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THE-PROTECTION-OF MINORITY RIGHTS-IN-SRI-LANKA-A CRITICAL ANALYSIS-OF THE-ROLE-OF THE-JUDICIARY

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ABSTRACT

The rights of the minorities; Tamils, Muslims and Indian origin Tamils have not been protected in many instances in Sri Lanka. The paper attempts to explore the role of the judiciary in protecting the rights of the minorities and how it responded to it in the post - independence era. There are plenty of cases ranging from the Mudanayake case, showcase the failure on the part of the judiciary to positively respond to the claims of the minorities. The researcher has analysed the manner in which the judiciary approached and determined the minority claims and the factors if any which prevented the judiciary from actively engaged in the process. The judiciary in a multi ethnic country like Sri Lanka, has the responsibility to protect the interests of the minorities which is a sina qua non for the nation building process. Nonetheless the failure to adopt sensitive approach, and the inability to superintend the functions of the other organs, has significantly impacted in causing deeply divided societies in Sri Lanka. The research is a qualitative study. The provisions of the successive Constitutions, legislations, research papers and relevant cases are critically analyzed. Kishali Pinto Jayawardena and Jayantha De Almeda Gunaratne are interviewed as they possess sound knowledge in dealing with the cases involving minority rights and have engaged in a series of research on the topic. It is worthy to understand the role of the judiciary in protecting the minority interests in the time when the state has committed to building up the nation through the reform of the present Constitution.

Keywords: *Contribution, Minorities, Protection judiciary, Rights*

1. INTRODUCTION

Tamil speaking minorities viz; Tamils (North and East), Muslims and Up country Tamils have been discriminated in many aspects in Sri Lanka. The constitutional arbiter of the rights of the citizens, the judiciary too has contributed to the same and deeply divided communities are the result.

The paper attempts to explore the role of the judiciary in protecting the rights of the minorities in Sri Lanka since independence. To this end the provisions under the successive Constitutions in respect of minority protection will be evaluated. Most importantly the approach of the judiciary towards the protection of minority rights will be analyzed through critical analysis of the judgments of the court. In addition to the desk based analysis of constitutional

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provisions, decided cases, books, and research papers, interviews have been conducted with Kishali Pinto Jayawardena and Dr.Jayantha De Almeda Gunaratne, researchers on this field.

2. WHO IS A MINORITY?

The term minority has no concrete legal definition but several attempts have been made to define it. According to Fransisco Capotorti , a Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and protection of minorities minority group is defined as , a group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintains a sense of solidarity, directed towards preserving their culture, traditions, religion or language. The permanent Court of International Justice in its advisory opinion on the Greco-Bulgarian Convention on Emigration, referred to minorities as a group of persons living in a given country or locality , having race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship ,ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

These subjective definitions; expression of the desire to preserve its own traditions and cultures and the permanent establishment within a state were endorsed by many states and few states such as Spain and Yugoslavia favored the objective approach. As pointed out by Greek government, a minority should be sizable and 'substantially compact' and the relation between the number of the minority and the size of the geographical area in which the group lives must be taken into account.

Because of the definitional difficulties, it is recommended to abandon the term 'minority'. The terms "national, ethnic, linguistic, cultural, religious, and tribal groups" are used in its place. However minorities on the grounds such as migrant workers, indigenous people are neglected even in the alternative terminologies. The international concern is not only the abandonment of the term minority but also a healthy approach to protect the interests of the minority people.

3. PROTECTION OF MINORITY RIGHTS -INTERNATIONAL LAW PERSPECTIVE

The concept of protection of minority groups incorporated into the International Human Rights under three different heads; non systematic protection consisting mainly the protective clauses in international treaties particularly for religious minorities ,secondly the system established after world war I, with the framework of the League of

Nations and the developments in the United Nations era.

The Treaty of Westphalia (1648), the treaty of Oliva (1660) the treatyof Nimeguen are few among the treaties which incorporated clauses ensuring the rights to religious minorities. The protection of minority rights was systematically carried out with the framework of the League of Nations. Minority schools were established in several countries, neglected groups were rehabilitated, forced assimilation was resisted and representatives of democratic minority groups could play a role in the political affairs of countries such as Czechoslovakia and Latvia. Moreover, the methods of mediation and conciliation produced some results and the Permanent Court of International Justice contributed to the protection of minorities with important decisions, of great value even today. The advisory opinion of the Permanent Court of Justice on the subject of *Minority Schools in Albania*(delivered on 6 April 1935) ,stated that the idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a state, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and co-operating amiably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary the first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the state, the second is to ensure for the minority element suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

The minority provisions in the treaties were considered to be fundamental and could not be limited by ordinary legislation. Amendment of those provisions would only be possible when approved by a majority in the Council of the League of Nations. Individuals or groups could submit petitions to the Council of the League and a committee consisting of three members was appointed to inquire into the complaints.

With the establishment of the United Nations, the concept of minority protection travelled in a different dimension. Instead of group rights as it was understood in the previous era, is emphasized on individual rights in the UN era. The rights are individual based on the ground of non - discrimination. This trend could be seen via the provisions of the United Nations Charter (Article 1(3), the Universal Declaration of Human Rights (Article 2 (1) and the International Covenant on Civil and Political Rights(Articles 2(1) and 26.

The international community realized that the non- discrimination rule and individual centered system of human rights are in adequate to protect the rights of the

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individuals as members of a group and the groups' interest at large. It is understood that the status of regionalism, indigenous people and migrant workers could not be dealt by either the old or new approach regard to the rights of the people. New legal instruments have arisen with different terminologies such as communities, people, social group or group, instead of minorities. The new trend focuses on harmonization of the rights of the state, the individuals and the group. Such an approach was adopted in the 1978 UNESCO Declaration on Race and Racial Prejudice which emphasizes on the need to protect the identity and the full development of groups. It stresses the need of affirmative action for disadvantaged or discriminated groups. The Convention on the Prevention of the Crime of Genocide ,ILO Conventions , the UN Convention on the Elimination of all forms of Racial Discrimination are few among the treaties which get along with this new trend. The International law is changing its approach to group and its rights.

4. PROTECTION OF MINORITY RIGHTS IN SRI LANKA- CONSTITUTIONAL ARRANGEMENTS

4.1 Soulbury Constitution

It is an accepted fact that the Sri Lankan state consists of ethnic, linguistic and religious minorities who demands for non-discrimination or equal treatment from the colonial period to date. An institutional arrangement was made under the Soulbury Constitution, in consideration of the continuous demand from the minority communities for equal treatment, in the form of section 29(2) which reads as follows,

No such law shall;

(a) prohibit or restrict the free exercise of any religion or

(b) make persons of any community or religion liable to disabilities or restriction to which persons of other communities are not made liable or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religion or

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

The section 29(2) meant to be an entrenched clause with the iron-clad guarantee of non-amenability. It was incorporated into the Constitution as a guarantee for the minorities who opposed the unitary form of government in Sri Lanka and in fact sought for another model of Constitution the establishment of an ethnicity ascertained sub state a Tamil home land in the northern and eastern provinces. As expressed in the dictum of Lord Pearce in the *Bribery Commissioner v Ranasinghe* case: Article 29(2) represents the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution: and these are therefore unalterable under the Constitution. The non-alterable character of section 29(2) could be drawn from some secondary sources too, Eg; during the debate on the

Ceylon Independence Bill in the House of Commons on 21 November 1947, the then Secretary of State for the Colonies, Mr.Creech Johnesdeclared: I should perhaps also mention that the Government of Ceylon, while able in the future to amend their Constitutions, have felt that the provisions of the existing Constitution safeguarding minorities should be retained. In*Ibralebbe v the Queen* Lord Viscount Radcliffe stated that the parliament can make laws for peace, order and good government, subject to the reservations contained in Section 29(2) and supported the unalterable character of section 29(2).

The British rulers following their conventions did not desire to have a bill of rights in the Constitution with the believe that will limit the application of rights to those only guaranteed by the Constitution and felt that the section 29(2) will exclusively protect the rights of the minorities. This was proved to be wrong and Lord Soulbury regretted for such an omission.

Section 29(2) was not operated as expected and several laws were passed in contravention to the section and most notably the judiciary in Sri Lanka and the Privy Council, the highest appellate court till 1972, did not show the courage to invalidate those laws according to section 29(3), in many instances. The bitter experiences will be dealt with in detail in the present paper.

As expressed by Prof.Lakshman Marasinghe that the section 29(2) and its unalterable status became a painful throne in the minds of the Sinhalese as it questions the independence status of the country and attempts were made to obsolete the minority safe guarding provisions in the autochthonous Constitutions and in return the polarization of the communities resulted and remain unsettled.

4.2 Provisions under First Republican Constitution

The first republican Constitution contained a chapter on fundamental rights. Even though the declared rights were justiciable before the Supreme Court, they were subjected to a wide range of limitations unlike section 29(2). Buddhism was recognized as the state religion. The Sinhala language received the constitutional recognition as the sole official language of Sri Lanka while Tamil language was permitted to be used for prescribed administrative purposes as per the Tamil language (Special Provisions) Act of 1958.

The Tamil representatives walked out of the Constitution Assembly procedures as the drafters of the Constitution did not even consider the minimal request to have at least a provision like 29(2) of the Soulbury Constitution. When Mr.Suntharalingam challenged the drafting process of the 1972 Constitution on the ground of repealing the Soulbry Constitution, the court dismissed the case stating that the court has no authority to challenge the Constitution before it is established.

4.3 Second Republican Constitution

The 1978 Constitution provided for a list of fundamental rights including the right to free from torture, freedom of expression, freedom of movement, freedom from arbitrary arrest and detention etc, but without guarantee for right to life and the rights are subjected to prescribed limitations under Article 15. The Tamil language had been recognized as one of the national languages along with Sinhala and Sinhala retained as the sole official language. Tamil was also recognized as an official language subsequently with the 13th amendment to the Constitution. Sinhala and Tamil were declared as the languages of court and administration throughout the country with the limitation of use of Tamil language only in the North and east and Tamils were destined to live in translation in rest of the country. These arrangements have caused practical inconvenience since the languages are used in different contexts for different persons depending on the geographical areas where the people are located. The lack of provisions to the effect of ensuing rights to a citizen to enjoy his or her linguistic rights and receive services from the public sector in any of the three languages of his or her choice, not depending on the geographical area, showcase the defects in the language policy of Sri Lanka.

A provision similar to section 29 (2) was not brought into the Constitution to do justice to the minorities, other than Articles12(2) which prohibits discrimination on the ground of ethnicity, race, language, religion etc., Article 12 (3) which provides no person shall be subjected to disability, liability, restriction or condition regarding access to shops , public restaurants, hotels, places of worship etc. on any ground whatsoever, and Article 14 (1) (f) which guarantees the right of a person or in association with others to practice and promote his own culture and use his own languages. When these constitutional provisions barring discrimination on the ground of ethnicity, religion ,language, are violated by executive actions, remedy could be sought from the Supreme Court of Sri Lanka which is also subjected to procedural limitation as prescribed under Article 126(2) such as one moth rule, locus standi etc. However they may be amended with simple majority except Articles 10and 11.

Even though the directive principles are not enforceable, Article 27 (6) of insists the state duty to ensure equality of opportunity to citizens, "so that no citizen shall suffer any disability on the ground of language, religion, ethnicity etc. Despite these safeguards, the religion of the majorities was given the foremost place.

The 1978 Constitution emerged soon after the time when Tamils determined to establish a separate Tamil state with autonomy, but the constitution incorporated certain characters such as declaration of unitary state, foremost place to Buddhism, official language status to Sinhala, against the demand of minority communities. The drafters of the 1978 should have acted with

more sensitivity towards minorities in order to calm down ethnicity related conflicts in Sri Lanka. The insensitivity on the part of the drafters of both the republican Constitutions resulted in a long lasting civil war which impacted on the lives, properties of the people belong to Tamil and Sinhala communities. Further the executive presidential system introduced by the 1978 Constitution has weakened the democratic governance and the observance of the principles of rule of law, Constitutionalism etc. The Executive President is vested with the powers to interfere in to the affairs of the other organs and immunized from legal scrutiny.

The constitutional safeguards even though they are minimal and imperfect, are meaningless, unless the judicial system of the particular country cautiously deals with right violations and tries at its best to interpret and give effect to those provision with the aim of protection of minorities who form part of the country. A good judiciary can give maximum effect to the constitutional provisions protecting minority rights through judicial activism. The functioning of the Sri Lankan judiciary, under the operational period of three different Constitutions; one expressly provided for protection of minority rights, the other two provided for a lesser extent, is worthy to examine. To what extent the principles of rule of law and constitutionalism had been borne in mind of the judiciary in pronouncing judgments in cases involving minorities to be analysed under different heads;

1. The citizenship rights of the minorities
2. The language rights of the minorities
3. The civil liberties of the minorities
4. The employment rights of the minorities
5. The land right of the minorities
6. The religious rights of the minorities
7. The power sharing claim of the minorities

5. THE JUDICIAL ROLE

The judiciary in a homogenous country does mechanical interpretation of legislation where the contents of the legislation are in compliance with the general principles and customs accepted by all the people. The same mechanical interpretation of laws, giving high emphasis on the intention of the parliament and the value judgments of the legislature, are unfit to a multi ethnic multi linguistic, multi religious country like Sri Lanka. In the absence of the right to judicial review, the adoption of the mechanical interpretation of laws, made the judiciary in Sri Lanka highly restrained. There are few judicial pronouncements where the judiciary have gone beyond the language, plain meaning of the law and have looked at the spirit of the Constitution and its impact on the society.

The role of the judiciary in protecting the minority rights in Sri Lanka is going to be evaluated through the analysis of the cases under different heads as listed above.

5.1 The Citizenship Rights of the Minorities

In *Mudannayake v Sivagnasunderam* case the decision of the revising officer invalidating the Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1948, which prescribed Citizenship of Ceylon as a necessary qualification of an elector and the Citizenship Act No. 18 of 1948 offending Section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council of 1946 and 1947, was challenged by the Attorney General, the court stated that it is a perfectly natural and legitimate function of the legislature of a sovereign country to determine the composition of its nationals. As the response to the question whether these two provisions impose communal disadvantage, the court stated that in approaching the decision of this question it is essential that we should bear in mind that the language of both provisions is free from ambiguity and therefore their practical effect and the motive for their enactment are irrelevant. What we have to ascertain is the necessary legal effect of the statutes and not the ulterior effect economically, socially orpolitically. This decision was endorsed by the Privy Council in *Kodakkan Pillai v Mudanayke* case. Both the Supreme Court and the Privy Council were insensitive to the fact these legislations infringe the right to be an elector of a minority person, the Indian Tamil and pronounced an inhuman ruling. Radhika Coomaraswamy criticizing these judgments for deferring to the language of the law ignoring the intention of the parliament, the actual facts of the case, the social impact of the law. The court did not challenge the fact the if the status of the Sinhalese could be transferred from British subject to citizens of Sri Lanka why not the same occur with upcountry Tamils. This formalistic method of interpretation by the judiciary has undermined the principles of rule of law in Sri Lanka.

5.2 The Language Rights of the Minorities

The enactment of the Official Language Act made Sinhala as the official language of Ceylon and no reference was made to Tamil or English Languages. As a result of this act, the new entrants to the public service and the old entrants under the age of 50 were compelled to pass a competency test in Sinhala language in order to get salary increment. There was a sharp drop of Tamil representation in the public service between 1956 to 1970 as the consequence of the act.

One of the victims of the act, Mr.Kodeeswaran challenged the validity of the Official Languages Act on the ground that it is made in contravention to section 29(2) of the Soulbury Constitution thus *ultra vires.* The court of first instance endorsed the non-validity, however the Supreme Court rejected the ruing of the court of first instance on the ground that a public servant has no right to sue his employer for wages. When Kodeewaran appealed to the Privy Council also did not check the constitutional validity of the law, instead concentrated on the ability of a public servant to sue the employer.

The failure on the part of the judiciary to uphold the constitutional provisions resulted in unhappy ethnic history and conflict. The linguistic discrimination has generally been accepted as a key grievance of the North-Eastern Tamil community contributing to their demand for self-determination. The Sinhala only policy was viewed not merely the elimination of the Tamil language from its due place in the political life of this county but the shutting out the Tamil speaking people of this country from the political , economic and cultural life of Ceylon and the judiciary has failed to redress the grievances. The practical relevance of the section 29(2) as a tool to protect not only the minorities but also the majorities whose interest were undermined during colonial rule, was unrealized by the judiciary.

Although incremental steps have been taken to recognize the linguistic rights of the Tamil minorities, by the republican Constitutions, the telling effects of the Official Language Act do still continue to afflict the ethnic relations of the country. So much so, although changes effected by constitutional amendments have neutralized officially the effect and purpose of some of the legislation on the status and use of languages in the country, the restrictive and discriminatory pieces of legislation such as the Official Languages Act and Tamil Languages (Special Provisions) Act of 1958 have not been repealed and removed from the statute book yet.

5.2.1 Tamil as the Language of the Court

A proactive judicial determination was made in *Coomaraswamy v Shanmugaratnelyer* and another, where the Supreme Court while exercising its interpretative jurisdiction under Article 125 stated that the fact that Tamil is not the language of the Courts in the rest of Sri Lanka other than in the Northern and Eastern Provinces does not mean that it cannot be used in those Courts. While Tamil can be used in these Courts, it is mandatory that their records and proceedings shall be kept in Sinhala, the official language. Thus it is not correct to state that the only national language used in the District Court of Colombo is Sinhala. It is quite regular to use both national languages in the District Court of Colombo and declared that the Minster's regulation to the effect that all pleadings, applications and motions in all such cases shall also be in such national language as is used in such Court', is not warranted by Article 24 (4) and is ultra vires the powers of the Minister.

5.2.2 The Language of Official Communication

Another unfortunate decision was delivered in *Kandasamy Adiapatham* case where the court held that a cheque was not a communication under Article 22 of the Constitution and therefore a Tamil citizen was not entitled to receive a state cheque in Tamil. Even though the Court recognized the grievances the petitioner had undergone, failed to remedy the violation of his fundamental right to equality, by the state on

the ground of language. The protection afforded to minorities by virtue of Article 22(2)(a) became meaning less in this case as the court was focusing on the nature of the cheque not the violation of fundamental rights. As stated by B.Skanthakumar, this case among others underlines how Sri Lanka's higher judiciary was slow in evolving itself into an institution constitutionally defining the public policy framework for pluralism and multiculturalism... reluctant to play the role of an assertive arbiter...when encountering violation of rights on the basis of ethnic discrimination.

5.3 The Civil liberties of the Minorities

The civil rights of the minorities such as the freedom of movement, freedom from arbitrary arrest and detention, freedom of speech, freedom of lawful assembly, were at high risk during the operation of emergency regulations and the Prevention of Terrorism Act which contained anti minority provisions. Many legal scholars condemned the failure on the part of the judiciary to question the constitutionality of the PTA when the government sought to introduce the act as an urgent bill.

Hidramani v Ratnavele (1971) 75 NLR 67) case concerned the arrest and detention of a person on the orders of the Permanent Secretary to the Ministry of Defenseand External Affairs under Regulation 18(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 6 of 1971The detainee's son filed a habeas corpus case to compel the state to bring the body of the detainee before the Court. The Court presumed the good faith of the Permanent Secretary, instead of calling into question the preventive nature of the detention, as opposed to the manifestly investigative nature of the detention. Interestingly, none of the dicta on the distinction between preventive and investigative detention from the *GnanaseehaThero* case were even considered by the court. Nor did the Court consider the fact that the ERs themselves made no reference to the violation of the Exchange Control Act as giving rise to a suspicion that the detainee is likely to act in a manner prejudicial to the public safety and to the maintenance of public order. Instead, it concluded that a detention order issued by the Permanent Secretary in good faith was not justiciable. Individual rights relating to the freedom from arbitrary arrests and detention, the presumption of innocence and due process often prevent law enforcement from proceeding unchecked during the investigation of offences. From an administrative point of view, such rights become encumbrances within the investigative process. Public security laws if misapplied could potentially facilitate unchecked investigations at the expense of these rights. Hence the executive may find that public security laws provide an easy and possibly more convenient avenue through which investigations into offences could take place. The judiciary has the duty to ensure that the emergency regulations are

not misapplied for executive conveniences but it only succeeded in assisting the executive to abuse the emergency regime in the guise of maintaining public security. Individuals such as *Hidramani* were causalities of this abuse.

The emergence of a movement advocating for Tamil separate state, induced the government of Sri Lanka to proclaim emergency and enact counter terrorism act. In the *Amirthalingam Trial at- Bar*case, he was indicted for possessing and disseminating documents leading to overthrow the government which were contravene the Emergency regulations proclaimed under the Public Security Ordinance. In a remarkable ruling, the High Court held that Regulation 59(1A) of Emergency (Miscellaneous Provisions and Powers) Regulation No.5 of 1976 was invalid. However the Supreme Court revised the High Court Judgment and declared that the emergency regulations were valid by going beyond letters of the Constitution even though it was known to the judges that the proclamation of the same was procedurally defective. This is an extra ordinary judgment favouring the executive at the expense of the individual right. The right of an individual to advocate for separate state in a nonviolent basis was not a matter of consideration.

The regulations 19 and 2 of 2005 Emergency regulations gave the armed forces powers of search, seizure, arrest and detention without warrant; police powers in dealing with prisoners; and the power to question a person in detention which established a framework through which the executive could, if it so wished, target persons and groups that threatened power structures. Section 12(1) of the PSO gives the President the power to call out the Armed Forces to maintain public order where he believes circumstances endangering public security have arisen in any area, or is imminent, and he believes the police are inadequate to deal with the situation. Upon the making of such an order, the armed forces are vested with the same powers of the police including the powers of search and detention. Even after the lapse of emergency in August 2011, the President has consistently called out the armed forces every month by way of Proclamation under Section 12 of the PSO. Such a Proclamation has legitimized the continued militarization of the country, particularly the North and East.

In *Namasivayam vs Gunawardena* case, the petitioners complained that Article 11, 13, 13 (2) had been infringed. Even though the court accepted the fact that arrest of the petitioner without stating the reason, violated Article 13 (1), justified the detention on the ground that in the background of the conditions prevailing in the country, the suspicion that the petitioner was involved in the activities of TELE, was reasonable. *Namasivayam* case is another classic example of the judiciary's approach not to question the executive action when the label of terrorism involved. When there is a

conflict between individual rights and the public security, it is settled at the expense of the individual rights particularly of Tamils.

But there are few cases where the judiciary had ascertained the violation of fundamental rights of the petitioners and ordered for compensation. These judgments signal the positive approach of the judiciary towards minorities, In *Gnanamuttu v Militry Officer Ananda & Others*, petitioner challenged under Article 12 and 13(1) of the Constitution, detention and production before the Magistrate for not producing the police registration form at the army check point. Justice Bandaranayake states that activities of the army and the police in this case had no legal basis and ordered for Rs.50,000 as compensation. Likely in *Padmanathan vOIC, Intelligence Bureau, Vauniya case,* the petitioner alleged violations of Article 13(1) &13(2) of the Constitution. The Court held that the state's right to detect and investigate crimes committed against it with the human resources available, should be limited to that purpose and should not be carried out to harass individual petitioners and ordered for Rs. 2, 00,000 as compensation. Even though these judgments have been admired and praised, scholars like Kishali Pinto Jayawardena raises serious doubt whether the judiciary could have made such decisions, if these cases did not cease to have public security scenario. She further stated that these judgments were possible only because of the nonexistence of a threat to the state as Mr.Gnanamuttu was discharged by the Magistrate and Attorney General ordered for the Release of Padmanthan before filing the FR case respectively. However these judgments have set healthy precedents which will pursue the future courts to protect minority rights.

In the famous case of *Nallaratnam Singarasa* case the High Court of Vavuniya, Court of Appeal and the Supreme Court refused to accept the fact the confession made by Singarasa was involuntary. The petitioner then complained to the Human Rights Committee under the second first Optional Protocol to ICCPR. The committee expressed that casting burden on the accused to prove that the confession he made to relevant authority was involuntary, contravene the provisions of the ICCPR and recommended to discharge him or offer him a fresh trial. The court not only ignored the recommendation but also challenged the constitutional status of Sri Lanka's accession to Optional Protocol. The judgment showcases how insensitively the judiciary had dealt with the petition of a minority person ignoring the state's treaty obligations under International Law.

The land mark judgment in *Machchavallavan* case, the individual rights and the protection of it prevailed over the public security issue. The case was on enforced disappearance of two sons of the petitioner. The court held that it was prima facie evident the violation of fundamental

right under Article 13(4) and ordered for rupees 150,000 each as compensation. This judgment is celebrated for the brave attitude of the judiciary to give predominance to individual rights in the public security domain.

An unpleasant decision was taken once again in *Tissainayagam* case. The editor of the North Eastern magazine was indicted on the ground that by writing certain articles in the said magazine, he inciting the commission of the acts of racial or communal disharmony. Despite the allegation of Tissaniyagam, on the involuntary character of the confession and without proper assertion whether the alleged article incite communal disharmony, the Court of Appeal sentenced him to 20 years of rigorous imprisonment. However with the pardon granted by the former President Mahinda Rajapakse, he escaped from the imprisonment and left the country. The rights of a minority journalist were at the stake and mercy of the President of the country. The then President granted pardon to the students of Jaffna University who were arrested and detained for remembering the Heroes day. The rehabilitation provided for non-surrenders which was contradictory to the Prevention of Terrorism (Surrendees care and Rehabilitation) regulations No 5 0f 2011, was not challenged. *Azath Salley's case* is also an example where the President was the final determiner of individual rights. Azathsalley was removed from the charge of inciting social disharmony, only after his affidavit to the President expressing apology.

Even though the operation of Emergency Regulations was lifted in August 2011 with the end of the civil war and on the continuous pressure from stake holders, the de facto operation of the same is observed. With the promulgation of the following five new regulations by the President in the capacity of the Minister of Defense,

1. The Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011
2. The Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) No. 2 of 2011;
3. The Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011;
4. The Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011; and 698
5. The Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011.

5.4 The Employment Rights of the Minorities

The judiciary did not consider the employment rights of the minorities cautiously. One good example is the case of *Valliamma v Trafford Hill Rubber Estates Ltd.* The fact that the conductor had compelled the workman to work at a spot that was away from the other labourers,

close to the road where the Sinhalese mob was active, the Supreme Court failed to adopt the more acceptable and worker friendly interpretation found in *Lawrence v. George Mathews Ltd.* Instead, adopted an approach favoring the respondent in light of another English judgment in Holden v. Premier Waterproof and Rubber Co. Ltd; A spot which owing to its locality is in fact inherently dangerous although the danger may be a lurking danger and not known to anyone, such as a wall with a bad foundation which may collapse a tree which may fall or a spot running the risk of being attacked by a mad man. An approach favourable to the employer was adopted at the expense of the employee's rights.

5.5 The Land Rights of the Minorities

A pertinent judgment is delivered in *Manel Fernando v Minister of Lands.* The acquisition of the petitioner's property was declared illegal. Justice Mark Fernando stated that; In fact the petitioner's land was not required for a public purpose; hence the acquisition was unlawful, arbitrary and unreasonable. The statutory power given in order to enable the state to acquire land needed for a public purpose cannot be used for any other purpose. That would be a gross abuse of power, particularly in this case, where the owner's wish to dispose of his land had been brought about by unlawful and improper harassment on account of race. The consideration of acquisition as violation of equality under Article 12(2) of the Constitution on the ground of race sets a precedent which should be followed by future courts when dealing with land disputes involving minority claims. However it is noted that the several private land owners of North have been affected as a result of military encroachment, acquisition for development purposes, without adequate remedy or compensation.

With the recent judgment of SC Appeal No. 21/13, where the Supreme Court of Sri Lanka severely limited the powers of the Provincial Councils over land, made the situation worse. The court essentially stated that the Provincial Councils would only have power over lands which were given to them by the central government. According to Bhavani Fonseka, this centralization is problematic both because it raises questions as to whether there will be any real devolution of powers under the Thirteenth Amendment, but also because it reduces the possibility of the involvement of local actors when dealing with land in the area. It's crucial that the central Government devolve powers provided in the Constitution and work with the Eastern Provincial Council and Northern Provincial Council on issues of land.

5.6 The Religious Rights of the Minorities

The article 9 of the Constitution of 1978 has given foremost place to Buddhism, the majority religion while guaranteeing the right to freedom of religion, including the freedom to have or to adopt a religion or belief of his choice (Article 10) and the

freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching (Article 14(1) (e). several bills were challenged as they were contrary to Article 10. '*Christian Sahanaye Doratuwa Prayer Centre (Incorporation)* was rejected by the court as it violated Article 10 of the Constitution. In contrast, *Provincial of Teaching Sisters of the Holy Cross of the Third Order of Saint Francis of Menzingen of Sri Lanka*, the Court unanimously held that where the objective of a group is to propagate non-Buddhists, this would be in violation of Article 9.As Deepika Udagama pointed out almost as if Sri Lanka had become a theocracy with the propagation of 'other' religions being taboo. In the absence of propagation as a fundamental right unlike India, the Court tried hard to protect and promote *Buddha Sasana*.

The right to adopt a religion of choice was restricted by court in *Natalie Abeysundara v. Christopher Abeysundara and Another* case when it fringes the fundamental rights of the others particularly that of the existing wife.

In*Jeevakaran v Ratnasiri Wickramanayake & Others*, the petitioner alleged that his fundamental rights under Articles 10& 14(1)(e) had been violated with the removal of MahaSivrathri from the list of Public holidays, by the Minister and alleged further that sudden denial of holiday ,violated his legitimate expectations and therefore was totally 'unreasonable... capricious' and The court refused to consider this as a violation of fundamental rights and stated that the obligation created by Article 14 (1) (e) is to allow the citizen to practice his religion, but not to give him additional facilities or privileges which would make it easier for him to do so. While the State must not prevent or impede religious observances, it need not go further, and provide a holiday or other facilities for such observances. The court considered the only the rights worship as a fundamental right and not the facilitation of it. The court neither considered one's right to religious observance in association with religious practices nor approached the issue as minority group's religious right to observe not the right to worship in conscience or belief.

5.7 The Power Sharing Claim of the Minorities

Several attempts had been made to address the claim for power sharing from the minorities, were introduced, among them the thirteenth amendment to the Constitution and Provincial Councils Bill were considered as constituting the apex of the pyramid of constitutional reform introduced to neutralise ethnic conflicts in the long history of constitutional government in Sri Lanka-dating back to 1931.

However in determining the validity of the Amendment to the Constitution case In Re the Thirteenth Amendment to the

Constitution case, the Supreme Court was not cautious of the minority claims, instead in order to avoid the requirement under Article 83 of the Constitution which requires the two third majority of Parliament and the approval of people at a referendum to change the unitary character of the state and the inalienable sovereignty clause. The government of Sri Lanka was under the pressured obligation to establish provincial councils along with the merger of North and Eastern Provincial Councils, as a result of the Indo Lanka Accord between the governments of India and Sri Lanka. In this background, the Supreme Court rendered its support to the government of Sri Lanka in passing the two bills, endorsed the constitutionality of the said bills while omitting its constitutional duty to consider how far the Thirteenth Amendment reflected the demands of the minority community for power sharing. The provincial councils were considered sub ordinate legislatures, as in the words of Prof.Marasinghe ethnically ascertained local government status was put on the provincial councils as equivalent to local authorities exercising delegated powers. In fact Tamils demanded for institutional safeguards guaranteeing divided sovereignty, the Thirteenth Amendment granted devolved soverginity restricted to the matters listed under the provincial list. The omission to declare North and East provinces as home lands of Tamils as stated in the Indo Lanka Accord, the excessive powers vested with the governor who functions at the pleasure of the head of the state was also not considered by the court. If the court could had all the aspects of the bill in detail and determined otherwise, the prolongment of the ethnic conflict would had been avoided or other forms of power sharing could had evolved.

The Supreme Court of Sri Lanka pronounced another judgment with insensitivity in the *North East Demerger case*. Despite the aspiration of the minorities, the court declared merger of North and East invalid on technical grounds. The court, taking note of the volatile and ethnically incendiary material produced and trend of submissions based thereon, reminiscent of the ethnic mistrust that led to terrorism, violence, death and devastating destruction that has characterized our body-politic, the Court indicated to Counsel that the case would be considered only from the perspective of securing to every person the equal protection of the law guaranteed by Article 12(1) of the Constitution. The essential corollary of the equal protection of the law is the freedom from discrimination, based" on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds" guaranteed byArticle 12(2). The court further held that the elements of race, religion and language characterize ethnicity that tends to divide people. Caste, sex, political opinion and place of birth are sub-elements of further divisions between people. In contrast the equal protection of the law unifies people on the basis of the Rule of law and the peaceful

resolution of disputes that characterizes the exercise of judicial power in terms of Article 4(c) read with Article 105(1) of the Constitution. From this perspective the physical identification of a unit of devolution of legislative and executive power, being the bone of contention, diminishes in significance. Whilst ethnic criteria would be relevant to define the territory of unit of devolution since a homogeneous unit could be better managed and served, the overriding consideration would be current criteria (not historic material or speculative assumptions for the future) that contribute to the functional effectiveness and efficacy of a unit from the perspective of service to the people, being the sole objective of representative government.

The ruling of the court in Demerger case was based on the principles of rule of law. Even though the court prepared to protect the right to equality of persons failed to pay attention to the concern of the minorities. The non-adoption of a preventive approach by court in both the cases, contributed to further strengthen the ethnic conflict.

6. RECOMMENDATIONS AND CONCLUSION

The analysis of the cases reveals that in many situations except few, the judiciary in Sri Lanka was restrained by several internal and external factors. The state interest, the public security concerns, other restraints provided by the constitutional provisions, may be identified as factors which kept the judiciary under restraints. As Sharvananda C J. said in our constitutional jurisprudence the scope of for judicial activism is limited. The role of the Supreme Court is interpretative and not creative so as to expand the ambit of fundamental rights. The courts are inhibited from assuming a legislative role. The absence of the power of judicial review is a serious defect whereas in the United States of America a legislative enactment is not a law unless it is in conformity with due process and in India the legislature does not have the last word in the kind of restriction that can qualify as reasonable restrictions (Article 19). Both in the United States of America and India all laws inconsistent with the fundamental rights are void. In the background that the constitutional structure and the provisions limit the role of the judiciary towards protection of minority rights in Sri Lanka.

Sharvananda C.J referred to another obligation the judiciary is bound to follow, that the language of a statute should be construed in the light of principle of constitutionality as illustrated in A.G of Gambia v Momodou Jobecase and supported the view that the court must try to strike a just balance between the fundamental rights and the larger and broader interests of society so that when such a right clashes with the larger interests of the country, it must yield to the latter, with reference to *Pathumma v State of Kerala*. Sharvananda's views seems to support the

judicial approach in many cases where the minorities right were derived on the face of national or public security.

On the other hand, Radhika Coomaraswamy questioning the jurisprudence of the court in light of the statement of Upendra Baxi ," to accept jurisprudential adulthood the question is not any longer whether or not judges make law, Rather the questions are: what kind of law, how much of it and in what manner. She raised concerns in light of the judgment of the Privy Council in *Queen v Liyanage*case invalidating Criminal Law (Special Provisions) Act, of our own Supreme Court had made principled intervention from its inception, those issues which were so prominent in the case may have been perceived in a different light. The formalistic method of interpretation served to foreclose the Sri Lankan Supreme Court from its inception as an important arena for debate on constitutional values and standards.

In order to overcome the constraints, the Constitution must undergo reform and the judiciary must be placed with the right to judicial review and the right to set aside those laws which deprive the rights of the people. The judiciary must be able to protect the rights of the people even during the emergency state by questioning the validity of the regulations and other actions of the Executive President, for this purpose the immunity granted to the President by virtue of Article 35 must be subject to reform. The judiciary must be made free from interference from the executive and the legislature both in theory and practice. The extralegal impeachment of the 43rd Chief Justice made Supreme Court as a mere institution with no independence.

Moreover the judiciary with sensitivity should adopt the right based approach in determining violations of right cases. The rights of the citizens should not depend on administrative convenience, political opportunities and political expediency. If all these improvements take place in Sri Lanka, the judiciary will serve as a guardian of minority rights undoubtedly. For this, the willingness to solve the national problem to be born and sustained in the minds of all the stake holders.

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