapons, ammunition, explosives, or any article or thing being used or intended to be used in the manufacture of explosives, or combustible or corrosive substances or any biological, chemical, electric, electronic or nuclear weapon, other nuclear explosive device, nuclear material or radioactive substance or radiation emitting device[10];

This framework, which sets out the scope of the offence of 'terrorism', is both deficient and dangerous, as intention (b) (i.e., 'wrongfully or unlawfully compelling the Government of Sri Lanka…to do or abstain from doing any act') can include public protests and demonstrations, strike action, and acts of civil disobedience.

Taken together, the intentions listed in clause 3(1)(b) and the acts or illegal omissions listed in clause 3(2) in including clause 3(2)(e) can criminalise

legitimate acts of public protest by citizens. For example, a protest to compel the government to refrain from any act may involve inadvertent damage to a place of public use.

Notably, the ATB itself can make certain means of compelling the government 'wrongful' or 'unlawful'. For example, the ATB in clause 61 empowers a Senior Superintendent of Police (SSP) to issue 'directives' to prevent a range of actions including entering certain areas or congregating in certain locations. Therefore, a protest held in violation of such a directive can be considered wrongful or unlawful by the police, and potentially constitute the offence of 'terrorism' if intended to compel the government in some way.

Recalling Nipun's case, upon receiving information about the strike action and protest, the SSP in the area can issue a directive under clause 61 of the ATB prohibiting the protest. The SSP issues the directive in consultation with a local magistrate. Nipun, however, proceeds with the protest outside the CEB. While Nipun's protest is ongoing, assume the protest escalates to the point where serious damage to a place of public use occurs. For example, protestors cause damage to one of the windows of the CEB building. Taken together, the intentions listed in clause 3(1)(b) together with the act listed in clauses 3(2)(e) (i.e., 'causing serious damage to any place of public use, a State or governmental facility, any public or private transportation system or any infrastructure facility or environment') would result in the characterisation of the protest as an 'offence of terrorism' despite the fact that the perpetrators of such damage may be dealt with under ordinary criminal law, i.e., the Penal Code Ordinance, No. 2 of 1883 (as amended). This characterisation is problematic, particularly given that such suspects would be subjected to a separate procedural regime under the ATB.[11]

Given the broad definition of 'terrorism', the ATB may be used to restrict public protests and demonstrations, strike action, and acts of civil disobedience all of which are integral parts of the fundamental rights of all citizens to the freedom of speech and expression, the freedom of peaceful assembly, and the freedom of association guaranteed by articles 14(1)(a)[12], (b), and (c)[13] of the Constitution. Therefore, the ATB fails to remedy the first weakness of the PTA. i.e., its failure to offer a clear definition of 'terrorism'.

In its determination, the Supreme Court held that 'Clause 3 of Bill falls foul of article 12(1)' and 'as a consequence it requires to be passed with a special majority'. The Court held that the clause would cease to be inconsistent if an exception or carve out is enacted as follows:

> The fact that a person engages in any protest, advocacy of dissent, or engages in any strike, lockout or other industrial action, is not by itself, a sufficient basis for inferring that the person –
>
> a) is committing an act or an illegal omission with an intention, specified in subsection (1) of Section 3 or
>
> b) intends to cause an outcome specified in subsection (2) of Section 3.

At the outset, it should be noted that the Court can only prescribe the procedure for enacting a Bill and cannot prevent the Bill from being enacted. In this case, similar to the PTA, the ATB can be enacted with special majority in parliament despite any inconsistency with the fundamental rights chapter of the Constitution. Thus, clause 3 of the ATB can potentially be enacted with a special majority in Parliament without the abovementioned exception.

The broad definition in the ATB can also result in further open-ended offences when read with subsequent provisions in the ATB. For example, under clause 10(1)(a) of the Bill, a person who 'publishes or causes to be published a statement, or speaks any word or words, or makes signs or visible representations which is likely to be understood by some or all of the members of the public as a direct or indirect encouragement or inducement for them to commit, prepare, or instigate the offence of terrorism' also commits an offence

if they satisfy the conditions in clause 10(1)(b). These conditions are that the person either 'intends directly or indirectly to encourage or induce the public to commit, prepare, or instigate the offence of terrorism', or 'is reckless as to whether the public is directly or indirectly encouraged or induced by the statement to commit, prepare, or instigate the offence of terrorism'.

Moreover, clause 11 of the Bill criminalises the sale, distribution, and even possession of 'terrorist publications'. Clause 11(3) of the Bill defines a 'terrorist publication' as a publication that is 'understood by some or all of the persons to whom it is or may be available as direct or indirect encouragement or other inducement to them to commit or, to prepare for, the offence of terrorism'. Both clause 10 and clause 11 cover the internet and electronic media.

For instance, imagine Nipun uploads a post with the details of the protest on his Facebook account. He adds a caption calling for everyone to join the protest. By virtue of the above clauses, Nipun has now committed two additional offences, as the scope of the offences found in clause 10(1) and clause 11(1) is extremely broad. This framework may further jeopardise the fundamental right to the freedom of speech and expression guaranteed under article 14(1)(a) of the Constitution, which includes the right to call for peaceful protests against a government's policies.

Additionally, clause 15 of the Bill separately criminalises the failure to report an offence or the preparation of an offence under the ATB. For instance, anyone who read Nipan's post on Facebook could be considered a person who became aware of plans to stage a protest (which is deemed to be an offence under clauses 3(1) and 3(2) of the Bill) but fails to report such plans. Therefore, the breadth of the definition of 'terrorism' can result in an additional overbroad offence under clause 15 of the ATB, i.e., the failure to report an offence under the ATB.

While the Supreme Court did not specifically comment on clauses 10(1)(b), 11 and 15 of the ATB, given their broad scope, their application in practice could result in further violations of fundamental rights, including the right to equality and the freedom of speech and expression.

Long-term detention without trial

A suspect may be held in detention without trial for up to twelve months under clauses 31 and 37 of the ATB. Therefore, the ATB offers no substantial improvement on the PTA. In fact, clause 31 of the original Bill enables a Deputy Inspector General of Police (DIG) to issue a detention order for an initial period of three months. This provision may be contrasted with section 9 of the PTA, which only enables the Minister of Defence (who is often the President of the Republic) to issue a detention order.

A detention order is an extraordinary measure that may amount to a restriction on the fundamental right to the freedom from arbitrary detention guaranteed by article 13(2) of the Constitution. Therefore, it is imperative that such an extraordinary power, *if at all*, be exercised only by an executive authority who is directly answerable to Parliament, the Cabinet of Ministers, and ultimately, to the People. Even if, for the sake of argument, we could imagine an extraordinary context in which a Minister of Defence or indeed the President of the Republic could be entrusted with such extraordinary power, a DIG is by no means such a high official.

The revised Bill, in clause 31, provides that the Secretary to the Ministry of Defence can issue a detention order, upon an application by an officer not below the rank of a DIG authorised by the Inspector General of Police for an initial period of two months. While the reduction of the time period is positive, the Secretary to the Ministry is not an official in whom such power should be vested.

Therefore, when it comes to the second weakness of the PTA (i.e., the enabling of long-term detention without trial), the ATB is actually worse than the

PTA, as it enables such long-term detention on the authorisation of a lower-level official, i.e., the secretary as opposed to the minister. Vesting such extraordinary powers in the secretary appears to be problematic and may result in violations of article 12(1) and article 13(2) of the Constitution.

The Supreme Court in its determination observed that the ATB includes certain improvements such as, the detention order must set out the reason for its issuance, a copy of the detention order should be served on the suspect and next of kin, and a copy of the detention order should be sent to the Human Rights Commission of Sri Lanka. The Court observed that the detention orders under the ATB are subject to judicial oversight, i.e., the detention order is up for inspection before the Magistrate who is at liberty to make the observation that the reasons given in the detention order are not sufficient or do not warrant a detention order despite the fact that the Magistrate is required to give effect to the detention order. The Court also noted that the right to liberty and that the power of the Magistrate to further detain a suspect in terms of article 13(2) can be curtailed and derogated from in terms of article 15(7)[14] in the interest of national security and public order. Accordingly, the Court held clause 31 is not inconsistent with the Constitution.

Production before a magistrate within 48 hours

Clause 28(1) of the ATB provides that an arrested person must be produced before the nearest magistrate not later than within forty-eight hours of the arrest. Section 9B of the PTA (as amended in 2022) only provides for a suspect against whom a detention order has been issued to be visited by the magistrate every month. Production before a magistrate is not required if a detention order has been issued under section 9 of the PTA. Therefore, the ATB amounts to a substantial improvement on the PTA in terms of ensuring the expeditious production of suspects before a Magistrate.

The Supreme Court in its determination found that clause 28 as a whole is consistent with the Constitution.

Denial of Bail

Section 7 of the PTA stipulates that the Magistrate must remand the suspect until the conclusion of the trial. The Magistrate (and after the indictment is served, the High Court) is precluded from granting a suspect bail. At present, under the PTA, the Attorney-General may consent to bail when the case is still before the Magistrate, and the Court of Appeal may grant bail even after the indictment is served. By contrast, under the proposed ATB, suspects would be entitled to apply for bail. Yet two issues would still arise where a detention order is in place.

We shall return to Nipun's case to understand how bail under the ATB might play out in practice. Imagine that the relevant DIG, upon hearing about the planned protest, decides to apply for a detention order against Nipun. At this initial stage, if Nipun is arrested and produced before a Magistrate, and the Secretary to the Ministry of Defence issues a detention order, the Magistrate has no option but to give effect to the detention order. Clause 28(2)(a) of the Bill provides: 'where, by the time the suspect is produced before the Magistrate – a Detention Order has been issued in terms of clause 31, and is placed before the Magistrate for his inspection, the Magistrate *shall* make an order to give effect to such Detention Order' (emphasis added).

Furthermore, under clause 72 of the revised Bill, the Secretary to the Ministry of Defence is empowered to order that a person be detained until the conclusion of the trial before the High Court if they are of the opinion that 'it is necessary or expedient that a person be kept in the custody of any authority in the interest of national security and public order'. The power to consider granting bail to such an accused person is exercised solely by an executive official, i.e., the Secretary to

the Ministry of Defence rather than the High Court.

This scheme of depriving the judiciary of the power to grant bail appears to be inconsistent with the Sri Lankan Constitution. Under Article 4(c) of the Constitution, 'the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognised, by the Constitution, or created and established by law…'. This article is a core feature of Sri Lanka's constitutional framework, which ensures the separation of powers between the legislative, executive, and judicial organs of government. Accordingly, the power to determine whether or not a suspect shall be discharged, released on bail, or remanded falls within the domain of judicial power and is ordinarily exercised by a judge. An executive official being vested with such power would create a tension with article 4(c) and the doctrine of separation of powers.

Article 13(2) of the Constitution clearly guarantees to every person the safeguard that after being produced before the judge of the nearest competent court, they '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'. However, under clause 28(2)(a) of the ATB, a magistrate is stripped of this power when a detention order is in place. In fact, under clause 28(2)(a) of the revised Bill read with clause 31, the exclusive power to determine whether a suspect is detained or not during the first two months following their arrest appears to be vested in an executive officer, namely the Secretary to the Ministry of Defence.

Under clause 36 of the original Bill, once a period of three months lapses after the initial issuance of a detention order, the Magistrate may refuse to extend a detention order and may grant bail to the suspect. However, under clause 36(5)(c), the Magistrate can grant bail to the suspect only 'where there are no reasons to believe that the suspect has committed an offence'. Therefore, it is only after a period of three months in detention can Nipun make an application for bail. Yet even at this stage, the Magistrate may not be empowered to grant bail due to the high threshold required to grant bail.

Effectively, the original Bill provided that a Magistrate can only grant bail to a suspect if there are no reasons to believe the suspect has committed an offence. Such a condition is wholly untenable; in fact, if there are no reasons to believe that the suspect has committed an offence, the suspect should be discharged, as they are no longer suspected of committing any offence. Such a condition severely undermines the ordinary power of a Magistrate to determine whether or not a suspect ought to be released on bail subject to reasonable conditions. For instance, section 14 of the Bail Act, No. 30 of 1997 provides that an application for bail may be refused to a person if the court has reason to believe:

a) that such person would:
   i) not appear to stand his inquiry or trial;
   ii) interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or
   iii) commit an offence while on bail; or

b) that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

Under clause 30(2) of the revised Bill, the Magistrate may grant bail if criminal proceedings have not been instituted within twelve months from the date of arrest. Under clause 76, if the trial against a person remanded or detained has not commenced within twelve months from the date of arrest the Court of Appeal may grant bail. The revised Bill addresses the absurdities of the original Bill by providing for discharge where there is no reason to believe that an offence has been committed under the ATB. However, under clauses 36(4) and (5), as revised, there are no circumstances in which the magistrate can grant

bail to a suspect where criminal proceedings have been instituted. The magistrate has only three options: (a) to extend the detention order; (b) to refuse to extend the detention order, but to place the suspect in remand custody if 'there exists reasonable ground to believe that the suspect may have committed an offence'; or (c) to discharge the suspect if there are 'no reasons to believe that the suspect has committed an offence'. Thus, the *only* circumstance in which Nipun may be granted bail, if he is detained under a detention order, is if he is detained for more than a year without criminal proceedings being instituted against him.

Therefore, clause 28(2) and clause 36(5) of the ATB appear to be inconsistent with article 3[15] read with article 4(c) of the Constitution. Furthermore, the practical application of clauses 28(2) and 72 may result in violations of article 13(2) of the Constitution. Clause 36(5) could produce similar violations. Accordingly, the revised Bill fails to adequately address the issue of the denial of bail to suspects.

The Supreme Court in its determination observed that under clause 28(2) 'it is clear that a person arrested under the Bill shall be produced before a Magistrate with or without a detention order'. The Court stated that 'when the Magistrate inspects the detention order before him, he is required to assess the validity of the detention order judicially and not mechanically'. The Court stated that the Magistrate is provided 'an opportunity to evaluate whether the Secretary for Defence has given his mind to the issuance the detention order and set out one or more of the purposes prescribed in clause 31 as reasons for issuing' the same. The Court went on to state that 'though there is thus a limitation on the discretion of the Magistrate in considering the nature of the offence and the administrative prerogative that should be available for a considerable amount of time to conduct an investigation, such limitation would have no effect on the judicial power that has been vested on him in law'.

The Court also observed that the Bill has other safeguards which provide for the Magistrate to play a role in the detention and that, independent of the Bill, 'the Supreme Court or the Court of Appeal has not been deprived of their right to entertain fundamental rights application or writ applications in respect of a detention order'. The Court accordingly held that clause 28 is consistent with the Constitution. However, the Court welcomed amendments proposed by the Attorney General to bring the English and Sinhala text in line, which was to specifically provide that when no detention order has been issued, the Magistrate may discharge a person if there are no reasons to believe the suspect has committed an offence under the Act.

By contrast, the Court held that clause 72 of the Bill does not confer the safeguards similar to a detention order under clause 32 (e.g., short periods of detention, magisterial visits and forensic examination). It accordingly held that the said clause is arbitrary and discriminatory and thus, would require a special majority in parliament. The Court also held that, 'in view of the infringement with a judicial order that may arise owing to the imposition of a detention order on an indictee', article 4(c) with article 3 is violated and thus, the clause requires a special majority and a referendum.

The Court, however, determined that these inconsistencies could be cured if the words 'notwithstanding any other provisions of this Act or any other written law' were deleted from clause 72(1) and if the same safeguards with respect to detention orders under clause 31 are made available to an indictee.

Admissibility of confession to the police

Under section 16(1) of the PTA, a confession to an officer not below the rank of Assistant Superintendent of Police is admissible as evidence against the accused. The ATB dispenses with such admissibility and, under clauses 78 sets out the conditions on which a confession to a Magistrate could be admissible against the accused. Such

conditions are that the suspect must be examined by a government forensic medical specialist immediately before and after the confession to a Magistrate, and the specialist's report should be produced by the prosecutor during the trial at the inquiry into the voluntariness of the confession. Therefore, the ATB is a substantial improvement on the PTA with respect to the admissibility of confessions made to police officers.

Police directives

In addition to the abovementioned five issues, the ATB contains other deeply problematic provisions that expand the powers of law enforcement authorities. The most serious such expansion can be found in clause 60(1) of the Bill, which empowers a Senior Superintendent of Police (SSP) to issue 'directives' to the Public, where he:

> [R]eceives reliable information that an offence under this Act is committed or is likely to be committed, he may issue any one or more of the following directives to the public, if he is of the opinion that there is a clear and present danger, and that such directive is necessary for the purpose of protecting persons from harm or further harm, associated with such offence.

The directives that an SSP is empowered to issue under clause 61(1) can require the public:

a) not to enter any specified area or premises;

b) to leave a specified area or premises;

c) not to leave a specified area or premises and to remain within such area or premises;

d) not to travel on any road;

e) not to transport anything or to provide transport to anybody;

f) to suspend the operation of a specified public transport system;

g) to remove a particular object, vehicle, vessel or aircraft from any location;

h) to require that a vehicle, vessel, ship or aircraft to remain in its present position;

i) not to sail a vessel or ship into a specified area until further notice is issued;

j) not to fly an aircraft out of, or into a specified air space;

k) not to congregate at any particular location;

l) not to hold a particular meeting, rally or procession; and

m) not to engage in any specified activity:

Clause 61(1)(m) in fact specifies that 'any specific activity' may be prohibited by such a directive. Such a provision gives the broadest possible power to an SSP to prohibit any activity by any person under the Act. Such a directive would be valid for an initial period of 24 hours and may be extended for further periods of 24 hours, the total of which may not exceed 72 hours. Such a directive could restrict a range of fundamental rights, including the freedom of speech and expression, the freedom of peaceful assembly, the freedom of association, the freedom to manifest religion or belief, the freedom to engage in a lawful occupation, and the freedom of movement, respectively guaranteed by articles 14(1)(a), (b), (c), (e)[16], (g)[17], and (h)[18] of the Constitution.

Although the proviso to clause 61(1) of the Bill requires directives to be approved by a Magistrate, it still vests in an SSP powers akin to those exercised by the President of the Republic under the Public Security Ordinance, No. 25 of 1947. For example, by issuing a directive to the public not to travel on a road, not to congregate in an area, or not to engage in a procession, an SSP can exercise powers that are identical to the powers of the president to issue emergency regulations under Part II of the Public Security Ordinance or

the powers to impose 'curfew' under section 16 of the Ordinance.

In *Joseph Perera v. the Attorney-General and Others*[19], the Supreme Court held that in making emergency regulations, the president is exercising 'legislative powers'. A separate chapter on Public Security found in the Constitution provides for such legislative power to be exercised by the president. The powers vested in an SSP to make directives under clause 61(1) of the Bill must be similarly understood as an exercise in 'legislative power'. Yet, the Constitution does not similarly provide for law enforcement officials to exercise such powers. Thus, vesting such powers in an SSP may not be consistent with article 4(a) of the Constitution, which provides that 'the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum'. Moreover, the said vesting of legislative power in an SSP appears to be inconsistent with article 76 of the Constitution, which provides:

> (1) Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power.
>
> It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make, in any law relating to public security, provision empowering the President to make emergency regulations in accordance with such law.

The only circumstances in which Parliament may alienate its legislative powers would be in the context of a state of emergency, where the president is empowered under article 155(2)[20] of the Constitution to make emergency regulations. The vesting of similar powers in an SSP to make directives falls outside the scope of article 76 and, therefore, may create an inconsistency with the Constitution. Such inconsistency does not appear to be cured by virtue of the fact that a Magistrate is consulted on the making of directives, as a judicial officer is not empowered under article 76 to exercise legislative power either.

Clause 61(1) effectively enables a 'police state' to be established in Sri Lanka, whereby police officers are empowered to restrict the fundamental rights of the people through directives. Article 15(7) of the Constitution only permits fundamental rights to be lawfully restricted by 'law', including emergency regulations. In *Thavaneethan v. Dayananda Dissanayake*[21] the Supreme Court clarified that the term 'law' found in article 15(7) of the Constitution is restrictively defined in article 170[22] to mean Acts of Parliament and Orders-in-Council and is only extended to include emergency regulations issued under the Public Security Ordinance. Thus, the entire scheme of clause 61(1) appears to not be compatible vis-à-vis Chapter III of the Sri Lankan Constitution.

The Supreme Court in its determination observed that 'directives cannot be issued without the prior approval of the Magistrate' and 'thus, judicial oversight is provided for in order to ensure the restrictions are imposed only where necessary'. The Court accordingly held that clause 60 is consistent with the Constitution.

Rehabilitation

Under clause 69 of the original Bill, where the officer in charge of the police station believes that there is adequate evidence to institute criminal proceedings against the suspect, they must: 'request the Attorney General to institute criminal proceedings against the suspect'. Clause 70 then requires the Attorney General to indict and institute criminal proceedings against the suspect. The said clause provides:

> The Attorney General shall indict and institute, undertake or carry-on criminal proceedings in respect of an offence committed by a person who under this Act and an offence committed by such person under any other law in the course of committing such offence under this Act.

Clause 71(1) read with clause 71(3) authorises the Attorney General to suspend and defer the institution of criminal proceedings against a person accused of an offence under this Bill only upon an application to the High Court, subject to the 'imposition of one or more of the following conditions' upon the accused:

a) to publicly express remorse and apology before the High Court, using a text issued by the Attorney General as instructed by the Court;

b) to provide reparation to victims of the offence, as specified by the Attorney General;

c) to participate in a specified programme of rehabilitation;

d) to publicly undertake that such person refrains from committing an offence under this Act;

e) to engage in specified community or social service; or

f) to refrain from, committing any indictable offence or, breach of peace.

Clauses 69, 70, and 71 of the original Bill read together suggested that the Attorney General can only suspend or defer the institution of criminal proceedings subject to the conditions in clause 71(3) and upon the High Court's consent, even if the Attorney General is of the opinion that there is insufficient evidence against such a person.

What would Nipun's fate be in this regard? Let us imagine that several months later, the officer in charge of the relevant police station decides that there is adequate evidence to institute criminal proceedings against him. He requests the Attorney General to institute proceedings. The Attorney General is skeptical about the claims and is of the opinion that there is insufficient evidence. However, due to the wording of the ATB, he has no option but to indict Nipun. After some time passes, Nipun is indicted, and now the Attorney General only has the option of suspending proceedings against Nipun, subject to the condition that Nipun participate in a rehabilitation programme.

Accordingly, clauses 69, 70, and 71 of the original Bill, when read together, were deeply problematic in terms of the Attorney General's ability to determine whether or not to indict a person. These clauses appear to be not consistent with article 12(1) of the Constitution, as they are arbitrary and unreasonable, and deny suspects equal protection of the law.

The revised Bill addresses these issues to a large extent by affording the Attorney General discretion in terms of determining whether or not to indict Nipun. However, if the Attorney General decides to indict Nipun and later wishes to suspend or defer proceedings, the condition of Nipun participating in a rehabilitation programme still applies.

The Court observed that 'if the objective [of clause 70 of the Bill[23]] were to pursue measures such as rehabilitation instead of punishment, there has to be a prior agreement reached with the suspect before the agreement is sanctioned by Court'. The Court stated that the current clause 'does not clearly bring out the requirement of prior agreement before the jurisdiction of the Court is invoked'. Thus, the Court held that clause 70 is inconsistent with article 12(1) and has to be passed by a special majority. The Court also held that the inconsistency ceases if clause 70(1) is amended 'to incorporate the prior consensual agreement reached between the Attorney-General and the person charged and the subsequent sanction of Court'.

Proscribing organisations

Clause 79(1) of the Bill empowers the President to proscribe an organisation that is engaged in an offence under the Bill. The said clause provides:

> Notwithstanding anything in any other written law, where the President has reasonable grounds to believe that any organization is engaged in any act

> amounting to an offence under this Act, or is acting in an unlawful manner prejudicial to the national security of Sri Lanka or any other country, he may by order published in the Gazette, (hereinafter referred to as "Proscription Order") proscribe such organization in terms of the provisions of this Act.

The scope of clause 79(1) is extremely broad. For example, in Nipun's case, a wide range of organisations can be proscribed simply for supporting his protest campaign. Under clause 79(1), any organisation calling for or publicly supporting what is deemed to be an offence of terrorism under clauses 3(1) and (2) of the Bill can be proscribed. As discussed above, a protest against a governmental policy may very well fall within the offence of terrorism. Thus, clause 79(1) of the Bill may also result in violations of the freedom of association and the right to equality.

The Supreme Court in its determination on the Bill did not comment on clause 79 of the Bill.

Presidential orders

The ATB empowers the president to impose, Restriction Orders, Curfew Orders, and Orders on Prohibited Places. All three of these powers may be exercised in the absence of parliamentary control.

First, clause 80(1) of the Bill empowers the president to make an order imposing restrictions on certain persons. The said clause provides:

> Where here on a recommendation made by the Inspector General of Police, the President has reasonable grounds to believe, that any person has committed, or is making preparation, to commit an offence under this Act, and the conduct of such person can be investigated without him being arrested, and if the President is of the opinion that it is necessary to do so, the President may, on application made to the High Court and upon obtaining the sanction of such Court, make an order in writing (hereinafter referred to as "Restriction Order") imposing such restrictions, as shall be specified in that order, for a period not exceeding one month.

Clause 80(2) provides:

A Restriction Order made under subsection (1) may include restrictions on –

a) the movement outside the place of residence;

b) travelling overseas;

c) travelling within Sri Lanka;

d) travelling outside the normal route between the place of residence and place of employment;

e) the communication or association, or both, with particular persons as shall be specified in the Order; or

f) engaging in certain specified activities that may facilitate the commission of an offence under this Act.

Second, clause 81(1) of the Bill empowers the president to declare 'curfew' for a period specified, either for the entirety or a part of Sri Lanka. The said clause provides:

> Notwithstanding the provisions of the Public Security Ordinance (Chapter 140), the President may by Order published in the Gazette (hereinafter referred to as a "Curfew Order") declare curfew under this Act, for a period specified in such Order, either to the entirety or part of Sri Lanka including its territorial waters and air space, for

> the purposes referred to in subsection (2) and subject to the provisions of subsection (3).

Clause 97(1) provides:

> "curfew" means the prohibition of the presence, movement in or through a public place including any road, railway, tunnel, territorial sea, stream, park, market, seashore, and recreation area.

Such a 'Curfew Order' would be valid for a maximum period of 24 hours, and maybe extended with a minimum interval period of three hours between two curfew periods.

Third, clause 82(1) of the Bill empowers the president to stipulate any public place or any other location to be a prohibited place. The said clause provides:

> For the purposes of this Act, the President may, on a recommendation made by the Inspector General of Police or the Commander, respectively of, Army, Navy or Air Force or the Director General of Coast Guard, from time to time, by Order published in the Gazette, stipulate any public place or any other location to be a prohibited place (hereinafter referred to as the "Prohibited Place").

Such Restriction Orders, Curfew Orders, and Orders on Prohibited Places could potentially restrict a range of fundamental rights, including the freedom of speech and expression, the freedom of peaceful assembly, the freedom of association, the freedom to manifest religion or belief, the freedom to engage in a lawful occupation, and the freedom of movement.

It may be recalled that article 15(7) of the Constitution only permits fundamental rights to be lawfully restricted by 'law', including emergency regulations. The Supreme Court has emphasised that any instrument used to restrict fundamental rights should be subject to 'parliamentary control'.[24] It is noted that emergency regulations issued under the Public Security Ordinance are subject to parliamentary control by virtue of article 155(6) of the Constitution. Moreover, curfew orders issued under section 16 of the Public Security Ordinance are also subject to parliamentary control by virtue of section 21 of the said Ordinance. Thus, clause 80(1), 81(1) and 82(1) of the Bill appear to be inconsistent with the scheme envisaged by article 155 of the Constitution, as there is no requirement for such Orders to be brought before Parliament and made subject to parliamentary control. Therefore, all three clauses could result in impermissible restrictions on a range of fundamental rights guaranteed in the Constitution.

The Supreme Court did not comment on the said clauses in its determination on the Bill.

Vicarious liability

Clause 89 of the Bill provides that any member of a body of persons 'shall be deemed to be guilty' of an offence if an offence under the Bill is committed by a body of persons, unless such person can prove that the offence was committed without their knowledge or that they exercised all due diligence to prevent the commission of such offence. According to the said clause, if the relevant body of persons is a body corporate, every director and principal executive officer of that body corporate, or if it is a firm, every partner of that firm, or if it is a body unincorporated other than a firm, every officer of that body responsible for its management and control, would be deemed guilty of the relevant offence.

While similar provisions exist (e.g., section 40 of the Employees' Provident Fund Act, No. 15 of 1958, the offences in such instances are clearly and sharply defined. By contrast, the broad scope

of the 'offence of terrorism' under the proposed ATB means that members of bodies of persons can be prosecuted for a broad range of legitimate activities. For example, in Nipun's case, if a labour rights organisation or trade union calls for or publicly supports his protest campaign, and is found guilty of an offence, the members of such organisation would automatically be deemed guilty of an offence. Such persons would be presumed guilty, and it would be their burden to prove their innocence.

The scope of clause 89 appears to be extremely broad and may undermine the presumption of innocence. Such a presumption is a cornerstone of Sri Lanka's criminal justice system[25] and is guaranteed in article 13(5)[26] of the Constitution. Therefore, clause 89 of the Bill could result in violations of article 13(5) of the Constitution.

The Supreme Court in its determination on the Bill did not comment on clause 89.

Transitional arrangement

Clause 96(a) of the Bill perpetuates the provisions of the PTA in terms of investigations and cases that are already pending under the PTA. The said clause provides:

> [A]ny investigation, trial, appeal or application conducted, held, preferred or made under the repealed Act and pending decision, in any court or with other authority, on the day immediately preceding the date of commencement of this Act shall be disposed of, continued, held or entertained, as nearly as may be practicable, under the provisions of the repealed Act including provisions pertaining to procedure and evidence.

Accordingly, an investigation preceding the date of commencement of the ATB, whenever it is enacted, will continue under the provisions of the PTA including those relating to procedure and evidence. Under the PTA, scores of accused have been held in long-term detention and remand for years only to be discharged or acquitted.[27] In this context, the Bill will facilitate long term detention and the denial of fair trial rights under the PTA, thereby producing further violations of the fundamental rights guaranteed under article 13(2), (3)[28] and (5) of the Constitution.

The Supreme Court did not comment on clause 96 in its determination on the Bill.

Other matters in the Supreme Court Determination

The Supreme Court made a number of other observations with respect to the ATB. First, it held that clause 4 of the Bill (i.e., on penalties) should be amended to ensure more clarity. Second, it found that the Sinhala text of clause 42 (i.e., on access of an Attorney-at-Law to person in remand or detention) has to be made consistent with the English text, and that any conflict results in an inconsistency with article 12(1) of the Constitution. Third, it found that clause 53 (i.e., on the use of force to stop a vessel or vehicle) is arbitrary and inconsistent with article 12(1), and thus requires a special majority in parliament, unless the words 'any other person acting on his demand' are omitted. Fourth, the Court held that clause 75(3) of the Bill (i.e., on the withdrawal of an indictment) infringes article 4(c) read with article 3 of the Constitution, as the intervention of the High Court in imposing conditions for the Attorney General to withdraw an indictment is not made clear and, thus, the said clause requires a special majority in parliament and a referendum. Finally, it determined that clause 83(7) (i.e., on non-conviction-based forfeiture) should be amended to remove any ambiguity.

In all these instances, the Court proposed amendments that, if adopted, would make the Bill consistent with the Constitution.

Conclusion

Nipun attempted to exercise his fundamental rights and protest against certain government policies. Regardless of whether one agrees with his position, it is reasonably clear that his actions fall within his freedoms to expression, peaceful assembly, and association. However, under the proposed ATB, his actions, particularly if the protest escalates in some way, may constitute the 'offence of terrorism'. A police officer can issue directives prohibiting his campaign, thereby criminalising his actions under the proposed ATB. Additionally, supporting his campaign, publishing content about his campaign, and a range of other acts could also attract criminal sanctions under the ATB. Quite simply, the ATB can be deployed to destroy the legitimate freedoms of citizens under the pretense of combatting 'terrorism'.

While the ATB is a marginal improvement on the PTA in some respects, such as the production of suspects before a magistrate, and the non-admissibility of confessions to police officers, it has too many serious deficiencies to be accepted as a good alternative to the PTA. Long-term detention without trial, empowering the Secretary to issue detention orders, empowering police officers to issue wide-ranging directives, and the denial of bail remain the most egregious features of the proposed new law. In this context, replacing the PTA with the ATB may only lead to a new era in which the fundamental rights of the people are systematically violated on the grounds of national security.[29]

Endnotes

[1] The Article analyses both the provisions of the initial bill and the subsequent bill. Unless stated otherwise the clause numbering is as per the updated bill.

[2] Article 12(1) provides: 'all persons are equal before the law and are entitled to the equal protection of the law.'

[3] Article 13(1) provides: 'no person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.'

[4] Article 13(2) provides: '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.'

[5] Deleted in the updated version.

[6] Deleted in the updated version.

[7] The phrase 'grievous' was deleted in the updated version.

[8] Deleted in the updated version.

[9] Deleted in the updated version.

[10] A new sub-provision (n) is added stating, 'committing an act which constitutes an offence within the scope of the Convention on the Suppression of Terrorist Financing Act, No.25 of 2005'.

[11] See sections below for more details.

[12] Article 14(1)(a) provides: 'every citizen is entitled to – the freedom of speech and expression including publication.'

[13] Article 14(1)(b) provides: 'every citizen is entitled to – the freedom of peaceful assembly.'

[14] Article 15(7) provides: 'The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.'

[15] Article 3 provides: 'In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.'

[16] Article 14(1)(e) provides: 'every citizen is entitled to – the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.'

[17] Article 14(1)(g) provides: 'every citizen is entitled to – the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.'

[18] Article 14(1)(h) provides: 'every citizen is entitled to – the freedom of movement and of choosing his residence within Sri Lanka.'

[19] [1992] Sri.L.R. 100, 214-215.

[20] Article 155(2) provides: 'the power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.'

[21] [2003] 1 Sri.LR.74, 94-98.

[22] Article 170 provides: 'law means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council.'

[23] Clause 71 in the original Bill.

[24] See, for example Thavaneethan v. Dayananda Dissanayake [2003] 1 Sri.L.R. 74, 97-98.

[25] See, for example Nandana v. Attorney General [2008] 1 Sri.L.R. 51; Liyanarachchi and Others v. Officer-In-Charge Police Station, Hunnasgiriya, [1985] 2 Sri.L.R. 256.

[26] Article 13(5) provides: 'every person shall be presumed innocent until he is proven guilty.'

[27] Ruki Fernando and Lucille Abeykoon, 'PTA – A License for Prolonged Detention of Innocents'. Groundviews, 27 September 2021, https://groundviews.org/2021/09/27/pta-a-license-for-prolonged-detention-of-innocents/ [last accessed 4 April 2024].

[28] Article 13(3) provides: '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.'

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