IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

"Anti-Terrorism Bill "

SC (SD) No:01/2024	Petitioner	:	Vijitha Herath, Member of Parliament, 464/20, Pannipitiya Road, Pelawatta, Battaramulla.
	Counsel	:	Nigel Hatch, PC with Shantha Jayawardena and S Illangage
SC (SD) No:02/2024	Petitioner	:	Herath Mudiyanselage Wasantha Samarasinghe, Former Member of Parliament, No.12/2, Sri Vibuthi Pura, Battaramulla.
	Counsel	:	Upul Kumarapperuma with Kaneel Maddumage, Radha Kuruwitabandara and Kavindi Weerasekara
SC (SD) No:03/2024	Petitioner	:	Eranga Gunasekara, 464/20, Pannipitiya Road, Pelawatta, Battaramulla.
	Counsel	:	J. M. Wijebandara with T.Krishanthi Wijebandara, Senuri Imalsha Ratnaweera, K.K.D. Dushmanthi Porogama and Brandi de Silva.
SC (SD) No:04/2024	Petitioners	:	1. Centre for Policy Alternatives (Guarantee) Limited, No.6/5, Layards Road, Colombo 05 2. Dr. Paikiasothy Saravanamuttu, No.3, Ascot Avenue, Colombo 05.
	Counsel	:	M.A. Sumanthiran, PC with Bavani Fonseka, Luwie Ganeshathasan,Dharshika Ariyanayagam, Khyati Wickramanayake, Sakshin Ganesan, Anne Kulanayagam, Divya Mascrange and

Piyumani Ranasinghe.

SC (SD) No:05/2024	Petitioner	:	Udaya Kalupathirana, 45/12, Ernest Place, Luxapathiya, Moratuwa.
	Counsel	:	Lakshan Dias with Maneesha Kumarasinghe
SC (SD) No:06/2024	Petitioner	:	W. Charith Jayantha Peiris, 67/A, Doowawatta Wella. Marawilla.
	Counsel	:	Nuwan Peiris
SC (SD) No:07/2024	Petitioner	:	Law and Society Trust, No.3, Kynsey Terrace, Colombo 07.
	Counsel	:	Ermiza Tegal with Namashya Ratnayake and Taahira Lafir
SC (SD) No:10/2024	Petitioner	:	Hon. Ranjith Madduma Bandara, General Secretary- SJB No.815, E.W. Perera Mawatha, Ethul Kotte.
	Counsel	:	Farman Cassim, PC with Vinura Kularathna and Jesica Abeyrathna.
SC(SD) No:12/2024	Petitioners	:	1. Rathnayake Mudiyanselage Tharindu Amila Uduwaragedara of "Jayasewana", Bandarawela Road, Ettampitiya. 2. Hendras Mudiyanselage Rekha Nilukshi of No. 9 E, 1/3 , Hilda Flats Lane, Hilda Lane, Dehiwala
	Counsel	:	Dr.Jayampathy Wickramaratne with Ms. Ermiza Tegal and Taahira Lafir
SC (SD) No:13/2024	Petitioners	:	1. Nelum Deepika Udagama 2. Camena Erica Gunaratne Both of Lawyers' Collective, 110, Hulftsdorp Street, Colombo 12.

	Counsel	:	Saliya Peiris, PC with Suren Gnanaraj, Mahin de Silva and Farhad Jiffy.
SC(SD) No:18/2024	Petitioners	:	1. Sri Lanka Working Journalists' Association, 276/3, Pradeepa Mawatha, Maligawatta, Colombo 10. And 03 others
	Counsel	:	Dr. Jayampathy Wickramaratne with Ermiza Tegal and Taahira Lafir
SC (SD) No:19/2024	Petitioners	:	1. Centenary Movement No.22/5C, Sandagala, Uhumeeya, Kurunegala. 2. Prashan De Visser President United Centenary Front, No.144/04/A, Alwis Town, Nayakanda South, Hendala, Wattala 3. Heshanka Suraj Fernando Treasurer, United Centenary Front, No.435/1A, Thimbirigasyaya Road, Colombo 05. 4. Priyanka Jeyraj Naasir Hasan, Executive Committee Member, United Centenary Front, No.59/8, Temple Road, Kalubowila, Dehiwala.
	Counsel	:	Shaheeda Barrie with Nisala Seniya Fernando, Ridmi Benaragama, Ishara Jayasena and Pramod Perera
SC (SD) No:20/2024	Petitioner	:	W.A.G. Sisira Kumara, Convener Professional Center for People, No.24/7, Walawwawatta, Boruppa, Gunnepana.

	Counsel	:	Thanuka Nandasir with Rivihara Pinnaduwa and Susil Wanigapura
SC (SD) No:21/2024	Petitioner	:	Nagananda Kodituwakku, General Secretary, Vinivida Foundation, 99, Subadrarama Road Nugegoda.
		:	Petitioner appeared in person
SC (SD) No:22/2024	Petitioners	:	1. Antony Lasantha Manoj Kumara Nanayakkara, No.74/B, Hokandara South, Hokandara. 2. Rev. Father. Kuranage Pattric Sujeewa Perera, Puttalam Road, 22 Mile Post. Saliyawewa Junction. 3. Rev. Bibiladeniya Mahanama Thero Sri Shailathalaramaya, Diggalagedara, Mandalapola.
	Counsel	:	Shantha Jayawardena with Ms. Niroshika Wegiriya, Hirannya Damunupola, Azra Basheera, Sajana de Zoysa and Vihangi Tissera.
SC (SD) No:23/2024	Petitioners	:	1. Amara Divakara Liyanarachchi, No. 33/3A, Wekunagoda, Galle. 2. Pilana Gardiye Godakandage Yasaswin, Metiwalahena, Nalagasdeniya, Hikkaduwa.
	Counsel	:	Luwie Ganeshathasan
SC (SD) No:24/2024	Petitioner	:	Galbokka Hewage Ajith Kumara, No.84, Nagarukkarama Mawatha Kalegana, Galle.

	Counsel	:	Thanuka Nandasiri with Manoja Gunawardena.and Susil Wanigapura.
SC (SD) No:25/2024	Petitioner	:	Sara Arumugam, No.95, Galle Road, Dehiwala.
	Counsel	:	Lakshan Dias with Maneesha Kumarasinghe
SC (SD) No:26/2024	Petitioner	:	His Eminence Cardinal Malcolm Ranjith, The Archbishop of Colombo The Archbishop's House, Colombo 08.
	Counsel	:	Shammil Perera, PC with Premal Ratwatte, Duthika Perera, Sawithri Fernando, Awinda de Silva and H.G. Kahapalaarachchi
SC (SD) No:27/2024	Petitioner	:	Mr. Nizam Kariyappar PC, General Secretary Sri Lanka Muslim Congress, No. 51 Vaxual Lane, Colombo 02.
	Counsel	:	Rauff Hakeem with Shifan Maharoof and Faisal Mohaideen
SC (SD) No:28/2024	Petitioner	:	Mohamed Aslam Othman, 149, Kew Road, Colombo 02.
	Counsel	:	Nizam Kariyappar PC, Heejaz Hizbullah and Shifan Maharoof
SC (SD) No:29/2024	Petitioners	:	1. Pahala Vithanage Nandana Udayakumara, Joint Secretary Technological Engineers and Superintendents Union, Ceylon Electricity Board, No.50, Sir Chittampalam A Gardiner Mawatha, Colombo 02.

2. J.B. Gurusinghe,
General Secretary
United Federation of Labour,
No.17, Barracks Lane,
Colombo 02.

And also as the,

President
Sri Lanka All Telecommunication
Employees Union
2nd Floor, SLT Head Quarters
Building,
Sri Lanka Telecom, Lotus Road,
Colombo 01.

3. A.M.S.D. Perera,
Secretary
Samastha Lanka Viduli Sandesha
Sevaka Sangamaya,
No.17/1, Ninugama, Piliyandala.

4. Kajugahapity Arachchige Sajeewa
Anupa Nandula,
Ceylon Bank Employees Union,
Senior Vice President
No. 02, Temple Road, Colombo 10.

5. I.D. Nihal Ajith,
Organizing Secretary,
United General Employees Union,
No.136, Temple Road,
Kaluthara North.

6. Konara Mudiyanselage Chinthaka
Bandara,
President
Sri Lanka Post and
Telecommunication Service Union,
P.O. Box 28, Colombo 01

7. K.A. Kalpa Madhuranga,
Secretary

PROTECT Union,
475/4, Thimbirigasyaya Road,
Colombo 05.

8. Tharindu Iranga Jayawardhana,
President,
Young Journalists' Association
No.176/3, Oruthota, Gampaha.

9. Thirumadura Anuka Vimukthi
de Silva,
Movement for National Lands
And Agricultural Reform (MONLAR),
57, 1st Lane, Medawelikada
Road, Rajagiriya.

Counsel : Swasthika Arulingam with
Dharmi Siwaraj

SC (SD) No:30/2024

Petitioner : Muhammadhu Jazeem Muhammadhu
Ahnaf,
No.57/2, Pandaraweli, Chilawathrai,
Mannar.

Counsel : Sanjaya Wilson Jayasekara and Kaushalya
Sendanayake

SC (SD) No:31/2024

Petitioner : Duminda Nagamuwa,
Propaganda Secretary
Frontline Socialist Party,
22/1, Melder Place,
Nugegoda.

Counsel : Nuwan Bopage with Dinusha
Thiranagama and Charith de Silva

SC (SD) No:32/2024

Petitioners : 1. Don.Amila Egodamahawatta,
100/4 A, Balagala Road, Hendala,
Wattala.

2. Marion Lihini Fernando,
No.31/17, 1st Lane,
Moratuwella, Moratuwa.

3. Don.Nihal Weerasinghe,
No.163, Makola Road,
Makola.

Counsel : Kaneel Maddumage with Kavindi Weerasekara.

SC (SD) No:33/2024

Petitioner : Ms. Ambika Satkunanathan,
No.27, Rudra Mawatha,
Colombo 06.

Counsel : Pulasthi Hewamanne with Harini Jayawardhena, Fadhila Fairoze and Githmi Wijenarayana.

SC (SD) No:34/2024

Petitioner : Loku Nishshanka Arachchige Don Manjula Nalin Nishshanka alias Manju Nishshanka,
172/10, Yakkala Road,
Gampaha.

Counsel : Pulasthi Rupasinghe with Sanjaya Marambe, Subangi Vimalanathan,
Yasanga Senadeera, Sajini Wickremasinghe,
Prathap Welikumbura and C. Kariyawasam.

SC (SD) No:35/2024

Petitioner : Benadict Joseph Starling Fernando
Secretary,
Lanka Guru Sangamaya/Ceylon Teachers' Union
65/4, Chithampalam A Gardiner Mawatha,
Colombo 02.

Counsel : Rushdie Habeeb with Supun Dissanayake, M. Azad and Shaila Rafeek.

SC (SD) No:36/2024

Petitioners : 1. Mr.N. M. P. Kaushalya K. Nawaratne,
No.8B, 1st Lane,
Pagoda Road, Nugegoda.

2. Mr. H. Isuru Balapatabendi,
No.7/6, Sunset wing,
Trillium Residencies, Colombo 08.

	Counsel	:	Saliya Pieris, PC with Pulasthi Hewamanne, Mehran Careem and Farhad Jiffry
SC (SD) No:37/2024	Petitioners	:	1. Thangarajha Nandakumar, No.654, Wijayasrigama, Rajawella. 2. Anthode Chandra, No.22, Rathwaththe Lower Division, Ukwela. 3. Kurukulasuriya Marius Rukshan Fernando, No.281, Deans Road, Colombo 10. 4. Selvarani Ramaiah, No.10/1, Balagolla, Kengalla. 5. Muttiah Rajalechchimi, No.111 Temple Road, Ambakote, Kengalla 6. Meiyan Parameshwari, No.654, Wijayasrigama, Rajawella
	Counsel	:	Heejaz Hizbulla with Suren Perera, M. Jegeteeswary, Chalana Perera, Shifan Maharoof and Piyumi Seneviratne.
SC (SD) No:38/2024	Petitioner	:	Mohamed Zahir Ahamed Rudane, Attorney-at-Law, General Secretary, Social Justice Party, No.196, Hulftsdorp Street, Colombo 12.
	Counsel	:	Rushdie Habeeb with Shaila Rafeek, SupunDissanayake and Azad Musthapha

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent in all cases

Hon.Wijayadasa Rajapakshe,
Minister of Justice, Prison
Affairs and Constitutional
Reforms,
Ministry of Justice,
Supreme Court Complex,
Adhikarana Mawatha,
Colombo 12.

2nd Respondent in SC (SD) No.05/
2024 and SC (SD) No:25/2024

Counsel for the State : Nerin Pulle,PC, ASG with Jehan Gunasekara, SC, Medhaka Fernando,SC and Sajith Bandara, SC.

Before : Hon. Jayantha Jayasuriya, PC, CJ
Hon. Vijith K. Malalgoda, PC, J
Hon. A.H.M.D. Nawaz, J
Hon. A.L. Shiran Gooneratne, J
Hon. Arjuna Obeyesekere, J

The Court assembled for hearing on 26th, 29th – 31st of January, 1st and 2nd of February 2024.

Several Petitioners impugn in these proceedings the Bill titled "Anti-Terrorism" that was published in the Gazette on September 15th, 2023 and subsequently placed on the order paper of Parliament on 11th January 2024 in terms of Article 78(1) of the Constitution. The long title of the Bill reads quite comprehensively as;

"AN ACT TO MAKE PROVISION FOR THE PROTECTION OF THE NATIONAL SECURITY OF SRI LANKA AND THE PEOPLE OF SRI LANKA FROM ACTS OF TERRORISM, OTHER OFFENCES ASSOCIATED WITH TERRORISM AND CERTAIN SPECIFIED ACTS CONSTITUTING THE OFFENCE OF TERRORISM COMMITTED WITHIN OR OUTSIDE SRI LANKA; FOR THE PREVENTION OF THE USE OF SRI LANKAN TERRITORY AND ITS PEOPLE FOR THE PREPARATION FOR TERRORISM OUTSIDE SRI LANKA; TO PROVIDE FOR THE DETECTION, IDENTIFICATION, APPREHENSION, ARREST, DETENTION, INVESTIGATION, PROSECUTION AND PUNISHMENT OF ANY PERSON WHO HAS COMMITTED AN ACT OF TERRORISM OR ANY OTHER OFFENCE ASSOCIATED WITH TERRORISM; FOR THE REPEAL OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT, NO.48 OF 1979; AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO".

The long title of the Anti-Terrorism Bill gives articulation to the necessity to provide for the protection of the national security of Sri Lanka and the people of Sri Lanka from acts of terrorism and its manifestations regardless of the territory where these acts take place while such a duty has as its component preventive measures to be taken in respect of detection, identification, apprehension, arrest, detention, investigation, prosecution and punishment of any person who has committed the act of terrorism or any other associated offences. In view of this avowed policy to introduce a new law on terrorism, it is unsurprising that the impugned Bill seeks to repeal the Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979, as amended (PTA).

As our island nation underwent a long history of internal civil conflict and violence, public order continued to be endangered by elements or groups of persons that resorted to the use of force and unsurprisingly, the PTA did not turn out to be as temporary as its aspirational title indicated, and in December 2001 was cited by the government as the primary legislative

mechanism for compliance with UN Security Council Resolution 1373 of 2001.[1] This Court is not unmindful of the criticisms that the PTA continued to receive and it is noteworthy that the Bill before this Court seeks to repeal the PTA that had received a significant amount of domestic and international critique like its Indian counterparts the Terrorism and Destructive Activities (Prevention) Act 1987 (TADA) and the Prevention of Terrorism Act 2002 (POTA).

Following the repeal of POTA it has to be mentioned that the currently operative counter terrorism law in India happens to be the "Unlawful Activities (Prevention Act of 1967)" (UAP Act or UAPA) which has been revived by an amendment made in the year 2004 and the long title of the UAP Act reads as;

> *"An act to provide for the more effective prevention of certain unlawful activities of individuals and association and for dealing with terrorist activities and for matters connected therewith".*

In all these endeavors across the globe to deal with terrorism which has not spared South Asia, the tension between balancing human rights and national security has been acutely felt and an issue of institutionalizing a proper relationship between national security concern and the need to protect and advance fundamental rights and personal freedoms or liberties of the citizenry did indeed occupy the front burner of the majority of the submissions made before this Court in the course of these proceedings. Pivotal to the central theme of the arguments was the all-embracing eternal verity of the Rule of Law which the Petitioners contended the impugned Bill does not seek to satisfy given the fact that the law must afford adequate protection of fundamental human rights subject to their necessary and proportionate derogations. At the very inception this Court would wish to set down these central themes of argument vis-à-vis the contention of the State that this proposed legislation addresses these concerns by putting in place appropriate safeguards in such a manner as to achieve the proper balance between the competing interests. This Court acknowledges the fact that a comprehensive legislation on counter terrorism must seek to balance national security concerns with human rights, while embodying, inter alia, international standards and best practices across the globe. In order to arrive at the correct perspective of the so called

[1] See concluding observations of the Human Rights Committee: Sri Lanka 1 December 2003, para 13 (CCPR/CO/79/LKA)

international standards and practices that a particular counter terrorism law must take cognizance of, this Court will survey international instruments and other jurisdictions with a view to ascertaining whether there is unitary harmonization on the question of the proper balance to be struck between the two competing imperatives of social contract which we have just mentioned namely national security and fundamental rights.

Before this Court proceeds to examine the underlying struggles between these two concepts in the proposed legislation, it is not altogether irrelevant to cite the policy and purpose behind the Anti-Terrorism Bill upon a perusal of the preamble to the Bill. The preamble resonates with purposes and principles as follows;

> ***WHEREAS,*** *terrorism has seriously threatened the sovereignty and territorial integrity of Sri Lanka, and has caused deaths and serious injury to the citizens of Sri Lanka, and has caused vast damage to public and private property of Sri Lanka, and has retarded national development;*
>
> ***AND WHEREAS,*** *terrorism in its various forms and manifestations is a major threat to the peace and security of the community of nations; and, it is a foremost duty of the Government to protect Sri Lanka, its people, and property from acts of terrorism and related acts;*
>
> ***AND WHEREAS,*** *Sri Lanka is under obligation to enact laws to give domestic legal effect to international instruments relating to countering of any acts of terrorism and related acts to which Sri Lanka has become a signatory;*
>
> ***AND WHEREAS,*** *the Government of Sri Lanka is committed to protect other sovereign nations and their people from the scourge of acts of terrorism;*
>
> ***AND WHEREAS,*** *Sri Lanka is committed and desirous of eradicating and preventing domestic and international terrorism through enforcing an effective system for the administration of criminal justice against terrorism, based on international norms and standards and domestic needs;*
>
> ***AND WHEREAS,*** *the Government of Sri Lanka considers the safeguarding of national security is of paramount importance for the purpose of securing due recognition and respect of the rights and freedom of the people of*

Sri Lanka and for the protection of territorial integrity and enhancing the sovereignty of the people of Sri Lanka;

***AND WHEREAS**, the Government of Sri Lanka is mindful of the need to ensure just and fair application of the system for the administration of criminal justice against terrorism.*

As has been pledged in its national report submitted to the UNHRC pursuant to Human Rights Council Resolutions 5/1 and 16/21 on the Universal Periodic Review (UPR) process, the voluntary pledge given therein is clearly manifest in the objectives of the Bill as enumerated above.

The primary objective of the Bill in terms of the preamble recognizes that national security remains the imperative for securing the rights and freedoms of the people noting that *"the safeguarding of national security is of paramount interest for the purpose of securing due recognition and respect of the rights and freedom of the people of Sri Lanka and for the protection of territorial integrity and enhancing the sovereignty of the people of Sri Lanka"*.

The constitutionality of the Bill has to be determined having regard to the rights and freedoms of the people of Sri Lanka as proclaimed in its Bill of Rights (Chapter III of the Constitution) and having regard to the international norms and standards and domestic needs that are so eloquently spoken of in the preamble quoted above. It is pertinent to observe that just as much the government has pledged to protect Sri Lanka and its people and property from acts of terrorism, it also stands committed to protect other sovereign nations and their people from the scourge of terrorism. This declaration in the preamble to the Bill is indicative of the necessity to view terrorism and its manifold avatars not only from domestic interests but also from international, transnational and cross border perspectives. The question before this Court is to what extent these lofty ideals of combatting terrorism, whilst promoting and protecting the fundamental rights of the people, are sought to be achieved through an effective use of the provisions of the proposed Act.

Both the long title and the preamble reflect the policy and purpose behind the Anti-Terrorism Bill. While bearing in mind that national security is looked at from multiple lenses, this Court is also reminded of John Locke who articulated that legitimate political government is a product of social contract where people in the state of nature conditionally transferred some

of their rights to the government in order to better ensure the single and comfortable enjoyment of their lives, liberty and property.

This Court has on numerous occasions emphasized the importance of looking at the long title and preamble in order to appreciate the intent and purpose of a proposed legislation-See *Sunpac Engineers (Private) limited and Another v. DFCC Bank PLC and Others*[2] and *Weragama v. Weerasinghe.*[3] Colin-Thome, J (as His Lordship was in the Court of Appeal) approved of a unitary approach to statutory interpretation in *Senthilnayagam and Others v. Seneviratne and Another* [4];

> *It is now settled law that the totality of an Act, from the title to the interpretation Clause, may be referred to for the purpose of ascertaining its general scope, and of throwing light upon its construction. Consideration of the "mischief" or object of the enactment is common, and will often provide the solution to a problem of interpretation.*

Thus, it is not only the provisions of an Act but also an integrated examination of both the long title and the preamble that would assist Court in assaying the constitutionality of a Bill at hand. It is made clear by the decision of *Kanthiah Thambu Chelliah and Others v. Paranage Inspector of Police and Others*[5] which declared;

> *[I]t was found that public order in Sri Lanka continued even in 1979 to be endangered by elements that advocated the use of force or the commission of crimes, as a means of governmental change, within Sri Lanka and that it was necessary to introduce more stringent laws to meet the situation. Accordingly, the Legislature decided to repeal Law 16 of 1978 and to enact the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 which according to its long title was for the dual purposes of:*
>
> *(1) making temporary provision for the prevention of acts of terrorism in Sri Lanka, and*

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[2] SC/Appeal/11/2021, SC Minutes of 13.11.2023 (the *parate* execution judgment).
[3] SC Appeal No. 55/2017, SC Minutes of 07.12.2021
[4] [1981] 2 Sri LR 187 at 203
[5] [1982] 1 Sri LR 132 at 157

(2) *to prevent "unlawful activities" of any individual, group of individuals association, organization within Sri Lanka or outside Sri Lanka.*

In the national report that was submitted pursuant to the request of the Office of Legal Affairs of the United Nations (UN) with respect to UNGA Resolution 74/194 of 18th December 2019, by which member states were requested to provide data on agreements and other aspects undertaken to prevent and fight the threat to international peace and security as a result of terrorist activities, Sri Lanka pinpointed that the provisions of the Prevention of Terrorism Act (PTA 1979) and the Public Security Ordinance (1947) serve as the basis for action against terrorist activities at national level. In other words, these two enactments constitute the species within the genus of security laws of the country.

This Court referred to security laws as a genus in *Shiyam v. Officer-in-Charge, Narcotics Bureau and Another*[6];

> *The Prevention of Terrorism (Temporary Provisions) Act and the Public Security Ordinance, not only relate to laws containing offences pertaining to the security of the State, but also make express provision that relates to bail. Therefore, they belong to a narrow genus of security of the State and to a broad genus of laws containing provisions relating to grant of bail.*

These two laws, as old as the hills, have to necessarily yield to modern practices that have evolved over the years. As undertaken by Sri Lanka before the UNHRC in their Universal Periodic Review (UPR), any new species of a legislation replacing the old order must recognize the importance of protecting human rights while criminalizing acts related to terrorism and seek to further improve the cause of human rights and, ensure national security and fundamental freedoms in Sri Lanka. In this exercise it is incumbent on us to bear in mind what this Court has declared on previous occasions as regards the balance to be struck, which we have adverted to above.

[6] [2006] 2 Sri LR 156

The overarching objective of ensuring national security vis-a-vis the protection of fundamental rights was commented upon by the Supreme Court in *Kumaranatunge v. Samarasinghe, Additional Secretary, Ministry of Defence and Others:*[7]

> *I have already pointed out that the freedom from arbitrary arrest and detention guaranteed by Articles 13(1) and (2) of the Constitution is subject to such restrictions as may be prescribed by law in the interests, inter alia, of national security and public order. Law in this context is defined as including "regulations made under the law for the time being relating to public security". It is well recognized that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy, when the foundations of organized government are threatened and its existence as a constitutional state is imperiled.*

In the *Special Determination on the Sri Lanka Broadcasting Authority Bill*[8] quoting with approval *Joseph Perera alias Bruten Perera v. The Attorney General and Others*[9] the Supreme Court opined;

> *"Article 14 of the Constitution deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country. Freedom of speech...goes to the heart of the natural right of an organized freedom-loving society to impart and acquire information.... This freedom is not absolute. There is no such thing as absolute or unrestricted freedom of speech and expression, wholly free from restraint; for that would amount to uncontrolled license which would tend to disorder and anarchy. Absolute and unrestricted individual rights do not and cannot exist in a modern State. The welfare of the individual, as a member of collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs... Our Constitution has rightly struck a proper balance between varying competing social interests, and has... set forth the*

[7] [1983] 2 Sri LR 63 at pp. 80 - 81
[8] Decisions of the Supreme Court on Parliamentary Bills Volume VII (1991-2003) p. 79 at p. 90
[9] [1992] 1 Sri LR 199

restrictions to which the fundamental right of speech and expression may be subject to..."

Further, in the case of *Janath S. Vidanage and Others v. Pujith Jayasundara, Inspector General of Police*[10] (the "Easter Sunday Bombing Case"), a Seven Judge Bench of this Court demonstrated the linkage between national security and the liberty of individuals as well as the duties assigned to the Minister of Defence and the President with respect to defence and security as follows;

A conjoint reading of the constitutional imperatives such as Articles 4(b), 30(1), 44(2) and 52(2) makes it patently clear that the Minister of Defence is placed under a charter of duties and obligations from which he cannot resile as regards national security and internal security of the country. It is often said that national security and liberty of individuals stand out as two sides of a coin which binds the state to a strong commitment. On the day in question, to wit the 21st of April 2019, the President of the country who was also the Commander-in-Chief of the Armed Forces had undertaken these obligations which our Constitution, domestic laws and regulations, amply declare aloud demanding allegiance to the commitment of maintaining defence and security of the nation

The Magna Carta of 1215 was the earliest example of such an undertaking to protect the liberty and security of the citizen given by King John of England.

While this case established the link between the protection of national security and the safeguarding of the rights and freedoms of the people, maintenance of national security was declared to be one of the foremost duties borne by the state. The Court further observed that any dereliction of this duty, would visit the state and the officials with appropriate sanctions inclusive of the duty to pay reparations to the victims. Thus, any legislative measure to combat terrorism and maintain national security must at the same time take cognizance of the rights and freedoms of the people and more particularly the benefit of fundamental rights which enures to every person and citizen. Any such legislative measure has to be thus consonant with Article 4(d) of the Constitution which mandates that all organs of the government have

[10] SC/FR/163, 165, 166, 184, 188, 191, 193, 195-198, 293/2019, SC Minutes of 2023.01.12 at p. 69

to respect, secure and advance the fundamental rights, save in the manner and to the extent they could be derogated from in accordance with Article 15(7) of the Constitution.

The Petitioners in this case have raised at this pre-enactment review several infringements by the proposed legislation of fundamental rights as declared in Articles 11, 12, 13 and 14 of the Constitution.

The violation of Article 12 of the Constitution sprang from the assertions of the majority of the Petitioners that the definition assigned to terrorism in the Bill is vague, uncertain and unclear. In the circumstances, it becomes necessary to evaluate these arguments vis-à-vis the current legal definition of terrorism under international law and in some jurisdictions such as Australia, the United Kingdom and New Zealand. This Court chooses to select the aforesaid nations because they have a legal system based upon the common law.

Before we proceed to look at the definitions that exist in international law and the above countries, let us set out the definition of terrorism that is posited by Clause 3 of the impugned Bill.

Clause 3 – Offence of terrorism

(1) Any person, who commits any act or illegal omission specified in subsection (2), with the intention of–

(a) Intimidating the public or a 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; or

(c) Propagating war or, violating territorial integrity or infringement of sovereignty of Sri Lanka or any other sovereign country, commits the offence of terrorism.

(2) *An act or an illegal omission referred to in subsection (1) shall be-*

(a) murder;

(b) hurt;

(c) hostage taking;

(d) abduction or kidnapping;

(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;

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

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

(h) 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;

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

(j) 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;

(k) *without lawful authority, importing, exporting, manufacturing, collecting, obtaining, supplying, trafficking, possessing or using firearms, offensive weapons, ammunition, explosives, or any article or thing 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, or*

(l) *committing an act which constitutes an offence within the scope of the Convention on the Suppression of Terrorist Financing Act, No.25 of 2005.*

(3) *For the purpose of subsection (2), "place of public use" includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether as of right or otherwise.*

The argument has been advanced that the above definition of the offence of terrorism is broad and thus it is offensive of Article 12 (1) of the Constitution. The corollary of this argument is that vague laws may trap the unwary by not providing a clear notice of the offence that a person is to be charged with. Clause 3 (2) (g) was cited as an example of such an over breadth that would capture even a legitimate dissent by way of a protest or civil disobedience. This Court takes cognizance of the fact that if an enactment is void for vagueness such a law may impermissibly delegate value judgements to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *More so uncertain and undefined words inevitably lead citizens to "steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked".*

The preciseness or otherwise of the offence of terrorism in Clause 3 of the Bill has to be ascertained and the vagueness argument determined only after comparative jurisprudence beyond passport control is surveyed and this Court would now proceed to embark upon that exercise.

This question of vagueness or over breadth has to be necessarily determined and disposed of, because a definition of the offence of terrorism acts as a gatekeeper to invasive investigatory powers that may expose a suspect to stringent criminal liability. As the majority of counsel pointed out, the vagueness of the definition may lead to abuse of process resulting in silencing of legitimate dissent. The Court acknowledges that a broad and open definition has the effect of conferring a greater power on the police than a narrow definition. It is with these arguments in mind we chance upon the universal concern that no universally (or even widely) accepted definition of terrorism exists at international law.

Geoffrey Levitt posing the question is *"Terrorism" Worth Defining?*[11] lamented thus;

> *The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail; periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed.*

Articles and books about the definition of terrorism begin with a quote from a thinker of a previous generation reflecting on the difficulties of defining terrorism[12] or a review of the definitional efforts stretching back to at least 1930s.[13]

Definition of terrorism at international law.

There are several sources which have sought to define terrorism at international law. International consensus on what constitutes terrorism has been frustrated by the divergent (and intractable) political positions of some states on questions such as whether the actions of the States themselves can be characterized as "terrorist", and whether the violent actions of national liberation movements merit the label.[14] As a result, the approach taken to defining terrorism in the international arena has been to adopt a *specific* model. In adopting the specific approach, international law has adapted itself to the 'predominant form of terrorist action at any given time',[15] and has attempted to side step the political sensitivity of the

[11] 13 Ohio N. U. L. Rev. 97; 97 (1986).
[12] See, e.g., John F.Murphy, *International Law in Crisis: challenges posed by the new terrorism and the changing nature of law*, 44 Case W.RES. J. INT'L.59, 61 (2011) (quoting R.R.Baxter).
[13] See, e,g., Attempts to Define "Terrorism" in international law, 52 NETH.INT'L.REV, 57-61 (2005).
[14] *ibid.*,
[15] Jean – Marc Sorel, *'Some Questions About the Definition of Terrorism and the Fight against its Financing'* (2003) 14 European Journal of International Law 365, 368.

broader definitional question. As a consequence, there are some international conventions, such as the *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents,*[16] the *International Convention Against the Taking of Hostages,*[17] and the *International Convention for the Suppression of Terrorist Bombings,*[18] directed to commonly acknowledged terrorist *modus operandi.*[19]

One can see this international dimension in Clause 3(2)(l) in that the impugned Bill defines the *actus reus* as committing an act which constitutes an offence within the scope of the Convention on the Suppression of Terrorist Financing Act No.25 of 2005.[20] This legislation which was amended by Acts, No. 41 of 2011 and No. 3 of 2013 contains a list of treaties specified in Schedule I to this Act. The Amendment Act No. 3 of 2013 defines the term "terrorist act" in this specific legislation to mean as follows;

> *"terrorist act" means –*
>
> *(a) an act which constitutes an offence within the scope or within the definition of any one of the Treaties specified in Schedule I to this Act;*
>
> *(b) any other act intended to cause death or serious bodily injury, to civilians or to any other person not taking an active part in the hostilities, in a situation of armed conflict or otherwise and the purpose of such act, by its nature or context is to intimidate a population, or to compel a government or an international organization, to do or abstain from doing any act; or*
>
> *(c) the use or threat of action-*

[16] Entered into force on 20 February 1977.
[17] Entered into force on 3 June 1983.
[18] The International Convention for the Suppression of Terrorist Bombings was adopted by GA by GA Res 52/164 of 15 December 1997, and entered into force on 23 May 2001.
[19] See generally Peter J Van Krieken, *Terrorism and the International Legal Order* (2002).
[20] The International Convention for the Suppression of the Financing of Terrorism was adopted by GA Res 54/109 of 9 December 1999, and entered into force on 10 April 2002. Sri Lanka became a party on 8 September 2000, the UK on 7 March 2001, and the US on 26 June 2002.

(i) *which is designed to influence the government or to intimidate the public or section of the public; and*

(ii) *which is made for the purpose of advancing a political, religious or ideological purpose, and such action,*

(aa) involves serious violence against a person;

(bb) involves serious damage to property;

(cc) endangers the life of another person, other than the person committing the action;

(dd) creates a serious risk to health or safety of the public or a section of the public; or

(ee) is designed seriously to interfere with or seriously disrupt an electronic system.

The Convention on the Suppression of Terrorist Financing Act as amended shows clearly how a comprehensive definition of a terrorist act has become necessary to address the emerging facets of terrorism across the world.

Though the impugned Bill seeks to criminalize the commission of an act which constitutes an offence under the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005 provided the *mens rea* elements in Clause 3(1) of the Bill are satisfied, we observe that terrorist acts which constitute offences under the Conventions listed in Schedule I to the Act No.25 of 2005 are not captured in the context of the offence of terrorism within the meaning of Clause 3(2)(l) of the proposed legislation.

This Court takes the view that in order to bring the law more in line with international law, acts that constitute offences under the listed Conventions must also be added as *actus reus* elements and it could be achieved by amending Clause 3(2)(l) to reflect acts which constitute offences under the listed Conventions. The amended Clause 3(2)(l) would read as follows:

(l) *Committing an act which constitutes an offence within the scope of the Convention on the Suppression of Terrorist Financing Act, No.25 of 2005*

or

Committing an act which constitutes an offence within the scope of or within the definition of any one of the Treaties specified in Schedule I to the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005.

It is pertinent to note that in late 2004, the Secretary General of the United Nations presented the report of the high-level panel on Threats, Challenges and Change to the General Assembly, which was compiled by a panel of experts appointed by the Secretary General. Among a wide range of other topics, the report recommended that the General Assembly should complete negotiations on a comprehensive convention on terrorism. In addition to this direction, however, the report recommended that the definition (1) restate that the acts proscribed by the 12 global terrorism conventions constitute acts of terrorism and declare that such acts are crimes at international law and (2) refer to the definitions in the Financing Convention and Resolution 1566. Noteworthy is the conclusion implicit in the report that the Financing Convention and Resolution 1566 provide definitions of terrorism.

The conventions referred to above exhibit high levels of ratifications, signaling widespread acceptance. Abstracting from their particular prohibitions illustrates that terrorism as a legal concept at international law has a core content. The serious harming or killing of non-combatant civilians and the damaging of property with a public use causing economic harm done for the purpose of intimidating a group of people or a population or to coerce a government or international organization are proscribed offences according to international standards. The act, which must be independently unlawful, must be intentional, and its consequences must at least be foreseen and desired. No particular motivation need explain that and none can justify it. It is often exhorted that States ought to ensure that the definition of terrorism in their domestic legal systems is consistent with this minimum definition of terrorism at international law. According to Reuven Young, given the broad support,

considerable overlap in obligations, recurring themes in the conventions, and the endorsement of the definition of terrorism in Resolution 1566 by the Security Council, a powerful definitional jurisprudence exists in international law sufficient for States to draw on in forming their own definition in domestic law.[21]

The Sixth Committee of the United Nations General Assembly attempted to formulate a comprehensive general definition of terrorism. Article 2 (1) of the *Draft Comprehensive Convention on International Terrorism* provides:

> (1) *Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:*
>
> *(a) Death or serious bodily injury to any person; or*
>
> *(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment: or*
>
> *(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this Article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.*

The fact that the core elements of this international definition are substantially mirrored in Clause 3 of the impugned Bill strikes this Court as an intentional attempt by the legislature to comply with international standards.

In our view, the international definition offers a useful yardstick with which to measure the domestic definition.

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[21] Reuven Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation, 29 B.C. International & Comparative Law Review 24 at p. 65

The UN would appear to have exerted significant influence on the actions of member States in formulating domestic definitions. The United Nations has been a focus of debate and activity in responding to terrorism, and a number of international instruments have provided an impetus for States to respond to terrorism through their domestic legal regimes. One of the most important of these instruments is Resolution 1373 of the United Nations Security Council, made on 28 September 2001, which determines among other things that States shall '[p]revent and suppress the financing of terrorist acts' and '[t]ake the necessary steps to prevent the commission of terrorist acts'. While Resolution 1373 requires States to take action, it does not set out what are 'terrorist acts', the target of that action, leaving this to the States themselves. We turn now to the domestic legal definitions of terrorism. Many of them can be seen as responses to September 11, 2001 and Resolution 1373. On the other hand, some jurisdictions, such as the United Kingdom and New Zealand, have had counter-terrorist legislation in place for a longer period. For purposes of clarity the terms of the Resolution 1373 could be set out below, before we move on to domestic legal definitions of some jurisdictions.

In its Resolution of 1373 of 2001, the UN Security Council declared that every member state should –

> *"Deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens,"*
>
> *"Ensure that any person who participate in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts,"*
>
> *"Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings"*

It is apposite to recall that under *"Article 25 of the UN Charter"*, "the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter".

Thus, it is imperative that the exhortation of the UN Security Council to enact laws criminalizing terrorist acts binds member states and it is in accord with such an international obligation the countries have been placed under an obligation to enact its own domestic counter terrorism laws and Sri Lanka cannot lay claim to any exception to this onerous duty.

Australian Definitions

The Commonwealth, New South Wales, Victoria, Queensland and the Northern Territory are the only Australian jurisdictions that have made specific reference to terrorism in legislation. After September 11, the Federal Government provided the focus for the Australian legal response. Schedule 1 of the *Security Legislation Amendment (Terrorism) Act 2002* inserted a new definition of 'terrorist act' into the *Criminal Code Act* 1995. The definition appears in S. 100.1 of part 5.3 of the Code and provides:

> *(1) In this Part: ...*
> *terrorist act means an action or threat of action where:*
>
> *(a) the action falls within subsection (2) and does not fall within subsection (3); and*
>
> *(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and*
>
> *(c) the action is done or the threat is made with the intention of:*
>
> *(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
>
> *(ii) intimidating the public or a section of the public.*

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and

(b) a reference to the public includes a reference to the public of a country other than Australia.

Australian carve out

The definition of terrorism in the Australian Criminal Code exempts **any advocacy, protest, dissent or industrial action that is not intended to cause the *actus reus* elements of the offence of terrorism.** Such a carve out is made more clear in the New Zealand definition, whilst the UK definition does not have such an exemption.

United Kingdom

The United Kingdom has had counter-terrorism measures in place for decades. The *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) was a response to the mainland bombing campaign of the Irish Republican Army conducted throughout the 1970s,

'80s and '90s.[22] In 2000, the United Kingdom Parliament consolidated its counter-terrorism laws, many of which were temporary, into a single Act. The resulting piece of legislation, the *Terrorism Act 2000* (UK), contains a definition of terrorism, the 'vague contours' of which, according to Sir David Williams, repose a significant amount of trust in the 'good sense of the police and security services, prosecutors, judges and jurors to maintain a sense of proportion when acts of terrorism are alleged'.[23]

The definition states:

> *(1) In this Act 'terrorism' means the use or threat of action where-*
>
> *(a) the action falls within subsection (2);*
>
> *(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and*
>
> *(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.*
>
> *(2) Action falls within this subsection if it -*
>
> *(a) involves serious violence against a person;*
>
> *(b) involves serious damage to property;*
>
> *(c) endangers a person's life, other than that of the person committing the action;*
>
> *(d) creates a serious risk to the health or safety of the public or a section of the public; or*

[22] For a discussion of the historical context of the enactment of the *Terrorism Act 2000* (UK), the Anti-*terrorism, Crime and Security Act 2001* (UK) and its legislative precursors, see Sir David Williams, 'Terrorism and the Law in the United Kingdom' (2003) 26 *University of New South Wales Law Journal* 179,179 - 83.
[23] Ibid., 179

(e) *is designed seriously to interfere with or seriously to disrupt an electronic system.*

(3) *The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.*

(4) *In this section-*

(a) *'action' includes action outside the United Kingdom;*

(b) *a reference to any person or to property is a reference to any person, or to property, wherever situated;*

(c) *a reference to the public includes a reference to the public of a country other than the United Kingdom; and*

(d) *'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.*

(5) *In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organization.*

It must be noted that this definition was carried over without amendment into the *Anti-terrorism, Crime and Security Act 2001* (UK), which is the United Kingdom's legislative response to the September 11 terrorist attacks.

It is relevant to point out that in 2018 the Bar Association of Sri Lanka was in the vanguard of recommending the adoption of such a stringent definition of terrorism as the UK definition and it would appear that any lesser standard would have been inadequate and insufficient in light of the fact that the most gruesome deaths of innocent civilians took place in the following year in one of the worst terrorist attacks that this country ever experienced. It has to be noted that Clause 3 of the impugned Bill does reflect some substantial elements that are identical

to the UK definition except the use or threat which is made for the purpose of advancing a political, religious or ideological cause.

New Zealand

"Terrorist act' is defined by Section 5 of the *Terrorism Suppression Act* in three alternate ways.[24] First, under s 5(1)(a), an act is a 'terrorist act' if it 'falls within subsection (2)'.

Section 5(2) then provides:

> *An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:*
>
> > *(a) to induce terror in a civilian population; or*
> >
> > *(b) to unduly compel or to force a government or an international organization to do or abstain from doing any act.*

Subsection (3) further states:

The outcomes referred to in subsection (2) are-

> *(a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act);*
>
> *(b) a serious risk to the health or safety of a population;*
>
> *(c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental*

[24] Under *Terrorism Suppression Act 2002* (NZ) s 25(1), 'planning or other preparations to carry out the act, whether it is actually carried out or not', a 'credible threat to carry out the act, whether it is actually carried out or not' or an 'attempt to carry out the act' also constitute a terrorist act.

damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b)and(d);

(d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;

(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

Subsection (4) exempts acts of war made during situations of armed conflict and made in accordance with applicable international law from sub-s(2),while sub-s(5) states:

To avoid doubt, the fact that a person engages in any protest, advocacy, or 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 carrying out an act for a purpose, or with an intention, specified in subsection (2);or

(b) intends to cause an outcome specified in subsection (3).

Second, under s 5(1)(b) an act qualifies as a 'terrorist act' if it is an act 'against a specified terrorism convention' (the use of 'against' in this context is certainly awkward). Section 4(1) defines a 'specified terrorism convention' as any of the nine treaties listed in Schedule 3, such as the *Convention for the Suppression of Unlawful Seizure of Aircrafts* or the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.*

New Zealand carve out

Section 5 (5) of the *Terrorism Suppression Act 2001* enacts the safeguard in the definition of terrorism in favor of specified individual rights. The fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout or other industrial action, is not by itself, a sufficient basis for inferring that the person is (a) carrying out an act for a purpose,

or with an intention, specified in subsection (2) or (b) intends to cause an outcome specified in subsection (3).

Canadian carve out

The Canadian exemption relates to freedom of belief, expression and of association (as in Articles 9 to 11 of the European Convention on Human Rights). The exemption is found in the Canadian Anti-Terrorism Act 2002, Section 83. 01;

> *"for greater certainty the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph."*

Our analysis shows both the New Zealand and the Australian counter terrorism legislation exhibit structural similarities to the UK definition. The Australian Senate Legal and Constitutional Committee, expressing concern at the Australian Bill's principal definition, specifically noted the difficulties with defining terrorism at international law but cited with approval a submission that listed various definitions at international law and in the U.S legislation. The Committee later concluded in the following tenor:

> *The Committee considers that there is no compelling reason why Australian legislation should reach further than legislation enacted in the United Kingdom, the USA or Canada, or as proposed in New Zealand... While the Committee acknowledges the difficulties that have been experienced internationally in defining terrorism, all the definitions that have been drawn to the Committees attention during this inquiry contain some element of intent to cause extreme fear to the public and/or coerce the Government. The Committee considers that this element is at the very heart of the nature of terrorism.*[25]

After having indulged in the above survey of the international efforts to define terrorism and domestic jurisdictions to follow suit, this Court takes the view that Clause 3 of the proposed

[25] S. Legal and Constitutional Committee, Security Legislation Amendment (Terrorism) Bill 2002 (No. 2) (and related legislation)

counter terrorism legislation is reflective of the structural configurations of the definitions of terrorism fashioned out by international efforts and overseas legislatures.

The chart below conveniently brings out the similarities of the multifarious efforts at the definitional issue.

Comparison of the definitions of terrorism in other countries.			
Element / theme	International Law	United Kingdom	New Zealand
1. Proscribed terrorist outcomes	• Death, serious injury • Serious property damage causing economic harm	• Serious violence against persons; death; endangering another's life or the public health or safety. • Serious property damage; acts designed to seriously interfere with or disrupt an electronic system.	• Death or serious bodily injury; serious risk to public health or safety. • Destruction or serious damage to property of great value; major economic loss; major environmental damage; serious interruption or destruction of infrastructure facility if endangering or harming people. • Bio-terrorism if likely to devastate an economy.
2. Acts Independent Criminality	• Unlawful	• Not required by the definition	• Not required by the definition
3. Intimidation or Coercion	• Intimidation or coercion • Targets: governments, international organizations, populations or part thereof. • Mens rea; calculated or intended	• Influence a government; intimidate a section of the population. • Mens rea; "Designed". • Not required if; using of firearms or explosives.	• Terror in a civilian population. • Unduly compel or force a government or international organization. • Mens rea: intent.

However, we once again revert to the argument of the Petitioners that as the definition stands, it may lead to abuse and arbitrariness. The unanimity of concern among the Petitioners is as plain as the nose on the face of the arguments. The definition of terrorism does not make exceptions for legitimate causes or goals, such as protest or dissent. We have already made

references to this consistent strand in the submissions of the Petitioners and it has to be accepted that such an ambiguity is indeed rife in the definition.

In accordance with the rule of law, clarity and precision in the legal definition of an activity as criminal is a baseline for ensuring both the effectiveness of the law and the accountability of the agents of the state that are responsible for enforcing it. A law that is vague or overly broad provides neither fair notice to individuals of what conduct is prohibited or potential consequences for violations of that law, nor clear standards for those entrusted with law enforcement, thus leaving open the possibility of abuses. Justice Louise Arbour elaborated on this notion in her dissenting opinion in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney-General),* where she emphasized that a *"vague law violates the principle of fundamental justice because it does not provide for 'fair warning' to individuals as to the legality of their action and because it increases the amount of discretion given to law enforcement officials in their application of the law, which may lead to arbitrary enforcement."*[26]

Though some of the elements contained in Clause 3 of the impugned Bill is identical to the UK definition which has percolated into countries such as Australia and New Zealand, what is absent from the definition is an exemption or a carve out that will recognize legitimate dissent, and lawful civil disobedience that has not reached the intensity or gravity necessary to constitute an offence of terrorism. In the circumstances, Clause 3 of the Bill falls foul of Article 12(1) of the Constitution and as a consequence it requires to be passed with a special majority. However, the Clause will cease to be inconsistent if an exemption or a carve out is enacted similar to that of Section 5 (5) of the New Zealand Terrorism Suppression Act of 2001, with the insertion of the following new sub-Clause to Clause 3 and to be numbered as (4) to read as follows;

> *"The fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout or other industrial action, is not by itself, a sufficient basis for inferring that the person –*

[26] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney-General)* (2004) 1 SCR 76, 2004 SCC 4, Arbour,J (Dissent).

(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."*

Next we move on to some of the other Clauses of the Anti-Terrorism Bill that were impugned in these proceedings or appear to raise contentious issues. Whilst we have dealt with Section 3 of the impugned Bill touching upon the definition, it must be mentioned that the Clauses of the Bill are categorized under thirteen parts (I –XIII) as enumerated below;

- Part I - Application of the Act (Clause 2)
- Part II - Offences and Penalties (Clauses 3 – 17)
- Part III - Investigation of Offences (Clauses 18 – 46)
- Part IV - Powers and Duties of Certain Officers (Clauses 47 – 60)
- Part V - Material for Investigation (Clauses 61 – 63)
- Part VI - Magistrate to Make Orders to Facilitate Investigations (Clauses 64 – 68)
- Part VII - Institution of Criminal Proceedings (Clauses 69 – 70)
- Part VIII - Trial (Clauses 71 – 76)
- Part IX - Admissibility of Statements (Clauses 77 – 78)
- Part X - Miscellaneous Orders (Clauses 79 – 83)
- Part XI - Sentencing Guidelines (Clauses 84 – 85)
- Part XII - General (Clauses 86 – 94)
- Part XIII - Repeal and Transitional (Clauses 95 – 98)

Four Schedules appear at the tail end of the Bill corresponding to Clauses 26(1), 26(4) and 31(1)(b) with the Second and Third Schedules falling under Clause 26(4) of the Bill.

Clause 2 – Applicability of the Act

The Anti-Terrorism Bill lays down that it applies to *"any person who commits an offence under this Act, whether within or outside the territorial limits of Sri Lanka"*. In accordance

with the long title and the preamble of the Bill, the proposed legislation seeks to address international, transnational and domestic terrorism by covering a diverse range of offences. The Bill captures offences committed against Sri Lankan citizens or government property, offences committed by former citizens of Sri Lanka (subject to specified conditions) and offences by those who have their habitual residence in Sri Lanka.

The Bill is transnational in that it even seeks to cover offences committed on board or in respect of any aircraft/vessel "within the territory of Sri Lanka" in Clause 2(1)(b)(v). The Bill is not limited to aircrafts/vessels that are registered in/belonging to/used by the Sri Lanka government. This has to be contrasted with Section 24 of the PTA which includes Acts committed in or in relation to any vessel or aircraft registered in Sri Lanka within the ambit of the Act.

Clause 3 - Offence of Terrorism

The above discussion on Clause 3 in preceding paragraphs pertains to the offence of terrorism which was the principal cause that was agitated before this Court for constitutional invalidity. For the reasons set out above this Court has declared Clause 3 inconsistent with the Constitution but we have also declared that the taint of unconstitutionality will cease to operate once the carve out or exemption as we have formulated is adopted into the definition.

Clause 4 – Penalty for the offence of terrorism

Though Clause 4(1)(a) introduces a sentence of life imprisonment for causing death coupled with the *mens rea* elements necessary to constitute the offence of terrorism under Clause 3(1)(a) of the Bill, the formulation in Clause 4(1)(a) appears to be defective. Clarity is sought to be achieved by the following Amendment that has been proposed by the Attorney – General to Clause 4(1) (a):

> *"Any person who commits the offence specified in sub section (1) of Section 3 read with paragraph (a) of subsection 2 of Section 3 shall upon conviction by the High Court be punished with imprisonment for life."*

We are of the view that the said amendment sheds clarity to Clause 4(1)(a).

Although the Attorney General has proposed an amendment to Clause 4(1)(b), the ambiguity in regard to punishments for *actus reus* elements from Clause 3(2)(b) to Clause 3(2)(l) still prevails on account of a lack of precision in the formulation as has been tendered to this Court. We observe that this lack of clarity in Clause 4(1)(b) for penalties in regard to Clause 3(2)(b) to Clause 3(2)(l) should be remedied at the committee stage of Parliament in the following manner:

> *"Any person who commits the offence specified in sub section (1) of Section 3 read with paragraphs (b) or (c) or (d) or (e) or (f) or (g) or (h) or (i) or (j) or (k) or (l) of subsection (2) of Section 3 shall upon conviction by the High Court be liable to rigorous imprisonment for a term not exceeding twenty years and to a fine not exceeding Rs. One million."*

Clause 9 – Terrorism associated acts

The Attorney General has proposed an amendment to Clause 9 on the following lines;

> *Any person who knowing or having reasonable grounds to believe that such information will be used by such other person to commit or conspire, abet or attempt an offence under this Act*
>
> *(a) gathers any confidential information, having the intention of supplying such information to a person,*
>
> *Or*
>
> *(b) supplies any confidential information to a person*
>
> *commits an offence under this Act.*
>
> *Provided however, nothing published in good faith with due diligence for the benefit of the public or in the national interest in printed and electronic media, or in any academic publication, shall be deemed to be an offence under this section.*

The expression "confidential information" is defined to mean –

(a) any information, the dissemination of which is likely to have an adverse impact on the security and defence of Sri Lanka;

(b) any information not in the public domain, the dissemination of which is likely to have an adverse effect on national security or public security, relating to-

(i) the persons of the police, armed forces or Department of Coast Guard;

(ii) the functions, movements or whereabouts of a specified person;

(iii) a prohibited place or an approved place of detention;

(iv) the conduct of investigations into offences under this Act, findings of such investigations, persons arrested and detained and identity of officers conducting investigations;

(c) any information relating to the police or the armed forces, on the conduct of any official activity, including any law enforcement or military measure which is intended to be carried out or is being carried out, or has been carried out;

(d) any secret code, word, password or encryption detail relating to national security and defence;

The above catalogue provides a list or description of what might be considered security-sensitive information and the act of gathering and supplying that information is sought to be criminalized by the above Clause. If the above acts are committed in circumstances which

give rise to a reasonable suspicion that the gathering or supplying of such material is for a purpose connected with the commission, preparation or instigation of an act of terrorism this Court does not find a criminalization of these acts inconsistent with the Constitution. This section is aimed at protecting classified and security sensitive information and in the view of this Court the section gives due consideration and weight to the broader and compelling public interest in safeguarding national security and strategic interest.

Clause 19 – Arrest by police officers and other officers

In regard to Clause 19 of the Bill an argument was advanced that the conferral of the power to arrest on a member of the armed forces or a coast guard officer may lead to militarization. Upon a close scrutiny of the Clause we find that an officer other than a police officer may engage in the act of arrest without a warrant only if the conditions stipulated in paragraphs 19(a) to 19(e) exist. The preconditions to such an arrest in Clause 19 are worth a mention.

> *Any police officer, member of the armed forces or a coast guard officer, may arrest without a warrant, any person-*
>
> *(a) who commits in his presence, or whom he has reasonable suspicion to believe, that such person has committed or there is an imminent possibility of committing by such person an offence under this Act;*
>
> *(b) who has been concerned in committing an offence under this Act;*
>
> *(c) in respect of whom such police officer, member of the armed forces or a coast guard officer receives information or a complaint which such officer or member believes to be reliable that a person has committed or concerned in committing an offence under this Act;*
>
> *(d) who is fleeing from Sri Lanka with the intention of evading arrest or is evading arrest after committing an offence under this Act; or*

(e) *who is violating the conditions of bail, subject to which such person has been released, being a suspect for the commission of an offence under this Act.*

The above provisions show that there is no absolute license to arrest a person at the whim and fancy of a member of the armed forces or a coast guard officer. The exercise of power is subject to objective criteria and only when the intensity of a criminal act reaches such a level as to constitute the offence of terrorism, the officers other than police officers can be pressed into service. We also find that Clause 20 of the Bill subjects these officers to restraints when they attend the functions of police officers.

We draw attention to the definition of the offence of terrorism subject to its carve out as we have formulated, and with the restraints in Clause 20 which should operate as safeguards, the necessary balance between national security and fundamental rights are proportionately struck.

In a nutshell the wording in Clause 19(1)(a) makes it clear that an arrest can be made by the Police, Army or coast guard where "there is an imminent possibility of committing by such person an offence under this Act" and therefore only makes allowance for preventive arrest. As we have pointed out, the circumstances in which the powers of arrest maybe exercised are extremely limited and also subject to restraints and judicial oversight as prescribed in Clause 20. The person arrested has to be turned over to the OIC of the nearest police station without unnecessary delay, and in any event within a period not exceeding twenty hours. There are two provisos to this rule. In terms of the first proviso, where the suspect has been arrested outside the territory of Sri Lanka or on board any aircraft or vessel, the period of time necessary for the journey from the place of arrest to the relevant police station, shall be excluded in calculating in such twenty-four hours' period. In terms of the second proviso if producing the person at the nearest police station is not practicable due to reasons beyond the control of the arresting officer, the custody of such person shall be given to the office in charge of the next nearest police station.

The arresting officer is placed under an obligation to notify the arrest to a commissioned officer, who has been authorized to receive such information. There are also safeguards given in Clause 21 when the arrest is effected by a police officer.

It is not unusual to find powers conferred on persons other than the police. Section 35 of the Code of Criminal Procedure Act empowers even private citizens to effect arrest in cognizable offences and produce such arrested persons to the nearest peace officer or police officer. In similar circumstances, the conferment of police powers of arrest on members of the armed forces or coast guards is not unfettered and carries with it the requirement to produce at the nearest police station as far as practicable. The language contained in Clauses 19, 20 and 21 are mirrored in the Code of Criminal Procedure Act and as such is not inconsistent with any provision of the Constitution.

Clause 22 – Power to stop and search any person

Clause 22 of the Bill refers to the power conferred on a police officer, a member of the armed forces or a coast guard officer to stop and search any person, vehicle, vessel, train or aircraft. This power was also contended as amounting to an invasion of personal liberty and against the rule of law. Under Clause 22 any document or thing taken into custody must be handed over to the officer in charge of the nearest police station who will in turn produce a report to a Magistrate before whom the relevant suspect is produced whereupon the Magistrate shall make an appropriate order with regard to the possession or release of any document, thing or article so taken into custody. This Court is cognizant of the potential breaches that are likely to occur as a result of this power being used in an illegitimate manner. Clause 22(2) of the Bill makes reference to the provisions of Clause 26 which shall *mutatis mutandis* apply in respect of the exercise of the powers relating to issuing of a notification to the relevant parties such as the spouse, father, mother, or any other close relative of the arrestee, forthwith or in any case not later that twenty-four hours of the arrest.

When exercising stop and search powers, it has to be borne in mind that these powers are exercisable only for the purpose of "searching for articles of a kind which could be used or has been used or derived in connection with committing an offence under the Act". Since these powers could be abused, they must be used 'fairly, responsibly, with respect for people being searched and without unlawful discrimination'; since the stop and search powers amount to an intrusion on the liberty of the person stopped or searched, it has to be brief and such powers must not be exercised based on 'generalizations or stereotypical images (or) a person's religion'.

These extraordinary powers were considered by the House of Lords, in *R (Gillan) v Metropolitan Police Commissioner*.[27] An Assistant Commissioner of the Metropolitan Police gave an authorization under section 44(4) of the Terrorism Act of 2000 covering the whole of the Metropolitan Police District. That authorization was confirmed and was then renewed on a continuous basis since February 2001. Both applicants were stopped in the vicinity of a weapons exhibition being held at the ExCel Centre, Docklands. Nothing incriminating was found; the length of the transaction was up to 20 minutes. The House of Lords accepted that an authorization might be expedient under section 44(3) if, and only if, the person giving it considered it likely that the stop and search powers would be 'of significant practical value and utility in seeking to achieve ... the prevention of acts of terrorism.'[28] Lord Bingham was satisfied that the authorization and confirmation processes had not become a 'routine bureaucratic exercise'[29], even though a London-wide authorization had been repeatedly enforced since 2001.

At the stage of implementation, some of their Lordships were troubled by the dangers of discrimination. Lord Bingham emphasized that the implementing constable was not free to act arbitrarily and must not stop and search people who are 'obviously not terrorist suspects'[30] while, in Lord Hope's view[31], 'the mere fact that the person appears to be of Asian origin is not a legitimate reason for its exercise.'

An even more stark aspect of the indulgence in this judgment is that the House of Lords denied that the stop and search process had involved any intrusion into rights to liberty under article 5. Clive Walker commenting on this case observed that the Court's depiction of the stop and search process as no more threatening or oppressive than waiting until the light turns green at a pedestrian crossing[32], is wholly unconvincing for two reasons. Firstly, section 45 involves the exercise of an official coercive power not a directive power — the person waiting for the green light can give up and try another route. Nor is the time of 'non-detention detention' pending search (which was alleged to endure for up to 20 minutes) as fleeting as suggested.[33]

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[27] [2006] UKHL 12
[28] ibid., para 15
[29] Ibid., para 18
[30] ibid., para 35
[31] ibid., para 45
[32] ibid., para 25
[33] Clive Walker, Human Rights and Counter Terrorism in the UK (2016)

Some of the important aspects of the dicta of the House of Lords in the case of *R (Gillan) (supra)* need to be borne in mind such as discriminatory stops and searches and the fact that these powers must be used fairly, responsibly, with respect for people being searched and without any generalizations or stereotypical distinctions based on religion.

Clauses 23, 24, 25 and 26

The Court observes that these Clauses represent a significant advance in the area of the rights which are provided for persons who are arrested/suspected of terrorism as they ensure that certain vital information is provided to the person arrested in the language understood by the suspect **(Clause 23),** the privacy of the suspect is protected **(Clause 24)** and gender sensitivity is accorded **(Clause 25).** A notification of the arrest to the next of kin of the suspect and the Human Rights Commission of Sri Lanka is provided for in **Clause 26.**

We take the view that these provisions seek to advance, secure and protect the fundamental rights of suspects under Articles 11, 12 and 13 of the Constitution. This is an improvement on the existing law of the PTA.

Clause 28 – Production before Magistrate

According to this Clause, when a person is arrested, the maximum period within which a suspect may be detained is 48 hours. One juxtaposes the period of 72 hours where an arrestee could be detained under the Prevention of Terrorism (Temporary Provisions) Act, vis-à-vis the period of 48 hours and the fact remains that the period of 48 hours is indeed in excess of 24 hours within which a suspect has to be produced before a Magistrate in terms of the Code of Criminal Procedure Act. It has been argued that the reduction of the period since arrest from 72 hours to 48 hours is a relaxation of the existing law.

Such an extension of time from the 24-hour limitation is contended to be in breach of Article 13(2) of the Constitution but we bear in mind that it is sought to be departed from on the strength of Article 15(7) of the Constitution. In *Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority and Others*[34] this Court had occasion to consider the standards that an

[34] [2000] 1 Sri LR 314

Article 15(7) restriction has to display when a legislative measure seeks to limit fundamental rights. Such a restriction arose out of emergency regulations in the case and had to be prescribed by law as required by Article 15(7). The case clarified that such a limitation of fundamental rights must be necessary and for a legitimate aim in a democratic society. The phrase 'prescribed by law' was explained by Court at p.361:

> *Against the foregoing background, I hold that the impugned restrictions had a basis in law, and that as far as the quality of law was concerned, it was accessible to the petitioner and formulated with sufficient precision to enable her - if need be, with appropriate legal advice - to foresee, to a degree that was reasonable in the circumstances, the consequences which a given action may entail. Admittedly, the first respondent, the 'Competent Authority' was given a wide discretion; yet, as we shall see later in considering the question of necessity, the scope of the discretion and the manner of its exercise were indicated with sufficient clarity, having regard to the purported aim in question, to make the decisions of the Competent Authority reviewable and to give her adequate protection against arbitrary interference. I therefore conclude that the impugned restrictions were "prescribed by law" for the purposes of Article 15(7) of the Constitution.*

The requirement of legitimate aim was expatiated upon thus at p.361:

> *In addition to being "prescribed by law'", restrictions on the Constitutional right of freedom of speech, in order to be valid, must have a legitimate aim recognized by the Constitution. No doubt after balancing interests, albeit at a very general, wholesale level, the makers of our Constitution have in Article 15 made a threshold categorization, inter alia, of the varieties of speech that are not protected absolutely, but which may be limited by law. Channa Pieris, (3), at p. 140. Speech and expression concerning "the interests of national security" is one of them. (Article 15(7)).*

The Court considering when restrictions are 'necessary in a democratic society at 377-379 noted as follows:

> *At the same time, due account must be taken of the fact that the aim of the regulation was the protection of national security within the meaning of Article 15(7). In order*

to verify that the interference was not excessive in the instant case, a fair balance between competing interests must be struck: the requirement of protecting national security must be weighed against the petitioner's right of free speech and expression- Cf. Groppera Radio AG v. Switzerland, at p. 343; Barfod v. Denmark at p. 499. In matters of this nature, the interests of society as a whole must be considered. Otto Preminger Institute v. Austria, at p. 59. The notion "necessary", as we have seen, implies" a pressing social need". This may include the "clear and present danger" test, as developed by the American Supreme Court, pace Seervai, and the question "pressing social need", must be addressed in the light of the circumstances of a given case.....

In the instant case, there is, as the petitioner herself states a "war" between the LTTE and the Government Forces. Judicial notice of the fact that "the Government is faced with a serious civil war" was taken by this Court in Wickramasinghe v. Edmund Jayasinghe, at p. 307. Terrorism is a tactic that is resorted to by the LTTE in that "war". That is a matter that is well and widely known, and of which judges of this Court have taken cognizance. See Visuvalingam & Others v. Liyanage, at p. 333. Terrorism not only hurts, but tends to destroy democracy and democratic institutions. There are imminent dangers threatening the free, democratic constitutional order of the Republic of Sri Lanka. In such a situation, national security must take precedence over the right of free speech, for, as Chief Justice Vinson observed in Dennis v. U. S., the safety of the nation is "the ultimate value of society. For if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

Upon a perusal of 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. As regards the production of the detention order before the Magistrate who shall give effect to such a detention order it was argued in the Counter Terrorism Bill Determination, SC SD 41-47/2018, that it conflicted with Article 13(2) of the Constitution. This Court declared in the said determination;

"Learned counsel for the Petitioner whilst referring to Clause 27(2)(a) of the Bill contended that the words 'the Magistrate shall make an order to give effect to such Detention Orders' in the said Clause would violate Article 13(2) of the Constitution.

But it has to be noted here that when a Detention Order issued under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 for a period of three months was in operation, there is no requirement to produce the suspect before a Magistrate. Clause 27(2)(a) of the Bill seeks to relax the above position and under this Clause even if there is a Detention Order the suspect will have to be produced before a Magistrate; the Detention Order must be placed before the Magistrate for his inspection; and the Magistrate will make an order giving effect to the Detention ***Order only if it is a valid Detention Order****. Since Prevention of Terrorism (temporary Provisions) Act, No. 48 of 1979 is an existing law, Court will have to consider the fact that is consistent with the Constitution. If the existing law is consistent with the Constitution, relaxation of that law cannot violate the Constitution. Therefore, we reject the above contention of learned counsel for the Petitioner."*

This salutary dicta was pressed before us by the counsel for the state for the argument that a comparable situation arises under Clause 28(2) vis-à-vis the PTA which does not have such a significant advancement on rights of the suspects.

The Petitioners contended that under Clause 28(2)(a) the Magistrate is only required to play a very mechanical role in inspecting the availability of a valid detention order. It was further contended that there is no meaningful advancement of the scheme relating to a person against whom a Detention order has been issued compared to the present law because of such a mechanical role played by the Magistrate. Justice Mark Fernando in the case of *Weerawansa v AG*, [2000] 1 SLR 387 stated *"If an officer appointed to perform judicial functions exercised the discretion vested in him, but did so erroneously, his order would nevertheless be "judicial". However, an order made by such an officer would not be "judicial" if he had not exercised his discretion, for example, if he had abdicated his authority, or had acted mechanically, by simply acceding to or acquiescing in proposals made by the police - of which there was insufficient evidence in that case."* Further, in *Weerawansa v. The Attorney General and Others* as well, which considered the corresponding provision to Clause 28 in the PTA, this Court had no hesitation in holding that the Magistrate performs more than a mere 'rubber stamping' function, and also referred to the judicial oversight exercised by the Magistrate where a person is produced with a detention order. Hence, when the Magistrate inspects the Detention order presented before him, he is required to assess the validity of the Detention order judicially and not mechanically.

Clause 28(2)(a) states that "*where [...] a detention order has been issued in terms of section 31, and is placed before the Magistrate for his inspection, the Magistrate shall make an order to give effect to such Detention Order.*" When the provision states that "where [...] a detention order has been issued in terms of section", it presupposes that the Magistrate when making an order to give effect to the Detention order he ought to be satisfied that a detention order has been properly issued in terms of the requirements under Clause 31.

This provides the Magistrate an opportunity to evaluate whether the Secretary of Defence has given his mind to the issuance of the Detention order and set out one or more of the purposes prescribed in Clause 31 as reasons for issuing such Detention Order. 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 by law.

When looking at whether there is any erosion of judicial power by the limitation posed by Clause 28(2)(a), one has to read whether Article 13(2) of the Constitution gives an absolute judicial power to a judge of a competent Court to decide on the liberty of a person arrested by the law enforcement authorities.

Article 13(2) states:

> *"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."*

While this Bill temporarily demarcates a precise judicial role which the Magistrate has to play by inspecting a detention order, it has provided ample safeguards which provides the Magistrate with the power to protect a person from any act of torture or cruel, inhumane and degrading treatment. The Magistrate under Section 29 has a wide variety of powers which allows him to change the place of detention, to change the investigative agency, to produce

any suspect before judicial medical officer and to require the Inspector General of Police to initiate an investigation to facilitate prospective criminal proceedings.

In addition to the above safeguards, independent of the Anti-Terrorism Bill, the Supreme Court or the Court of Appeal has not been deprived of their right to entertain Fundamental Rights applications or Writ applications in respect of a detention order issued on a person.

Clause 28(2)(a) is no way in contravention with any Article of the constitution. Such Clause only intends to provide certain legitimate restrictions on the rights exercised by a person under Article 13(2) of the Constitution.

The present Bill in addition to a person being detained under detention order, also provides for a situation where a suspect arrested under the Bill must be produced before the Magistrate after the expiry of 48 hours without a detention order. In such a situation the Magistrate is given the discretion under limb (2)(b) to release the suspect on bail where there are no reasonable grounds to remand the suspect, and limb (3) makes provision for the Magistrate to hold a private interview with the suspect thus advancing the fundamental rights of the suspect under Articles 11, 12 and 13 of the Constitution.

In any case we observe that given the improvements made to Clause 31, Clause 28(2)(a) is in fact an improvement over the PTA as it must first be established that a 'Detention Order has been issued in terms of section 31' before the mandatory obligation on the Magistrate to give effect to such order is triggered. Clause 28(2)(a) does not require the Magistrate to give effect to any and all Detention Orders.

On the foregoing we take the view that the Clause 28 of the Bill is consistent with the Constitution.

However, the Attorney General has proposed an amendment to the effect that the following amendment to Clause 28(2)(b)(i) and Clause 28(2)(b)(ii) would be moved at the Committee Stage of Parliament, to bring the Sinhala and English text in line with each other:

Clause 28 (2)

(b) a Detention Order has not been issued or has not been placed before the Magistrate, the Magistrate may –

(i) if the officer in charge of the relevant police station makes an application seeking an order to remand the suspect, based on grounds that the Magistrate deems reasonable in the circumstances, order that the suspect be placed in remand custody:

Provided however, where the Magistrate is satisfied that there are no such reasonable grounds, the suspect may be released on bail; or

Provided further, where the Magistrate is satisfied that there are no reasons to believe that the suspect has committed an offence under this Act, he shall be discharged; or

(ii) if the officer in charge of the relevant police station requests or has no objection to bail being granted, release the suspect on bail under the provisions of the Bail Act, No.30 of 1997, upon conditions to be stipulated by such Magistrate, excluding a condition where such suspect is released on bail on his own recognizance or an undertaking given by him to appear when required; or

Clause 29 – Magistrate to direct the suspect to a forensic medical examination

This Clause mandates the Magistrate to direct the suspect to a forensic medical examination where the Magistrate is of the opinion that the suspect may have been subjected to a violation of Article 11 and thus a protection is sought to be afforded to the rights of the suspect under Article 11 of the Constitution. This in turn is in line with Article 4(d) of the Constitution.

Clause 30 – Maximum period of remand

The Clause states the maximum period of one year shall be calculated from the date of arrest. This necessarily implies that regardless of whether a person has been in detention or remand, such person can only spend a maximum of one year in remand from the date of his arrest. Hence, no person shall be held in pre-trial detention more than one year unless a special application has been made by the Attorney General for the extension of remand for a period of three months.

The Petitioners contended that Clause 30(1) of the Bill which sets out the maximum period of detention is inconsistent with Articles 3 read with Articles 4(d), 11, 12(1), 12(2), 14(1)(g) and 14(1)(h) of the Constitution as it allows for the High Court to extend the period of remand without the institution of criminal proceedings on an application made by the Attorney General without reasons being adduced and also allows for a person to be kept in remand in perpetuity which amounts to torture or cruel, inhuman or degrading treatment or punishment.

We bear in mind that the extension of detention is a discretionary power which is vested in the High Court judge and such discretion has to be exercised on valid reasons to be given for extension of detention. Further the Clause 76 of the Bill will operate as a safeguard in that where trial has not commenced within 12 months from the arrest the Court of Appeal may release such person on bail, and the High Court may release the suspect on bail as well if there are exceptional circumstances.

Clause 31 – Detention orders

Clause 31 of the impugned Bill providing for detention orders has made several changes in comparison with Clause 31 of the previous Bill. The previous CTA Bill of 2018 empowered a DIG to issue a detention order on an application made by an OIC of a police station. Under the present Bill the IGP or an officer not below the rank of a DIG authorized by the IGP must seek a detention order from the Secretary to the Ministry of the Minister of Defence.

Clause 31 (2) prescribes the purposes for which the Secretary to the Ministry of Defence could issue such a detention order namely

(a) *to facilitate the conduct of the investigations in respect of the suspect;*

(b) *to obtain material for investigations and potential evidence relating to the commission of an offence under this Act;*

(c) *to question the suspect in detention; and*

(d) *to preserve evidence pertaining to the commission of an offence under this Act, for such reasons to be recorded in the Detention Order.*

It bears noting that a detention order must also set out reasons for its issuance in addition to the above prescribed purposes for which they should be issued. This is an improvement that goes to minimize potential abuse of detention orders and such an advancement did not exist even in the 2018 Counter Terrorism Bill. Another positive improvement is the requirement that a copy of the detention order has to be served on the suspect and his next of kin. Clause 31 (3) introduces a consultation with the Human Rights Commission in regard to conditions of detention. The fact that approved places of detention would be gazetted by the President under the Anti-Terrorism Bill brings about transparency as to the identity of the facility where the suspect would be detained. A copy of the detention order would also be served on the Human Rights Commission, as soon as practicable and the officer in charge of the place of detention has been placed under a duty to notify the Human Rights Commission not later than seventy two hours from the commencement of detention.[35] This would enable the Human Rights Commission to visit the place of detention in terms of the Human Rights Commission of Sri Lanka Act, No.21 of 1996.

It was submitted before this Court that the Secretary to the Ministry of Defence would be exercising judicial power when he proceeds to issue a detention order. This argument goes contrary to the constitutional arrangement as found in the Constitution. Article 13(4) of the Constitution is unambiguous when it declares that the arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial shall not constitute punishment. Implicit in this provision is the statement that the detention is not punitive and therefore as only a judge can order punishment and detention after trial, a pre-trial detention pending investigations does not amount to an exercise of judicial power. In other words, there is a clear distinction between executive detention and punitive detention. Though the right to liberty (freedom of movement) is guaranteed by the Constitution it can

[35] See Clause 33 of the impugned Bill

be curtailed in terms of Article 15(7) of the Constitution in the interest of national security and public order. The right could be subordinated to the exigencies of investigation where there are reasonable (objective) grounds for suspicion.

The English case of *Liversidge v. Anderson*[36] exemplifies executive detention as is found in Clause 31 of the impugned Bill. In this case, one Mr. Jack Perlzweig, who used the alias 'Robert Liversidge', was a British citizen born to Russian parents. He was described as a somewhat shadowy and mysterious figure, who had become a wealthy businessman by the late 1930s. In May 1940, before the battle of Britain, he was serving as a volunteer pilot officer in the Royal Air Force. He challenged his detention in Brixton Prison under Regulation 18B of the Defence (General) Regulations, 1939, which provided that if the Secretary of State made an order in which he recited that he had reasonable cause to believe that a person was of 'hostile association', and that by reason thereof it was necessary that he be detained, the subjective satisfaction of the Secretary of State acting in good faith was sufficient to render such detention as being in accordance with law, and unassailable in Courts of law. Though the majority held that the language of the Act was such as to give power to the Secretary of State to make regulations having the effect for which the Secretary of State contended the question was whether the power had been exercised. That was a question of construing, namely giving the correct meaning to, the words of the regulation. Viscount Maugham held that the house should prefer a construction which would carry into effect the plain intention of those responsible for the regulation rather than one which would defeat that intention. Lord Atkin alone reached a different conclusion;

> *"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on the liberty by the executive, alert to see that any coercive action is justified in law."*

In what has become the *locus classicus* on objective criteria that have to be applied to the subjective language as is found in Clause 31(1)(b) of the Bill, Lord Atkin's dissent serves as

[36] [1942] AC 206

the gateway to open the doors of judicial review to assess the lawfulness of reasons on which the Secretary to the Ministry would issue the detention order. This permits the entertainment of fundamental rights applications and writ applications to impugn detention orders issued on a person. The Petitioners cited the case of *Centre for Policy Alternatives and Another v. Attorney – General and Others*[37] in support of the proposition that the availability of judicial review is no ground to refuse an application alleging violations of fundamental rights. This Court opines that the dicta in this case must be confined to the facts and circumstances of the content of the regulations that were challenged in this case. In fact, the Court went on to hold in the case that the absence of proper judicial oversight throughout the entire process that pertained to de-radicalization renders it inherently arbitrary.

Such an absence of judicial oversight as was found in the above case does not exist in the case of detention orders. As we have observed, detention orders are subject to judicial oversight. It is put 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 despite the fact the Magistrate is required to give effect to the detention order. Even within the period of two months of detention the suspect has to be produced before the Magistrate. At the end of the period of two months the Magistrate is empowered to remand him or discharge him or enlarge him on bail. Apart from the exercise of this oversight the Magistrate is placed under a duty to visit places of detention. He is also empowered to change the location of detention facilities if the circumstances warrant such a course of action. He could make unannounced visits to places of detention. All these would constitute safeguards and improvements on the existing state of the law and one cannot shut oneself from the fact that the fundamental rights as enjoined in Article 4(d) are thus advanced, secured and protected.

Independently of the above, Clause 94 of the impugned Bill permits judicial review applications to be made against any decision, determination, order or direction made by any relevant authority under the provisions of the proposed legislation.

In the end we would also advert to two cases which established that the power of the Magistrate to further detain a suspect in terms of Article 13(2) can be derogated from under Article 15(7) of the Constitution.

[37] SC/FR/91/2021 and SC/FR/106 – 107 / 2021 (SC minutes of 13.11.2023)

This Court considered the paramount interest of maintaining national security in *Kumaratunge v. Samarasinghe, Additional Secretary, Ministry of Defence and Others*[38]:

> *I have already pointed out that the freedom from arbitrary arrest and detention guaranteed by Articles 13(1) and 13(2) of the Constitution is subject to such restrictions as may be prescribed by law in the interests, inter alia, of national security and public order. Law in this context is defined as including "regulations made under the law for the time being relating to public security". It is well recognized that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy, when the foundations of organized government are threatened and its existence as a constitutional state is imperiled.*

The same point was emphasized in *the Special Determination* of this Court on *the Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organizations* (Amendment) Bill[39]:

> *Prima facie, Section 11 appears to be in conflict with Article 13 (2) but Article 15 (7) of the Constitution provides that the exercise and operation of all the fundamental rights declared and recognized, inter alia, by Article 13 (2) shall be subject to such restriction as may be prescribed by law in the interests of national security, public order etc.*

In the circumstances we hold that Clause 31 of the Bill is not inconsistent with the Constitution.

Clause 36 – Detention beyond two months only with approval of a Magistrate.

In terms of the new order that is sought to be achieved under the new dispensation the detention order upon its first issuance is only valid for a period of two months and if it is necessary to extend such order beyond the period of two months the approval of the Magistrate is required under Clause 36. There is also another safeguard that under Clause 38

[38] [1983] 2 Sri LR 63 at 80-81
[39] [Decisions of the Supreme Court on Parliamentary Bills Vol. 1 {1978-1983) 51] at 54

during the currency of a detention order the suspect has to be produced before a Magistrate once every 14 days. It has to be noted that the Bill before this Court seeks to put in place a scheme where after the initial few months of detention any extension would only be made with the approval of a Magistrate. It is enjoined in Clause 36(1) that a confidential report has to be filed before the Magistrate if the period of detention beyond 2 months is sought. However, the burden is placed on the officer in charge of the relevant police station to cite three grounds to extend the period of detention namely

(a) the allegation against the suspect;

(b) the findings of investigation; and

(c) reasons which require further detention

It is only after an inquiry the Magistrate may order the extension of the period of detention or refuse such extension, setting out his reasons. Due process is thus enjoined in that both the police officer seeking the extension of the period of detention and the objections raised by the suspect or his Attorney-at-law have to be heard at the inquiry. There is provision that the Magistrate shall ensure that the disclosure of information in the confidential report would not affect the investigation. In other words, if the Magistrate is to disclose the information contained in the confidential report he is obligated to ensure that the investigation is not prejudiced. There is no explicit recognition of a duty on the part of the Magistrate to furnish information as the right of the suspect to present his case and object to the extension of the period of detention is recognized in Clause 36(3) of the Bill.

Though this Court observes in the Bill a substantial departure of procedure from the PTA in regard to the mode of extension of detention orders, the attention of Court is driven to the fact that the information contained in the confidential report may be necessary to a fuller presentation of the suspect's case for the purpose of securing his freedom and it is not without relevance that the magisterial interposition is brought to bear upon the question whether the suspect must be discharged or placed in remand custody.

Clause 38(4) of the Bill indicates that the investigation authorities need to consistently carry out investigations under the scheme of the Act, if the investigation officers wish to obtain an order from the Magistrate to place a suspect in remand custody.

Clauses 42 and 46 - An Attorney-at-Law to have access to a person in remand or in detention and suspect be treated humanely.

These two Clauses ensure that the Attorney at Law of a person remanded or detained under the Act has the right to access such person and make representations on his behalf. A person so remanded or detained under the Act has the right to communicate with relatives (Clause 42) and the proposed legislation also makes provision to ensure that the suspect be treated humanely (Clause 46). Both these provisions are thus included to ensure that the rights of the suspect under the Constitution are protected, and are therefore in line with Article 4(d) of the Constitution.

While access to an Attorney-at-law is subject to regulations, the same is not unconstitutional as alleged by the Petitioners. It is noteworthy that this Court examined section 10A of the Prevention of Terrorism (Temporary Provisions) Act and declared it constitutional in its Special Determination on the Prevention of Terrorism (Temporary Provisions) (Amendment) Act 2022.

The Court wishes to observe that there appears to be a discrepancy between the Sinhala and English texts of Clause 42 in that whilst the Sinhala text presupposes the existence of regulations for access of an Attorney-at-law to be provided to a suspect, under the English text the access to an Attorney-at-law does not seem to be based on the existence of regulations. If Clause 42 as it appears in the English text is adopted in the Sinhala text, it is only then that this provision will pass constitutional muster in terms of Article 12 (1) of the Constitution. In the circumstances this Court determines that this provision will remain unconstitutional as long as the Sinhala text remains unamended. As long as this unconstitutionality remains, Clause 42 cannot be enacted into law except with a special majority required by the Constitution. The unconstitutionality will cease if the textual disparity is remedied.

Clause 52 – Powers to facilitate investigations

Under Clause 52(1)(e), a police officer conducting investigation is empowered to secure a statement on affidavit or oath provided that a prior order of a Magistrate permitting this course of action is obtained. In our view we do not find this obnoxious as the sanction of a Magistrate would provide a safeguard against the rights of the suspect being trampled upon.

Clause 53 - Use of force to stop a vessel or vehicle

Clause 53 is to the following effect;

> *Where the person in charge of any vehicle, vessel, train or aircraft disobeys any order given by a police officer or any other person acting on his demand for halting any such vehicle, vessel, train or aircraft for the purposes of this Act, such police officer or the person may use such force as may be necessary to halt such vehicle:*
>
> *Provided however, any such force may be used only where all other means of halting the vehicle, vessel, train or aircraft have proved ineffective:*
>
> *Provided further, any such officer shall not use excessive force except in the exercise of private defence within the meaning of the Penal Code.*

Though the practice of the police seeking assistance to apprehend an offender is not *per se* illegal, the manner in which Clause 53 is couched leads to uncertainty. Since the use of force by any other person acting on the demand of a police officer is likely to cause confusion in the mind of the person who is ordered to comply with the order given by such person acting at the dictation of the police officer, there is every possibility that the person ordered would not be aware of the delegated power of the civilian person who has ordered the vehicle or other mode of transport to stop. In such a situation the power of the civilian to stop a vehicle may not be obeyed and to that extent this provision is arbitrary and will fall foul of Article 12(1) of the Constitution resulting in a special majority needed to enact this provision into law. This inconsistency will cease if the words "any other person acting on his demand" are omitted.

Clause 60 - Police may issue directives for the protection of the public.

Clause 60 permits an officer not below the rank of a Senior Superintendent of Police where reliable information is received that an offence under the Act is committed or is likely to be committed to make certain directives for the protection of the public, if such officer is of the opinion that there is clear and present danger, and such directive is necessary to protect persons from harm.

At the outset it has to be observed that Clause 60(1) has explicitly enumerated the circumstances in which the powers given therein may be used, and also that such powers are to be exercised to prevent harm to persons.

The directives that may be issued under this Clause broadly relate to imposing constraints on the freedom of movement under Article 14(1)(h), the freedom of peaceful assembly under Article 14(1)(b) and association under Article 14(1)(c) of the Constitution. Such constraints are legitimate restrictions on fundamental rights that may be imposed under Article 15(7) of the Constitution, in the interests of both national security and public health.

Moreover, as stated in the proviso to Clause 60(1) of the Bill, such directive cannot be issued without the prior approval of the Magistrate, who must be satisfied of the necessity of the directive and also make the directive(s) subject to any condition. Thus, judicial oversight is provided for in order to ensure that the restrictions are imposed only where necessary. Under Clause 60 (2) the Human Rights Commission of Sri Lanka has to be informed of any directive by the relevant officer who issued such directive or the Magistrate who granted prior approval for any such directive under paragraphs (a) to (m).

The duration of the directive and further the limitations of the consequential powers which are conferred on police or members of the armed forces, mainly referring to search and otherwise giving effect to the directive, where authorized are also stipulated in this Clause. Therefore, any person may reasonably comprehend the scope of such powers conferred on the police/armed forces and take steps to regulate their behaviour accordingly. Considerations of gender sensitivity are also acknowledged and enforced under sub-Clause (9) of this Clause.

In consideration of all the factors referred to above, the Clause 60 is consistent with the Constitution.

Clause 70 - Suspension and deferment of indictment

The Petitioners contended that Clause 70 of the Bill clothes the Attorney General with the power to suspend or defer the institution of criminal proceedings, which is inconsistent with Articles 3, 4(d), 11 and 12(1) of the Constitution. The Petitioners have also argued that this power attempts to legitimize an existing practice where persons in detention are compelled to accept rehabilitation which is a form of punishment without guilt.

The Court would set out at the outset that if the objectives 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 concept of Deferred Prosecution Agreements (DPAs) owes its parentage to several jurisdictions across the world. It is well ingrained in the United Kingdom, the United States of America and Singapore. The Crimes and Courts Act of 2013 introduces Deferred Prosecution Agreement in the UK and sets out specific offences to which DPAs would apply in Part II of Schedule 17 of the said Act.

The principles pertaining to DPAs were discussed in the case of ***SFO v Sarclad*** **Ltd**[40] in which the Serious Frauds Office of the UK entered into a DPA with the company Sarclad for the offence of Conspiracy to commit bribery and failure to prevent bribery. The said case discussing the implications of DPAs noted the following:

> *"[T]here is no doubt that Sarclad's conduct was very serious both in terms of type and scale so that it is not straightforward that a proposed DPA is in principle in the interest of justice. However, it is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and*

[40] [2016] 7 WLUK 804

putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile."

It is important to note that DPAs are intended to be an important component in meting out justice in the criminal justice process. The reasons set out above and the rationale provided for in the case of ***SFO v Sarclad Ltd*** show clear justification as to why DPAs would be important in relation to offences committed by private sector entities.

Further, in any DPA the Attorney General must follow a stringent process under judicial supervision and obtain the sanction of the High Court for the suspension and deferring of the indictment. This sets out a clear mechanism of judicial oversight.

In this background it is appropriate to look at Clauses 70 (3) and (4) which read as follows:

(3) *Where the Attorney General decides in terms of subsection (1) to suspend and defer the institution of criminal proceedings against any person alleged to have committed an offence under this Act, he shall prefer an application to the High Court, to obtain the sanction of such Court to the imposition of one or more of the following conditions on such person as consideration for the suspension and deferment of the institution of criminal proceedings against such person: -*

[...]

(4) *The High Court shall, upon consideration of the application made by the Attorney General under subsection (3), order the person alleged to have committed the offence to appear before the Court, shall notify such person of the conditions imposed by the Court and be afforded an opportunity to be heard and consent to the conditions so imposed by the Court.*

Hence, the DPAs envisaged by Clause 70 are subject to judicial scrutiny and similar to the United Kingdom, in assessing the fairness and reasonableness of the DPAs the judges would

be able to adopt a suitable criterion in approving DPAs presented to them. Such judicial oversight eliminates any arbitrariness or irrationality that may arise in the operation of such Deferred Prosecution Agreements.

In view of the detailed criteria and procedure laid down for the initiation and operation of a deferred prosecution agreement, as well as the role of the Court in that process, it is evident that there has to be a consensual agreement in the first instance between the prosecutor and the suspect and it is thereafter that Court sanction has to be obtained. However, as the proposed section is couched, it does not clearly bring out the requirements of a prior agreement before the jurisdiction of the Court is invoked. As such Clause 70 of the Bill becomes inconsistent with Article 12(1) of the Constitution and has to be passed by a special majority. The Clause 70(1) will cease to be inconsistent if it is suitably amended to incorporate the prior consensual agreement to be reached between the Attorney-General and the person charged with an offence amenable to deferred prosecution agreements.

We observe elements of restorative justice accruing to the benefit of both the accused and the victim by virtue of Clause 70(3) of the Bill but such facets of justice will not inure to the benefit of the accused and the victim, unless Clause 70(1) is suitably amended to reflect the agreement we have referred to above and the subsequent sanction of Court, where the accused and the victim voluntarily and genuinely manifest the conditions stipulated in Clause 70(3) of the Bill.

On the question of DPAs, even international conventions such as the UNCAC[41] recognizes immunity from prosecution in some instances such as cooperation with law enforcement authorities. Article 37.1 of the UNCAC provides that *"Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention"*.

Additionally, we advert to the Special Determination on the Anti-Corruption Bill[42] that considered the question of applicability of DPAs to legal entities and determined that as far

[41] The United Nations Convention Against Corruption
[42] SC/SD/16-21/2023

as the applicability of DPAs was limited to body corporates, DPAs within the four corners of the Anti-Corruption Bill would not be unconstitutional. However, this Court would not find it obnoxious and offensive of the Constitution if the DPAs that are sought to be introduced by the proposed legislation cover a diverse range of activities related to terrorism and should satisfy the criteria of restorative justice which would be beneficial to both the victim and the accused in a process of reconciliation and non-recrimination.

However, in order to bring constitutional consistency to the Clause 70, we determine that it should be amended so as to incorporate the prior agreement between the Attorney General and the accused and the component of subsequent judicial sanction. The Clause will cease to be inconsistent only if this amendment is introduced.

Clause 72 – Detention until conclusion of trial

As it stands, Clause 72 allows the Secretary to the Ministry of the Minister of Defense in the enumerated circumstances to make an order detaining a person till the conclusion of a trial. Though the provision refers to a power being vested in the Secretary to the Ministry of Defense to detain an accused person indicted with an offence in the High Court on the grounds of national security and public order, this order of the Secretary has been subjected to directions to be given by the High Court for the purpose of ensuring a fair trial.

Undoubtedly, this Clause bears the hallmarks of Section 15A (1) of the PTA which was challenged when it was sought to be enacted as far back as 1982. Section 15A (1) of the PTA Bill empowered the minister to make order that a person be kept in the custody of any authority and thereby permitting to substitute his order of custody in place of the order of remand made by the High Court. In the result the person in custody would be removed from judicial custody and placed under ministerial custody. In the matter of a reference made under Article 122 (1) (b) of the Constitution, the Cabinet of Ministers had certified that the Bill was urgent in the national interest.

While holding that the Section 15A (1) constituted an interference with a judicial order and would be inconsistent with the provisions of Article 4(c) read with Article 3 of the Constitution, the Court opined that the Bill must be passed by a 2/3rd majority and approved by the people by a referendum. However, the Supreme Court comprising Samarakoon C.J, D.

Wimalaratne, J and Victor Perera, J held that the Bill could be amended to make the Ministerial Order administrative subject to such directions as may be given by the High Court to ensure a fair trial of the person/persons in custody.

Though Clause 72(1) of the impugned Bill is similarly couched as the enacted 15A (1) of the PTA subsequent to the SC determination in 1982, this Court observes substantial differences between the two provisions. Clause 72(1) begins with the words "notwithstanding any of the provision of its Act or any other written law" thus resulting in the defeasance or removal of several safeguards inherent in the impugned Bill available to suspects placed under a detention order. It would appear that under Clause 72 (1) a detention order can be imposed even on persons who have been enlarged on bail by the High Court. There is no maximum period of detention prescribed for the accused persons who are sought to be captured under Clause 72(1) of the Bill.

Whilst detention orders made under Clause 31 of the Bill carries with it a slew of safeguards such as short periods of detention, magisterial visits and forensic examination, the detention orders sought to be made under Clause 72 do not confer the benefit of such safeguards. In the circumstances Clause 72 is arbitrary and discriminatory and therefore it could be passed only with a special majority required by the Constitution. In view of the infringement with a judicial order that may arise owing to the imposition of a detention order on an indictee it amounts to a violation of 4 (c) with Article 3 and therefore Clause 72(1) has to be passed by a special majority of Parliament and approved by the people at a referendum. This invalidity can only be cured by suitably amending Clause 72.

The provision will also cease to be unconstitutional if Clause 72(1) is appropriately amended by the deletion of the words "notwithstanding any other provisions of this Act or any other written law" and this invalidity can be cured if provision is made in Clause 72(1) to accord the same benefits available for detention orders made under Clause 31. Accordingly,

The amended Clause 72(1) will read as follows;

> (a) *if the Secretary to the Ministry of the Minister of Defence is of opinion that it is necessary or expedient that a person against whom an indictment has been forwarded under the Act be kept in*

the custody of any authority, in the interest of national security and public order during the pendency of the trial, he may make an application to the High Court where the case against the person is pending, setting out the reasons that necessitate the issuance of a detention order and after hearing such application and the objections thereto the High court may grant sanction to the application to issue the detention order subject to directions.

(b) such directions in addition to ensuring a fair trial of such person, shall include an order that the detention of the indictee shall be subject to the same conditions, mutatis mutandis, as are applicable to a person detained in terms of Section 31.

Correspondingly Clause 72 (2) must be amended as follows;

Any detention order made in pursuance of sub section (1) shall be communicated to the Commissioner General of Prisons and it shall be the duty of such Commissioner General, to deliver the custody of such person to the authority specified in such detention order and the provisions of the Prisons Ordinance (Chapter 54) shall cease to apply in relation to the custody of such person.

The summary of determinations at the end hereof also carries the above formulation of the necessary amendment to Clause 72(1).

Clause 75 – Withdrawal of indictment

In terms of Clause 75(1) of the Bill the Attorney General is empowered to withdraw the indictment against an accused having due regard to the facts specified in Clause 75(2) and subject to one or more conditions referred to in subsection (3) with the sanction of the High Court. As Clause 75 (3) stands, the intervention of the High Court in imposing conditions is not specifically made clear. In the circumstances this Court determines that Clause 75(3) will infringe Article 4(c) read with Article 3 of the Constitution resulting in the requirement of a

2/3rd majority and a referendum. The invalidity will cease upon an amendment being made to Clause 75(3) of the Bill.

Clause 75 (3) must be amended as follows:

> *(3) On an application made by the Attorney General, the High Court may impose one or more of the following conditions:-*
>
> *(a) to publicly express remorse and apology before the High Court, using a text issued by the Attorney General;*
>
> *(b) to provide reparation to victims of the offence, as specified by the Attorney General;*
>
> *(c) to voluntarily participate in a specified programme of rehabilitation;*
>
> *(d) to publicly undertake that he refrains from committing an offence under this Act or under any other law;*
>
> *(e) to engage in specified community or social service;*
>
> *and*
>
> *(f) to refrain from committing, any indictable offence, or, breach of peace.*

Clause 83(7) – Non conviction based forfeiture

In terms of Clause 83(7) of the Bill, where any person has been acquitted of any charge under this Act, the Court may make order that any property used for or derived out of the commission of such offence be forfeited and confiscated to the state. Sharvananda, C.J in the well known case of *Manawadu v. the Attorney General*[43] held that;

[43] (1987) 2 Sri.LR 30

Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17 (1) of which states that everyone has the right to own property and Article 17(2) guarantees that no one shall be arbitrarily deprived of his property. The contention of State Counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the courts will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly (Vide Lord Denning in R v. Chief Immigration Officer[44]).

In light of the above dicta, before Court proceeds to forfeit and confiscate the property used for or derived out of the commission of the offence under the Act in the event of an acquittal, anyone making a claim to the property is entitled to be heard on the forfeiture at an inquiry. This will satisfy the *audi alteram partem* rule.

This clause as it stands will lead to an ambiguity that any person who has a claim to make to the property used for or derived out of the commission of the offence may not be heard at an inquiry. The provision becomes vague to the extent of this ambiguity and thus requires a special majority to be passed into law. It has to be suitably amended by adding the following paragraph as (b) to 83 (7);

Any person having an interest to the property should be afforded an opportunity to be heard before such an order is made.

The above would sum up the pith and substance of the arguments that were raised before this Court for and against the provisions of the Bill and our conclusions thereon. We would now summarize the determinations we are enjoined to make in pursuance of Article 123(1) of the Constitution.

[44] (1976) 3 All ER 843, 847

Where this Court determines any inconsistency with the Constitution, this Court is bound to give reasons and state whether the said Bill or any provision thereof is violative of the Constitution. The consequential determinations this Court is required to make are specified in Article 123(2) which reads:

> (2) *Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the constitution, it shall also state –*
>
> *(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or*
>
> *(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or*
>
> (c) *whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83, and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.*

It is in pursuance of the above the following summary is rendered setting out the gist of our determinations.

Summary of Determinations.

1. **Clause 3** of the Bill is inconsistent with Article 12(1) of the Constitution and thus it requires a special majority to be passed by Parliament. This inconsistency will cease to be operative if the carve out or exemption as formulated by this Court is adopted as an amendment to the said Clause 3. Such an exemption could be enacted on the following lines;

The fact that a person engages in any protest, advocacy, or 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 (1) of Section 3.

2. The existing **Clause 3(2)(l)** has to be amended by the addition of the word "OR" followed by a paragraph referring to the Treaties specified in Act No.25 of 2005. The amended Clause 3(2)(l) would read as follows;

(l) Committing an act which constitutes an offence within the scope of the Convention on the Suppression of Terrorist Financing Act, No.25 of 2005

or

Committing an act which constitutes an offence within the scope of or within the definition of any one of the Treaties specified in Schedule I to the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005.

3. **Clause 4** has to be suitably amended to read as follows;

Although the Attorney General has proposed an amendment to Clause 4(1)(b), the ambiguity in regard to punishments for *actus reus* elements from Clause 3(2)(b) to Clause 3(2)(l) still prevails on account of a lack of precision in the formulation as has been tendered to this Court.

We observe that this lack of clarity in Clause 4(1)(b) for penalties in regard to Clause 3(2)(b) to Clause 3(2)(l) should be remedied at the committee stage of Parliament in the following manner:

(1) Any person who-

(a) commits the offence specified in subsection (1) of section 3 read with paragraph (a) of subsection (2) of section 3, shall, upon conviction by the High Court be punished with imprisonment for life;

(b) commits an offence specified in subsection (1) of section 3 read with paragraphs (b) or (c) or (d) or (e) or (f) or (g) or (h) or (i) or (j) or (k) or (l) *of subsection (2) of section 3, shall upon conviction by the High Court be liable to rigorous imprisonment for a term not exceeding twenty years and to a fine not exceeding rupees one million.*

4. **Clause 42** - The Sinhala text of the Clause has to be brought into harmony with the English text as they both conflict with each other thus resulting in constitutional invalidity in terms of Article 12(1) of the Constitution which would require a special majority to enact Clause 42. If the Sinhala text is amended in accordance with the English text, the constitutional invalidity will cease to operate and the amended Clause 42 can be enacted into law by a simple majority.

5. **Clause 53** - This provision as it stands is arbitrary and will fall foul of Article 12(1) of the Constitution resulting in a special majority to enact this provision. The inconsistency with the Constitution will cease if the words "any other person acting on his demand" are omitted from the provision.

6. **Clause 70 –** For reasons set out in the determination, Clause 70 is inconsistent with Article 12(1) of the Constitution and requires a special majority to be enacted into law. However, the inconsistency will cease to be operative if Clause 70 is amended to reflect the prior agreement between the Attorney-General and the person charged and the subsequent sanction of Court.

7. **Clause 72 (1)** – For reasons set out in the determination the Court concludes that as it stands, Clause 72(1) is unconstitutional and needs to be passed by a special majority and a referendum if it is to become law. The unconstitutionality will cease upon the following amendments made to Clause 72(1).

   The amended Clause 72(1) will read as follows;

   (a) *if the Secretary to the Ministry of the Minister of Defence is of opinion that it is necessary or expedient that a person against whom an indictment has been forwarded under the Act be kept in the custody of any authority, in the interest of national security and public order during the pendency of the trial, he may make an application to the High Court where the case against the person is pending, setting out the reasons that necessitate the issuance of a detention order and after hearing such application and the objections thereto the High court may grant sanction to the application to issue the detention order subject to directions.*

   (b) such directions in addition to ensuring a fair trial of such person, shall include an order that the detention of the indictee shall be subject to the same conditions, mutatis mutandis, as are applicable to a person detained in terms of Section 31.

Correspondingly Clause 72 (2) must be amended as follows;

Any detention order made in pursuance of sub section (1) shall be communicated to the Commissioner General of Prisons and it shall be the duty of such Commissioner General, to deliver the custody of such person to the authority specified in such detention order and the provisions of the Prisons Ordinance (Chapter 54) shall cease to apply in relation to the custody of such person.

8. **Clause 75 – Withdrawal of indictment**

In terms of Clause 75(1) of the Bill the Attorney General is empowered to withdraw the indictment against an accused having due regard to the facts specified in Clause 75(2) and subject to one or more conditions referred to in subsection (3) with the sanction of the High Court. As Clause 75(3) stands, the intervention of the High Court in imposing conditions is not specifically made clear. In the circumstances this Court determines that Clause 75(3) will infringe Article 4(c) read with Article 3 of the Constitution resulting in the requirement of a 2/3rd majority and a referendum. The invalidity will cease upon an amendment being made to Clause 75(3) of the Bill on the following lines.

3) On an application made by the Attorney General, the High Court may impose one or more of the following conditions:-

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

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

(c) to voluntarily participate in a specified programme of rehabilitation;

(d) to publicly undertake that he refrains from committing an offence under this Act or under any other law;

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

and

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

9. **Clause 83 (7) –**

Clause 83 (7) as it stands must be renumbered as 83 (7) (a). Another paragraph itemized as (b) must be added thereafter to Clause 83 (7). The amended Clause 83(7) will read as follows;

Clause 83 (7) (a);

Where any person has been acquitted of any charge under this Act, the Court may make order that any property used for or derived out of the commission of such offence be forfeited and confiscated to the state

Clause 83 (7) (b);

Any person having an interest to the property should be afforded an opportunity to be heard before such an order is made.

We have examined comprehensively the provisions of the Bill vis-à-vis the arguments that were raised by the respective Counsel for and against the provisions of the Bill. We are mindful that this new legislation, if enacted into law, will repeal and replace the much maligned and controversial PTA. The provenance of the PTA is worth recalling as terrorism was burgeoning and the response was conceived as a temporary measure which has admittedly outlived itself. The special majority with which the PTA was enacted did not emanate from a judicial pronouncement. It was a voluntary undertaking from the Cabinet of Ministers which only necessitated the then Supreme Court to ascertain whether a referendum was needed to pass that Bill into the statute books of this country. The only question that was required of the Supreme Court was to examine whether a referendum was needed in terms of the Constitution.

However, in regard to this Bill this Court embarked upon its constitutional duty to ascertain whether the Bill before us or any provision thereof may only be passed by a special majority or the special majority and by a referendum. Bearing in mind the constitutional duty, we have subjected the provisions of the Bill to an anxious scrutiny having regard to the constitutional touchstones such as Articles 11, 12, 13 and 14 of the Constitution and permissible derogations that have to meet the standard of proportionality under Article 15(7) of the Constitution.

Having scrupulously examined the provisions of the Bill within the four corners of the remit of our jurisdiction, we determine that subject to the amendments we have adumbrated to the provisions of the Bill, the Bill could be enacted into law with a simple majority only if the amendments determined by us are introduced to the provisions, that will make them consistent, in the end.

We place on record our appreciation of the thoroughness and diligence that all learned counsel brought to bear on their comprehensive oral and written submissions in the resolution of the constitutional questions immanent in the Bill.

Jayantha Jayasuriya, PC.
Chief Justice

Vijith. K. Malalgoda, PC.
Judge of the Supreme Court

A. H. M. D. Nawaz
Judge of the Supreme Court

A. L. Shiran Gooneratne
Judge of the Supreme Court

Arjuna Obeyesekere
Judge of the Supreme Court