CHANNA PIERIS AND OTHERS
v.
ATTORNEY-GENERAL AND OTHERS
(*Ratawesi Peramuna Case*)

SUPREME COURT.
AMARASINGHE, J.
GOONEWARDENE, J. AND
WIJETUNGA, J.
SC APPLICATIONS
NO. 146/92 TO 154/92
AND 155/92 (SEVEN APPLICATIONS)
(CONSOLIDATED)
17 FEBRUARY, 1994

Fundamental Rights – Constitution, Articles 11, 13(1), 13(2), 13(4), 14(1) (a) and 14(1) (c) – Illegal arrest – Communicating reasons for arrest – Freedom of speech and expression – Freedom of association – Detention – Torture – Regulations 18(1), 17, 19 of the Emergency (Miscellaneous Provisions and Powers) Regulations.

The ten applications were by consent considered together. The applicants in the ten applications were granted leave to proceed for the alleged infringements of their rights guaranteed by Articles 11, 13(1), 13(2), 14(1) (a) and 14(1) (c) of the Constitution. The petitioners were participants in a "movement" called the Ratawesi Peramuna formed in November 1991 under the leadership of Aturelliya Rathana, the petitioner in application No. 149/92. The Peramuna had problems. In order to consider the 'crises' encountered by the Peramuna, Rathana convened a meeting which was held at the Kawduduwa Temple on 27th February, 1992. The current political climate, various criticisms of the Ratawesi Peramuna, the disruption in January 1992 of the exhibition of posters in Matara and the resurgence of the JVP were discussed after which a manifesto was introduced by Champika Ranawake the petitioner in Application No. 154/92. There were about 15 participants at the Kawduduwa temple meeting. On an anonymous telephone call received at the Wadduwa Police Station that a meeting of the Janatha Vimukthi Peramuna was being held behind closed doors at the Kawduduwa temple by some University students led by one Champika Ranawaka, the third respondent Inspector Ekanayaka went with a party of police officers and stood outside a window of the closed room where the meeting was being held and listened to the discussions that were taking place. Sub-Inspector Galkande, 4th respondent, stood at another window and he also listened. They made notes of the discussions that were taking place. They formed the impression that the participants were engaged in a conspiracy to overthrow the Government.

Inspector Ekanayake tapped at the door and got it opened and arrested the suspects. Having explained the charge to them he took them into custody. The 3rd and 4th respondents had noticed several priests and about ten young persons seated on the ground in a circle. One of the young men was standing and addressing the others and exhorting his audience to topple the Government. After this speech a priest had asked whether anyone opposed what had been just said. No one spoke and there was silence. At this the Inspector understood there was a confirmed conspiracy against the Government. He made a record of what had been said – so did Sub-Inspector Galkanda. The third respondent heard a great deal more than the fourth respondent. They pasted their notes in the minor offences book.

Held :

1. Rights guaranteed by Articles 12, 14(1) (h) and 14(1) (g) of the Constitution were not violated as no evidence in support of such violations have been adduced and no submissions made during the hearing in support of such violations.

2. It is incumbent on the person making the arrest to precisely indicate the procedure under which the arrest was made. A detention of a person in pursuance of Regulation 18 must be in a place authorised by the Inspector-General of Police or Deputy Inspector-General of Police, Superintendent of Police or Assistant Superintendent of Police. Otherwise the detention would be in violation of Regulation 19(2) and therefore, not being in accordance with procedure established by law, there would be violation of Article 13(1) of the Constitution which provides that no person shall be arrested except according to procedure established by law. Therefore the arrests of M. C. Pieris (Application No. 146/92), M. D. Daniel (Application No. 147/92), S. H. Dayananda (Application No. 148/92), Atureliya Rathana (Application No. 149/92), Rev. Thalpitiya Wimalasena (Application No. 150/92), K. N. Perera (Application No. 151/92), Chandanaratna (Application No. 153/92), Ranawake (Application Nol. 154/92) are violative of Article 13 (1) of the Constitution.

3. The Ratawesi Peramuna was an anti-government organisation. However, as a matter of law, merely vehement, caustic and unpleasantly sharp attacks on the government, the President, Ministers, elected representatives or public officers are not *per se* unlawful.

Per Amerasinghe, J :

(a) "The right not to be deprived of personal liberty except according to a procedure established by law is enshrined in Article 13(1) of the Constitution. Article 13(1) prohibits not only the taking into custody but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law."

(b) "Legitimate agitation cannot be assimilated with incitement to overthrow the government by unlawful means. What the third respondent is supposed to have heard, even according to the fabricated notes he has proferred, was a criticism, of the system of Government, the need to safeguard democracy, and proposals for reform."

(c) "The call to 'topple' the President or the Government did not mean that the change was to be brought about by violent means. It was a call to bring down persons in power by removing the base of public support on which they were elevated.

If the throwing down was to be accomplished by democratic means, the fact that the tumble may have had shocking or traumatic effects on those who might fall is of no relevance. It is the means and not the circumstances that have to be considered."

4. The obvious purpose of Regulation 23 (a) is to protect the existing government not from change by peaceable, orderly, constitutional and therefore by **lawful** means, but from change by violence, revolution and terrorism, by means of criminal force or show of criminal force.

5. There was no basis for arrest under Regulation 18 read with Regulation 23 (a) for there was nothing the 3rd respondent heard which suggested that the petitioners were doing anything to overthrow the Government by means that were not lawful.

Further the arrest could not have been made on the basis that Regulation 23 (b) was being violated. There was not a word in the 3rd respondent's notes about murdering or confining anyone.

6. The petitioners were also vaguely charged with attempting, aiding, abetting or conspiring to commit offences (Regulation 45) and of assisting offenders (Regulation 46). There were no offences under the Regulations which the petitioners were alleged to be aiding, abetting or conspiring to commit. The petitioners were not persons arrested for committing an offence under Regulation 23 (a), 23 (b), 45 and 46.

7. In general, in order to make an arrest according to the procedure established by Regulation 18(1) on the basis of a reasonable ground of suspicion, clear and sufficient proof of the commission of the offence alleged is not necessary. A *prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. Suspicion can take into account also matters which, though admissible, could not form part of a *prima facie* case. What the officer making the arrest, needs to have are **reasonable grounds** for suspecting the persons to be concerned in or to be committing or to have

committed the offence. Were the circumstances, including the prevailing situation in the country at the time, objectively regarded (the subjective satisfaction of the officers making the arrest is not enough) sufficient to induce the third respondent to reasonably suspect that the petitioners were concerned in or committing or had committed an offence under the Regulations specified.

A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources.

8. The offence which the 3rd respondent had in mind when he arrested the petitioners was the offence of conspiracy as set out in Regulation 23 (a) though other offences are also mentioned in the Detention Order. In the case of conspiracy to overthrow the Government by unlawful means, the Government cannot be expected to wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited or the bomb assembled and fuse ignited. If the ingredients to the reaction are present, it is not necessary to await the addition of the catalyst. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when it seeks to extinguish the sparks without waiting until the flame has been enkindled or blazed into conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace, but it may and it is expected in the exercise of its duty, to suppress the threatened danger in its incipiency. If the Government is aware that a group aiming at its overthrow by unlawful means is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action to save the nation from the physical and political harm that might otherwise ensue is not only reasonable but also the duty and a fundamental function of Government and its law enforcement agencies. In order to justifiably claim that the arrest were fitting in regard to time and circumstances, the respondents were obliged to establish that the speech impelled the hearers to imminent, unthinking lawless action to overthrow the Government.

Law enforcement officers cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweller's scale. At the same time, sufficient regard must be had to the constitutional right of free speech. Here the Police had their suspicions and hoped that some evidence might turn up to make their suspicions reasonable. Detention for search has here not been in accordance with the procedure established by Regulation 18(1`).

9. The fundamental right of each and everyone of the petitioners to be free from arrest except according to procedure established by law guaranteed under

Article 13(1) of the Constitution has been violated. Neither the Secretary nor the Assistant Superintendent were empowered by Regulation 17 to detain the petitioners for the purpose of completing investigations relating to the commission of offences; Regulation 17(1) is not concerned with the investigation of offences but with measures aimed at the prevention of certain specified kinds of unlawful behaviour.

Although detention orders under Regulation 17 may be issued while a Detention Order under Regulation 19 or under the Prevention of Terrorism Act is in force, yet there must be some justification for it. The evidence for arrests of the petitioners in terms of Regulation 18(1), could not have led to the formation of an opinion that it was necessary to detain the petitioners in terms of Regulation 17(1).

The failure to provide the petitioners with copies of the detention orders does not infringe any constitutional right.

10. The person being arrested must be informed of the reason for his arrest. The obligation of the person making the arrest is to give the reason at the moment of the arrest, or where it is in the circumstances not practicable, at the first reasonable opportunity.

11. The petitioners were not arrested and kept arrested in accordance with a procedure established by law and they were not informed of the reason for their arrest. While the arrest, holding in custody, detention or deprivation of personal liberty of a person pending investigation or trial does not constitute a punishment by imprisonment and while holding a person in preventive detention has been held not to be punitive imprisonment violative of Article 13(4) of the Constitution yet deprivation of personal liberty would amount to punitive imprisonment violative of Article 13(4), where the person was never, or cannot any longer, be reasonably said to be held for purposes of investigation, trial or preventive detention as the case may be.

12. The fact that Article 13(1) is violated does not necessarily mean that Article 13(2) is therefore violated. Nor does the violation of Article 13(2) necessarily mean that Article 13(1) is violated. Arrest and detention, as a matter of definition, apart from other relevant considerations, are "inextricably linked". However Articles 13(1) and 13(2) have a related but separate existence. Article 13(1) is concerned with the right of a person not to be arrested including the right to be kept arrested except according to procedure established by law and the right to be informed of the reasons for arrest, whereas Article 13(2) is concerned with the right of a person arrested to be produced before a judge according to procedure established by law and the right not to be further deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

The fundamental rights of the petitioners to be brought before the judge of the nearest competent court according to procedure established by law guaranteed by Article 13(2) of the Constitution were violated.

13. In regard to violations of Article 11 (by torture, cruel, inhuman or degrading treatment or punishment), three general observations apply:

(i) The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.

(ii) Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.

(iii) Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment.

There has been here no violation of the fundamental rights guaranteed by Article 11 of the Constitution.

14. The petitioners had no purpose of helping to make the Ratawesi Peramuna an instrument of terrorism or violence which would menace the peace and welfare of the State. They were considering matters of personal concern and were anxious to mobilize public opinion to accept their views so that they might replace those in power with other representatives who may give effect to their views. The fundamental right of freedom of expression under Article 14(1) (*a*) of all the petitioners (except of petitioner in SC Application No. 150/92) has been violated.

15. The right of association is not only guaranteed by the Constitution to protect the freedom of intimate association but also as an indispensable means of preserving other individual liberties concerned with a wide variety of political, social, economic, educational, religious and cultural ends. In essence the petitioners' complaint is that their right of association for the advancement of certain beliefs and ideas was violated by their arrest and detention. The Ratawesi Peramuna was not an organization whose members or adherents were engaged in purposes prejudicial to national security or the maintenance of public order or in other unlawful activities. The Peramuna was not a proscribed organization. No justification existed for the violation of the petitioners' associational rights relating to their expressive activities. The fundamental right of freedom of association guaranteed by Article 14(1) (c) of the Constitution was violated by the 3rd and 4th respondents in respect of all the petitioners except the petitioner in SC Application No. 150/92.

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2. *De Silva v. Mettananda and Others:* SC 158/87 – SC Minutes of 10.03.89
3. *Piyasiri v. Fernando* [1988] 2 Sri LR 173, 179
4. *Rajapaksa v. Kudahetti:* SC Application No. 52/70 – SC Minutes of 28.07.92
5. *Jayakody v. Karunanayake:* SC Application No. 91/91 – SC Minutes of 18.11.92
6. *Kumarasena v. Sub-Inspector Shriyantha & Others:* SC Application No. 257/93 – SC Minutes of 23.05.94
7. *Podiappuhamy v. Liyanage & Others:* SC Application 446/93 – SC Minutes of 31.05.94
8. *Lalanie & Nirmala v. De Silva & Others:* SC 53/88 – SC Minutes of 24.05.89
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18. *Pieris v. The Commissioner of Inland Revenue* (1963) 65 NLR 457, 458
19. *Kumaranatunga v. Samarasinghe:* SC Application 121/82 – SC Minutes of 03.02.83; (1983) 2 FRD 347, 355, 362, 363
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28. *Dissanayake v. S. I. Guneratne and Others:* SC Application 22/91 SC – Minutes of 11.10.91

29. *Gitlow v. New York* 268 US 652; 455 Ch. 625, 69L. Ed. 1138 (1925)
30. *NAACP v. Claiborne Hardware Co.* 458 US 886 (1982)
31. *Watts v. United States* 394 US 705 (1969)
32. *Masses Publishing Co. v. Patten* 244 Fed. 535 (SDNY 1917)
33. *New York Times Co. v. Sullivan* 376 US 254, 84 S. Ch. 710, 11L. Ed. 2 Ed 686 (1984)
34. *Cohen v. California* (1971) 403 US 15, S. Ch. 1789, 29 L. Ed. 2 Ed. 284
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46. *Yapa v. Bandaranayake* [1988] 1 Sri LR 63
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56. *Shaaban Bin Hussein v. Chong Fook Kam* [1969] 3 All ER 1626
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58. *Dennis v. US* 1951 341 US 495, 71 S. Ch. 857, 95L. Ed. 1157

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68. *Leelaratne v. Cyril Herath and Others:* SC Application 145/86 – SC Minutes of 09.03.87
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82. *Gerstein v. Pugh* 420 US 103, 95 S. Ch. 854, 43L. Ed. 2nd 54 (1975)
83. *Scheisser Case* – European Court on Human Rights Decision of 04.12.79
84. *Skoogstrom Case* – European Court of Human Rights Decision of 02.10.84
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86. *Geekiyanage Premalal de Silva v. Rodrigo:* SC Application 24/89 – SC Minutes of 05.09.90
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160. *Abrams v. United States* 250 US 616, 624, 40 S. Ct. 17, 20, 63 L. Ed. 1173, 1178 (1919)
161. *Schenck v. United States* 249 US 47, 39 S. Ct. 247 – 63 L. Ed. 470 (1919)
162. *Near v. Minnestota* 283 US 697, 51 S. Ct. 625 – 75 L. Ed. 1357 (1931)
163. *Yasapala v. Wickremasinghe* (1980) 1 FRD 143, 155
164. *Abeywardene v. Perera:* SC Application 92/91 – SC Minutes of 23 August 1989
165. *Chaplinsky v. New Hampshire* 315 US 568 (1942)
166. *Cantwell v. Connecticut* 310 US 296 (1940)
167. *Palko v. Connecticut* 302 US 319, 327 – 658 S. Ct. 149, 152 – 82 L. Ed. 288 (1937)
168. *NAACP v. Alabama* 357 US 449, 78 S. Ct. 1163, L. Ed. 1488 (1958)
169. NAACP v. Button 371 US 415; 83 S. Ct. 328, 9 L. Ed. 405 (1963)
170. *Roberts v. United States Jayacees* 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)
171. *Mudiyanselage Tillekaratne Bandara Ekanayake v. Edison Gunatilleke and the A.G.* : SC Application 1007/92 – SC Minutes of 16 November 1993

Applications for infringement of fundamental rights

R. K. W. Goonesekere with *Methsiri Coorey* for Petitioner in SC Application Nos. 146/92, 149/92 and 154/92.

Ms. Manouri Muttetuwegama for the petitioners in SC Applications Nos. 147/92 and 148/92.

C. Swarnadhipathy for the petitioners in SC Applications Nos. 151/92 and 153/92.

J. C. Weliamuna for the petitioner in SC Application No. 152/92.

Suranjith Hewamanna with *J. C. Weliamuna* for the petitioner in SC Application No. 155/92.

D. P. Kumarasinghe, Deputy Solicitor-General for the Respondents.

Cur. adv. vult.

17th June, 1994.

AMERASINGHE, J.

1. THE PARTIES AND THE MANNER OF HEARING AND DETERMINATION

Sixteen persons in ten applications to this Court complained that their fundamental rights guaranteed by the Constitution were violated.

Nine of them filed separate applications: Mahinda Channa Pieris in Application No. 146/92; M. D. Daniel in Application No. 147/92; Singapulli Hewage Sunny Dayananda in Application No. 148/92; Athureliye Rathana (Ranjith) in Application No. 149/92; Rev. Thalpitiye Wimalasara in Application No. 150/92; Kuruwitage Nandana Perera in Application No. 151/92; Jayasinghe Mudiyanselage Janaka Priyantha Bandara in Application No. 152/92; Pallimulle Hewa Geeganage Pradeep Chandanaratne in S.C. Application No. 153/92; and Ranawake Arachchige Patali Champika Ranawake in S.C. Application No. 154/92.

Seven others collectively filed S.C. Application No. 155/92. The seven persons were Avalikara Galappathige Muditha Malika Wimalasuriya, Gileemalege Janaka Priyantha Dayaratne, Karunaratne Paranawithana, Weerasekera Mudalige Anura Weerasekera, Rev. Kalupahana Piyarathna, Rev. Ambalanthota Premarathana, and Rev. Kitulgala Upali.

The First and Second respondents in each of the ten applications were respectively the (1) Hon. Attorney-General and (2) Inspector-General of Police.

The third respondent in each of the ten applications was Inspector of Police Ekanayake Mudiyanselage Karunatilake, the Officer-in Charge of the Wadduwa Police Station, who was identified as I.P. Karunatilake, Officer-in-Charge, Police Station, Wadduwa in all the applications save one: In application No. 149/92 he is referred to simply as "The Officer-in-Charge, Police Station, Wadduwa," However, in paragraph 1 of his affidavit dated 9th August 1992, filed in Application No. 150/92; and in paragraph 1 of his affidavit dated 24 August 1992 filed in Application No. 146/92; in paragraph 1 of his affidavits dated 9th September 1992 filed in Application Nos. 147/92; 148/92; 149/92; 151/92; 152/92; 153/92; 154/92 and 155/92 Ekanayake Mudiyanselage Karunatilake identifies himself as the Officer-in-Charge of the Wadduwa Police Station and as the Third Respondent.

The Fourth Respondent in each of the ten applications was Sub-Inspector Galkanda Arachchige Sunil Piyaratne of the Wadduwa Police who was identified as "Sub-Inspector Piyarathana of Wadduwa Police" in all the applications save one: In application No. 149/92 the fourth respondent is named as "Sub-Inspector Pathiratne" of Wadduwa Police. However, in paragraph 1 of his affidavit dated 9 August 1992 filed in application No. 150/92; and in paragraph 1 of his affidavit dated 24th August 1992 filed in application No. 146/92; and in paragraph 1 of his affidavit dated 9th September 1992 filed in application Nos. 147/92; 148/92; 149/92; 151/92; 152/92; 153/92; 154/92 and 155/92, Galkanda Arachchige Sunil Piyaratne identified himself as the Fourth Respondent.

The Fifth Respondent in Applications Nos. 146/92; 147/92; 152/92 and 155/92 is the Officer-in-Charge, Security Co-ordinating Division, Colombo.

The Fifth Respondent in Applications Nos. 149/92 and 151/92 is the Officer-in-Charge, Police Station, Maradana.

The Fifth Respondent in Application Nos. 148/92; 150/92; 153/92 and 154/92 is the Officer-in-Charge, Police Station, Pettah.

The Officer-in-Charge of the Police Station Maradana and the Officer-in-Charge of the Police Station Pettah are named as the Sixth and Seventh respondents respectively in Application No. 155/92.

THE MATTERS FOR CONSIDERATION

The applicants in each of the ten applications were granted leave to proceed for the alleged infringements of their rights guaranteed by Articles 11, 13(1), 13(2), 14(1) (a) and 14(1) (c) of the Constitution. Those are the matters for consideration. However I must clear the records of persisting and misleading errors.

ARTICLES 12, 14(1) (h) AND 14(1) (g) NOT VIOLATED

The petitioners in their petitions and amended petitions complain of the infringement of the right of "associating with others" in their "lawful occupation" and being deprived of their "freedom of association as provided for in the Constitution." In their amended petitions the petitioners state that their constitutional rights under Articles 14(1) (a), 14(1) (c) and 14(1) (h) have been violated.

Article 14(1) (h) is concerned with the right of a citizen to freedom of movement and of choosing his residence within Sri Lanka. Leave to proceed was not sought or granted for the alleged violation of Article 14(1) (h) at the stage of the hearing when leave to proceed was considered.

Why were alleged violations of Article 14(1) (h) repeated in the amended petitions especially when leave to proceed was not granted in respect of the alleged violation of that provision?

The right to engage oneself in association with others in any lawful occupation is a right guaranteed by Article 14(1) (g) of the Constitution. Leave to proceed under Article 14(1) (g) was not sought or granted by the Court at the stage of the hearing when leave to proceed was considered.

Why was an oblique reference to an alleged violation of Article 14(1) (g) repeated in the amended petition? Additionally, M. D. Daniel 147/92, Dayananda 148/92, Nandana Perera 151/92, Bandara 152/92, Chandanaratne 153/92, Ranawake 154/92; and Wimalasuriya, Dayaratne, Paranavithana, Weerasekera, Piyarathana, Pemarathna and Kitulgala Upali in 155/92 in their petitions and

amended petitions complain of the violation of Article 12(2) of the Constitution on account of their political opinions.

At the hearing when the matter of leave to proceed was being considered learned Counsel for the petitioners did not seek leave to proceed under Article 12 and leave to proceed under Article 12 was not granted.

Since the amended petitions contain averments directly alleging the violation of Articles 12 and 14(1) (h) and obliquely alleging the violation of Article 14(1) (g), and no evidence in support of such violations have been adduced and no submissions made during the hearing in support of such violations, I declared that Articles 12, 14(1) (h) and 14(1) (g) have not been violated by the respondents in respect of any of the petitioners in the matters before this Court.

CONSOLIDATION OF MATTERS

It was agreed by Counsel for the petitioners and respondents that the ten applications concerning the sixteen persons complaining of the violations of their fundamental rights under Articles 11, 13(1), 13(2), 14(1) (a) and 14(1) (c) and the evidence adduced should be considered together and that a single order of this Court should bind the parties and be sufficient for all purposes.

Mr. Goonesekere and Ms. Muttetuwegama for the petitioner, and Mr. Kumarasinghe for the respondents addressed us in broad, general terms. Learned Counsel for the Petitioners stating that the cases were "not the same. There are differences", left the Court to discover the "differences" and unscramble the evidence submitted in the sometimes glib, and often marginally truthful, averments in the affidavits and counter-affidavits filed by the 16 applicants in their ten petitions and supporting affidavits from others and in the equally unsatisfactory affidavits and supporting documents of the respondents.

I wish to draw the attention of attorneys-at-law to their grave professional responsibilities in the preparation and submission of affidavits, especially in matters in which a Court is called upon to arrive at a determination based solely upon the evidence adduced in affidavits, I would also draw the attention of everyone concerned,

including Government officials, to the fact that stating wrong, false and especially purposely untrue statements in affidavits is a matter that could lead to criminal proceedings against them.

THE RATAWESI PERAMUNA

The petitioners were participants in a "movement" called the Ratawesi Peramuna formed in November 1991 under the leadership of Athureliye Rathana, the Petitioner in Application No. 149/92.

In his affidavit (2.2 – 2.4) Rathana says he became a monk in 1976 and that he played an active and prominent role when he was at the University at Dumbara and Peradeniya between 1984 and 1986 and that he was the organizer of a protest march to Kandy. The movement, he says (2.5), was intended to "unite the democratic opposition of the country."

The movement was believed by some of the petitioners to be "the base for a broad political" (eg. see paragraph 2.1 of the affidavit dated 15th April 1992 of Wimalasuriya in Application 155/92) or "agitational" (eg. see para. 4.3 of of the affidavit dated 14th April 1992 of Seneviratne in Application 146/92) "front and not controlled by any party."

Champika Ranawake, the Petitioner in Application No. 154/92 in paragraph 3.4 of his affidavit dated 15th April 1992 states that it was an "anti-government pressure group which would not have any bias to existing political parties." Ranawake, who was a founder-member of the Peramuna, (154/92, 2.2 – 3.4) says that, as a University student, he took an active part in anti-JVP activities, but, finding "the guns of both the JVP and the Government trained towards" his group, ceased to participate in politics after he was arrested in September, 1989. He continued, however, to write articles to the *Lakmina* and *Ravaya*. He began his activities again with what he called "the fever of the Impeachment Motion in 1991", and, with Rathana and others, formed the Peramuna to bring together "intellectuals and other professionals" to formulate policies that would remain despite changes of Government, and to "prevent the youth from being pushed to violent politics."

Although it would seem that eight of the sixteen petitioners were university students (See Wimalasuriya 155/92, 4.8) and that the movement was said to have had the support of university students (See Bandara 152/92, 2.1 and Nandana Perera 151/92, 2.1) the membership of the movement was not confined to university students.

For instance, there was Malinda Seneviratne, the petitioner in SC Application 146/92. He had, according to paragraphs 2.1 – 4.3 of his affidavit, read the "fundamental texts of Marxism" while he was at school, and in his political thinking was "influenced to a large extent" by the political views of his father who he says was "a Trotskyite as an undergraduate." He was admitted to the Dumbara Campus in 1985 but proceeded to the United States in 1987 under an Exchange Program and later read Sociology at Harvard University where he graduated in 1991. His undergraduate dissertation was "Students as Agents of Revolution: The Case of the Sri Lanka Student Movement." In January 1992 he was employed by the Peradeniya University as an English Instructor of the Medical Faculty. When Rathana put it to him, he thought that the formation of the Ratawesi Peramuna as " a broad agitational front" was "a good idea" and attended two of its meetings and met Rathana and others at the "open canteen" of the University at Colombo at about 6 p.m. on 26th February 1992 and agreed to meet at the Kawduduwa temple.

The matters engaging the attention of the Peramuna were wider than those purely concerning the literati: M. D. Daniel, a Committee Member, says (147/92, 2.1) he had, at a meeting of the Peramuna at the office of the Leader of the Opposition, voiced concerns about the plight of farmers. Nor was the Peramuna intended to be limited in membership. Rathana (149/92, 2.5) says that the aim was "to bring together the alternative forces in the opposition – intellectuals, students, artists, youth, workers, farmers etc." It appears from paragraph 5 of the affidavit of Champika Ranawake that he had a scheme to restructure the Peramuna on the lines of a political party.

Several meetings of the members of the movement were held and a District Branch was formed at Matara. According to Seneviratne in his affidavit (146/92, 4.3) the Peramuna organized a "series of public

seminars and an exhibition of posters depicting human rights violations by the Government and the JVP in Matara on 26th, 27th and 28th of January." Seneviratne and many of the other petitioners alleged that "a group of armed men had stolen some of the posters." (Seneviratne 146/92, 4.3: Daniel 147/92, 2.2; Dayananda 148/92, 3.2; Rathana 149/92, 2.6; Nandana Perera 151/92, 2.2; Bandara 152/92, 2.2; Chandanaratne 152/92, 2.1; Ranawake 154/92, 3.6; and Wimalasuriya 155/92, 2.2).

The Peramuna it is said came to be criticized by "pro-Anura elements within the SLFP" as being a "group formed to promote Chandrika": (Seneviratne 146/92, 4.4; M. D. Daniel, 147/92, 2.3; Dayananda 149/92, 3.3; Rathana 149/92, 2.7; Wimalasara 150/92, 2.3; Nandana Perera 151/92, 2.3; Bandara, 152/92, 2.3; Chandanaratne 153/92, 2.2; Ranawake 154/92, 3.7; Wimalasuriya 155/92, 2.3).

It was also said that the Peramuna lacked money and organization and that a moderate stance should be taken on issues such as "the ethnic conflict", "affiliated university colleges" and "peoplization": (Rathana 149/92, 2.8; Nandana Perera 151/92, 2.4; Bandara 152/92, 2.4; Ranawake 154/92, 3.8; Wimalasuriya 155/92, 2.4).

There was also the return of the JVP into the political arena which they regarded as a matter for concern. I shall deal with this aspect of the matter in greater detail later on.

The Peramuna had problems. In order to consider the "crises" encountered by the Peramuna, Rathana, the petitioner in application 149/92, (who had earlier been appointed 'convener' of the Peramuna), summoned a meeting.

THE MEETING OF THE RATAWESI PERAMUNA ON 27 FEBRUARY 1992

The meeting was held on 27th February 1992 at the Kawduduwa temple. It commenced at about 6 a.m.

The current political climate, various criticisms of the Ratawesi Peramuna, the disruption in January 1992 of the exhibition of posters

in Matara, and the resurgence of the JVP were discussed, after which a manifesto was introduced by Champika Ranawake, the Petitioner in Application No. 154/92.

After a discussion, the meeting was adjourned at about 1 p.m. to enable them to take lunch. (See the affidavits of Seneviratne 146/92, 5.2 & 5.3; Daniel 147/92, 2.4; Dayananda 148/92, 3.4; Rathana 149/92, 4.9; Nandana Perera 151/92, 2.5; Bandara 152/92, 3.3; Chandanaratne 153/92, 2.4; Ranawake 154/92, 4.1; and Wimalasuriya 155/92, 3.3).

THE TELEPHONE CALL

Document XI filed by the Third Respondent in support of his affidavit resisting each application is a "Message Form". It is dated 27.02.92 and the time of receipt is stated to be 13.50 hours. The message is said to have been received at Wadduwa Police Station. In the "From" column, it is said to have been transmitted by "an informant who did not state his name." The message was this: "Today, there is a meeting of the Janatha Vimukthi Peramuna, all participants being students of the Colombo University, under the leadership of Champika Ranawake. Inform the Officer-in-Charge."

THE CIRCUMSTANCES OF THE ARREST – TAKING INTO THE CUSTODY OF THE LAW

According to the third respondent in his affidavits (of 9th August 1992, paragraph 5 in respect of SC Application 150/92; 24th August 1992, paragraph 5 in respect of SC Application 146/92; 9th September 1992 paragraph 4 in respect of Applications Nos. 147/92, 149/92 and 152/92; 9th September 1992 paragraph 5 in respect of Applications Nos. 148/92, 151/92, 153/92, 154/92 and 155/92), on 27.2.92 at 1.50 p.m. an anonymous telephone call was received at the police station that a "meeting of the Janatha Vimukthi Peramuna was being held behind closed doors at the Kawduduwa Temple and that the participants are University students, led by one Champika Ranawaka. I annex herewith a true copy of the telephone message marked "XI". On receipt of this information, I went to the temple with a

party of police officers. I stood outside the closed room and listened to the discussions that were taking place. I made a note of the part of the discussion that I could hear. I annex hereto a photocopy of my notes marked "X2". There were about 15 participants. Upon listening to the speeches, I formed the impression that they were engaged in a conspiracy to overthrow the Government. As such, I tapped at the door and got it opened and entered the room where the discussion was taking place and having explained the charge against the suspects, took them into custody ...."

The fourth respondent in his affidavits (of 9th August 1992 in Application 150/92; 24th August 1992 in Application 146/92; of 9th September in applications 147/92; 148/92; 149/92; 151/92; 152/92; 153/92 and 154/92) in paragraph 3 admits being a member of the police party that arrested the petitioners; and in paragraph 4 states that he had read the affidavits of the Third Respondent and associates himself with what the Third Respondent had said as being "true and accurate". In Application No. 155/93 the Fourth Respondent in his affidavit dated 9 September 1992 states in paragraph 3 that he was a member of the police party that arrested the petitioners; and, in paragraph 6, that he had read the affidavit of the Third Respondent and associates himself with the averments of the Third Respondent as being "true and accurate".

Document X2 filed by the Third Respondent was supposed to be a contemporaneous record of what he and the Fourth Respondent made in their notebooks and later pasted in the Minor Crimes (sic.) Information Book at 17.40 hours. According to the Third Respondent's notes, in response to the phone call, he "arrived at the Kawduduwa temple at 14.20 where a secret meeting was being held behind closed doors." He says he "stood near a window and listened. There were several priests and about ten young persons seated on the ground in a circle. One of the young men was standing and addressing them. Now I am recording what he is saying. If this autocratic system of administration continues, before another twenty years our country will be completely destroyed. The system which has enabled Premadasa to rule autocratically must be abolished. Premadasa is waging war with Prabhakaran. This must be stopped. The proposal to set up Universities at a District Level will devalue the

status of graduates and leave them destitute. Because of bickering in the opposition Premadasa's power will grow. The youth cannot permit this expansion of power. The country must be rid of autocratic rule. We must under the guise of the Ratawesi Peramuna take this struggle forward. අප විසින් රටවැසි පෙරමුණ මුවාවෙන් මෙම අරගලය ඉදිරියට දියත් කළ යුතුව තිබෙනවා. මෙම රජය පෙරලීමට අරගල කිරීමට දැන්ම සූදානම් විය යුතුව තිබෙනවා. We must make immediate preparations to topple the Government. For that purpose we need to strengthen our organizational structure. Therefore we have assembled today representatives of all the Universities. We must set up a Government which will remove problems pertaining to the economy, education, administration and culture. Under such a system of Government 200 Village and Provincial Governments controlled by a Central Government is proposed. Above the Central Government will be a body of persons learned in various fields. Under their direction a just and orderly administration will be established. In this way the freedom of the mass media will be established. In this way fundamental human rights will be given and it will become possible to remove harrassment. He went on talking. Then a priest rose and inquired whether there were any suggestions or new proposals or opposition to the proposed scheme of action. The lack of opposition by anyone was signified by their silence, said the priest. At this time I understood that there was a conspiracy against the Government. Now I proceed to take steps to make arrests."

The next entry by the third respondent in document X2 is dated 27.03.93 and is stated to have been recorded at 14.50 hours "after the arrests were made". The statement goes on to say that the Third Respondent knocked at the door which Rev. Thalpitiye Wimalasara opened. He explained the charge about the conspiracy against the Government, to each of the persons arrested separately, investigated each person separately, ascertained that there were no "external injuries" in respect of each person, and took various books and documents (which he refers to by title and author) for further investigations, after making a written inventory of the papers and pages in each book or document. The report says that nothing else that was "relevant to the case" was found.

The final entry in X2 is the statement of the Fourth Respondent, Sub-Inspector Piyaratne, entered at 17.50 hours. It is as follows: On the information given to me by the Officer-in-Charge, I arrived at Kawduduwa temple at 14.40 hours. Having informed me that a secret meeting was taking place in the "Simamalake" and that he was listening at a window he advised me to listen at the other window. When I went to the other window and looked, I saw about ten young persons and several priests seated on the ground. A young person who was speaking said "If the autocratic rule we have continues for about another 20 years our country will be completely destroyed. Therefore another system of Government must be introduced after chasing away (පන්නා දමා) autocratic Premadasa. Because of bickering Premadasa's power will grow. We cannot possibly allow Premadasa's autocratic rule to go on. We must under the guise of the Ratawesi Peramuna (රටවැසි පෙරමුණ මුවාවෙන්) take this revolutionary struggle (අරගලය) forward. Firstly fundamental rights and the Government must be toppled (ප්‍රථමයෙන් මානව අයිතිවාසිකම් හා රටේ පවතින ආණ්ඩුව පෙරලිය යුතුය). For that end you must remember lives will have to be sacrificed." And so on, the speaker said. Then a priest rose and inquired whether in respect of the proposals there were suggestions or opposition or doubts. Since all those present were silent, it appeared that there was no opposition. At this time, on a signal from the Officer-in-Charge, we forced our way into the Simamalakaya. The Officer-in-Charge arrested the person who made the speech. The Officer-in-Charge examined the books and documents and took charge of them and on the orders of the Officer-in-Charge the premises were searched for weapons. There were none. While I am a witness for the Officer-in-Charge I am now proceeding with the suspects to the station."

Although the Third Respondent states in his affidavits that he tapped at the door and had it opened, his so-called notes say that when he formed the opinion that there was a conspiracy, he took steps to arrest the petitioners. If getting the door opened was a step in the process of arrest, it is not supported by anyone. Even Piyaratne the Fourth Respondent fails to support him. The notes of the Fourth Respondent state that when he received a signal from the Third Respondent the police party forced their way into the room (කඩාවැදී) and the Third Respondent arrested the person who made the address and the others. According to the Fourth Respondent the

third respondent then examined and took over documents and ordered a search of the premises for weapons. No mention is made of explaining charges, or interrogation, or examinations for external injuries, referred to by the Third Respondent.

The Third and Fourth respondents in their affidavits state that they stood at two windows, making notes. If, as the third respondent states in his notes, the petitioners were seated *in a circle*, then, wheresoever the two officers were standing near two windows, peeping in from time to time, as they must have in order to have been able to record as they say they did, the number of persons present, in order to be able to have seen that there were *young* persons and *priests*, how they were seated and who was speaking at a given time, some of those facing the windows would surely have seen the officers and alerted the others and stopped the discussions? And then, did no one hear the approaching police vehicles?

If the Third Respondent believed there was "a conspiracy to overthrow the Government", necessitating the immediate arrest and detention of the petitioners, is it not rather strange that he chose to paste his notes in the Information Book pertaining to Minor Offences rather than in the book reserved for Grave Crimes? I referred to this during the course of the arguments, but the learned Deputy Solicitor-General offered no explanation.

The Third Respondent in his notes states that in respect of each and every one of the sixteen persons arrested, he explained the charge of conspiracy, investigated, and ascertained that there were no external injuries. According to his notes, the tap on the door was at 14.30 hours. He had completed the arrests after explaining the charges, investigations and so on by 14.50 when he made the second entry in his notes giving details of the sixteen arrests. This means that, in respect of each suspect, in about 75 seconds he explained the charge, interrogated the person and examined him for external injuries. In fact, the Third Respondent must have had much less time for all that, since between 14.30 and 14.50 hours, according to his notes, he had seized several books, and documents, ascertaining and noting the titles, authors, number of papers as well as pages in each of them!

The Police message XI which the Third Respondent produced does not refer to "a secret meeting" behind "closed doors" at all. This seems to have been introduced in the Third Respondent's affidavits to give some support to his conspiracy theory. Someone had to open the "closed doors". So. the incumbent of the temple, Wimalasara, was supposed to have done this. However, Wimalasara was in ill-health and asleep in his residential quarters and brought by some of the officers to the place where the others were. (Cf. the affidavit of Jayalin Silva dated 3 November 1992 filed by the Petitioner in Application 150/92; Paragraph 2.3 dated 15 April 1992 of Rev. Wimalasara filed in Application 150.92).

The Third Respondent heard, it seems a great deal more than the fourth respondent, but the Fourth Respondent happened, it seems, to have heard and recorded in more or less the same words all the key statements attributed to the speakers by the third respondent. Was it simply a matter of discernment? A comparative examination of the "notes" of the Third and Fourth respondent leads me towards the conclusion that the fourth respondent simply copied a part of what the third respondent had invented and made available to him. His clumsy attempt at variation (for example, his attempted variation of the third respondent's explanation of the increase in Premadasa's autocratic powers on account of the problems of the opposition; and the telescoping of the third respondent's notes relating to the call to topple the Government into the supposed statement that the freedom of the news media and fundamental rights will be secured, resulting in the Fourth Respondent's strange version that there was advocacy not only to topple the Government but that fundamental rights also should be dethroned!) suggests that X2 is a sham – a deceptive and worthless document fabricated to provide a justification for the arrest of the petitioners based solely on a misconception of what it meant to be a member of the Janatha Vimukthi Peramuna on 27th February, 1992. If the petitioners' are to be believed, the Third and Fourth respondents really heard nothing because the meeting had not yet been resumed. Were the notes a concoction by the Third Respondent to provide a justification for an accusation of conspiracy when it dawned on them that it was not an offence to be a member of the JVP and that in any event the persons arrested were not members of the JVP. ?

If so, it is not the first time this kind of thing has happened. Kulatunga, J. in *Wimalawardena v. Nissanka*[1] referred to the practice of police officers "nonchalantly making false entries and fabricating evidence to cover up their illegal acts," and drew attention to the fact that police officers seemed to be immune to ordinary liability in circumstances in which ordinary citizens might have been otherwise dealt with. Reference was made to the "self-serving notes" of Police officers in *De Silva v. Mettananda and Others*[2]. The Third Respondent, especially by interrogating Chandanaratne (153/92 para. 3.4) could well have obtained information regarding some broad areas of concern and matters that were talked about in the morning to form the basis of "notes".

However, I shall assume that the statements purported to have been recorded by the Third and Fourth respondents were in fact made in order to consider the case of the respondents in the light of their best showing.

VIOLATIONS OF ARTICLE 13(1) OF THE CONSTITUTION: MATTERS FOR CONSIDERATION

The petitioners state that their fundamental rights guaranteed by Article 13(1) of the Constitution were violated.

Article 13(1) states that "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

There is no dispute in the matters before us that the petitioners were taken into the custody of the law. The problems raised in *Piyasiri v. Fernando*[3] and *Rajapaksa v. Kudahetti*[4] ascertaining whether the petitioners were deprived of their personal liberty do not trouble us in the matters before us.

The question then is whether the two rights set out in Article 13(1), namely, (1) the right to be free from arrest except according to procedure established by law; and (2) the right to be informed of the reason for arrest, have been violated. (Cf. *Piyasiri v. Fernando*)[3].

ARREST – TAKING INTO CUSTODY – NOT ACCORDING TO PROCEDURE ESTABLISHED BY LAW – SOME GENERAL OBSERVATIONS

Ordinarily, in terms of the Code of Criminal Procedure, where a person is alleged to have committed an offence, the complaint against him and the offence it constitutes are set out in writing by the Magistrate with reference to the alleged offence and he is summoned to appear before the Magistrate at a specified time and place to answer the complaint and be further dealt with according to law. If the person does not appear, the Magistrate may issue a Warrant so that the person may be brought before the Court by the person authorized by the Warrant to answer the complaint and offence set out in the Warrant of arrest. Further, in certain circumstances, upon oath being made substantiating the matter of a complaint, the Magistrate may order that a person be apprehended forthwith and brought before him to answer the complaint and to be further dealt with according to law.

However, in certain other special circumstances, a person may be arrested without a Warrant. The procedure generally established by law for arresting a person without a Warrant are set out in Chapter IV B (Sections 32-43) of the Code of Criminal Procedure. Where a person is arrested without a warrant otherwise than in accordance with these provisions, Article 13(1) of the Constitution will be violated. *(Jayakody* v. *Karunanayake* [5] See also *Kumarasena* v. *Shriyantha and Others* [6]; *Podiappuhamy* v. *Liyanage and Others* [7].

It was common cause that the petitioners were arrested without a Warrant.

The Third and Fourth respondents do not in their affidavits say that the arrests were made in accordance with the provisions of the Code of Criminal Procedure. However, that does not necessarily mean that the respondents were in breach of Article 13(1) of the Constitution, for the arrests could have been made in accordance with some other procedure established by law.

In the written submissions filed by Counsel on their behalf, the respondents state that, after the arrests, the petitioners were "taken to the Wadduwa Police Station and detained under the Emergency Regulations." The position of the respondents is that, having acted under the Emergency Regulations, they made the arrests in accordance with a procedure established by law and therefore did not violate Article 13(1) of the Constitution.

Article 15(7) of the Constituion provides that the exercise and operation of certain fundamental rights declared and recognized by the Constitution, including those referred to in Article 13(1) and 13(2), shall be subject to such restrictions as may be prescribed by law in the interests, among other specified things, of national security and public order; and "law", for the purpose of paragraph 7 of Article 15, is said to include regulations made under the law for the time being relating to public security.

The law relating to public security in force at the time relevant to the matters before us was the Public Security Ordinance (Cap. 40) as amended by Act No. 8 of 1959, Law No. 6 of 1978 and Act No. 28 of 1988 under which various Regulations have been made from time to time.

It is unhelpful to simply say, as the respondents do, that the petitioners were arrested under **"the Emergency Regulations"** for the simple reason that a bewildering mass of emergency regulations made under the Public Security Ordinance covering a wide range of matters, including, for instance, the Adoption of Children (606/6 of 18.4.90 and 730/8 of 1.9.92), the possession and control of Ceylon Cold Stores (604/10 of 6.4.90, 612/12 of 6.2.90, 640/18 of 14.12.90, 660/5 of 30.4.91, 664/8 of 31.5.91, 669/9 of 2.7.91), Edible Salt (635/7 of 7.11.90), Private Omnibuses (653/22 of 15.3.91, 692/8 of 10.12.91), School Developmewnt Boards and Provincial Boards of Education (701/12 of 12.2.92 – the references are to Gazette numbers and dates of publication), have nothing to do with the arrests and detentions in question. Moreover, significant changes of the Regulations take place from time to time. When a petitioner states in an application under Article 126 of the Constitution that his freedom to be at liberty, unless he is arrested according to procedure

established by law, has been denied, it is incumbent on the person making the arrest to precisely indicate the procedure under which the arrest was made. Additionally, for reasons I shall explain, it is desirable that certified copies of the relevant regulations should be filed by the respondents.

VIOLATION OF ARTICLE 13(1) BY FAILURE TO ACT IN ACCORDANCE WITH PROCEDURE ESTABLISHED BY REGULATION 19(2)

The Third Respondent, in support of his affidavits, filed Detention Orders issued in response to only two of the ten applications, namely 152/92 and 155/92. They were marked as follows: X3A in application 152/92 relating to Bandara and as X3A in application 155/92 relating to Wimalasuriya, X4A in relation Dayaratne, X5A in relation to Paranavitane, X6A in relation to Weerasekera, X7A in relation to Piyarathana, X8A in relation to Premarathana and X9A in relation to Kithulgala Upali.

Having regard to the fact that detention orders, were not filed in respect of the other petitioners, I assume that there were no detention orders made in terms of Regulation 19(2) in respect of such other petitioners. A detention of a person in pursuance of Regulation 18 must be in a place authorized by the Inspector-General of Police or Deputy Inspector-General of Police, Superintendent of Police or Assistant Superintendent of Police. Otherwise the detentions would be in violation of Regulation 19(2) and therefore, not being in accordance with procedure established by law, they would be violative of Article 13(1) of the Constitution which provides that no person shall be arrested except according to procedure established by law. I hold therefore that the arrest of M. C. Pieris, the applicant in SC Application 146/92; M. D. Daniel, the applicant in SC Application 147/92; S. H. Dayananda, the applicant in SC Application 148/92; Athureliye Rathana, the applicant in SC Application 149/92; Rev. Thalpitiye Wimalasara the applicant in SC Application 150/92; K. N. Perera the applicant in SC Application 151/92; P. H. G. P. Chandanaratne, the applicant in SC Application 153/92; and R. A. P. C. Ranawake, the applicant in SC Application 154/92 to be violative of Article 13(1) of the Constitution.

There are however some decisions which suggest that where the provsions of Regulations 19(2) have been violated either because the persons arrested were not detained at a place designated by the Inspector-General of Police or by another authorized officer because there were no detention orders (see *Lalanie and Nirmala* v. *De Silva* [8]; *Dissanayake* v. *Superintendent, Mahara Prison* [9] or because they were detained at places other than those designated in an order (see *Wijesiri* v. *Rohan Fernando* [10]; *Dissanayake* v. *Superintendent Mahara Prison* supra); or because the requirements prescribed by Regulation 19(2) for instance with regard to production before a judge have not been complied with (see *Weerakoon* v. *Mahendra and Others* [11] or because, for lack of supporting grounds the detention orders were "unlawful" (see *Vidyamuni* v. *Jayetilleke* [12]; *Wijewardene* v. *Zain* [13] or "vitiated" (see *Sasanasiritissa's case* [14] see also *Weerakoon* v. *Weeraratne* [15], Article 13(2) of the Constitution has been violated.

Article 13(2) simply states that "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." (Per Goonewardene, J. in *Faiz* v. *Attorney-General*,[16] and in *Wijeratne* v. *Vijitha Perera* [17]. Article 13(2) does not, as the decisions referred seem to assume, state that "No person shall be held in custody, detained or otherwise deprived of personal liberty except according to procedure established by law."

The right not to be deprived of personal liberty except according to a procedure established by law is enshrined in Article 13(1) of the Constitution. Article 13(1) prohibits not only the taking into custody but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law. Where a person is deprived of personal liberty without being brought before the judge of the nearest competent court according to procedure established by law, there could be a violation of both Articles 13(1) and 13(2) of the Constitution. These matters will be further considered later on in my judgment.

MERE ERRORS OF FORM DID NOT VIOLATE ARTICLE 13(1)

The caption in each of the orders refers to Emergency Regulations published in Gazette Extraordinary dated July 18th, 1989. There are no Emergency Regulations published in Gazette Extraordinary dated July 18th, 1989. What appears in Gazette Extraordinary (No. 567/3) of July 18th, 1989 is the Proclamation of the President of the Republic declaring that the provisions of Part II of the Public Security Ordinance shall come into operation. In the body of each Order the Assistant Superintendent states that he is acting in terms of powers derived from Regulation 19(4) and 19(2) published in Gazette Extraordinary 701/19. Gazette Extraordinary No. 701/19 does not set out Emergency Regulations: It sets out the Proclamation of the President of the Republic declaring that Part II of the Public Security Ordinance shall come into operation.

Errors of the kind made in the preparation of these Detention Orders do not *per se* make the arrests otherwise than in accordance with a procedure established by law, for an exercise of power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a statute which confers no power has been quoted as authority for a particular act but where there was in force another statute which conferred that power. (Per Sansoni, J. in *Peiris* v. *The Commissioner of Inland Revenue*,[18] followed per Soza and Ranasinghe, JJ. in *Kumaranatunge* v. *Samarasinghe*[19] See also *Fernando* v. *Attorney-General*,[20] *Edirisuriya* v. *Navaratnam*,[21] *Joseph Silva* v. *Balasuriya & Others*[22]; *Gunaratne* v. *Cyril Herath and Others* [23] and *Wijesooriya* v. *Abeyratne and Others* [24].

However, these errors suggest that the arrests were arbitrarily made, not as required by Article 13(1) of the Constitution in terms of the relevant procedure established by law, namely Regulation 18(1), the police being at a loss even six days after the arrests to accurately indicate some procedure established by law under which they might have made the arrests. Moreover, errors of this sort show "a deplorable lack of diligence on the part of the police" and not only "creates much suspicion and doubt as to the legality of the arrests

but also as to the veracity of the respondents' affidavits upon certain matters." (Atukorale, J. in *Chandradasa* v. *Lal Fernando*) [25].

I shall assume that the Orders were issued, as they might have been, in pursuance of Regulation 19 of the Emergency (Miscellaneuous Provisions and Powers) Regulations No. 1 of 1989 made under the Public Security Ordinance and published in Part 1 Section (1) General, of the Gazette Extraordinary of 20.06.1989 as amended from time to time. Those were the regulations in force at the relevant time, although they were later replaced by the Emergency (Miscellaneous Provisions and Powers) Regulations Ordinance No. 1 of 1993 made by the President under Section 5 of the Public Security Ordinance and published in the Gazette Extraordinary No. 771/16 of 17th June 1993. I shall also infer from the detention orders made, even though they were not issued in respect of certain petitioners, that the arrests of all the petitioners were supposed to have been under Regulation 18(1).

ARREST UNDER REGULATION 18(1) IN GENERAL

Regulation 18(1) empowers certain persons, including any police officer, to "search, detain for purposes of such search, or arrest without warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed, an offence under any Emergency Regulation . . . "

Were the arrests in the matters before us in accordance with the procedure established by law as set out in Regulation 18(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989?

The following analysis is a checklist approach I shall follow to facilitate my determination on whether the constitutional requirement of freedom from arrest except according to procedure established by law has been observed in the matters before me. The words italicized have no application to the matters before us but have to be mentioned merely for the sake of completeness.

ANALYSIS

Regulation 18(1) empowers

a person authorized by that provision

(1) to search; or
(2) detain for purposes of "such" search as referred to in (1) or
(3) arrest without Warrant,

any person

(a) who is committing; or
(b) who has committed; or
(c) who he has reasonable ground for suspecting

(i) to be concerned in; or
(ii) to be committing; or
(iii) to have committed

an offence under the Emergency Regulations; *and to*

(4) search; or
(5) seize; or
(6) remove; or
(7) detain

(a) any vehicle; or
(b) vessel; or
(c) article; or
(d) substance; or
(e) thing whatsoever

used in or in connection with the commission of an offence under the Emergency Regulations.

The respondents were police officers and were therefore "authorized" persons.

ARREST UNDER REGULATION 18(1) – ARREST WITHOUT WARRANT WHEN NO OFFENCE COMMITTED OR BEING COMMITTED – 3(a) AND (b) OF THE ANALYSIS

It was an uncontroverted fact that there was a telephone message stating that a meeting of the JVP was being held. The third and fourth respondents proceeded to the temple because of that message. The Order proscribing the JVP was revoked on 10.5.88 (Vide Gazette Extraordinary 505/3 of 10.5.88) and as conceded by learned counsel for the respondents on the day in question, namely 27 February 1992, membership of the JVP was not "an offence under the Emergency Regulations". The procedure established by Regulation 18(1) is to enable the police to arrest a person who is committing or who has committed or who is reasonably suspected to be concerned in or committing or who has committed **an offence under the Emergency Regulations.** Membership of or participation in the activities of a lawful organization, such as JVP was at that time, was not an offence under the Emergency Regulations, (see *Wickremabandu* v. *Herath*[26]; *Deniyakumburugedera Sriyani Lakshmi Ekanayake* v. *Inspector Herath Banda and Others*[27]; *Dissanayake* v. *S. I. Gunaratne* [28] and no arrest was possible under or in pursuance of the procedure established by Regulation 18(1) on account of participation in a JVP Meeting. (See 3(a) and (b) of the analysis above).

What was the offence under the Emergency Regulations which the petitioners were committing?

The detention orders filed by the third respondent state that the petitioners had contravened Regulations 23(a) and (b) and Regulations 45(a), (b), (c) and Regulation 46.

Regulation 23 (a) provides that whoever conspires to overthrow or attempts or prepares to overthrow, or does any act, or conspires to do or attempts or prepares to do any act calculated to overthrow, or with the object or intention of overthrowing, or as a means of overthrowing, otherwise than by lawful means, the Government of Sri Lanka by Law established, shall be guilty of an offence.

Much emphasis was placed by the learned Deputy Solicitor-General on the supposed use of the phrase රට වැසි පෙරමුණ මුවාවෙන් – under the guise of the Ratawesi Peramuna and the word "දරගලය" – revolutionary struggle. The learned Deputy Solicitor-General was of the view that the speech went beyond legitimate criticism and fell into the genre of criticism called "incitement".

However, mere incitement is not an offence. As Justice Holmes observed in *Gitlow* v. *New York* [29] "Every idea is an incitement. It offers itself for belief and if believed is acted on, unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason".

Legitimate agitation cannot be assimilated with incitement to overthrow the Government by unlawful means, What the third respondent is supposed to have heard, even according to the fabricated notes he has proffered, was a criticism, albeit a severe criticism, of the system of Government, the need to safeguard democracy, and proposals for reform.

Ms. Muttetuwagama, submitted that these were not calls to revolt but rather a rhetorical way of saying things. Vague references to revolutionary action of an unspecified kind will not do. I agree.

Almost as eloquently and persuasively as she did, Justice Stevens observed in *NAACP* v. *Caliborne Hardware Co.*[30] "Strong and extemporaneous rhetoric cannot be nicely channelled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action they must be regarded as protected speech." And as the U.S. Supreme Court observed in *Watts* v. *United States.*[31] "The language of the political arena, like the language used in labour disputes is often vituperative, abusive and inexact." In the *Watts* case the petitioner had been convicted under a law making it an offence "knowingly and wilfully" to make any threat to take the life of the President. The petitioner had been conscripted to serve in the army in the Vietnam War. At a public rally he said, "I am not going. If they ever make me

carry a rifle the first man I want to get in my sights is L.B.J.", referring to President Lyndon B. Johnson. In holding him free from liability, the Court said: "Certainly the statute is constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." Nevertheless, considering in context, the conditional nature of the remarks and the fact that listeners had laughed at the statement, the "political hyperbole" indulged in by the petitioner was taken to be nothing more than "a kind of very crude offensive method of stating a political opposition to the President."

Learned Hand, then a District Judge, in *Masses Publishing Co.* v. *Patten*,[32] regarded as legitimate the "right to criticise either by temperate reasoning or by immoderate and indecent invective" as "normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority." The Judge went on to say: "Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of the law. Detestation of existing policies is easily transformed into the forcible resistance of the authority which puts them in execution, and it would be folly to disregard the casual relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which is in normal times a safeguard of free government."

I do also recall Justice Brennan's opinion in *New York Times Co.* v. *Sullivan*[33] that cases of this kind should be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

As far as we are concerned, that pledge is enshrined in Article 14(1)(a) of the Constitution which guarantees that every citizen is entitled to the freedom of speech and expression including publication.

While the emotive content of words might in the circumstances of a case be the more important element of the overall message to be

communicated (Cf. Justice Harlan, in *Cohen* v. *California*)[34] and at the same time bearing in mind that words are not only the keys of persuasion but also the "triggers of action", yet in the circumstances of this case there was nothing in the speech directly or by way of rational inference to suggest that the pre-eminent message was to overthrow the Government by unlawful means. It is the course of meaning which holds on through a speech that matters. It is the tenor of the speech rather than isolated sentences, phrases and words that matter. (Cf. per Sharvananda CJ in *Joseph Perera* v. *A.G.*)[35].

The fourth respondent says that what was being advocated was simply "chasing away" the President – a perfectly legitimate objective under a democratic system of Government if it was to be accomplished by lawful means. The call to "topple" the President or the Government did not mean that the change was to be brought about by violent means. It was a call to bring down persons in power by removing the base of public support on which they were elevated.

If the throwing down was to be accomplished by democratic means, the fact that the tumble may have had shocking or traumatic effects on those who might fall is of no relevance. It is the means and not the consequence that have to be considered.

The third respondent says in his affidavits that he concluded that the petitioners "were engaged in a conspiracy to overthrow the Government." An offence of conspiracy to wage war against the Republic is dealt with in Section 115 of the Penal Code read with Section 114. However, in the written submissions of the respondents and Detention Orders the reference is to the offence of conspiracy under the Emergency Regulations in Regulation 23. No one was arrested for sedition and incitement, which is dealt with in Regulation 26. Regulation 26 provides as follows:

> "Any person who by words, whether spoken or written or by sight or visible representations or by conduct or by any other act (a) brings or attempts to bring the President or the Government into hatred or contempt, or excites or incites or attempts to excite or incite feelings of disaffection to or hatred or contempt of the President or the Government; or (b) brings or attempts to bring the Constitution or the administration of justice

into hatred or contempt or excites or incites or attempts to excite or incite the inhabitants of Sri Lanka or any section, class or group of them to procure otherwise than by lawful means, the alteration of any matter by law established; or (d) raises or creates or attempts to raise or create discontent or disaffection among the inhabitants of Sri Lanka or any section,class or group of them; or (e) promotes or fosters or attempts to promote or foster feelings of hatred or hostility between different sections, classes or groups of inhabitants of Sri Lanka; or (f) excites or incites or attempts to excite or incite inhabitants of Sri Lanka or any section, class or group of them to the use of any form of physical force or violence, breaches of the peace, disobedience of the law or obstruction of the execution of law, for the purpose thereby of inducing or compelling the Parliament or the government to alter any matter by law established or to do or forbear from doing any act or thing; or (g) excites or incites or attempts to excite or incite the inhabitants of Sri Lanka or any section, class or group of them to do or omit to do any act or thing which constitutes a breach of any emergency regulation, shall be guilty of an offence and punished with rigorous imprisonment which shall extend to at least three months but shall not extend to more than twenty years and may also be liable to a fine."

One would have thought that the speech in the matters before us was reached by Regulation 26? However, there was just the one speech containing the supposedly offensive words; if the charge had been incitement, only the arrest of the speaker could have been justified. And so, it seems, a charge of conspiracy was made to justify the other arrests, the element of complicity being supplied by the statement that a priest inquired whether there was opposition and the others signifying their involvement by remaining silent.

By making Regulation 23(a) it has been determined that a conspiracy to overthrow the organized Government established by law by unlawful means is so inimical to the general welfare and involves such danger of substantive evil that such an action is an offence that must be penalized by the State in the exercise of its police power. The obvious purpose of Regulation 23(a) is to protect

the existing government, not from change by peaceable, orderly, constitutional and therefore by **lawful** means, but from change by violence, revolution and terrorism, by means of criminal force or show of criminal force. (Cf. section 114, 115 and 120 of the Penal Code and Regulation 25 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1993. It is of interest to note in passing that Regulation 23(a), which is the provision we have to, and do, consider, has ceased to exist, and that offences under the Penal Code, including offences to wage war against the Republic (section 114) and conspiracy to do so (section 115) have now been incorporated by reference in substitution for Regulation 23(a).)

The petitioners were certainly not meeting merely to hold a seminar of political theory or to engage in an academic study of national problems. They were engaged in more than a harmless letting off of steam. The Ratawesi Peramuna was as we have seen acording to the petitioners themselves, an "anti-government" organisation. However, as a matter of law, merely vehement, caustic and unpleasantly sharp attacks on the government, the President, Ministers, elected representatives or public officials are not *per se* unlawful. (See per Brennan, J. in *New York Times Co.* v. *Sullivan*, (supra). Cf. *Deniyakumburagedera Sriyani Lakshmi Ekanayake v. Inspector Herath Banda and others* [27]; *Amaratunga* v. *Sirimal* [36]; *Joseph Perera* v. *A.G.*[35] per Sharvananda C.J.) They have on that day been engaged in discussions against the Government: but there was nothing said that showed incitement to have been subjectively intended by the speaker; or that might be objectively regarded as being encouraged by the speaker; or in the context apt to create a seditious temper that was likely to produce lawless action.

It is useful in this connection to consider what might or might not constitute unlawfully exciting or attempting to excite disaffection under the normal law. Section 120 of the Penal Code states as follows:

> "Whoever by words, either spoken or intended to be read, or by signs or by visible representations or otherwise, excites or attempts to excite feelings of disaffection to the President or to

the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the people of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the people of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such people, shall be punished with simple imprisonment for a term which may extend to two years."

The "Explanation" to the Section states as follows:

"It is not an offence under this Section by intending to show that the President or the Government of the Republic have been misled or mistaken in measures, or to point out errors or defects in the Government or any part of it or the administration of justice, with a view to the reformation of such alleged errors or defects, or to excite the people of Sri Lanka to attempt to procure by lawful means the alteration of any matter by law established, or to point out in order to their removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between different classes of the people of Sri Lanka."

The speech, according to the third and fourth respondents' affidavits, was directed against "autocratic rule" and the constitutional framework they supposed facilitated it. Changes of the Executive President and the Constitution were advocated. This was perfectly legitimate. Jefferson articulated the relevant precepts in the following words:

". . .It is the Right of the People to alter or to abolish it (Government), and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

There was no evidence that the Peramuna ever adopted, embraced or espoused undemocratic means either to overthrow the

government or to change the Constitution. On the other hand, the evidence in the affidavits of the petitioners cited at the end of this paragraph was that Peramuna eschewed violence either for obtaining or retaining power. A raison d'etre for the Peramuna was to wean young persons from pursuits aimed at changing governments by violence. The petitioners in their affidavits have maintained that, not only were they not members of the JVP, but that they were anxious to prevent young persons from resorting to violence and armed conflict. They were opposed to and viewed the re-entry of the JVP into the political arena as requiring a more cautious approach on the part of the Ratawesi Peramuna, making that a subject for their discussions at Kawduduwa temple on 27th February 1992. They were conscious of the fact that their lives were in danger. While they were themselves not preparing for violent action, they might have been steeling its members to be ready to face the violence of rival groups, having regard to the armed intervention they had experienced at their poster exhibition at Matara. The statement attributed by the third respondent to a speaker at the meeting that they must be ready to sacrifice lives is therefore quite understandable. ((See para 2.4 of the affidavit of M. D. Daniel in S.C. Application No. 147/92; para 3.4 of the affidavit of Singappuli Hewage Sunny Dayananda in S.C. Application No. 148/92; 2.9 of the affidavit of Athureliya Rathana in S.C. Application No. 149/92; para 3.4 of the affidavit of Jayasinghe Mudiyanselage Janaka Priyantha Bandara in S.C. Application 152/92; para 2.4 of the affidavit of Pallimulle Hewa Geeganage Chandraratne in Application No. 153/92; and para 4.1 of the affidavit of Ranawake Arachchige Patali Champika Ranawake in S.C. Application No. 154/92.)

The criminal activities of the once proscribed JVP perhaps left an indelible impression. Unfortunately some law enforcement officers, including the third respondent, seem to have come to the erroneous conclusion that all anti-government activity, regardless of the body under whose auspices it is being advanced, are **necessarily** directed at subverting the Government by violent, undemocratic and unlawful means. Several applications made to this Court have made this quite obvious. (E. g. see *Gunaratne v. Cyril Herath* [23] *and Wijesooriya v. Abeyratne and Others* [24]).

Overthrowing the Government of the day might in the third respondent's private opinion have been bad or undesirable or harmful or unfortunate or positively disastrous, evil and reprehensible; he may have entertained a hate or revolted dislike of the contents of the speech; but the relevant matter for him as a police officer acting in pursuance of Regulation 18(1) read with Regulation 23(a) in respect of persons engaged in expressive activities was to consider whether there was anything to show that the petitioners were engaged in a plot, some combination or agreement, to overthrow the Government by imminent action which was likely to bring about such overthrow otherwise than by **lawful means**; to use a phrase in common parlance, "by the bullet rather than by the ballot", by force and violence rather than by the means provided by law, and therefore in contravention of Regulation 23(a) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989. On the other hand, it was not the function of the police, purporting to act in pursuance of their powers of arrest under Regulation 18(1), to be an instrument of Government for the suppression of merely unpopular views. (Cf. *Feiner v. New York*) [37].

Police Officers who are tempted to play the role of censors should be mindful of the fact that the right of free speech cannot be interfered with on slender grounds and that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Virgina State Board of Education v. Barnette*) [38].

As we shall see later on, it is of fundamental importance that there should be freedom of thought and expression in a democracy. What I should like to emphasize here is the fact that attempts to achieve conformity by compulsion must be effectively discouraged, for "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that [the Constitutional guarantee of freedom of expression] was designed to avoid these ends by avoiding beginnings."

(*West Virginia State Board of Education v. Barnette*, supra, cited with approval by Fernando, J. in *Wijeratne v. Vijitha Perera and Others*)[17].

Police Officers should also realize that if, as indeed it should be, it is their desire to maintain public order and stability, precipitate action of the sort taken by the third and fourth respondents may be counter-productive and pernicious. As Justice Brandeis pointed out in his judgment in *Whitney v. California*[39], repression breeds hate and hate menaces stable government. The immense value of free speech as a safety valve cannot be overemphasized. As Nowak, Rotunda and Young (*Constitutional Law*, pp. 836-7) point out:

"Just as the ancient Roman eventually learned that executing Christians did not suppress Christianity, modern Governments should realize that forbidding people to talk about certain topics does not encourage public stability. It only creates martyrs. Punishing people for speech does not discourage the speech; it only drives it underground and encourages conspiracy. In the battle for public order, free speech is the ally, not the enemy".

In ventilating their dissident views, the petitioners may have passed the bounds of argument and persuasion and there may have been advice, encouragement or even pressure brought to bear on the listeners to overthrow the Government . Yet, there was no basis for arrest under Regulation 18 read with Regulation 23 (a), for there was nothing the third respondent was supposed to have heard that in any way suggested that the petitioners were doing anything to overthrow the Government by means that were not lawful.

According to the Detention orders marked X3A in Application 152/92 and X3A – X9A in Application 155/92, the petitioners were also supposed to have been acting in contravention of Regulation 23(*b*). What Regulation 23(b) states is this:"Whoever conspires to murder or attempts to murder, or wrongfully confines, conspires or attempts to prepare to wrongfully confine, the President or a Member of Parliament, or a Member of the Police or a Member of the Armed Forces, or a Public Officer with the intention of inducing or compelling the President, such Member of Parliament, Member of the Police or Member of the Armed Forces or a Public Officer to exercise or refrain

from exercising in any manner any of the lawful powers of the President, such Member of Parliament, Member of the Police, Member of the Armed Forces or Public Officer ... shall be guilty of an offence."

Even assuming that the third respondent did hear the things he recorded, how could an arrest have been made on the basis that Regulation 23(*b*) was being violated ? There was not a word in his notes of what he is supposed to have heard about either murdering or confining anyone.

The petitioners were also vaguely charged with attempting, aiding, abetting or conspiring to commit offences (Regulation 45) and of assisting offenders (Regulation 46).

What were the offences under the Regulations the petitioners were aiding, abetting or conspiring to commit ? None.

For the foregoing reasons I hold that the third and fourth respondents in arresting the petitioners were not arresting persons who were committing or who had committed an offence under Emergency Regulations 23(a), 23)b), 45 and 46.

WERE THE ARRESTS WITHOUT WARRANT ON REASONABLE GROUND OF SUSPICION? – 3(C) OF THE ANALYSIS.

Were the petitioners making the arrest of persons whom they had reasonable ground for suspecting (1) to be concerned in; or (ii) to have committed an offence under the Emergency Regulations?

In general, in order to make an arrest according to the procedure established by Regulation 18(1) on the basis of a reasonable ground of suspicion (See 3(*c*) in the analysis of Regulation 18(1) above), an officer need not have clear and sufficient proof of the commission of the offence alleged. He is not called upon even to have anything like a *prima facie* case for conviction. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. Suspicion can take into account also matters which, though admissible, could not form part of a

prima facie case. The provisions relating to arrest are materially different to those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting point of criminal proceedings while the other constitutes the termination of those proceedings and is made by the Judge after the hearing of submissions from all parties. The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. What the officer making the arrest needs to have are **reasonable grounds** for suspecting the persons to be concerned in or to be committing or to have committed the offence. In general, the question for me in deciding whether the arrests on the ground of reasonable suspicion were in accordance with the procedure established by Regulation 18(1) is this: Were there circumstances, including the prevailing situation in the country at the time (see per Wanasundera J. in *Joseph Perera* [35] per, Kulatunga, J. in *Wijewardene v. Zain* [13] and in *Dissanayake v. Superintendent Mahara Prison* [9]. See also *Mallawaratchi v. Seneviratne*[40], objectively regarded, – the subjective satisfaction of the officer making the arrest is not enough – that should have induced the third respondent to reasonably suspect that the petitioners were concerned in or committing or to have committed an offence under the Emergency regulations specified by the respondents ?

If the answer is in the affirmative, Article 13(1) is not violated. If the answer is in the negative, Article 13(1) is violated. The test is the same whether the arrest is under the normal law, or under the Emergency Regulations or the Prevention of Terrorism Act. (*Muttusamy v. Kannangara* [41]; *Gunasekera* v. *Fonseka* [42] *Joseph Perera v. Attorney-General* [42]; Cf. *Lundstron v. Cyril Herath and Others* [43]; *Joseph Silva and Others v. Balasuriya and Others* [22]; *Jayasuriya v. Tillekeratne & Ohers* [44]; *Wijewardene v. Zain*[13]; *Withanachchi v. Cyril Herat and Others* [45], *Chandradasa v. Lal Fernando* [25]; *Yapa v. Bandaranayake* [45]; *Gunaratna v. Cyril Herath and Others* [23] and *Wijesooriya v. Abeyratne and others* [24]; *Weerakoon and Alahakoon v. Beddewela* [47]; *Gamlath v. Silva and Others*[48]; *Dissanayake v. Superintendent Mahara Prisons* [49]; *Munidasa v. Seneviratne*[49]; *Karunasekera v. Jayewardene* [50]; *Chandrasekeram* v. *Wijetunge* [51]; *Vidyamuni v. Jayetilleke* [13]; *Elasinghe v. Wijewickrema and Others* [51]; *Nihallage Dona Ranjani v. Liyanapathirana and Others* [53].

It has been said in some of these cases, using the ambiguous test laid down in *Baba Appu v. Adan Hamy* [54], as if it were a ritual or prescribed formula to be followed in deciding whether there was a ground of reasonable suspicion, that "a suspicion is reasonable if the facts disclose that it was founded on matters within the police officer's own knowledge or on the statements made by other persons in a way in which justify him giving them credit."

A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both, as the third respondent suggests he did in the matters before us, and as it was the case in *Ragunathan v. Thuraisingham* [55]. A suspicion does not become "reasonable" merely because the source of the information is creditworthy. If he is activated by an unreliable informant, the officer making the arrest should, as a matter of prudence, act with greater circumspection than if the information had come from a creditworthy source.. However, eventually the question is whether in the circumstances, including the reliability of the sources of information, the person making the arrest could, as a reasonable man, have suspected that the persons were concerned in or committing or had committed the offence in question. If the basis of the ground of arrest is alleged to be information received, the Court may, as it did in *Joseph Silva and Others v. Balasuriya and Others* [23], require the respondents to produce evidence of the information. However, I would with great respect hesitate to accept the view expressed by Wanasundera, J. in *Joseph Perera* (supra) and followed in *Joseph Silva and Others v. Balasuriya and others* [22] that "the sole issue for the Court is the knowledge and state of mind of the officer concerned at the time of the arrest ..." "knowledge", as opposed to mere "belief", means that what was **believed** was **true.** The truth of the matter is not what is relevant at the stage of arrest. What Regulation 18(1) requires is reasonable ground for suspecting. As Lord Devlin pointed out in *Shaaban Bin Hussein v. Chong Fook Kam* [56] "suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is

the end." Moreover, the officer is not required to have reasonable grounds to *believe*. As Dias J. pointed out in *Buhary v. Jayaratne* [57] "believe" is much stronger than "suspect" and involves the necessity of showing that a reasonable man must have felt convinced in his mind of the fact in which he believed. (See per Seneviratne J. in *Withanachchi v. Cyril Herath and others* [45] . However the officer making an arrest cannot act on a suspicion founded on **mere** conjecture or **vague** surmise. His information must give rise to a **reasonable** suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence. (See the observation of Atukorale J. in *Jayasuriya v. Tillekeratne*) [44].

The offence in question in the matters before us was the offence of conspiracy defined in Regulation 23(a). Other offences were also mentioned in the Detention Orders; but from the affidavits of the third respondent one gathers that it was the offence of conspiracy as set out in Regulation 23(a) that was supposed to have been in his mind when he heard the speeches and decided to arrest the petitioners.

According to the telephone message, the petitioners were attending a meeting of the JVP. The JVP was once proscribed under Regulation 68 as an organization whose activities were prejudicial to national security or the maintenance of public order. As a matter of prudence, past conduct might not have been altogether ignored. If in all the circumstances the Officer-in-Charge had reasonable grounds for suspecting that the petitioners were concerned in or committing or to have committed an offence under the Emergency Regulations, he had the duty to ascertain what the position was and take timely action.

In the case of a conspiracy to overthrow the Government by unlawful means, the Government acting through its agents of law enforcement cannot be expected to wait until the **putsch** is about to be executed, the plans have been laid and the signal is awaited or the bomb assembled and the fuse ignited. If the ingredients to the

reaction are present, it is not necessary to await the addition of the catalyst. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when it seeks to extinguish the spark without waiting until the flame has been enkindled or blazed into conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace; but it may, and it is expected in the exercise of its duty, to suppress the threatened danger in its incipiency. If Government is aware that a group aiming at its overthrow by unlawful means is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action to save the nation from the physical and political harm that might otherwise ensue is not only reasonable but also a duty and a fundamental function of government and its law enforcement agencies. (Cf. Vinson, C.J. in *Dennis v. U.S.*[58]; Justice Stanford in *Gitlow v. New York* [29]. Where there are utterances directed to inciting or producing imminent action to bring about the overthrow of organized government established by law by unlawful means and which are likely to incite or bring about such overthrow, such utterances involve danger to the public peace and to the security of the State. They threaten breaches of the peace and must be immediately dealt with even though the effect of a given utterance cannot be accurately predicted. As Justice Douglas observed in *Dennis v. United States* [58] : "There comes a time when even speech loses its constitutional immunity ... When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to cry a halt. Otherwise free speech which is the strength of the Nation will be the cause of its destruction."

However, intervention must be opportune. Justice Brandeis, in *Whitney's Case* [39] stated as follows:

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the

processes of popular government, no danger flowing from speech can be deemed clear and present, when the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussions the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such in my opinion is the command of the Constitution."

Since in Sri Lanka the word "emergency", by long usage, is sometimes taken to mean the state of emergency proclaimed by the President under the Public Security Ordinance, it might be pointed out that "emergency" in the Brandeis statement meant that the lawless action must be imminent before repressive action, by arrest or otherwise, is warranted. In order to justifiably claim that the arrests were fitting in regard to time and circumstances, the respondents were obliged to establish that the speech impelled the hearers to imminent, unthinking lawless action to overthrow the Government.

Law enforcement officers cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweller's scale. At the same time sufficient regard must be had to the constitutional right of free speech. Had it been established that the speaker subjectively intended incitement and in the context, the words used were objectively likely to encourage or produce imminent unthinking lawless action to overthrow the Government, then "more speech" in "'the market place" of ideas to correct the speech by reasoned debate had no place. The third respondent, acting for and on behalf of the State would then have had a significant interest in, and no other means of, preventing the resulting lawless conduct than by arresting the persons advocating and clearly supporting such activity. However, that was not the case.

The petitioners were not arrested on any certain and verifiable basis or even on the basis of reasonable suspicion that they were concerned in or committing or had committed the offence of conspiracy as defined by Regulation 23. They had done nothing to attempt or prepare to overthrow the Government by unlawful means.

Indeed, they were not prepared even for **lawful** activity, for they were merely attempting to structure their organization at the time. Even imminent lawful activity was as yet a remote possibility. The petitioners were arrested simply in the expectation that something might turn up to support the vague suspicions of the third respondent that the petitioners were engaged in some venture to overthrow the Government by unlawful means. The third respondent in paragraph 6 of his affidavit of 9th September 1992 filed in SC Application 153/92 states that petitioner Chandanaratne "and the other suspects were brought to the Wadduwa Police Station and they were interrogated with a view to finding out their subversive connections." Having no reasonable grounds against the petitioners, it was hoped that "connections" with others against whom there may have been reasonable grounds would, perhaps, supply the deficiency.

One may be "connected" through bonds of family or friendship or common employment and a myriad of other ways. There may have been no choice, as in the case of one's relatives or fellow employees. It is hardly reasonable to suggest that "connections" alone imply complicity or even a shared sympathy with each other's views. Yet the petitioners seemed to have lost their personal liberty simply because of possible "connections." People who were "connected", as in the case of the members of Ranawake's family, were therefore subjected to needless worry, vexation and harassment. Ranawake ((154/92, 4.13, 4.14 and 5.1) relates how *ex post facto* efforts were made in his case to discover a basis for his arrest, including extensive interrogation in relation to his writings seized from his home and that of his sister after a search of his home by Piyaratne, the fourth respondent, which included the splitting of mattresses. The third respondent in his affidavit (para 10) denies removing documents but admits the visits to the homes. The third respondent (para 18) admits that Piyaratne visited Ranawake's sister's home and Ranawake's home but states that he only examined the rooms. Piyaratne in his affidavit (para 3) not only denies splitting mattresses but denies even visiting Ranawake's home. I have no doubt that the search for "connections" cause needless distress, and by the destruction of mattresses, needless misfortune, in the homes of the Ranawake family.

The police had their suspicions and hoped that some evidence might turn up to make their suspicions reasonable. However, vague, general suspicions and the fervent hope or even confident assumption that something might eventually turn up to provide a reasonable ground for an arrest will not do. (Cf. *Piyasiri v. Fernando* [3]; *Wijesiri v. Rohan Fernando & Others* [10]; *Wijewardene v. Zain* [13]; *Weerakoon and Allahakoon v. Beddewela* [47].

Scott, L.J. in *Dumbell v. Roberts*[60] (followed in *Mutthusamy v. Kannangara*[41]; per Gratiaen, J.; and in *Faiz v. Attorney-General*[16] per Perera, J. said: "The principle of personal freedom, that every man should be presumed innocent until he is found guilty applies also to the police function of arrest ... For that reason it is of importance that no one should be arrested by the police except on grounds which the particular circumstances of the arrest really justified the entertainment of a reasonable suspicion." Even a *bona fide* suspicion that something was amiss, if there are no reasonable grounds, is insufficient. The good intentions of the police officer are irrelevant. (See *Podiappuhamy v. Liyanage and Others* [61] Cf. *Premaratne and Somawathie v. K. D. Somapala* [62]). In the circumstances of that case, however, the Court was of the view that no more was required than a "formal" declaration of the violation of the petitioner's Constitutional rights. With great respect, either there is a violation or there is no violation and a declaration must be made accordingly.)

DETENTION FOR SEARCH – ANALYSIS (1) AND (2)

As we have seen, Regulation 18(1) empowers a person authorized by that law to (1) search or (2) detain for purposes of search any person, who is committing or who has committed or whom he has reasonable ground for suspecting **to be concerned in** or to be concerned in **or to be committing** or to have committed, an offence under the Emergency Regulations. "Search" may be an examination or exploration in order to find, or to ascertain the presence or absence of some person or thing by looking through places like residences or places or receptacles like cupboards and cabinets in which things are held or stored or by examining a person by handling, removal of garments and the like or looking through and examining writings, records and other documents in order to

ascertain whether there are certain things contained therein. A search in this sense took place according to the third and fourth respondent, for it was supposed to have been ascertained that the petitioners had no injuries and that there were found certain suspicious books and papers but nothing else of relevance to the case at the temple. There is no complaint by the petitioners with regard to the search in that sense. There was also a search in this sense of the homes of Ranawake and his sister which I have already referred to.

"Search", also means the examination, by interrogation or otherwise, systematically and in detail relating to the commission of an offence so as by such investigation to track down offenders. (See *Nanayakkara v. Henry Perera* [62]; *Weerakoon v. Weeraratne*[15]; *Perera and Sathyajith v. Siriwardene* [63]. See also *Wijewardene v. Zain*[13]; *Weerakoon v. Weeraratne*[15].

A person may, in terms of Regulation 18(1) be detained "for purposes of such search". The investigation must either relate to an offence under the Emergency Regulations which the person detained was committing or had committed, or to an offence under the Emergency Regulations which the person detained was suspected on reasonable grounds to be concerned in or to be committing or to have committed. A person, as the cases cited in the preceding paragraph show, cannot be detained for unspecified and unknown purposes. As we have seen there were no reasonable grounds for arrest and the petitioners were detained merely on account of a vague suspicion in the hope that something might turn up to make it reasonable. Such a detention for search is not in accordance with the procedure established by Regulation 18(1).

The respondents have failed to adduce evidence to show that the petitioners were (1) committing or (ii) had committed an offence under the Emergency Regulations or (iii) that they had any reasonable ground for suspecting the petitioners to be concerned in or to be committing or to have committed any offence under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989.

Therefore in detaining the petitioners for search the respondents were not acting in accordance with the procedure established by Regulation 18(1) of the Emergency Regulations. (See paragraphs (1) and (2) of the Analysis).

I therefore declare that the fundamental right of each and every one of the petitioners to be free from arrest except according to procedure established by law guaranteed by Article 13(1) of the Constitution has been violated.

ACTING ACCORDING TO A HYBRID PROCEDURE COMBINING REGULATION 17(1) WITH REGULATION 19.

There were other Detention Orders in addition to those already referred to which provide us with information regarding the basis of the arrests. A Detention Order dated 4 March 1992 (except in the case of Bandara in 152/92 and Weerasekera in 155/92 where the Orders are dated 3rd March 1992 and the period of detention is said to be from 3rd March 1992) and the period of detention is said to be from 3rd March, 1992) issued by the Assistant Superintendent of Police, Panadura, has been filed by the third respondent in respect of each of the following applications, namely, the applications of Seneviratne in 146/92; M. D. Daniel in 147/92, Sunny Dayananda in 148/92; Rathna in 149/92; Wimalasara 150/92; Nandana Perera in 151/92; Chandraratne in 153/92; Champika Ranawake in 154/92; Wimalasuriya in 155/92; Dayaratne in 155/92; Paranavithana in 155/92; Piyarathna in 155/92 and Kithulgala Upali in 155/92. The above mentioned Orders in applications 146/92; 147/92; 148/92' 149/92; 150/92; 151/92; 153/92; and 154/92 are marked in each order as X3. The Detention Order is marked as X3 in the application of Wimalasuriya in Application 155/92; X4 in the application of Dayaratne in Application 155/92; X5 in the application of Paranavithana in 155/92; X7 in the application of Piyarathna in 155/92; X8 in the application of Pemarathana in 155/92 and X9 in the application of Kithulgala Upali in 155/92.

The Detention Orders have the following terms except (a) with regard to the place of detention (Maradana Police Station is

designated in the case of Wimalasuriya, Paranavithana, Premarathana, Kitulgala Upali, Nandana Perera and Rathana; the Pettah Police Station is designated in the case of Dayaratne, Piyarathana, Ranawake, Chandana Perera, Wimalasara and Sunny Daniel; and the Co-ordinating Division is designated in the case of Weerasekere, Bandara, M. D. Daniel and Seneviratne), (b) the name and residence of each of the sixteen petitioners detained as set out in the Schedule to each order, and (*c*) the reference number of each order:

My Ref.....
Police Office,
Panadura
4th March, 1992.

DETENTION ORDER UNDER THE EMERGENCY MISCELLANEOUS PROVISIONS AND POWERS REGULATIONS

By virtue of the powers vested in me under Section 19(2) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 4 of 1989, published in the Gazette (Extraordinary), No. 701/19 of 14.2.82, I, L. A. Jayasinghe, Asst. Suptd. of Police, Panadura/Bandaragama Dist. being in (sic.) opinion that with a view to arresting the person specified in Column of the Schedule to this order residing in the corresponding entry in Column II of that Schedule from acting in any manner prejudicial to the National Security or to the Maintenance of Public Order or with a view to complete investigations into his actions in the commission of offences under the aforesaid Regulations, it is necessary to do (sic.) hereby order that such person be detained in custody at Police Station ... for a period of 84 days from 4 March 1992.

SCHEDULE

Column I Name of Detinue	Column II Place of Residence

A. L. Jayasinghe,
Asst. Superintendent of Police.

The number of the Column relating to the name of the person detained is not mentioned in the main text of the Orders.

In each case, the Assistant Superintendent of Police states that he was issuing the Order "by virtue of the powers vested in [him] under section 19(2) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 4 of 1989 published in Gazette (Extraordinary) No. 701/19 of 14.2.92". There is no such thing mentioned in that Gazette. There was however such a thing as the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 which was published in Part I Section I of Gazette Extraordinary of 20.06.1989. As we have seen, Gazette Extraordinary No. 701/19 of 14.2.92 merely sets out the Proclamation bringing Part II of the Public Security Ordinance into operation.

Assuming that he was acting under Regulation 19(2) (read with Regulation 19(4) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989, what was the Assistant Superintendent empowered to do? He could have authorized a person arrested in pursuance of the provisions of Regulation 18 to be detained for a period not exceeding ninety days, "reckoned from the date of his arrest under that regulation", in a place authorized by him. In terms of Regulation 18 a police officer "may search, detain for purposes of such search, or arrest without warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed, an offence under any emergency regulation ..." As we have seen, the petitioners were not committing, nor had they committed any offence under the Emergency Regulations. Nor were there reasonable grounds for suspecting them to be concerned in or to be committing or to have committed any offence under the Emergency Regulations. Therefore the petitioners could not be said to have been arrested and detained in accordance with the procedure established by Regulation 18. Therefore they were not persons "detained" in **pursuance** of the provisions of Regulation 18. The special procedures prescribed by Regulation 19 are conditional upon compliance with Regulation 18. This is evident from the use of the word "under" the Regulation 19(1) and the phrase "in pursuance of" in Regulation 19(2). Not being persons "detained in pursuance of

Regulation 18", the procedures for detention and release and production in terms of Regulation 19 had no applicability.

Probably realizing that the petitioners could not have been arrested and detained under Regulation 18, the Assistant Superintendent, in the Detention Orders under consideration, gives another explanation for the detention. He states in each case that the Detention Order was issued because it was his "opinion" that it was "necessary" to prevent the person detained "from acting in any manner prejudicial to the National Security or to the Maintenance of Public Order or with a view to complete investigations into his actions in the commission of offences under the aforesaid Regulations." Regulation 19(2), which he states empowered him, does not in fact empower the **Assistant Superintendent** or any one else to arrest or detain a person for the stated or any other reasons. What that regulation does is to prescribe procedures relating to the custody of persons arrested in pursuance of Regulation 18: Where they may be kept, how they should be treated, when and how such detention may end, and how a judge should act in changing the character of the custody when a person is produced before him. It was beyond his authority to issue such orders. It was ultra vires and the Orders were therefore worthless pieces of paper. However, if the **Secretary to the Ministry of Defence** was of opinion with respect to any person that, *inter alia*, **with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of public order**, it was necessary to do so, such *Secretary* was empowered by Regulation 17(1) (not Regulation 19 – Cf. *Godagama v . Ranatunge* [64] to make order that such person be taken into and detained in custody. What the **Assistant Superintendent** could have done was to use his powers under Regulation 17(2) to give effect to the **Secretary's orders**. The person so detained would then have had to be detained at a place authorized by the Inspector-General of Police and such detention would, in terms of Regulation 17(3), have been deemed to be "lawful custody".

Let us assume that the detention orders were made under Regulation 17(1), having regard to some of their terms. Regulation 17(1) of the Emergency (Miscellaneous Provisions and Powers)

Regulations No. 1 of 1989 says that the Secretary to the Ministry of Defence should be "of opinion" with regard to certain matters. This Court must be satisfied that (a) the **Secretary** (b) was of such opinion before Regulation 17(1) can be invoked as procedure established by law empowering the deprivation of personal liberty. The Secretary should be able to state that **he himself** came to form such an opinion. In *Weerakoon v. Weeraratne*[15], Kulatunga J. found that the Secretary had acted mechanically as a rubber stamp at the behest of the police and placed his signature on papers submitted to him. (See also the observations of Kulatunga J. in *Sasanasiritissa Thero and others v. De Silva and others* [14] where it was observed that the Secretary and his Additional Secretaries had "signed orders mechanically on the request of their subordinates" and the Court found that the Secretary and Additional Secretaries "never held the opinion they claim to have entertained." Cf. *Jayaratne v. Tennekoon*[16]; *Weerakoon v. Mahendra* [11]. It is a matter of personal judgment. And so, for instance, an affidavit supporting the detention from his successor in office would have been of no avail. (See *Dissanayake v. S. I. Gunaratne and others*[26]. In the matters before us it was not the Secretary or even his successor but an Assistant Superintendent of Police who arrogated the powers of the Secretary to himself. The Secretary cannot abdicate his authority. Nor may others usurp his powers. Otherwise Regulation 17(1) would become a dragnet in which innocent persons would become enmeshed whether it would have been against the Secretary's will or not – *nolens volens*.

It has been suggested that where a petitioner challenges an order made under Regulation 17(1) and asserts that the Secretary did not form that opinion which the Secretary was supposed to have formed, (See *Kalyanie Perera v. Siriwardene*[63] he must take steps to have the relevant material placed before the Court, (*Fernando v. Silva and Others*[67] and establish his averment by "proof positive". (See *Hirdramani v. Ratnavale* [69] cited with approval in *Sasanasiritissa Thero* [14].

On the other hand, if the Secretary has information to support his opinion, he must place it before the Court rather than baldly asserting that he was of the opinion that it was necessary to detain a petitioner.

Otherwise the Court will decide the matter on the available evidence. What is the position if the information on which the Secretary acted cannot be made public? In such a case the Court may make order that such information be made available to the Chief Justice who will make the information available to the Judges who will adjudicate on the matter. (*Leelaratne v. Cyril Herath and others*) [68].

Where it appears to the Court on the material available that the deprivation of liberty was unreasonable, the Court may hold that the Secretary, who is confidently assumed to be a reasonable man, could not have formed the opinion and was therefore not of the alleged opinion. (Cf. *Hirdaramani v. Rathnavale*[67]; *Wickremabandu v. Herath*[26] ; *Chandrasekeram and Others v. D. B. Wijetunge and Others*[51] ; *Vidyamuni v. Jayetilleke and others*[12]; *Sasanasiritissa Thero v. P. A. de Silva*[14]; *Kalyanie Perera v. Siriwardene* [64]; *Perera and Sathyajith v. Siriwardene* [63]; *Dissanayake v. Guneratne* [28]; *Fernando v. Kapilaratne and Others* [69] ;*Ekanayake v. Herath Banda and Others* [27]; *Weerakoon v. Weeraratne and Others* [15]; *Godagama v. Ranatunge* [64].

I should observe that at the date of the relevant detention order, namely 4th March 1992, Regulation 17(1) had been amended, (606/4 of 18th April 1990) *inter alia*, by substituting "satisfied" for "of opinion". This makes no practical difference. Thus in construing the phrase "if the Secretary of State is satisfied", Lord Denning MR in *Secretary of State v. Tameside* [70] cited in *Siriwardene v. Liyanage* [71], said that the Secretary's decision "must be reasonable in the sense that it is or can be supported with good reasons or at any rate be a decision which a reasonable person might reasonably reach."

The 1990 amendment of Regulation 17 in fact seems to be in accordance with the judicial interpretation of the old Regulation, for it requires the Secretary to be "satisfied upon the material submitted to him or upon such additional material as may be called upon for by him". The opinion is therefore one that must be based upon grounds. Moreover, the amended provision requires the Secretary to be satisfied that "it is necessary" to detain the person. The element of reasonableness is, therefore underlined.

These are considerations of general applicability. Thus, similar considerations it seems apply, *mutatis mutandis*, to arrests under the Prevention of Terrorism Act. In *Somasiri and Somasiri v. Jayasena and Others* [72] Kulatunga J., following *Senthilnayagam v. Seneviratne* [73] said: "If such arrest or detention is challenged, they should justify their conduct objectively by means of sufficient evidence." In that case, the Detention Order was found to have been signed by the Minister "mechanically at the request of the police without giving his mind to the preconditions under Section 9 for making such orders." The order was held to be "vitiated" and Article 13 was declared violated. In *Dissanayake v. Superintendent Mahara Prison* [9] too the Minister was held to have made the orders mechanically and the detention was held to be "unlawful".

In the matters before us, no evidence was placed to explain the reasons for the Detention Orders that were partly formulated in terms of Regulation 17(1).

Realizing probably that neither the Secretary, for want of reasons, nor an **Assistant Superintendent**, for want of authority, could have invoked the procedure prescribed by Regulation 17, the Detention Orders state alternatively that the petitioners were being detained "with a view to complete investigations" into their actions in the commission of offences under the "Emergency Regulations."

Neither the **Secretary** nor **The Assistant Superintendent** were empowered by Regulation 17 to detain the petitioners for the purpose of **completing investigations** relating to the commission of offences; Regulation 17(1) is not concerned with the investigation of offences but with measures aimed at the prevention of certain specified kinds of unlawful behaviour, (see *Godagama v. Ranatunge*)[64] and so, presumably, despite its terms, Regulation 19(2) is mentioned in the second set of detention orders as the empowering law.

A further matter should be referred to. The orders – X3A in 152/92 and X3A – X9A in 155/92 – are undated but are stated to be operative from 27.2.92 to 17.5.92. However, in paragraph 4 of his affidavit filed in application 152/92, the third respondent states that he was filing

detention "orders" in that case dated 4.3.92. There were two detention orders he filed in application 152/92. One of the two Orders was X3A. The attempt in the later Orders to explain the taking of the petitioners into custody on the ground that it was to prevent them from "acting in a manner prejudicial to national security" or to "the maintenance of public order", was obviously an attempt to supply possible deficiencies in the other orders. Neither set of detention orders were of any use to Bandara and Weerasekere, even if the Orders were shown to them, for they were released from custody on the date of the orders viz., 3rd March 1992. As far as the others were concerned, the Detention Orders cover a period of "84 days" from 4th March, 1992. Why 84 days and not 90 as determined by Regulation 19(2) under which the Assistant Superintendent states he was acting? Perhaps, as Mr. Goonesekere suggested, it was, albeit mistakenly, supposed that the other detention orders "justified" the first six days of detention? It is not for the police to determine the circumstances in which a person may be detained for investigation. That is a matter determined by Regulation 18(1). Nor is it for the police to determine the maximum or minimum period of detention. That is a matter determined by Regulation 19(2). (Cf. *Jayatissa v. Dissanayake*)[74]. However, the Inspector-General of Police and the other authorized officers mentioned in Regulation 19(4) may determine the place of detention and the applicability of the Prisons Ordinance with regard to persons detained. Fresh detention orders were necessary because the places of detention were altered and such places must, in terms of Regulation 19(2), be indicated in the Detention Orders. Detention except at a place authorized would make the custody otherwise than in accordance with procedure established by law. (See *Dissanayake v. Superintendent Mahara Prison*[9]).

However, the detention orders had more than that simple objective in view. They purported to be in terms, orders made under Regulation 17. Although detention orders under Regulation 17 may be issued while a Detention Order under Regulation 19 or under the Prevention of Terrorism Act is in force, yet there must be some justification for it. (See *Yapa v. Bandaranayake*[46]; *Lankapura v. P. D. A. Perera and Others*[75]. *Sasanasiritissa Thero and Others v. De Silva and Others*[14];

Lankapura v. Douglas Perera and others[75]; See also *Jayaratne v. Tennekoon*)[65]. A Detention Order under Regulation 17 is not simply a device to hold a person arrested under Regulation 18, (and therefore required to be released not later than 90 days after the arrest) in custody for an unspecified period. Nor is it a device to extend the period of detention after the lapse of the ninety day period for purposes of further investigation. Regulation 17 is there to enable the Secretary to the Ministry of Defence, either in respect of persons already in custody or others, to detain by order a person who, he is satisfied on the available material, it is necessary to detain to prevent him acting in any manner described in 17(1) (a) and/or (b). There was no explanation for the second Detention Orders in this case. The evidence for making the arrests in terms of Regulation 18(1) was the only evidence placed before us, and that evidence could not have led to the formation of an opinion that it was necessary to detain the petitioners in terms of Regulation 17(1). It may well be, as it was for instance the case in *Yapa v. Bandaranayake* (*supra*), that the grounds warranting an arrest under Regulation 18 may at the same time warrant a detention in terms of Regulation 17. However that is not so in the matters before us.

The second set of detention orders, which were applicable to all the petitioners, show that the respondents were not making the arrests in accordance with a procedure established by law but rather under a procedure evolved by them, albeit combining elements found in two distinct procedures designed with quite separate and clearly differentiated objectives in view. In any event, for the reasons explained, even the borrowed elements of the hybrid procedure have not been established. I therefore declare that the petitioners' fundamental rights guaranteed by Article 13(1) of the Constitution not to be arrested except according to procedure established by law have been violated.

PETITIONERS NOT INFORMED OF REASONS FOR ARREST – FURNISHING WRITTEN REASONS FOR ARREST

Article 13(1) provides not only that a person who is arrested should be arrested in accordance with procedure established by law but also that "Any person arrested shall be informed of the reason for his arrest."

The petitioners complained that they were not served with Detention Orders giving reasons for their arrest. In *Kumaranatunge v. Samarasinghe* [19] followed in *Sasanasiritissa Thero v. De Silva and Others* [14] Soza, J. observed: "Nowhere is service of the detention order made imperative by any rule of law. The order really serves as authority for the person putting it into effect. In fact, even under the Code of Criminal Procedure Act, no service of a charge sheet or Warrant of arrest where the arrest is on a Warrant is provided for. The person being arrested can ask to see the Warrant or order but there is no legal requirement that it should be served. No legal consequences flow from the non-service of the order."

Admittedly neither Section 53 of the Code of Criminal Procedure nor Regulations 17 or 19 stipulate that the reason for arrest should be communicated to the person in a written order and that he should be supplied with a copy of the order. I therefore hold that the failure to provide the petitioners with copies of detention orders does not infringe any constitutional right. However, as Colin Thome, J. observed in *Nanayakkara v. Henry Perera* (supra) "it is in the interest of natural justice" that this should be done. (See also per Kulatunga, J. in *Wickremabandu v. Herath and others* [26]; *Wijewardene v. Zain* [13]; *Perera and Sathyajith v. Siriwardene* [63]; *Jayaratne v. Tennekoon* [65]. So much for furnishing a **copy of the order** with reasons for arrest. The need to give reasons, apart from the form of doing so, is another matter.

THE NEED FOR AT LEAST AN ORAL EXPLANATION

The petitioners were arrested under the Emergency Regulations. The command in Article 13(1) that "Any person arrested shall be informed of the reason for his arrest" must be observed even when an arrest is made under the Emergency Regulations. (*Chandradasa v. Lal Fernando* [25]; *Pushpakumari and Jayawickrama v. Mahendra and Others* [76]; *Weerakoon v. Mahendra and Others* [11]; *Gamlath v. Silva and Others* [48]; *Munidasa and Others v. Seneviratne and Others* [49]. Cf also *Piyasiri v. Fernando* [3]; *Wijewardena v. Zain* [13]; *Perera and Sathyajith v. Siriwardene* [63].

The opposite view was taken in *Kumaranatunge v. Samarasinghe* [19] (Cf per Kulatunga J. in *Wickramabandu v. Herath and Others* [26] in relation to orders made in terms of Regulation 17(1). *Kumaranatunge* [19] was distinguished in *Wijesiri v. Rohan Fernando* [10].

Admittedly, restrictions of the exercise and operation of the right might have been imposed by the Emergency Regulations in terms of Article 15(7) of the Constitution: but no such restriction has been made of the constitutional right to be informed of the reasons for arrest. In this connection it might be observed in passing that H. A. G. de Silva J. in *Wickremabandu v. Cyril Herath and Others* [26] . Fernando J. agreeing; (cf. also the observations of Kulatunga J. which are, however, somewhat differently expressed) said that, although a restriction of a right may be permissible if it might survive, albeit in an attenuated form, yet, having regard to its nature, the curtailment of the right to be informed of the reason for arrest might amount to a denial.

Regardless of possible challenges to the validity of future Regulations that might impinge on Article 13(1). It has never been the position that any Regulation or other law has hitherto taken away the right to be informed of the reason for arrest conferred by Article 13(1). It may happen. It has not yet happened. For mercies vouchsafed in this regard, the petitioners in giving thanks might well have said '*non nobis*'.

It may be observed in passing that, although in terms of Article 22(1) of the Indian Constitution "no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest ... ", Clause (3) (b) of Article 22 provides that Clause (1) shall not apply "to any person who is arrested or detained under any law providing for preventive detention."

The right to be informed of the reasons for arrest is not set out in Regulation 17 or 18. It is to be found in Article 13(1) of the Constitution. That provision cannot be **repealed** by Regulations, much less by judicial interpretation. Although in terms of Article 15(7) the **exercise** and **operation** of the right to be given reasons may be subject to restrictions prescribed by law, including Regulations, no such law exists. If the recommended practice of issuing Detention Orders with written reasons for arrest cannot be observed, then the

person concerned should "at least" be orally given reasons, for that is his untrammeled right today under Article 13(1) of the Constitution. (Cf. *Kalyanie Perera v. Siriwardene*) [63].

Soza, J. referred to the Code of Criminal Procedure. Attention should be drawn to Section 53 of the Code of Criminal Procedure which provides that "The person executing a Warrant of arrest **shall notify the substance thereof to the person arrested,** and if so required by the person arrested shall show him the Warrant or a copy thereof signed by the person issuing the same." The need for "scrupulously and diligently" observing the terms of Section 53 to safeguard the "liberty of the subject" was stressed by Seneviratne J. in *Dharmatilleke v. Abeynaike* [77].

Assuming that the petitioners knew the general nature of the cause for arrest, and that therefore they were sufficiently informed of why they were being arrested (Cf. *Christie v. Leachinsky* [79]; *Lundestron v. Cyril Herath and Others* namely, that they were supposed to be members of the JVP, was that sufficient? I do not think so. The constitutional right is not to be simply given **any** explanation. For example, 'I do not like the shape of your nose' or 'I do not like your political party' are in a sense explanations or reasons; but a reason for arrest, a reason to deprive a person of his personal liberty within the meaning of Article 13(1) of the Constitution must be a ground for arrest. There can be no such ground other than a violation of the law or a reasonable suspicion of the violation of the law. In *Gunasekera v. de Fonseka* [42], followed in *Kumarasena v. Shriyantha and Others* [6] H. N. G. Fernando, C.J. said that a citizen has a right to resist an unlawful arrest, but he can exercise that right if he is informed of the "**grounds** upon which he is being arrested". It is, the Chief Justice said, "only if a person is informed of the ground for his arrest, or in other words, of the offence of which he is suspected, that he will have an opportunity to rebut the suspicion or to show that there was some mistake as to identify."

According to the averments of some of the petitioners (eg. see paragraph 6.7 of the affidavit of Malinda Channa Pieris Seneviratne in Application 146/92: paragraphs 2.5, 3.3 of the affidavit of Kuruwitage Nandana Perera in S.C. Application 151/92; paragraphs 3.3. and 4.4.

of the affidavit of Jayasinghe Mudiyanselage Janaka Priyantha Bandara in Application 152/92; paragraphs 2.4 of the affidavit of the Pallimulle Hewa Geeganage Pradeep Chandraratne in application 153/92; paragraphs 4.2 and paragraph 4.14 of the affidavit of Ranawake Achchilage Patali Champika Ranawake in Application 154/92; paragraphs 3.3. and 4.3 of the affidavit of Avalikara Galappathige Muditha Mallika Wimalasuriya in Application 155/92) it appeared to them that they were being arrested because the police believed they were members of the JVP, sometimes described by the police officers during the arrest as "JVP dogs". TheThird Respondent who was, without dispute, the man behind the arrests, states that he went to the temple simply because he was told that there was a meeting of the JVP but that he made the arrests because he formed the opinion, based on what he heard, that there was a conspiracy to overthrow the Government. For the reasons I have explained in discussing the circumstances of the arrest , I consider it improbable that the Third Respondent mentioned, much less "explained" the charges set out in the detention orders referred to. The third respondent simply arrested the petitioners because he believed them to be members of the JVP, and therefore, but for no other reason, suspecting them to be engaged in some unlawful activity designed to overthrow the Government. As we have seen, he had no reasonable ground. He was, however, hoping that some evidence might turn up to make his suspicion reasonable. As in *Wijewardene v. Zain*[13], the petitioners in the matters before us were arrested for subversive activity "on speculation in the hope of obtaining evidence of such activity but admittedly without informing [them] of such reason."

The JVP was not a proscribed party. Therefore an awareness on the part of the petitioners that they were being arrested for being supposed to be members of the JVP did not discharge the respondents from their duty or giving a reason for the arrests in the sense of telling them what offence or offences they were supposed to be concerned in or committing or to have committed. If he was arresting the petitioners for violating Regulations 23 (a), 23 (b), 45 and 46, as the first set of Detention Orders suggest, he did not give them the true reasons for the arrest. The officer was neither entitled to keep the reasons to himself nor to give a reason which was not the true reason. (*Christie v. Leachinsky* supra; *Wijewardene v. Zain*) [13].

If a person is taken into custody, or if a person already in custody is to continue arrested in terms of Regulation 17, as the second detention orders in the matters before us purport to order, the person so detained must in terms of Article 13(1) of the Constitution be informed of the reason for his arrest or state of arrest. In the case of an order made under Regulation 17 the person arrested should know why it was necessary to detain him with a view to preventing him from acting in any manner prejudicial to the national security or the maintenance of public order and to the maintenance of essential services or preventing him from acting in any manner contrary to the provisions of Regulation 41 (a) or (b) or Regulation 26. No such grounds were orally given in the matters before us.

The respondents claimed that the reasons for arrest were set out in the Detention Orders which were shown to the petitioners. If the first set of detention orders were shown to the petitioners, they could only have been usefully shown to those in respect of whom the orders were issued. As we have seen there were no orders with regard to some of the petitioners. Even as far as those petitioners in respect of whom detention orders were issued are concerned, the orders merely set out the provisions contravened and do not explain how the petitioners contravened them. A mere reference to a Regulation in a Detention Order does not sufficiently explain the reason for arrest. (*Weerakoon v. Mahendra* [11]. Cf. also the observations of Sharvananda, J. quoted below). Quoting chapter and verse is neither necessary nor sufficient.

The second set of Detention Orders do not give reasons. They merely set out the objects and purposes in pursuance of which the arrest and detention were made, namely, the prevention of the petitioners "acting in a manner prejudicial to the national security or the maintenance of public order or with a view to complete investigations into his actions." What was the prejudicial manner in which the petitioners were likely to act? What were the "actions" that were being investigated? The constitutional right of a person is to be informed of the reason – the grounds, material facts and particulars – for his arrest and detention and not merely the objects and purposes of the arrest and detention. It is such information that will enable him to take meaningful steps towards regaining his liberty. (See per Kulatunga,J. in *Wickramabandu v. Herath* [26]. See also *Weerakoon v. Weeraratne*) [15].

Moreover, as we have seen, the orders appear to have been issued on 3rd March ,1992 although the petitioners had been taken into custody on 27th February, 1992. Even if the Orders were shown to the petitioner the information was conveyed much too late to serve the purpose of being informed of the reason for arrest, namely the regaining of one's liberty expeditiously by explaining away the suspicions held by the arresting officer. As far as Bandara and Weerasekera were concerned the Detention Orders were issued on the date of their release.

Justice Sharvananda in his treatise **Fundamental Rights in Sri Lanka** states as follows at p. 141 :

> "The requirement that a person arrested should be informed of the reason for his arrest is a salutary requirement. It is meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for the arrested person to know exactly what the allegation or accusation against him is so that he can consult his attorney-at-law and be advised by him. *Mariadas v. Attorney-General* [79]. All the material facts and particulars must be furnished to the arrested person because they are the reasons or grounds for his arrest to enable the arrested person to understand why he has been arrested. A bald statement that the arrestee is a terrorist falls far short of the required standard. Further, it is important that the communication of the reasons should be in a language the arrestee understands. The adequacy of the reasons for arrest require that they are: (a) such as to *prima facie* warrant arrest and (b) based upon information which is considered reliable. The necessity to give reasons serves as a restraint on the exercise of power and ensures that power will not be arbitrarily employed."

The obligation of the person making the arrest is to give the reason at the moment of the arrest, or where it is in the circumstances not practicable, at the first reasonable opportunity. (*Mallawarachchi v.*

Seneviratne [40] followed in *Elasinghe v. Wijewickrema and others* [52]. In *Kalyanie Perera v. Siriwardene* [63] the petitioner was not given reasons immediately but within a reasonable time. In *Lalanie and Nirmala v. De Silva and others* [8] the giving of reasons a day after the arrest was held to be violative of Article 13(1). In *Wickremabandu v. Herath and others* [26] Kulatunga, J. states that Regulation 17(4) and (5) "permits a delay" in informing a person deprived of his liberty by an order made in terms of Regulation 17(1). With great respect Regulation 17(4) and (5) "permit" no such delay. (See Regulations 17(4) and 17(5). Indeed, delay in giving reasons would postpone the taking of steps to make representations to the President so that the Advisory Committee might expeditiously advise the Secretary to the Ministry of Defence.).

Justice Sharvananda in the passage from his work which I have quoted, explains that an object of the requirement in Article 13(1) of the Constitution that "Any person arrested shall be informed of the reason for his arrest" is that the earliest opportunity should be given to the person who is arrested or about to be arrested of securing his liberty by removing any misapprehension, misunderstanding or mistaken belief in the mind of the authority concerned. By failing to give reasons, the third respondent deprived himself of the opportunity of clarifying the matter and acting or otherwise, as it was the case in *Mariadas v. A-G* [79]. On the other hand by giving reasons in time the petitioners may have been able to secure their release expeditiously as it was the case in *Malawarachchi v. Seneviratne* [40] In *Christie v. Leachinsky* [78] (followed in *Munidasa and others v Seneviratne and others* [49], and per Perera J. in *Faiz v. Attorney-General and others* [16], Lord Chancellor Simon said: "If the charge or suspicion under which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken with the result that further inquiries may save him from the consequences of false accusations."

Explanations from the person arrested may serve its purpose only if the officer making the arrest is perceptive enough and not stupid or witless. It also presupposes that the real reason is given.

Rev. Rathana explained to the Police "You gentlemen are mistaken. We are not JVP but Ratawesi Peramuna officials discussing matters. You may take us away, but you will realize later that you were mistaken." (See para 3.1 of the Affidavit of M. D. Daniel in S.C. Application 147/92; paragraph 3.6 of the Affidavit of Singappuli Hewage Sunny Dayananda in S.C. Application 148/92; para 2.10 of the affidavit of Athureliya Rathana in S.C. Application 149/92; para 2.6 of the affidavit of Jayasinghe Mudiyanselage Janaka Priyantha Bandara in S.C. Application 153/92; para 4.3 of the affidavit of Ranawaka Arachchige Patali Champika Ranawake in S.C. Application No. 154/92; and para 3.4 of the affidavit of Avalikara Galappathige Muditha Mallika Wimalasuriya in S.C. Application No. 155/92).

The Third respondent, however, remained unyielding and obdurate. Why did the third respondent so recklessly throw away the opportunity of revising his beliefs? Why was he so utterly obtuse? was he blinded by zeal? The real reason for the arrests was, as the third respondent admits in his affidavits, that he supposed that the petitioners were engaged in a conspiracy to overthrow the Government. This was not, as we have seen, based on reasonable ground, but on the erroneous assumption that (a) the JVP was once a proscribed party, and therefore, a party continuing to be engaged in unlawful activity and forever branded with the mark of illegality and that (b) consequently, according to a previously conceived opinion, members of the group assembled at the temple who were, acording to the telephone message, members of the JVP were necessarily engaged in purposes prejudicial to national security and the maintenance of public order. One may sympathize with the commitment of the third respondent to his cause, but I cannot hold that he was constitutionally free to ignore the salutary safeguards established by law for arresting the petitioners. Law enforcement officers must be ever mindful of the fact that respect for procedures established by law, although they may sometimes appear to be irksome, are, in the, words of Justice Stewart in *Walter v. City of Birmingham* [80] , "a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." Having regard to the fact that all the information he had was that conveyed by an anonymous caller, should he have not acted more

cautiously even though he might have earlier considered the telephone messenger – albeit mysterious – to be reliable and credible?

The third respondent was told that the petitioners were not members of the JVP. The place of arrest, the Kawduduwa temple, as some of the petitioners admit, was a "noted" venue for political activity (See paragraph 2.9 of the affidavit of Rathana dated 14th April 1992; paragraph 3.9 of the affidavit of Champika Ranawake dated 15 April 1992 in S.C. Application 154/92). But of what sort of political activity: Was it not equally well-known in the area of which the Third and Fourth respondents were police officers as the scene of the assasination in December 1988 by the JVP of Rev. Pohoddaramulle Pemaloka? (See para. 2.9 of the affidavit of Rathana dated 14th April 1992; and paras 2.1 and 2.2 of the affidavit dated 15th April 1992 of Rev. Wimalasara, who was ordained by Pemaloka and succeeded him as the chief incumbent when Rev. Nandaloka abandoned his robes: and para 3.0 of the affidavit of Champika Ranawake dated 15 April 1992 in S.C. Application 154/92). So much so that, in the minds of at least some of the petitioners, the place of the meeting was simply {Rev.. Pemaloka's temple" (See eg. para 3.4 of the affidavit of Dayananda in S.C. Application 148/92). And if the version of some of the petitioners as to the little speech the Third Respondent was supposed to have made as soon as he came into the Police Station in the early hours of the 28th of February is true, (with regard to this, see the discussion later on in relation to the alleged violation of Article II) then the assassination of Pemaloka by a member of the JVP must surely have been very much in his mind? (See Nandana Perera 151/92, 3.3; Bandara 152/92, 4.3; Wimalasuriya 155/92, 4.3). Was the temple in which the chief incumbent, namely Rev. Wimalasara, a priest ordained by a person who was murdered by the JVP a likely place for a JVP meeting?

Although in his affidavits in respect of Seneviratne (146.92) and Dayananda (148/92) the Third Respondent does not state that he specifically explained the charges to them at the time of their arrests, yet he does so in the affidavits filed by him in respect of Daniel (147/92), para 9), Rathana (149/92 para 7), Wimalasara (150/92, para 9), Nandana Perera (151/92 para 13), Bandara (152/92, para 15),

Chandanaratne (153/92, para 13), Ranawake (154/92 para 15) and Wimalasuriya, Dayarathne, Pemarathana and Kitulgala Upali (155/92 para 15).

However, in respect of all the petitioners, the Third Respondent states as follows: "Upon listening to the speeches, I formed the impression that they were engaged in a conspiracy to overthrow the Government. A such, I tapped at the door and got it opened and entered the room where the discussion was taking place and having explained the Charge against the suspects, took them into custody. I annex hereto marked ... Detention Order ... " (See the Third Respondent's affidavits in the matters of Seneviratne 146/92 para 5; Daniel 149/92 para 4; Dayananda 148/92 para 5; Rathana 149/92 para 4 – where, however, an order is filed but not referred to in the affidavit; Wimalasara 150/92 para 5; Nandana Perera 151/92 para 5; Bandara 152/92 para 4; Chandanaratne 153/92 para 5; Ranawake 154/92 para 5 and in respect of Wimalasuriya and other applicants in 155/92 para. 5).

What was the "charge" he says he explained? That the petitioners were conspiring to overthrow the government by unlawful means? If the contents of the first set of Detention Orders filed by the Third Respondent in Applications 152/92 and 155/92 relating to the arrest and his affidavits are anything to go by, the charge he had in mind was the offence of conspiracy defined in Regulation 23(a), which, however, for the reasons explained, was not committed nor which he could have reasonably suspected the petitioners to be concerned in or to be committing or to have committed. What he says he heard may have lead him to conclude that there was a conspiracy to overthrow the Government, but what he heard could not have reasonably led him to believe or suspect that there was a conspiracy to overthrow the Government by unlawful means. Therefore, there was no reason for the arrests, in the relevant sense, which the Third Respondent could have explained.

If the petitioners were, as the Third Respondent suggests, engaged in a conspiracy to overthrow the Government by unlawful means and he entered the meeting place, as he says he did, then he would have caught them *flagrante delicto* and there would have been

no need to give any reasons, for then it would have been known to the petitioners why they were being arrested. (See per De Alwis J. *Joseph Perera v. AG*[35], following *Gunasekera v. Fonseka* [42] See also *Jayatissa v. Dissanayake* SC Application 74/88 SC Minutes 10 July 1989). No such position was taken up by the Third Respondent, for he probably entered the meeting place before the meeting was resumed, and even if we assume that he did listen to the speeches he reported in his notes, for the reasons I have given, there was nothing he heard that could have reasonably led him to suspect that an offence was being committed or about to be committed.

DECLARATION AND ORDER IN RESPECT OF ARTICLE 13(1)

For the reasons explained I am of the view that the petitioners (a) were not arrested and kept arrested in accordance with a procedure established by law and (b) that they were not informed of the reason for their arrest. I therefore declare that the fundamental rights guaranteed by Article 13(1) of the Constitution were violated in respect of Malinda Channa Pieries, applicant in S.C. Application 146/92; M. D. Daniel, applicant in S.C. Application 147/92; Singappuli Hewage Dayananda, applicant in S.C. Application 148.02; Athureliya Rathana (Ranjith), applicant in S.C. Application 149/92; Rev. Thalpitiye Wimalasara, applicant in S.C. Application 150/92; Kuruwitage Nandana Perera, applicant in SC Application No. 151/92; Jayasinghe Mudiyanselage Janaka Priyantha Bandara, applicant in S.C. Application 152/92; Pallimulle Hewa Geeganage Pradeep Chandanaratne, applicant in S.C. Application No. 153/92; Ranawake Arachchige Patali Champika Ranawake, applicant in S.C. Application 1554./92; and the following applicants in S.C. Application 155/92, namely, Avalikara Galappathige Muditha Mallika Wimalasuriya, Gileemalage Janaka Priyantha Dayaratne, Karunaratne Paranavithana, Weerasekera Mudalige Anura Weerasekera, Rev. Kalupahana Piyarathana, Rev. Ambalanthota Premarathana and Rev. Kithulgala Upali.

I make order that each and every one of the persons named in the preceeding paragraph, except Rev. Thalpitiye Wimalasara, shall be severally paid a sum of Rs. 5,000 by the State as a solatium for the

violation of both, as distinguished from each of, the rights guaranteed by Article 13(1) of the Constitution as aforesaid.

Rev. Thalpitiye Wimalasara was not present at the meeting place and was sleeping in his room in the temple, not only because he was in ill-health but also because he was not associated with the Peramuna. I therefore make order that Rev. Thalpitiye Wimalasara the applicant in SC Application 150/92 be paid a sum of Rs. 10,000 as a solatium by the State for the violation of his fundamental rights guaranteed by Article 13(1) of the Constitution.

THE FACT OF DETENTION AFTER TAKING THE PETITIONERS INTO THE CUSTODY OF THE LAW

After the arrest of the sixteen petitioners they were taken to the Wadduwa Police Station on 27th February, 1992. On 28th February Champika Ranawake was taken for some hours to Kalutara for interrogation and brought back to Wadduwa. (See paragraph 4.9 of the affidavit of Ranawake in S.C. Application 154/92 dated 15th April 1992). It would seem that the University students among the persons arrested, probably eight in number, were taken on March 3rd, 1992 to the office of the Police concerned with Security Co-ordination at Longdon Place, Colombo, and except for Bandara (the applicant in S.C. 152/92) and Weerasekere (an applicant in S.C. 155/92), were sent back to Wadduwa Police Station. (See para 4.8 of the affidavit of Bandara in S.C. 152/92 and para 3.7 of the affidavit of Nandana Perera in S.C. Application 151/92. See also para 6.6. of Seneviratne of 14th April 1992 in Application 145./92; para 3.4 of Wimalasara dated 15th April 1992 in Application 150/92; para 3.10 of the affidavit dated 15th April 1992 of Chandanaratne in S.C. Application 153/92; and para 4.8 of the affidavit dated 15th April 1992 of Wimalsuriya in Application 155/92). Bandara and Weerasekera were kept back at Longdon Place so that they might present themselves at the University examinations. However, they refused to do so while in police custody. (See para. 4.8 of the affidavit dated 15th April 1992 of Bandara in S.C. Application 152/92). Bandara and Weerasekere were then released on 3rd March 1992 on condition that they returned to police custody on 21st March 1992. (See para 3.4 of the affidavit of Wimalasara dated 15th April 1992 in Application 150/92; para 3.7 of the affidavit of Nandana Perera in Application 151.9; para 4.8 of the

affidavit of Bandara dated 15th April 1992 in Application 152/92; and para 4.8 of the affidavit of Wimalasuriya dated 15 April 1992 in Application 155/92).

The petitioners (other than Bandara and Weerasekere) were taken from Wadduwa Police Station to Colombo on 4th March 1992 and released on 17th March 1992 after being produced before the Fort Magistrate in connection with case No. 25841. Between 4th March and 17th March 1992, Seneviratne and Daniel were detained at the premises of the Police concerned with Security Co-ordination at Longdon Place, Colombo. Dayananda, Wimalasuriya, Chandanaratne, Ranawake, Dayaratne and Piyarathana were detained at the Police Station, Pettah. Rathana, Nandana Perera, Wimalasuriya, Paranavithana, Premarathana and Kitulgala Upali were detained at Maradana Police Station. (Cf. paras 6.6 and 6.8 of Seneviratne's affidavit of 14th April 1992 in Application 146/92; paras 3.7 and 3.10 of Daniel's affidavit of 14th April 1992 in Application 147/02; para 4.9 of Dayananda's affidavit of 14th April 1992 in Application 148/92; para 4.3 of Rathana's affidavit of 14th April 1992 in Application 149/92; paras 3.2 and 3.4 of Wimalasara's affidavit of 15th April, 1992 in Application 15-/02; paras 3.6 and 3.12 of Nandana Perera's affidavit of 15th April 1992 in Application 151/92; paras 3.5 and 3.10 of Chandanaratne's affidavit of 15th April 1992 in Application 153/92; para 4.12 of Champika Ranawake's affidavit of 15th April 1992 in Application 154/92; and para 4.8 of Wimalasuriya's affidavit of 15 April 1992 in Application 155/92).

The evidence relating to the places of detention and release given by the petitioners is corroborated by the Third Respondent in paragraphs 5, 6, 7 and 9 of his affidavit of 24th August 1992 filed in S.C. Application 146/92; paragraphs 4, 5 and 9 of his affidavit of 9 September 1992 in S.C. Application 147/92; paragraphs 5,. 6, 7, 8 and 9 of his affidavit of 9th September 1992 in S.C. Application 148/92; paragraphs 4, 5, 6 and 7 of his affidavit of 9th September 1992 in S.C. Application 149/92; paragraphs 5, 7 and 9 of his affidavit of 9th August 1992 in S.C. Application 150/92; paragraphs 5, 6, 7, 9 11, 12 and 13 of his affidavit of 9th September 1992 in S.C. Application 151/92; paragraphs 4, 5, 6, 7., 8, 10, 12 and 13 of his affidavit of 9th September 1992 in S.C. Application 152/92;

paragraphs 5, 6, 7, 9, 11 and 13 of his affidavit of 9th September 1992 filed in S.C. Application 153/92; paragraphs 5, 6, 7, 9, 11 13, 14, 15, 16 and 17 of his affidavit of 9th September 1992 in S.C. Application 154/92 and in paragraphs 5, 6, 7, 8., 9, 11, 13, 14 and 15 of his affidavit of 9th September 1992 in S.C. Application 155/92.

Corroboration is also available from the affidavits of Chief Inspector Opathavalage Wimaladasa. (See paragraphs 3 and 5 of his affidavit of 20th August 1992 in S.C. Application 146/92 and paragraphs 3 of his affidavit of 8th September 1992 in S.C. Application 147/92) as well as from the Detention Orders and extracts from the Routine Information Book filed by the respondents and from the several affidavits of relatives and others who visited the petitioners while they were in police custody.

ARTICLE 13(2) OF THE CONSTITUTION

The petitioners allege that Article 13(2) of the Constitution was violated by the Respondents. Article 13(2) provides that "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."

ARTICLE 13(2) – A SALUTARY PROVISION

The right to be produced before a judge is a "salutary provision to ensure the safety and protection of arrested persons." (See *Edirisuriya v. Navaratnam* [21]; *Nallanayagam v. Gunatilleke* [61]; *Weerakoon v. Mahendra*[11]; *Weerakoon v. Weeraratne* [115]; *Perera and Sathyajith v. Siriwardene* [63] ; *Kalyanie Perera v. Siriwardene* [63]; *Weerakoon v. Mahendra and others* [11].

OBJECT OF THE PROVISION

The "purposes" of Article 13(2) are not, as stated in *Wijesiri v. Rohan Fernando*[10], "enumerated" in that provision. However, in

general, the purpose of the provision is to enable a person arrested without a Warrant by a non-judicial authority to make representations to a judge who may apply his "judicial mind" to the circumstances before him and make a neutral determination on what course of action is appropriate in relation to his detention and further custody, detention or deprivation of personal liberty, (Cf. Sharvananda, **Fundamental Rights**, at p. 142; *Gerstein v. Pugh* [82]; Cf. also the decisions of the European Court on Human Rights in the *Schiesser case*[83]; the *Skoogstrom case* [84]; the *McGoff case* [85] ; Cf. also per Goonewardene, J. in *Mohamed Faiz v. The Attorney-General and Others* [16].

HAVING REGARD TO THE PURPOSES OF ARTICLE 13(2), PRODUCTION MUST BE REAL

The right to be produced before a judge will be beneficial to the person arrested and conducive to a person seeking his liberty, only if the "production" is real and not technical, as for instance when the person is kept in a motor vehicle outside the judge's house while the police officer alone meets the judge and obtains his order. (See *Ekanayake v. Herath Banda and Others*) [27]. In *Withanachchi v. Cyril Herath and Others* [45] Seneviratne J. deplored the practice of "producing" suspects at judges' residences which he said was a "common" practice of police officers "to prevent lawyers from representing a party ... and to prevent any application on behalf of a suspect being made." His Lordship also drew attention to similar observations he had made in *Dharmatilleke v. Abeynaike* [77] . Where a person is produced only in a technical sense so that the purposes of Article 13(2) are incapable of fulfillment, such a person cannot be said to have been brought before the judge according to procedure established by law and Article 13(2) of the Constitution will be violated. In *Ekanayake v. Herath Banda* [27], the petitioner was arrested on 11th September 1989 in terms of a Detention Order under Regulation 19 and later detained under a Detention Order under Regulation 17. There was no reasonable basis for either order. On 20th September 1989 the petitioner was taken to the residence of the Magistrate and warned not to say anything to the judge. While the petitioner was outside the residence, the Magistrate came up to the vehicle. Article 13(2) was declared violated. Fernando J. observed

that "production does not mean being shown or exhibited to a judicial officer, nor does it connote mere physical proximity: 'production' requires at least an opportunity for communication and this has been denied to the petitioner. She was thus denied the opportunity to make a prompt complaint of her arrest on 11th September 1989, the failure to inform her of the reason for arrest and the torture inflicted on her on 13.9.89."

THE RIGHT TO BE PRODUCED MAY BE SUBJECT TO LIMITATIONS

Although the constitutional right to be brought before a judge exists and remains "untouched" (as G. P. S. de Silva, J. observed in *Joseph Silva and Others v. Balasuriya and Others* [22] as long as Article 13(2) of the Constitution remains as it is, (Cf, the observations of Kulatunga, J. in *Wickremabandu's case* [26], yet the **exercise** and **operation** of that right is, in terms of Article 15(7) of the Constitution, subject to such restrictions as may be prescribed by law, *inter alia, in* the interests of national security and public order. "Law" includes regulations made under the law for the time being relating to public security. The relevant provisions of the law in force at the time of the arrest must be examined in order ascertain whether, if at all, and in what manner the right guaranteed by Article 13(2) may be operative.

THE WHITTLING EFFECT OF THE EMERGENCY REGULATIONS

With regard to persons arrested under the Emergency Regulations, the functions of the judge are severely restricted and the force and importance of the 'salutary' provision have been significantly diminished. Both under the old proviso and in terms of a new proviso the Regulation 19(2) introduced on 15th February 1990 (Gazette Extraordinary 597/9 of 15th February 1990), when a person is arrested or detained under the provisions of Regulation 18 and is produced before a Magistrate, such person cannot be released on bail except with the prior written consent of the Attorney-General. Further, although in terms of Regulation 19(2) a person should not be detained for a period exceeding 90 days, yet if the detainee is produced before a Court, all that the Court is empowered to do in

terms of Regulation 19(3) is to order that such a person be detained in the custody of the Fiscal in a Prison established under the Prisons Ordinance. However, as the facts in *Wijewardena v. Zain* [13] showed, the opportunity provided for the judge to express his opinion on the inappropriateness of the detention may yield positive results in favour of the liberty of the person detained.

THE IMPORTANCE OF ASCERTAINING THE PRESCRIBED LAW

I should like to draw attention to the fact that the "procedure established by law" may change from time to time and to emphasize the need for respondents to clearly indicate the procedure applicable in the case before the Court and produce, where required, copies of the Regulation or Gazette setting out the procedure relied upon, for copies of certain Regulations are not sent at all or in time to even the Supreme Court, although it is required to adjudicate upon matters relating to the laws set out in such documents. Errors might result from the applicability of wrong provisions.

In *Karunasekera v. Jayewardene and Others* [50] the petitioner was arrested in terms of Regulation 18 of the Emergency Regulations on 13th May 1990. He was produced before a Magistrate on 25th June 1990 and released on bail and later discharged on 2nd December 1991 because there were no grounds for arrest or detention. It was held, that Article 13(2) of the Constitution was violated. The attention of the Court was not drawn to the fact that on the date of arrest the proviso to Regulation 19 had been repealed and amended on 18th December 1989 (Gazette Extraordinary 589/5) so that there was no obligation imposed by the Emergency Regulations on the respondents to produce the petitioner before a Magistrate except when the Magistrate visited the place where the petitioner was detained.

Similarly, in *Weerakoon v. Weeraratne* [15] the petitioner was arrested on 25th January 1992, after the amendment of Regulation 19. However, it was held that the "impugned detention" was "vitiated" by the failure to produce the petitioner before a Magistrate not later than thirty days from his arrest "which is the procedure prescribed by law for his detention under Regulation 19(2)."

LIMITATIONS ON TIME – INTRODUCTION

The salutary right to be brought before a judge would be of little or no practical value unless the person is so produced within a reasonable time. The time within which the person should have been produced must be ascertained by reference to the provisions of the law applicable to the case at the relevant time.

The position in India, however, is different. Article 22(2) of the Indian Constitution provides that "Every person who is arrested and detained in custody, shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody without the authority of a magistrate." Article 22(3) provides that Clause (2) does not apply (a) to any person who for the time being is an alien enemy; or (b) to any person who is arrested or detained under any law providing for preventive detention.

LIMITATIONS ON TIME UNDER ORDINARY LAW

Ordinarily, a police officer making an arrest without a warrant is required by Section 36 of the Code of Criminal Procedure Act No. 15 of 1979 to send the person arrested before a Magistrate having jurisdiction in the case "without unnecessary delay." Section 37 of the Code of Criminal Procedure goes on to provide that a person arrested without a warrant should not be detained in custody or otherwise confined "for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate."

Where an investigation cannot be completed within the twenty-four hours fixed by Section 37 of the Code of Criminal Procedure and there are grounds for believing that further investigation is necessary, the officer in charge of the police station is required by section 115 of the Code of Criminal Procedure to "forthwith" forward the suspect to the Magistrate and take the prescribed steps to enable the Magistrate to decide whether it is expedient to detain the suspect in custody pending further investigation.

LIMITATIONS ON TIME UNDER EMERGENCY REGULATIONS – REGULATIONS 18 AND 19

Where a person is arrested under the powers conferred on a Police Officer by Regulation 18 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 made under the Public Security Ordinance (Cap 40) (vide Gazette Extraordinary of 20th June 1989), the provisions ordinarily applicable cease to be relevant, for Regulation 19(1) of the Emergency Regulations states that the provisions of Sections 36, 37 and 38 of the Code of Criminal Procedure Act No. 15 of 1979 shall not apply to persons arrested under Regulation 18. The person arrested therefore, need not be produced before a Magistrate in terms of Sections 36 and 37 of the Criminal Procedure Code and the police need not obtain orders from a Magistrate with regard to the duration or place of detention – *Joseph Silva and Others v. Balasuriya and Others* [22].

Between June 20th 1989 and December 2nd 1989, a person arrested and detained under the provisions of Regulation 18 was, in terms of the proviso to Regulation 19(1), required to be produced before "any Magistrate within a reasonable time, having regard to the circumstances of each case, and in any event not later than thirty days after such arrest."

The proviso to Regulation 19(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, requiring production before a Magistrate within a reasonable time and not exceeding thirty days, was repealed by a Regulation dated December 2nd 1989 published in Gazette 589/5 of 18.12.1989. In terms of the new provision the Magistrate was required to visit the place of detention at least once in every month and the person in charge of the place of detention was required to produce persons detained, otherwise than by order of the Magistrate, before the visiting Magistrate. The duty of production was therefore primarily linked to the Magistrate's visit. Making timely visits was the duty of the Magistrate in the discharge of a judicial function and not an executive obligation. The time for production became in effect, if and when the Magistrate visited the place of detention.

The petitioners were supposed to have been arrested in pursuance of and under Regulation 18. In terms of the provisions of

Regulation 19 prevailing at the time, namely 27th February – 17th March 1992, the procedure prescribed by the Emergency Regulations required the petitioners to be produced before a Magistrate upon the visit of the Magistrate to the place of detention. It was not the petitioners' case that they were not produced before a Magistrate who visited the places of their detention. In the circumstance, assuming that the petitioners were detained in pursuance of Regulation 18, I hold that the provisions of Article 13(2) were not violated by any failure to comply with the procedure established by Regulation 19.

LIMITATIONS ON TIME – EMERGENCY REGULATIONS – REGULATIONS 17

The petitioners were also, as we have seen albeit mistakenly, detained under certain provisions contained in Regulation 17. Where a person is detained in pursuance of an order made under Regulation 17 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 or Regulation 17 of the Emergency (Miscellaneous Provisions and Powers) Regulations of 1993, it has been said that by "implication" the person detained need not be produced before a judge. (see per Kulatunga, J. in *Wickremabandu's case* [26] and in *Weerakoon v. Mahendra* [11]. See also *Fernando v. Kapilaratne* [69]. Was failure to provide a procedure relating to the production of persons detained under Regulation 17 a sweeping away of the Constitutional right guaranteed by Article 13(2) by implication? Constitutional guarantees cannot be removed or modified except in accordance with the provisions of the Constitution. That, I believe is a proposition that commends itself to general acceptance. I believe it is still a well-established and universally conceded principle. One might even say that it is axiomatic. In the case of detentions under Regulation 19 the relevant provisions of the Code of Criminal Procedure are expressly suspended. The exercise and operation of Article 13(2) may, in terms of Article 15 (7) of the Constitution be subject to restrictions prescribed by law, but where the limitations are not plainly expressed. I would be reluctant to imply their existence. If there is no procedure prescribed by the Emergency Regulations, the right guaranteed by Article 13(2) should be secured and advanced by declaring that the ordinary provisions of law are

applicable in such a case. And indeed, if such provisions existed, they should be "strictly scrutinized and construed", since they make inroads into the liberty of the citizen. (Cf. per Samarakoon, CJ. in *Kumaranatunga v. Samarasinghe*) [19]

It is interesting to compare Article 22 of the Indian Constitution which deals with so important a matter understandably in the Constitution itself. Although Article 22(2) requires a person arrested to be produced before the nearest magistrate within the prescribed time, Clause 3 (b) of Article 22 expressly provides that the right to be produced does not apply to any person who is arrested or detained under any law providing for preventive detention.

VIOLATION OF ARTICLE 13(2) BY FAILURE TO PRODUCE THE ARRESTED PERSON WITHIN THE PRESCRIBED TIME

Where a person is not produced before a judge in the time prescribed, the provisions of Article 13(2) are violated. (E.g. see *Premalal de Silva v. Rodrigo* [86]; *Samanthilaka v. Ernest Perera and Others* [87]; *Sirisena v. Ernest Perera* [88]. See also *Abeywickrema v. Dayaratne* [89];*Pushpakumari and Jayawickrema v. Mahendra and Others* [76];*Weerakoon v. Mahendra and Others* [11]; *Karunasekera v. Jayewardene* [50]; *Weerakoon v. Weeraratne* [15]; Cf. *Somasiri and Somasiri v. Jayasena and Others* [72].

RELEASE OR PRODUCTION WITHIN PRESCRIBED TIME

Generally, if a person is released before the time statutorily prescribed for production, or if the person is produced before a judge within such prescribed time, Article 13(2) will not be violated. (See *Dayananda v. Weerasinghe and Others* [91];*Joseph Silva v. Balasuriya and Others* [22]; see also *Garusinghe v. Kadurugamuwa* [91]; *Liyanage v. Chandrananda* [92]; *Mallawarachchi v. Seneviratne* [40]; Cf. also *Saranal v. Wijesooriya and Others* [93] which held that where there is no evidence of detention without production within the prescribed time, the petitioner's application will be rejected).

DETENTION AFTER PRODUCTION – JUDICIAL ACT – NO PROTECTION FOR LONG DETENTION PENDING TRIAL

Once a person held in custody or detained or otherwise deprived of personal liberty is brought before a judge of the nearest competent

Court according to procedure established by law, he shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of the judge made in accordance with procedure established by law. (Article 13(2) of the Constitution). The holding of a person in custody upon the Orders of the judge constitutes judicial as distinguished from administrative or executive action. (See *Dharmatillake v. Abeynaike* [77]; *Kumarasinghe v. A.-G.* [84]; *Siriwardena v. Liyanage* [71]; *Dayananda v. Weerasinghe* [90]; *Leo Fernando v. Attorney-General* [95]; *Jayasinghe v. Mahendran and Others* [96]; *Velmurugu v. A.G.* [97]; *Saman v. Leeladasa* [98]. But see per De Alwis J. in *Joseph Perera* (*supra*) – where it was thought that because "judicial discretion" could not be exercised in acting under the Emergency Regulations, the continued detention after the judicial remand order remained executive action. See also *Sriyawathie v. Pasupathi and Jansz* [99] where detention on account of an invalid judicial order was held to be violative of the petitioner's fundamental rights. There is it seems no constitutional protection of the personal liberty of the subject where he is held in custody or detention pending trial for a longer period than under all the circumstances of the case is reasonable. Cf. Article 13(4). All that the Court has done is to urge the authorities to expedite the trial. Cf. *Kamegam v. Jansz and Others* [100] where long incarceration was unsuccessfully claimed by the petitioner to be violative of Article 11). On the other hand, in terms of Articles 5.3 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a person is entitled to a fair trial within a reasonable period. (E.g. see the decisions of the European Court of Human Rights in the cases of *Lawless* [101]; *Wemhoff* [102]; *Neumeister* [103]; *Strogmuller* [104]; *Matznetter* [105]; *Ringeisen* [106]; *Eckle* [107]; *Foti and others* [108]; *Corighano*[109]; *Vallon*; *Carr* [110]; *Capuano, Bagetta and Milasi* [112]. Cf. also *Lechner and Hess* [113].

THE STATUTORILY PRESCRIBED PERIOD SETS THE OUTER LIMIT

The prescribed maximum time within which a law may require a person to be produced before a judge merely indicates the outer limit which cannot be passed without violating Article 13(2) of the Constitution. In the circumstances of a case, detention for a shorter period of time may violate Article 13(2).

With regard to persons arrested under the Code of Criminal Procedure, it is clear from the terms of Sections 36 and 37 that the twenty-four hour period indicates the maximum time and not a mandatory period of detention, although certain dicta might suggest that so long as a person is released or produced within twenty-four hours, Section 37 is not violated whether or not it was under all the circumstances of the case a longer than reasonable period. For instance in *Lundstron v. Cyril Herath and Others* [43], where the petitioner was ordered to drive to the Police Station and she had to remain at the station in her vehicle until the keys of her car which were taken by the Police were returned, De Alwis, J. said: "The petitioner was thus in custody for a little over 12 hours and this period did not exceed 24 hours before which she was required to be produced before a Magistrate, in accordance with the procedure established by law, namely Section 37 of the Code of Criminal Procedure Act." "Consequently" it was held that Article 13(2) had not been violated. (Cf. also *Pathmasiri v. Illangasiri* [114]; per Goonewardene J. in *Wijeratne v. Vijitha Perera*)[115].

Section 36 of the Code of Criminal Procedure provides that an officer making an arrest "shall without **unnecessary delay ...** take or send the person arrested before a Magistrate having jurisdiction in the case." And Section 37 of the Code provides that an officer "shall not detain in custody or confine a person arrested without a warrant **for a longer period than under all the circumstances of the case is reasonable,** and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate."

Whether a detention within the prescribed maximum period is reasonable must be determined by the Court having regard to the circumstances of each case, including, but not limited to, the statutorily prescribed outer limit.

In *Kumaranatunge v. Samarasinghe* [19] a detention of ten hours was considered reasonable in a case to which section 37 of the Code of Criminal Procedure was applicable.

However, in *Faiz v. A.G.*[18], where the petitioner was arrested at about 6.30 p.m. on 26th April 1991 and produced before a

Magistrate on the following eveing within the prescribed twenty-four hour maximum period, and remanded till the 29th of April and released on bail, Fernando and Perera JJ. held that Article 132(2) was violated. Fernando J. explained that in the circumstances of the case the "detention was unnecessarily prolonged." In *Kumarasena v. Shriyantha and Others* [6], the petitioner, who was arrested without reasonable grounds, was released in about six hours after being subjected to degrading treatment in violation of Article 11 of the Constitution. I held that Article 13(2) was violated although the person was released within the twenty-four hour period. I said: "The salutary nature of the provision that persons arrested without warrant must be produced before a judge without unnecessary delay has been stressed over and over again by this Court. (E.g. see *Edirisuriya v. Navaratnam* [21] . The provision is there "to ensure the safety and protection of arrested persons." The desirability of the provision was strongly underlined by the facts of the case before us where much harm was caused even during the short period of detention."

At a time when it was required under Regulation 19(2) that persons should be produced no later than 30 days after arrest, it was held that Article 13(2) was not violated in a case where the person was released from custody in about 24 – 27 hours after "expeditious inquiry" had revealed that further detention for investigation was unnecessary. (*Mallawarchchi v. Seneviratne*) [40].

Regulation 19(2) provides that "Any person detained in pursuance of the provisions of Regulation 18 may be detained for a period not exceeding ninety days reckoned from the date of his "arrest under that Regulation" and shall at the end of that period be released by the Officer-in-Charge of that place unless such person has been produced by such officer before the expiry of that period before a Court of competent jurisdiction.

The period of ninety days prescribed by Regulation 19 and the right to detain for an unspecified period in terms of Regulation 17 are permissive, and not mandatory – it is certainly not, as suggested in *Namasivayam v. Gunawardene* [116] a penalty incurred by [a] petitioner under the Emergency Regulations" – and many hundreds of persons, including the sixteen petitioners in this case, have been properly released before the period of ninety days and, in the case of persons

detained or purported to be detained under Regulation 17, (including the petitioners in this case who were detained *inter alia*, in terms of the objects and purposes of Regulation 17) even before an appeal to the Advisory Committee had been lodged. This is in accordance with the scheme of the law and the foundational assumption underlying Regulations 17, 18 and 19 that a person arrested and detained should not be confined for a longer period than under all the circumstances of the case is "reasonable" (Cf. *Kumaranatunge's case* [19] (*supra*); *Gurusinghe v. Kadurugamuwa* [91]; *Mallawarachchi's case* (*supra*).

As soon as investigations have revealed that, although there were reasonable grounds for suspicion at the time of the arrest, further search (including, as explained above, investigation) is unnecessary, steps should be taken in terms of Regulation 19 to have the person released. It would be unreasonable not to do so. (See *Nanayakkara v. Henry Perera and Others* [62] followed in *Nallanayagam v. Gunatilleke and Others* [61]; *Joseph Perera v. A.G.*[35]; per De Alwis J. *Wijewardene v. Zain*) [13].

Likewise, although at the time of making an order under Regulation 17, the Secretary had reasonable grounds for doing so, yet if at any time thereafter the Secretary to the Ministry of Defence can no longer as a reasonable man be satisfied and so hold the opinion that it is necessary to continue to detain the person to prevent him from acting in a manner such person was once reasonably supposed to have been likely to act, the Detention Order issued under Regulation 17 should be revoked and the person detained set free. (See *Weerakoon v. Mahendra*) [11].

Persons should not be held in custody for an "excessive" period, that is, a longer than "reasonable period" in the sense that having regard to the purposes of arrest or detention, the detention can no longer be supported. (Cf. *Joseph Silva and Others v. Balasuriya and Others* [22]: *Jayatissa v. Dissanayake* [74].

If a person who, for the foregoing reasons ought to have been released, is in custody at the time of the hearing with regard to an application made to the Supreme Court to hear and determine any question relating to the infringement by executive or administrative

action of the fundamental rights declared and recognized by Article 13 of the Constitution, the Court may order the release of the petitioner as it did in *Padmakanthi v. O.I.C. Matale* [117] and in *Dissanayake v. Guneratne & Others* [28].

If a person is detained in terms of Regulation 17 and or 19 beyond a time when in all the circumstances it is unreasonable to do so, because the grounds for detention in terms of those laws no longer exist, such detention can no longer be said to be under or in pursuance of such Regulation or Regulations. The person detained can no longer be described as a person arrested according to the procedures established by those laws.

Detention without reasonable ground, or beyond a time when such detention ceases to be reasonable has been sometimes referred to as "excessive", "unjustified", "unlawful" or "illegal" detention. (Cf. *Wijewardene v. Zain* [13]; *Wickremabandu v. Herath and Others* [28]; *Jayaratne v. Tennekoon and Others* [66] and *Fernando v. Kapilaratne and Others* [70]; *Padmakanthi Dimbulagamuwa v. OIC Army Camp Matale and Others* [117]. Wanasundera J. in *Joseph Perera* [35] said that such detention **"transgresses the law."** No doubt this may be so for various reasons and give rise to various reliefs and remedies. For instance, there may be a cause of action based on false arrest. But the question for determination in matters of the sort before us is this: What provision or provisions of the Constitution are violated in a way that the transgression is justiciable in terms of Article 126 of the Constitution?

THE CONSEQUENCES OF UNREASONABLE DETENTION – VIOLATION OF ARTICLE 13(1)

Firstly, as we have seen in this case, there may be a violation of Article 13(1).

Where a person is taken into custody supposedly in terms of Regulation 17 or 18 but in fact otherwise than in accordance with those provisions, or where subsequently the circumstances make continued detention unwarrantable in terms of Regulation 17 and 18, the person detained must be released. Otherwise, being in the custody of the law, he would be a person who is not "arrested" in

accordance with procedure established by law and Article 13(1) would be transgressed.

Where a person is in the custody of the law he is a person "arrested", in the words of H. A. G. de Silva in *Piyasiri v. Fernando* [3] "for whatever the period may be". In *Kumaranatunga v. Samarasinghe* [19], Samarakoon C.J. said: "Article 13(1) ... deals only with arrest and not with subsequent detention ... the arrest and incarceration however short on document A [the Detention Order] was in contravention of the petitioner's fundamental right guaranteed by Article 13 of the Constitution." Samarakoon C.J. was referring to the right of the petitioner under Article 13(1) and not his right enshrined in Article 13(2) to be produced before a judge while in detention. It seems to be sometimes assumed that Article 13(1) is confined to the act of taking into custody whereas Article 13(2) is concerned with subsequent detention. H. A. G. de Silva, J. in *Wickremabandu* [26] for instance, stated that Article 13(1) dealt with arrest and that "paragraph (2) refers to the consequences of such arrest: the person arrested may be 'held in custody', 'detained' or 'otherwise deprived of personal liberty' – which would cover, for instance, house arrest, or a restriction order limiting freedom of movement to a particular area or during specified periods." Article 13(2) deals with an aspect of the rights of persons deprived of their liberty, namely the right to be produced before a judge and the right to be detained in terms of the orders of the judge thereafter made by him in accordance with procedure established by law.

Article 13(1) could be violated not only by the act of first depriving a person of his liberty in violation of procedure established by law, but also by holding any person in the custody of the law during any period, unless perhaps the detention is extremely brief and momentary so as to be of a *de minimus* nature, (the duration may be relevant in computing amounts to be awarded by way of relief: but that is another matter) when he is deprived of his liberty contrary to procedure established by law. He is under arrest. He is an arrested person. (Cf. per H. A. G. de Silva, J. in *Wickremabandu's Case* [26]. See also *Rajakpaksa v. Kudahetti* [119] on the meaning of the term "arrest").

In a vulgar sense "arrest" is simply taking a person into custody for the suspected commission of an offence. However, in law, as Fernando, J. observed in *Sirisena and Others v. Ernest Perera and Others* [88], "Arrest" must be given a wide meaning and includes deprivation of liberty for purposes other than the suspicion of the commission of an offence, as in that case where persons were detained for obtaining evidence. This is in accordance with the view expressed by H. A. G. de Silva, J. (Fernando J. agreeing) in *Wickremabandu* [26] that "taking Article 13 as a whole, "arrest" in paragraph (1) includes an arrest in connection with an alleged or suspected commission of an offence, as well as any other deprivation of personal liberty."

How else could a detention under Regulation 17, which is concerned merely with the **prevention** of violations of the law, be ever violative of Article 13(1) except on the basis that deprivation of personal liberty is what is meant by the term "arrested" in Article 13(1)?

Moreover, certain arrest can take place only if the person is already in the custody of the law. For instance, in *Karunaratne v. Rupasinghe* [118], it was held that a rehabilitation order could not be enforced in respect of a person who was not in custody. Fernando J. observed: "I hold therefore that this regulation does not authorize the arrest or detention of a person not already in detention ... The resulting position is that the arrest and detention was illegal."

The essential constitutional guarantee of the first part of Article 13(1) is that the State may not imprison or otherwise physically restrain a person against his will except according to fair procedures, namely, procedures established by law. Admittedly, the position might have been clearer if, as in Article 21 of the Indian Constitution, it had been simply stated that "No person shall be deprived of his personal liberty except according to procedure established by law." However, in the formulation of Article 13(1), I cannot find any reason to suppose that a narrower meaning was intended by the substitution of the word "arrested" for the phrase "deprived of his personal liberty."

It had been submitted by Counsel in *Wickremabandu* [26] that any detention other than detention pending investigation or trial constituted a "punishment" and was therefore violative of Article 13(4) of the Constitution. H. A. G. de Silva (Fernando J. agreeing), however, said: "If this contention is correct, it would follow that deprivation of liberty in relation to persons of unsound mind or suffering from specified diseases, (under the Contagious Diseases Ordinance, Cap. 223, the Mental Diseases Ordinance, Cap 227 and the Lepers Ordinance Cap. 228), or under Chapter XLVII of the Civil Procedure Code would also be punishment – since such deprivation is not "pending investigation or trial." We are of the view that references to public health and public order in Article 15(7) were necessary to ensure that legislation could authorise deprivation of liberty in situations of that kind."

There is abundant persuasive authority supporting the view that a person cannot be committed for treatment or detained for treatment subsequently unless it is in accordance with a procedure established by law to determine that a person is dangerous to himself or others. (E.g. see *O'Connor v. Donaldson* [120]; *State ex rel. Doe v. Madonna* [121]; *Jackson v. Indiana* [122]; *Humphrey v. Cady* [123]; *Addington v. Texas* [124]. See also the decisions of the European Court of Human Rights in the cases of *Winterwerp* [125]; *X v. U.K.* [126] *Luberti* [127] and *Ashingdane* [128].

THE CONSEQUENCES OF UNREASONABLE DETENTION – VIOLATION OF ARTICLE 13(4)

While the arrest, holding in custody, detention or deprivation of personal liberty of a person **pending investigation** or **trial** does not constitute a punishment by imprisonment, (Article 13(4); and while holding a person in **preventive detention** has been held not to be punitive imprisonment violative of the Constitution, (*Kumaratunge v. Samarasinghe* [19]; *Yapa v. Bandaranayake* [46]; *Wickremabandu v. Herath and Others* [26] yet deprivation of personal liberty would amount to punitive imprisonment violative of Article 13(4) of the Constitution where the person was never, or cannot **any longer,** be reasonably said to be held for purposes of investigation, trial or preventive detention, as the case may be. (See *Nanayakkara v. Henry Perera* [62]; *Yapa v. Bandaranayake* [46]; *Nallanayagam v. Gunatilleke* [81]; *Sasanasiritissa Thero and Others v. De Silva and Others* [14];

Wijewardene v. Zain [13]; *Joseph Silva v. Balasuriya* [22]; *Chandradasa and Another v. Lal Fernando & Others* [25]; *Guneratne et el* [23]; *Premalal de Silva v. Rodrigo* [86].

Although the **duration** *per se* of the imprisonment would sometimes seem to be regarded as the criterion for deciding whether Article 13(4) has been violated, it is the fact of detention beyond a time when it is not warranted that is relevant. The objective of Article 13(4) seems to be that no person shall be subject to death or deprivation of personal liberty except by an order of a competent court. Subjecting a person to pain, or suffering or loss caused by the deprivation of personal liberty without judicial authority is "punishment", when there is no constitutional or other legislative authority for doing so. (Compare Articles 13(2) and 13(4) of our Constitution and Article 22 of the Indian Constitution. See also Emergency Regulation 17). Punitive imprisonment may be of any duration. Thus in *Premalal de Silva's case* the petitioner who was supposed to have been arrested on 19th May 1989 in terms of the Code of Criminal Procedure – although there were no reasonable grounds – was produced before a Magistrate on 23rd May and enlarged on bail on 28th June 1989. Article 13(4) was held to be violated in addition to the violations of Article 13(1) and 13(2). Duration, of course, would be relevant in assessing the amount to be paid to a petitioner who has been detained for a longer period than under all the circumstances of the case is reasonable.

SEVERAL VIOLATIONS BASED ON THE SAME FACTS IS A POSSIBILITY

As a consequence of the deprivation of personal liberty otherwise than according to procedure established by law, rights other than those guaranteed by Article 13 of the Constitution too may in the circumstances of a case be held to be violated. For instance, deprivation of personal liberty in violation of Article 13(1) may consequentially or incidentally violate Article 14(1) (a) – freedom of speech, as it is in the matters before us (see also *Joseph Perera v. A.G.* [35] and/or Article 14(1) (b) – freedom of peaceful assembly: and/or Article 14(1) (c) – freedom of association as in the matters before us – and/or Article 14(1) (a) – the freedom to engage himself

in his lawful occupation, profession, trade, business or enterprise: and/or Article 14(1) (h) the freedom of movement *(Chandradasa v. Lal Fernando)*[25]. However, those are not matters that immediately concern us, but I mention them, firstly, to acknowledge the possibility that the evidence adduced in support of the violation of one provision of the Constitution may also support the violation of other provisions of the Constitution. Persons depriving others of their personal liberty should therefore realize that they may unwittingly lay themselves open to more violations of the Constitution than one. Secondly, I should like to emphasize that, in the circumstances of a case, the violation of one provision of the Constitution guaranteeing a fundamental right may not be necessarily violative of some other right. The alleged violation of each right must be considered independently in the light of the circumstances of each case. Thus, although in *Joseph Perera* [35] the arrest resulted in a violation of Article 14(1) (a), it did not do so in *Chandradasa's Case.*[25]

ARTICLE 13(1) VIS-A-VIS 13(2)

However, is this true of violations of Article 13(1) vis-a-vis 13(2)? In view of the fact that I have found that Article 13(1) was violated, does it follow that Article 13(2) is also violated as a **necessary consequence?** There are dicta that might lead to such a conclusion.

It has been said, for instance, that where the arrest is "invalid" "unlawful" or "illegal" the subsequent detention is also "invalid" "unlawful" and "illegal" and the provisions of Article 13(2) are therefore violated. (E.g. see *Chandradasa and Kularatne v. Lal Fernando and Others*[25]; *Lalanie and Nirmala v. De Silva* [8]; *Sasanasiritissa Thero and Others v. De Silva and Others* [14]; *Wijewardene v. Zain* [13]; *Dissanayake v. Superintendent, Mahara Prison* [9]; *Vidyamuni v. Jayatilleke* [12]; *Wijesiri v. Rohana Fernando* [10]; *Nihallage Dona Ranjanie v. Liyanapathirana* [53].

The genesis of the problem is not identifiable with certainty. Was it Chief Justice "Samarakoon's statement in *Kumaranatunga v. Samarasinghe* [19] that Article 13(1) of the Constitution "deals only

with arrest and not with subsequent detention"? It was probably not, for it seems that His Lordship was concerned with the right of the petitioner to be free from arrest except according to procedure established by law (Article 13(1)) rather than with his constitutional rights as a person held in custody, detained or otherwise deprived of personal liberty.

There were no problems until the Court (Athukorale J., G. P. S. de Silva and Bandaranayake, JJ. agreeing) in *Chandradasa and Kularatne v. Lal Fernando and Others* [15] held that "The arrests of the petitioners by the 1st respondent was not authorized in terms of Regulation 18(1) and was thus unlawful. The detention of the petitioners by the respondent was therefore illegal", and it was held that the violations of Articles 13(1), 13(2) and 13(4) had been "established" and that by reason of the "illegal detention", Article 14(1) (c), 14(1) (g) and 14(1) (h) had been "consequentially" violated.

The facts certainly supported the finding that the several transgressions of various Articles of the Constitution had taken place. The suggestion that, since the arrests were not in accordance with the procedure prescribed by Regulation 18(1), "therefore", by reason of that fact, *ipso facto*, other provisions of the Constitution were violated, was, with great respect, somewhat misleading, for although, as in *Chandradasa* [25] the same facts may have supported violations of several provisions of the Constitution, the violation of one provision of the Constitution does not inevitably and necessarily result in the violation of another provision.

Then in 1990 H. A. G. de Silva, J. (Fernando J. agreeing) in *Wickremabandu* (*supra*) suggested that Article 13(1) was concerned with the arrest of persons while Article 13(2) was concerned with "the consequences" of arrest.

None of these cases attempted to evolve a theory that if Article 13(1) is violated then Article 13(2) is also violated.

We then have the view expressed by Kulatunga J. that "arrest and detention are inextricably linked" (see *Wijewardene v. Zain* [13]. Based on Sharvananda J's observation in *Mariadasa Raj v. A.G.* [79] that if a

person arrested is not informed of the reason for his arrest,"his detention after the arrest is illegal", a theory was evolved that if an arrest is "illegal" or "unlawful", (Article 13(1), the subsequent detention is therefore "illegal" or "unlawful" and consequently Article 13(2) is violated. (E.g. see *Nihallage Dona Ranjani v. Liyanapathirana*)[53].

Conversely, it has sometimes been suggested that if the arrest is "justified" and not violative of Article 13(`1) it automatically follows that the detention is justified and that Article 13(2) is therefore not violated. (Cf. *Dalaguan v. Perera* [129] and *Madera v. Weerasekera*[130], where there were reasonable grounds for arrest, it was held in each case that the "arrest and detention were legal.").

This view has lead to difficulties resulting in the need to explain the violation of Article 13(2) by stating that if detention is "excessive" in the sense of being long in duration, rather than in relation to a prescribed period for production before a judge, the provisions of Article 13(2) of the Constitution have been violated.

In *Jayaratne v. Tennekoon* [65] it was held that the arrest was "justified and not violative of Article 13(1) of the Constitution." Kulatunga J. there states: "It follows that his detention after his arrest is also justified and not violative of Article 13(2). The question then is whether his continued detention up to date is justified ..." His Lordship states: "...learned Counsel for the petitioner ... has strenuously submitted that the continued detention of the detenu for so long a period is without due consideration of the relevant facts. He has not been charged with any offence: in these circumstances the detention is *mala fide* and unwarranted ... I am in agreement with this submission and hold that in all the circumstances the impugned detention is excessive and hence violative of the detenu's rights under Article 13(2) of the Constitution." Kulatunga, J. later adds as follows: "As regards the infringement of Article 13(2) I have already held that the arrest of the detenu is justified and not violative of Article 13(1) and that the detention after such arrest is also justified and not violative of Article 13(2); the infringement of Article 13(2) occurred only by reason of excessive detention."

In *Padmakanthi v. O.I.C. Matale* [117] the petitioner had been arrested on 10th August 1989. Although investigations were completed on 29th March 1990 the petitioner was still in custody at the date of the hearing of the application in the Supreme Court. It was held that detention after 29th March was "unjustified" and violative of Article 13(2).

In *Fernando v. Kapilaratne* [69] there were reasonable grounds for arrest and the petitioner had been informed of the reasons for arrest. Continued detention, however, was not warranted, for the petitioner was detained merely because he was not behaving himself properly while in custody. It was held, that, since the petitioner was held under Regulation 17, Article 13(2) was not violated by non-production before a Magistrate. However, Article 13(2) was violated on account of the "excessiveness of the detention," which "violated" the detention order from the date of the application to the Court.

In *Godagama v. Ranatunge* [64] Article 13(2) was declared violated because the petitioners had been detained for over two years.

There is no discussion of, or reference to, Article 13(2) at page 403 by Sharvananda J. *Mariadas* [79] was a case concerning Articles 11 and 13(1). In any event, I have no difficulty at all in accepting Chief Justice Sharvananda's proposition that if an arrest is illegal the subsequent detention is illegal. However, the fact that the arrest and subsequent detention are illegal does not carry with it the corollary that Article 13(2) is violated. *Mariadas* [79] did not as a precedent embalm a principle that a detention following an illegal arrest is also illegal and **that therefore Article 13(2) is violated.** There is nothing at all in Article 13(2) that expressly or by implication warrants such a conclusion. See Article 13(2). Article 13(2) of the Constitution does not say that "No person shall be held in custody or detained or otherwise deprived of personal liberty except according to procedure established by law. Nor does it say that "No person shall be held in custody or detained or otherwise deprived of his personal liberty unlawfully or illegally or for a longer period than under all the circumstances of the case is reasonable." What Article 13(2) does say is that "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."

Goonewardene, J. observed in *Faiz v. A.G.*[16] that it is not only "unnecessary" to "characterize any action that does not conform to the provisions of Article 13(1) as an "illegal arrest", it is "perhaps hazardous to attempt to characterize a particular action as an "illegal detention", an expression which carries certain overtones which may tend to colour and confuse and carry one away from an objective appraisal of a situation ... Upon a simple reading of its language uncomplicated by reference to the concept of "illegal detention", what do the provisions of Article 13(2) mandate or require to be done? It demands that any 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 ... when the period of time is exceeded before such person is brought before a judge, there would be a violation of Article 13(2) whereas if such period has not been exceeded, there would be no such violation and whether or not there has been an infringement of Article 13(1) is irrelevant ..."

In *Wijeratne v. Vijitha Perera* [115] Goonewardene J. referred to his judgment in *Faiz* [16], reiterated the views His Lordship had earlier expressed, and said that "a violation of Article 13(2) "can occur only when there has been a failure to transfer an arrested person from non-judicial custody to judicial custody within the time prescribed by law." The phrase "judicial custody" was no doubt meant to underline the salutary purposes of Clause (2) of Article 13 rather than to deal with the question of custodianship in the sense of in whose keeping an arrested person is to be – e.g. the police or the fiscal.

According to Goonewardene J. "an illegal arrest violative of Article 13(1) of the Constitution is not necessarily accompanied by the consequence that there is a violation of Article 13(2) as well."

Fernando J. in *Garusinghe v. Kadurugamuwa* [91] observed that "merely describing an arrest or detention as being "illegal" does not

amount to an allegation of an infringement of Article 13(1) or 13(2)". And as Fernando J. pointed out in *Chandrasekeram v. Wijetunge* [51], it may be that Article 13(1) is violated but "It does not necessarily follow that their subsequent detention was unlawful."

Moreover, the terms "unlawful" and "illegal" and "excessive" do not mean the same thing and are not interchangeable. For instance in *Wickremabandu v. Herath* [26], H. A. G. de Silva (Fernando J. agreeing) found that the detention was "unlawful: it is not merely excessive detention but illegal detention."

In most of the cases, notwithstanding the dicta explaining the manner in which Article 13(2) was violated, namely by reference to "invalidity" "illegality" and "unlawfulness", and "excessiveness" in the sense of long duration, the facts certainly justify a declaration of the violation of Article 13(2). Thus although in *Faiz v. A.G.* [18] Perera J. would appear to have decided that Article 13(2) was violated because the arrest was unjustified and therefore the "subsequent detention ... was unwarranted". Fernando J. explains that in the circumstances of the case detention even within the twenty-four hour period was "unnecessarily prolonged" and therefore violative of Article 13(2). In *Wijesiri v. Rohan Fernando* [10] and *Nihallage Dona Ranjani v. Liyanapathirana* [53] the petitioners were not produced before a judge within the time prescribed by section 37 of the Civil Procedure Code; and in *Weerakoon v. Weeraratne* [15] within the time prescribed by Regulation 19(2).

However as Goonewardene, J. cautions, preoccupation with questions of legality may "carry one away" from the matters to be decided in considering whether Article 13(2) has been violated. In *Wijesiri v. Rohan Fernando* [10] the petitioner was arrested without reasonable grounds under the Criminal Procedure Code on 23rd April 1990. A Detention Order under Regulation 19(1) was issued on 28th April 1992. The petitioner was produced before a Magistrate on 1st June 1990. Article 13(2) was held to be violated. Wadugodapitiya J. said that the production "was not for the purposes enumerated in Article 13(2) of the Constitution, but was for the purpose of having him discharged as there was no material against him. "The Detention Order had authorized detention for 90 days at Homagama

Police/Boosa/Poonani/Pelawatta camp. However, on 6th May the petitioner was transferred to and thereafter detained at Maharagama Police Station. Wadugodapitiya J. states: "Therefore, at most, it is only the short perod of detention from 29th April 1990 to 6th May 1990 that can be said to have been covered by the Detention Order ...the rest of the period is from my view of the matter, illegal ... I therefore hold that the 1st Respondent is guilty of violating the provisions of Article 13(2) of the Constitution."

In *Munidasa v. Seneviratne* [49], the petitioner was arrested on 13th July 1991 under Regulation 18 without reasonable grounds and without being given a reason for his arrest. The provisions of Article 13(2) were declared violated because the detention was held to be "illegal" and "unlawful" even though the petitioner had been produced before a Magistrate on 14th July 1991 and remanded by him and released on 19th July 1991.

In *Wijeratne v. Perera* [115], the petitioner was released within the maximum twenty-four hour period. Goonewardene, J. held that Article 13(2) had not been violated. However Fernando and Wadugodapitiya JJ held that Article 13(2) was violated.

Whether as in *Faiz v. A.G.* [16] there were circumstances in *Munidasa* [49] *and Wijeratne* [115] that made the detention violative of Article 13(2) is not evident from the judgments.

The provisions of both Articles 13(1) and 13(2) may be violated in a given case (E.g. see *Samanthilaka v. Ernest Perera* [87]; *Premalal de Silva v. Rodrigo* [86]; *Somasiri and Somasiri v. Jayasena* [72]; *Karunaratne v. Rupasinghe* [116]; *Weerakoon v. Mahendra* [111]; *Sirisena v. Ernest Perera* [88]; *Dissanayake v. Guneratne* [28]; *Munidasa and Others v. Seneviratne and Others* [49]; *Chandrasekeram v. Wijetunge* [51]; *Vidyamuni v. Jayetilleke* [12].

However, the fact that Article 13(1) is violated does not necessarily mean that Article 13(2) is therefore violated. Nor does the violation of Article 13(2) necessarily mean that Article 13(1) is violated. Arrest and detention, as a matter of definition, apart from other relevant considerations, are "inextricably linked". However, Article 13(1) and

13(2) have a related but separate existence. Article 13(1) is concerned with the right of a person not to be arrested including the right to be kept arrested except according to procedure established by law and the right to be informed of the reasons for arrest, whereas Article 13(2) is concerned with the right of a person arrested to be produced before a judge according to procedure established by law and the right not to be further deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law. Article 13(1) and 13(2) are no doubt linked: For instance, the procedure under which a person is arrested may determine the period within which a person has to be produced before a judge. Moreover, as we shall see the lack of grounds for arrest or subsequent cessation of reasonable grounds might well be important in deciding whether an obligation arises to produce a person. Article 13(1) and (2) are linked but not inextricably so.

The fact that Article 13(1) was not violated does not necessarily mean that Article 13(2) cannot be violated. For instance, a person may be arrested on grounds of reasonable suspicion and given reasons for his arrest. However, if he is not produced before a judge in accordance with a procedure prescribed by law – and that is the matter dealt with by Article 13(2) – there will be a violation of Article 13(2), althugh Article 13(1) was not violated. In *Nallanayagam v. Gunatileke* [61] a belated production" three days after the maximum thirty-day period specified was held to be violative of Article 13(2) although the arrest and continued detention even after the specified period for production was not violative of Article 13(1).

In *Pathmasiri v. Illangasiri and Others* [114], Article 13(1) was not violated because there were reasonable grounds and the petitioner was aware of the reasons for his arrest. However, the petitioner who had been arrested on 19th September, 1982 was produced before a Magistrate only on 25th September 1987 in violation of section 37 of the Code of Criminal Procedure and therefore Article 13(2) was held to be violated.

In *De Silva v. Mettananda and Others* [2] there was no question of the violation of Article 13(1). However the "arbitrary detention" of the petitioner for interrogation was held to have violated Article 13(2).

In *Kalyanie Perera v. Siriwardene* [63], there were reasonable grounds for arrest, and detention for investigation was, in the circumstances of the case warranted. The reason for arrest had been given. There was no violation of Article 13(1). Kulatunga, J. however, said: "The learned Counsel for the petitioners complained without contradiction by the State that the First Petitioner was never produced before a Magistrate. Accordingly, I hold her detention under Regulation 19(2) to be unlawful and violative of Article 13(2).

In some matters no complaint is made of the violation of Article 13(1) or the matter is not pressed but nevertheless a violation of Article 13(2) has been found. (E.g. see *De Silva v. Mettananda and Others* [2]; *Alwis v. Raymond and Others* ([131]); *Sasanasiritissa Thero and Others v. De Silva and Others* [14]. If the violation of one Article necessarily followed the other, it is difficult to understand why, ordinarily, resort to one might be abandoned except on the basis that the ingredients to constitute the other violation are wanting. There may, of course, be additional reasons, as for instance in *Sasanasiritissa* [14] where perhaps the violation of Article 13(1) was not pressed also because relief was not sought within the time for doing so specified in Article 126(2) of the Constitution.

Conversely, where Article 13(1) is violated it does not follow that Article 13(2) is violated. For instance, where a person is not informed of the reason for his arrest he would be entitled to complain of the violation of his rights under Article 13(1). Yet he may be brought within the time prescribed by the relevant procedure prescribed by law before a judge of competent jurisdiction, and in the circumstances it would not be open to him to complain that Article 13(2) has been violated merely because Article 13(1) has been violated.

In *Dharmatilleke v. Abeynaike* [77] Article 13(1) was violated because the substance of the Warrant was not notified in terms of Section 53 of the Code of Criminal Procedure, but Article 13(2) was not violated. Even though the petitioner was not "physically" produced before the Magistrate, Seneviratne J. observed that "On the facts of this application" – meaning that petitioner had been technically produced – "the relevant Article is only Article 13(1)". Violations of both Article 13(1) and (2) had been alleged in that case.

It may also be the case, as it was in *Manseer* v. *Seneviratne,*[132] that, although there were no reasonable grounds for arrest and Article 13(1) was contravened because the arrest could not have been made in accordance with procedure established by law, yet there was no violation of Article 13(2) since the person had been produced before the Magistrate within the prescribed time. Therefore, it seems, the petitioner did not press the matter.

THE CONSEQUENCES OF UNREASONABLE DETENTION – THE VIOLATION OF ARTICLE 13(2) OF THE CONSTITUTION BY FAILING TO PRODUCE THE DETAINED PERSON IN ACCORDANCE WITH THE PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE

If a person stands deprived of his personal liberty **otherwise than in accordance with procedure established by law,** including the Emergency Regulations, and this may be at the moment of taking the person into the custody of the law, or subsequently when the grounds for detention cease to exist, the person having custody of the person must set him free forthwith if he is to avoid violating Article 13(1).

If the person is not so released, then in terms of Article 13(2) steps must be taken to produce the person before the judge of the nearest competent court according to the procedure established by law.

Ordinarily, the procedure is that which is prescribed by the Code of Criminal Procedure. However, if a person is arrested in pursuance of Regulation 18 of the Emergency Regulations, in terms of Regulation 19(1) the provisions of the Code of Criminal Procedure are suspended and the procedure laid down in Regulation 19(2) is made the relevant procedure. The provisions relating to detention and production set out in Regulation 19(2) are conditional upon the person having been arrested "in pursuance of" Regulation 18. The arrest must have been in accordance with the procedure set out in Regulation 18. Where a person is not arrested in that way, Regulation 19(1), which suspends the operation of the provisions of the Code of Criminal Procedure when a person is arrested in pursuance of Regulation 18., thereby making way for the provisions of Regulation 19(2) to take their place, ceases to be operative. The suspension of

the operation of the provisions of sections 36, 37 and 38 of the Code of Criminal Procedure is conditional upon the person being arrested **under** Regulation 18. Where a person is not arrested and kept arrested in pursuance of Regulation 18, Regulation 19 has no applicability.

The procedure established by law for the purposes of Article 13(2) of the Constitution in such a case is the procedure prescribed by Section 37 of the Code of Criminal procedure. The provisions of the Code were not swept away by the Emergency Regulations. The provisions of the Emergency Regulations are supplementary, "in addition to, and not in derogation" of the provisions of the "ordinary law" including, of course, the provisions of the Code of Criminal Procedure. (See Regulation 54 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989. See also per Wanasundera, J. in *Joseph Perera* [35]; and per De Alwis, J. *Yapa* v. *Bandaranayake.*[46] Cf also per Soza, J. (Ranasinghe, J. agreeing) in *Kumaranatunga* v. *Samarasinghe.*)[19]

The provisions of the Code of Criminal Procedure do not, with great respect continue to exist merely in "truncated form", as it was supposed by Wanasundera, J. in *Edirisuriya* v. *Navaratne* [21] and cited with approval by Kulatunga, J. in *Wickremabandu* v. *Herath and Others.*[26] They may not set out the "procedure established by law" applicable to the circumstances of a particular matter relating to Article 13 of the Constitution on account of the operation of Regulation 19(1) because the arrest or detention has been made "under" Regulation 18(1). In such a case, the conditions for the operation of the substituted provisions having been satisfied, the provisions of the Regulations are followed as the relevant procedure established by law. The operation and exercise of Article 13(2) is not absolute; but it is subject only to "such restrictions as may be prescribed by law". (Article 15(7)). Where the restrictions are conditional and the conditions have not been fulfilled, the operation and exercise of Article 13(2) is subject to the ordinary procedures established by law. The provisions of the Code of Criminal Procedure do not exist in a mutilated form, but are merely conditionally suspended by the Emergency Regulations.

Looked at in this way, *Chandradasa and Kularatne* v. *Lal Fernando* [25]; *Vidyamani* v. *Jayatilleke* [12] and *Wijewardene* v. *Zain* [13] where there were no reasonable grounds for arrest and detention; and *Dissanayake* v. *Superintendent of Prisons*[9] *Jayaratne* v. *Tennekoon*,[66] *Padmakanthi* v. *O.I.C. Matale*,[117] *Fernando* v. *Kapilaratne* [69] and *Godagama* v. *Ranatunge*[64] where the detention although originally under and in pursuance of a procedure established by law subsequently ceased to be so, the petitioners rights under Article 13(2) were violated because they were not produced before a judge in terms of sections 36 and 37 of the Code of Criminal Procedure, although the violations have been explained by reference to "unlawfulness", or "illegality", or "excess" in the sense of long duration.

In the matters before us, the provisions of the Emergency Regulations relating to production before a judge were inapplicable because the petitioners could not have been arrested and detained under or in pursuance of Regulations 17 or 18. Therefore in terms of the applicable procedure established by law, namely Section 37 of the Code of Criminal Procedure, the petitioners should have been produced before a Magistrate no later than twenty-four hours of the arrest. As we have seen, the petitioners in this case were not arrested because they were committing or had committed any offence. They were not arrested because they were suspected to be concerned un or to be committing or to have committed an offence. They were not detained for any search or investigation on account of being concerned in or committing or because they had committed any offence. I do not think they should in terms of Sections 36 and 37 of the Code of Criminal Procedure, have been detained except for the time necessary to transport them from the temple, where they were arrested, to the Magistrate of the nearest competent court. Even if a person has been incarcerated following a procedure established by law, that does not completely terminate his or her right to liberty. That is a very basic and fundamental principle enshrined in the Constitution and supported by reason and abundant precedent. In the matters before us the petitioners were not arrested under a procedure established by law; they were arrested on grounds of vague suspicion, in circumstances that showed a reckless disregard

for their right to personal liberty so that their right to be produced before a Judge was particularly urgent. In failing to comply with the "salutary" provision relating to the production of the petitioners before a judge of the nearest competent court in this way, the respondents transgressed the rights conferred on them by Article 13(2) of the Constitution.

DECLARATION AND ORDER IN RELATION TO ARTICLE 13(2)

I therefore declare that the fundamental rights of the petitioners to be brought before the judge of the nearest competent Court according to procedure established by law, guaranteed by Article 13(2) of the Constitution were violated.

I make order that Jayasinghe Mudiyanselage Janaka Priyantha Bandara applicant in SC Application No. 151/92 and Weerasekera Mudalige Anura Weerasekera applicant in SC Application No. 155/92 who were detained from 27th February to 3rd March 1992 without being produced before a Magistrate, shall each be severally paid a sum of Rs. 5000 by the State as a solatium for the violation as aforesaid of their rights guaranteed by Article 13(2) of the Constitution.

I further order that Malinda Channa Pieris, applicant in SC Application 146/92; M. D. Daniel, applicant in SC Applicant 147/92, Singapulli Hewage Dayananda, applicant in SC Application 148/92; Athureliye Rathana (Ranjith), applicant in SC Application 149/92; Kuruwitage Nandana Perera, applicant in SC Application 151/92; Pallimulle Hewa Geeganage Pradeep Chandanaratne, application in SC Application 153/92; Ranawake Arachchige Patali Champika Ranawaka, applicant in SC Application 154/92; and the following applicants in SC Application 155/92, namely, Avalikara Galappathige Muditha Malika Wimalasuriye; Gileemalage Janaka Priyantha Dayaratne: Karunaratne Paranavithana: Rev. Kalupahana Piyarathana; Rev. Ambalanthota Premarathana; and Rev. Kithulagala Upali who were detained from 27th February to 17th March 1992 without being produced before a Magistrate be each paid severally a sum of Rs. 9000 by the State as a solatium for the violation as aforesaid of their rights guaranteed by Article 13(2) of the Constitution.

Rev. Thalapitiye Wimalasara was neither present at the meeting nor was he a member of the Peramuna. I therefore order that Rev. Thalpitiye Wimalasara the applicant in SC Application 150/92 be paid a sum of Rs. 10,000 by the State as a solatium for the violation of his rights guaranteed by Article 13(2) of the Constitution by his detention without being produced before a Magistrate from 27th February to 17th March 1992.

ALLEGED VIOLATIONS OF ARTICLE 11

The petitioners complained that their fundamental rights guaranteed by Article 11 of the Constitution were violated by the respondents. Article 11 provides that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

Three general observations may be usefully made at the outset.

Firstly, the acts or conduct complained of must be qualitatively of a kind that the Court can take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated. (E.g. see *W. H. K. Silva* v. *Chairman Fertilizer Corporation* [133] – which suggested criteria for identifying acts that were violative of Article 11 – followed in *Samanthilaka* v. *Ernest Perera and Others* [87]; *Weerakoon and Allahakoon* v. *Beddewala* [47]; *Vithanage Kumar Medagama* v. *Praneeth Silva and Others* [134] and *Ratnasiri* v. *Devasurendran and Others*.[135] Cf. also *Lundstron* v. *Cyril Herath and Others* [43]; *Gunasekera* v. *Kumara and Others* [136]; *Perera and Sathyajith* v. *Siriwardene*[63]; *Fernando* v. *Kapilaratne and Others* [69]; *Kumarasena* v. *Sub-Inspector Shriyantha and Others*.[6]

Where the acts proved are qualitatively of the relevant kind, the Court has declared a violation of Article 11 to have taken place. (E.g. See *Amal Sudath Silva* v. *Kodituwakku* [137]; *Pathmasiri* v. *Illangasiri and Others* [114]; *De Silva* v. *Amarakone*[138]; *Lankapura* v. *Lathiff* [139]; *Abeywickrama* v. *Dayaratne and Others* [90]; *Alwis* v. *Raymond and Others* [131]; *Ragunathan* v. *Thuraisingham*[55]; *Samanthilaka* v. *Ernest Perera and Others* [88]; *Geekiyanage Premalal de Silva* v. *Rodrigo* [86]; *Jayaratne* v. *Tennekoon* [66]; *Gamlath* v. *Silva* [46]; *Ekanayake* v. *Herath Banda and Others* [27]; *Liyanage* v. *Chandrananda* [93]; *Vidyamani* v.

Jayatilleke and Others [12]; *Wijesiri* v. *Rohan Fernando and Others* [10]; *Ratnasiri and Kumarana* v. *Devasurendran and Others* [135]; *Weerakoon* v. *Weeraratne* [15]; *Liyanage* v. *Chandrananda and Others* [92]; *Wimalawardena* v. *Nissanka and Others* [1]; *Ariyatillake* v. *Thalawala and Others.*[140]

Those were cases in which **physical harm** of a qualitatively relevant nature in terms of the criteria set out in *W. M. K. de Silva* [133] were satisfied. The Court was satisfied that the acts in question had occasioned suffering of a particular intensity or cruelty implied by the word "torture" (Cf. *Ireland* v. *U.K.*[141] decided by the European Court of Human Rights on 18th January 1978) or that the suffering occasioned had attained the level of severity inherent in the notions of "torture" and "inhuman", "degrading" treatment. (Cf. the decisions of the European Court of Human Rights in *Ireland* (*supra*) and in *Tyrer* [142] and *Campbell and Cosans.*[143] As to whether a particular act satisfies the relevant criteria is not an easy matter to determine. The assessment is in the nature of things, relative and depends on all the circumstances of the case including the nature and context of the act and the manner and method of its commission. (Cf. the decision of the European Court of Human Rights in the *Tyrer* case.[142] As it was observed in *Gunasekera* v. *Kumara and Others* (*supra*), adopting dicta from *Hobbs* v. *London & S. W. Railway*[144], the decision whether an act is qualitatively of the kind that contravenes Article 11 "is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line you can say on which side of the line the case is."

The facts in *Kumarasena v. Sub Inspector Shriyantha and Others* [6] left the Court in no doubt that the petitioner's case fell on the side of transgression. The petitioner was young girl who had been arrested without reasonable grounds and detained for about six hours at a police station. During that time, several police officers, accepting the invitation of the officer making the arrest to play with the "toy" he had fetched, touched her body, squeezed her breasts, pinched her buttocks, addressed her as "love bird", questioned her as to whether she wore underwear and invited her to come out with one of them. The Court held that the petitioner had been subjected to degrading treatment.

In that case I said: "In the circumstances of this case, the suffering occasioned was of an aggravated kind and attained the required level of severity to be taken cognizance of as a violation of Article 11 of the Constitution. The words and actions taken together would have aroused intense feelings of anguish that were capable of humiliating the petitioner. I therefore declare that Article 11 of the Constitution was violated by the subjection of the petitioner to degrading treatment."

Secondly, torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical. (*W. M. K. Silva v. Ceylon Fertilizer Corporation*) [133]. Holding a person incummunicado, without required medication, without adequate food and basic amenities for the performance of normal bodily functions and requirements, including sleep, have been held to be violative of Article 11. See *Fernando v. Silva and Others*[66].

Thirdly, having regard to the nature and gravity of the issue, a high degree of certainity is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment; and unless the petitioner has adduced sufficient evidence to satisfy the Court that an act in violation of Article 11 took place, it will not make a declaration that Article 11 of the Constitution did take place. (*Goonewardene v. Perera & Others* [145]; per Wanasundera, J. in *Thadchanamoorthi v. A.G. & Others*[146]; see also *Vijayakumar v. Gunawardena* [147] read with *Namasivayam v. Gunawardene*[116]; *Wijewardene v. Zain* [13]; *Witharana v. A.G. and Another* [148]; *Hameed v. Ranasinghe and Others* [149]; *Samanthilaka v. Ernest Perera* [87]; *Seneviratne v. Karunatilleke and Others* [50]; *Sirisena and Others v. Ernest Perera and Others* [88]. Would "the guarded discretion of a reasonable and just man lead him to the conclusion"? is the test I would apply in deciding the matter. If I am in real and substantial doubt, that is if there is a degree of doubt that would prevent a reasonable and just man from coming to the conclusion, I would hold that the allegation has not ben established. (Cf. *Bater v. Baxter* [151] cited with approval by Wanasundera J. in *Velumurugu*)[97]. With regard to the standard of proof where a respondent denies the petitioner's averments see also *Sasanasiritissa Thero and Others v. De Silva and Others* [14].

In this connection, I take note of the following observations of the European Commission of Human Rights in the *Greek Case* [152] quoted with approval by Sharvananda J. in *Velmurugu v. Attorney-General* [97] and followed by G. P. S. de Silva, J. in *Abeywickrema v. Dayaratne and Others* [90]

> "There are certain inherent difficulties in the proof of allegation of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, when allegations of torture or ill-treatment are made, the authorities, whether the Police or Armed Services or the Ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves ... few external marks."

The Supreme Court has been conscious of the difficulties in the proof of allegations of torture and stated that it will have regard to the circumstances of a case and not impose undue burdens on a petitioner which might impede access to justice. (See *Samanthilaka v. Ernest Perera and Others* [87] followed in *Liyanage v. Chandrananda and Others* [92].There were no special difficulties of proof alleged in the matters before us. The petitioners experienced no constraints in describing their grievances. As Wimalasuriya states in his affidavit, when the representatives of the Red Cross visited them at the Police Station "We described to them exactly how we were treated." According to Seneviratne, the petitioners obtained relief by complaining to the Assistant Superintendent of Police. Moreover, the petitioners have quite freely, in their several affidavits, narrated their stories without reservation. The difficulties in the matters before us, as

far as the petitioners are concerned, are not based on a want of evidence due to hesitation on their part to describe what happened, but rather, in several instances, on account of complications caused by their freedom to say as much as they did. It was an *embarrass de richesse* situation that impeded proof of the violation of Article 11 of the Constitution in several instances.

Nor was there a lack of witnesses. Their alleged infringements in the matters before us are supported by affidavits of the other petitioners who state they were spectators of those acts and auditors of the statements that gave rise for complaint.

There is no complaint that might even remotely suggest that "higher authorities" allied themselves with their subordinates. On the other hand, Seneviratne states that when complaints were made to the Assistant-Superintendent, he took steps to make life more tolerable by ordering the removal of handcuffs. Not only were inquiries made but positive remedial action was also taken by the higher authorities.

The observations in the *Greek Case* [152] are limited to a physical harm. In Sri Lanka, we have gone beyond regarding torture, cruel, inhuman and degrading treatment or punishment as being limited to physical injury, hurt, impairment or ill-treatment. see *W. M. K. de Silva* (*supra*) and *Fernando v. Silva* (*supra*). See also *Kumarasena v. Sub-Inspector Shiyantha and Others*, (supra). However, where such harm is alleged, as G. P. S. de Silva, J. observed in *Abeywickrema v. Dayaratne and Others* (*supra*) "from a practical point of view. "it is often only the medical evidence that could afford corroboration." These observations, as we shall see, are particularly applicable to Dayananda's case, (Application 148/92 and *Bandara's case* (152/92). As for the supposition that the police have techniques of assaulting persons without leaving traces, which the *Greek* case, on account of its reference to "forms of torture", is sometimes said to have noted, and which loomed large in Dayananda's case, I must draw attention to the words of Wanasundera, J. in *Thadchanamoorhi v. A.G. and Others* : "I do not think ... the Police have so perfected the art of assaulting that even when they use force ... one should not expect to find any marks of violence." The difficulty of recognition due to the healing process of time is another matter.

The evidence adduced appears in the several affidavits of the petitioners and respondents and by other persons. In setting out the facts, I shall refer to the deponent, the application number to which the affidavit relates, and relevant paragraph of the deponent's affidavit.

After the arrests were made, the hands of the lay petitioners were tied with strips of cloth from a torn sarong. (Bandara 152/92, 3.4 said it was his sarong). The priests were not tied. (Seneviratne 146/92, 5:3; Daniel 147/92, 3:1; Dayananda 148/92, 3.6; Rathana 149/92, 2.10; Wimalasara 150/92, 2.3). Bandara (152/92, 3.4) complained that the binding was so tight that he suffered from numbness.

The petitioners were then transported in a van and a jeep to the Wadduwa police station. (Seneviratne 146/92, 5.3; Daniel 47/92, 3.1; Dayananda 148/92, 3.6; Wimalasara 150/92, 2.3). Those who were in the van were kept in it until 4.30 or 5 p.m. which some of the petitioners regarded as a long time. (Bandara 152/92, 3.4). Daniel who wanted to answer a call of nature was particularly distressed. (Daniel 147/92, 3.10).

At the Wadduwa Police Station, Rev. Rathana, the petitioner in Application 149/92, and Champika Ranawake, the petitioner in Application 154.92, were confined in two separate cells. (Seneviratne 146/92, 6.1; Daniel 147/92, 3.2; Dayananda 148/92, 4.1; Rathana 149/92, 2.10; Wimalasara 150/92, 3.1; Nandana Perera 151/92, 3.1; Bandara 152/92, 4.1).

According to the petitioners, the others were tied or chained or handcuffed to each other and made to sit here and there linked by handcuffs fastened on their ankles or otherwise to the bannisters of the stairway at the Police Station. Bandara complained that the handcuffs out on his leg (sic.) at the Police Station were tight. Seneviratne, (146/92), 6.1) M. D. Daniel (147/92, 3.2) and Dayananda (148/92, 4.1) sat on the floor. However, the priests were given a bench. (Daniel 147/92. 3.5; Dayananda 148/92, 3.4; Wimalasara 150/92, 3.1; Nandana Perera 151/92, 2.6 and 3.1; Jayalin Silva's affidavit of 3.11.1992 paragraph 7 filed in 150/92).

The third respondent states in his affidavit that, due to the lack of accommodation in the cells, some of the petitioners were kept outside the cells under police supervision but that all of them were given benches to sit on and that they were not handcuffed or chained to the bannister, nor tied with strips of cloth. (See the third respondent's affidavit in 146/92, 7; 147/92, 8; 148/92, 6; 151/92, 7; 152/92, 6; 153/92. 7; 154/92, 7; 155/92, 7).

Dinner was provided at 10 p.m. (Seneviratne 146/92, 6.2; Rathana 149/92, 4.1; Wimalasara 150/92, 3.1; Nandana Perera 151/92, 3.3). They were served with dhal and bread. They were not faring too badly, for dhal and bread was what they had eaten by choice on the previous night. (See Seneviratne 146/92, 5.1). However, Seneviratne says the dhal supplied by the Police was "uneatable" (146/92, 6.3); and Nandana Perera (151/92, 3.3) and Chandanaratne (153/92, 3.3) complained of "too much salt". Ranawake (154/92, 4.14) complained of the lack of water at the Pettah Police Station. He complained "we were infected with diarrhoea." No one else made such a complaint and so Ranawake's ailment may have been related to something other than the quality of the water supplied. There were no other complaints about the food except Bandara's comment (152/92, 4.5) that it was "not palatable." Whatever was normally required by way of food to support life was supplied. The third respondent in his affidavits (151/92, 11; 146/92, 5; 153/92, 9) states that the petitioners were served with meals "normally supplied to police officers". It is of interest to observe that Seneviratne in his affidavit (146/92, 6.2; last line) refers to the petitioners offering biscuits to some person other than one of their group who had been brought to the police station. The biscuits and other items of food may have been brought by members of their families or by their friends and well-wishers who visited them and augmented and supplemented their supplies of food. However, from whatever the source, wholesome food was available although fastidious persons like Seneviratne. Chandanaratne and Bandara might have been somewhat disappointed with the quality of food police officers and those in their keeping are required to eat.

Ranawake (154/92, 4.12) states that his parents were allowed to see him to hand him food and to check if he needed anything. He

complained, however, that visits were limited to such purposes. Others complained that only family members were allowed to visit them and that friends had to be accompanied by either parent of the petitioner (Seneviratne 146/92, 6.8), or that they were not allowed to talk "freely" with their visitors (M. D. Daniel 147/92, 3.10; Wimalasara 150/92, 3.2). Dayananda (148/92, 4.6) and Rathana (148/92. 4.2) state that those who came to see them were only allowed to ask if they needed anything. Dayananda adds that his wife "was not allowed to speak even a word." He states, however, that they were visited by the Red Cross. Wimalasuriya (155/92, 4.7) also recalls the visit of the Red Cross and says: "We described to them exactly how we were treated." Ranawake (154/92, 4.6) recalls that he was visited by the Vice Chancellor of the Moratuwa University.

No affidavits or reports from the Red Cross or the Vice Chancellor have been filed in these proceedings, and the learned Deputy Solicitor-General pointed out that information from disinterested persons would have helped to ascertain the truth relating to the alleged violations of Article 11 of the Constitution.

The conversations might have been limited: but the petitioners were not held incommunicado. The affidavits of the petitioners, supporting petitions from others filed in 146/92 and 155/92 by the petitioners, the third respondent's affidavits, and extracts from the Routine Information Book he has filed, make this very clear.

Nor was it denied that anyone in need of medication had to suffer without it. Wimalasara (150/92, 3.1) states that he was taken back to the temple at about 7 p.m. on the date of the arrest "to collect some clothes and some medicine for my illness." Ranawake (154/92, 4.9) says he was given "Panadol" for his fever. Bandara says (152/92, 4.9) he had Panadol and used "Siddhalepa" to ease his "aches and pains."

Nandana Perera (151/92, 3.12) complained that the petitioners were permitted to answer calls of nature only once a day and Bandara (152/92, 4.5) and Wimalasuriya complained that the petitioners were allowed to bathe only once. Chandanaratne (153./92, 3.5) says that although he was allowed to go to the toilet on

the day after the arrest, he was not allowed to wash himself, but that after the Red Cross personnel arrived, the petitioners were allowed to bathe and wash their clothes. These allegations are denied by the third respondent. (See affidavits in 152/92, 10, and 153/92, 11).

According to their affidavits, the petitioners seem to have found it irksome that they were interrogated, finger-printed, photographed, and constantly placed under guard.

Seneviratne (146/92, 6.8) complained of the discomfort of having to sleep handcuffed during the first two days. However, he says that "this practice was stopped" after complaints were made by the petitioners to the Assistant Superintendent of Police. Seneviratne adds that "Although there was no physical ill-treatment, many of the officers passed remarks which caused us great pain of mind."

The use of opprobrious, abusive, rude, offensive and coarse language by the third and fourth respondents is referred to by all the petitioners but denied by the respondents.

It is alleged that menacing references were made. It is said by some of the petitioners, that "One Sergeant threatened us saying 'parana tyre thevama (sic.) ivara nehe, thava ona tharam thiyenava.' We were not allowed to speak with each other." (Dayananda 148/92, 4.2; Nandana Perera 151/92, 3.2; Bandara 152/92, 4.2; Chandararatne 153/92 3.2; Wimalasuriya 155/92, 4.2) Ranawake 154/92. 4.4 is supposed to have been told by "several Police Officers: 'Bandaragama Avi deepang' 'thova ada mas karanava' and other such threats. One person said 'Thova tyre vala yavanava.' I heard the others being threatened in a similar way.'

Stated as it is in exactly identical terms, including the unrelated complaint of not being allowed to speak to each other, the version of Dayananda, Nandana Perera, Bandara, Chandanaratne and Wimalasuriya appear to me to be artificial. In fact, I believe that their story and the threats reported by Ranawake seem to have been invented to tie up with their version of the fears they were supposed to have entertained when they were taken into custody.

At the time of the arrest, some of the petitioners (M. D. Daniel 147/92, 2.4; Dayananda 148/92, 3.4; Nandana Perera 1512/92, 2.5; Bandara 152/92, 3.3; Chandanaratne 153/92, 2.4 and Wimalasuriya 155.92, 3.3) say – in he course of a long passage, couched again in identical terms – that they conjured up "visions of dead bodies" during the so called "beeshanaya". (Would "reign of terror" be an appropriate translation?). Imagination, rather than the facts, seem to have played the dominant part in causing fear. One petitioner frightened himself by recalling "films" he had seen. So Chandanaratne says in paragraph 3.3 of his affidavit (153/92). They had supposed that the respondents were, as they say, members of a "vigilante group". However, at least by the time the statements referred to above were supposed to have been uttered, the petitioners had no illusions as to who the respondents were and therefore had no rational basis for fears of the sort they were supposed to have at first entertained. In fact they must have known this even before they were transported to the temple, for although the fourth respondent and some others were supposed to be in "civils", the third respondent was in uniform and he was identified by the petitioners on account of his distinctive clothes as a "Police Inspector". (Seneviratne, 146/92, 5.3; Daniel 147/92, 3.1; Dayananda 148/92, 3.6; Rathana 149/92, 2.10; Nandana Perera 150/92, 3.4; Chandanaratne 153/92, 2:5; Ranawake 154/92, 4.3; Wimalasuriya 155/92, 3.4).

The petitioners may have experienced feelings of apprehension or disquiet, but that was insufficient to bring them within the provisions of Article 11. (Cf. the dicta in the case of *Campbell and Cosans* [143] decided by the European Court of Human Rights on 25th February 1982). There was nothing said or done that subjected them to intense physical or mental anguish or that aroused such intense feelings of anguish and inferiority as were capable of humiliating and debasing them so as to break their physical and moral resistance. (Cf. the decision of the European Court of Human Rights in *Ireland* [141], *Tyrer*[142]; *Campbell and Cosans*[143]

None of the matters referred to so far amount to any transgression of Article 11 of the Constitution in terms of the criteria proposed in *W. M. K. de Silva*[133] Nor do they even remotely resemble the facts in

Fernando v. Silva [66] or *Kumarasena v. Sub-Inspector Shriyantha and Others* [6]. The petitioners might have been greatly distressed and felt keenly the loss of their personal liberty and accustomed comforts, yet there was no torture, cruel, inhuman or degrading treatment within the meaning of Article 11.

Indeed, on the whole, the petitioners had very little to complain about.

Nandana Perera (151/92. 3.12) makes the following interesting observation: "Although some of the officers were very cruel, a lot of them treated us kindly." Ranawake (154/92, 4.14) says that "The only cause for complaint at Pettah was the lack of water. We were infected with diarrhoea." However, Chandanaratne (153/92, 3.10) was contented during his detention at the Pettah Police Station. He says: "Here we were treated very well, food being given regularly, and no restrictions being placed on talking amongst ourselves."

I might say at once that there are no allegations in any of the affidavits relating to the violation of Article 11 by any of the respondents except those in relation to the third respondent. Inspector of Police Karunatilleke, the Officer-in-Charge of the Wadduwa Police Station, and the fourth respondent, Sub-inspector Piyaratne of the Wadduwa Police Station. I therefore declare that there are no violations proved or even suggested in the petitioners' affidavits against any of the respondents in the matters before this Court except with regard to the third and fourth respondents against whom certain matters are alleged. There are certain allegations made in some of the affidavits against Sergeant Chumley, who was, however, not named as a respondent. (See my observations in this regard later in this judgment in considering Wimalasara's Case).

Ranawake (154/92) and following petitioners in Application 155/92 – Wimalasuriya, Rev. Piyarathana, Rev. Premarathana and Rev. Kithulgala Upali – made no complaints of assault.

Nandana Perera's complaint (151/92, para 3.5) was that he was "poked" with a stick by the third respondent as he passed him.

According to Daniel (147/92, 3.8). Dayananda 148/92, 4.7; Nandana Perera (151/92, 3.9) and Chandanaratne (153/92, 3.7), expressing themselves in their separate affidavits in identical words: "one day SI Piyarathana asked something from Anura Weerasekera and slapped him saying "thopi police karayo ponnayo kiyala hithuvade? Police report aavama thope ellala api ahagannam."

Even if they did take place, I cannot regard the trivial acts relating to Nandana Perera and Weerasekera as violations of Article 11.

Daniel (147/92, 3.7) says that "One particular Sergeant was in the habit of kicking me on my head as he passed me." Who that Sergeant was is not known, nor is Daniel supported by any other petitioner. Daniel also complains (3.8) that the fourth respondent once pulled his hair. Even if this were true, it was too trivial a matter to be taken cognizance of under Article 11.

The alleged assaults which might support some of the other petitioners' complaints in relation to Article 11 took place between about 1.30 a.m. and 3.30 a.m. on 28th February 1992. Although Nandana Perera (151/92, 3.3) states that from dinner time till 1.30 a.m. the petitioners were subjected to threats, he does not state who uttered the threats or what they were. They were certainly not uttered by the third and fourth respondents who, he says, came in at 1.30 a.m. The more likely position is that after dinner, as many of the petitioners say (Seneviratne 146/92, 6.2; Rathana 149/92, 4.1; Wimalasara 150/92, 3.1; Bandara 152/92, 4.3; Wimalasuriya 166/92 4.3), the petitioners fell asleep or tried to sleep, albeit in their uncomfortable positions, (in the case of Chandanaratne 153/92 - 3.3 - with his head on his knees), until about 1.30 a.m.

Bandara's Case:

The essential features of his own case as stated by Bandara (152/92), and certain matters stated by him relating to the allegations of assault on certain other petitioners, are as follows:

"4.1 I was taken up the stairs and chained to one of the bannisters with a pair of handcuffs. These were actually put upon my left ankle.

Sergeant Chumley without taking any notice of my request not to tighten it too much, he tightened the handcuffs.

4.3 That night I had to sleep on the stairs. *The OIC,* the third respondent, *"came around 1.30 a.m. He was wearing a white pair of sharts" (sic.) "and T shirt (white, with stripes). He said: "geri JVP kaaraya, thopi konaka indala hamagahanava, den ithin eththa kiyapiyav, neththeng gahanne ellala." He also said "thopi aanduva peralannada hadanne? Thope nayakaya Wijeweera merenna baye paava deepuy ekkek. Oo merenna baye Gamanayake paava dunna. Paava dunne nethi ekama eka JVP karayay mata hambavune, Uge nama . . . (he said a name which I can't remember), umbala hitapau pansale haamuduruvo marapu eka thamey oo. Oo vitharay merenna baye paava dunne neththe. 'Sir, ekaparata oluvata vedi thiyala maranna' kiyala, vedi thiyanakotama uda penala 'Janatha Vimukthi Peramunata Jayawewa' kiyala vedi kala maruna. Thopith nikang merun noka aththa kiyapang."*

4.4 *The OIC said "onna oyahaamduruva huththige puthava mehata ganing sivura galola." and went upstairs. Rev. Wimalasara (from the temple) was taken up. I heard Rev. Wimalasara being beaten. I started shivering, thinking that he would do the same to me.*

Then they asked Chandana about his family. After that the OIC kicked and hit Chandana and hammered his head many times again" (sic.) "the wooded" (sic.) "hand rail of the staircase. He then pointed to me and [there is a long blank space here in the affidavit] "ganin okava udata". While I was being taken upstairs I was beaten on my face, head and chest. I was thrown off balance and got thrown a few feet away and fell down. The OIC said "oya polla genen" and taking the stick which SI Piyarathana was carrying, he hit me on my thighs and on my calves. He said "thoge athapaya kadanava. Kiyapiya gihilla geval bindaneda?" I was in extreme pain. He kicked me once more and said: "meeta vediya gehuvoth ila eta kedeneva, guti kannavath puluvan ekek nemey, violava karanna heduvata." I was tied upstairs. I was bleeding from a wound inside my mouth. I felt dizzy and felt that I was going to faint. Expecting another round of assault I was terrified and was shivering. *The OIC then went up to*

Priyantha who was tied up upstairs and said "geri vesige putha, tho nidida?" and hit him with a stick and trampled him. I saw Priyantha squirming in paid, sobbing and shivering. *Chandana who had been beaten earlier* also, was brought up again and beaten again by the OIC. *"Kiyapiya tho mokatada aave kiyala, kamkaruvage puth, bellige putha. After beating him the OIC asked him many questions about some "pamunugama incident".* Meanwhile Piyarathana came up to me and said "kiyapiya tho pita palath keeyaka veda karala thiyenavada?" He hit me in the area below my right ankle and on my sole. *After that the two of them went downstairs. I continued to hear foul language and the sound of someone being beaten and cries of pain. Meanwhile, I could hear Sergeant Chumley taking down Rev. Wimalasara's statement. I heard him shouting and the sound of assault. After some time the OIC came up again and started lecturing Chandana "apita onanam thopi okkama maranna puluvang, evata apita balaya thiyenava, thopi dannavada hadisi neethiya gene?"*

The words I have italicized, in paragraph 4.3 of Bandara's affidavit, including the curious word "sharts" and the words "uge nama. . (he said a name which I can't remember)", are produced in identical terms in paragraph 3.3 of Nanda Perera's affidavit in Application 151/92 as well as in paragraph 4.3 of the affidavit of Wimalasuriya (155/92).

The words I have italicized in paragraph 4.4 of Bandara's affidavit are reproduced in identical terms in paragraph 4.3 of Wimalasuriya's affidavit in Application 155/92.

The affidavits have obviously been prepared using (or more accurately in this case, abusing) the facilities of a word-processing device. Blocks of data have been mechanically transferred from one affidavit to another. The little speech by the man in what has been described in three separate affidavits as "white sharts and a T shirt (white with stripes)", was, it seems, remembered and recalled with precision, except for a certain name with regard to which all three deponents not only, inexplicably, suffer amnesia, but also record their inability to remember precisely in the same way. The remarkably

consistent way in which the events have been reported make the affidavits of Bandara, Nandana Perera and Wimalasuriya suspect.

When variations were sought to be introduced, the amendments were made without due care. Wimalasuriya's affidavit has been amended to enable Bandara to fit in his story into his own affidavit. In the process of manipulation, "against" in the affidavit of Wimalasuriya has been retyped as "againd" in Bandara's application. In the following sentence, Wimalasuriya says: "He then pointed to Janaka Bandara and said "ganin okava udata." The words "Janaka Bandara and said" were deleted in turning out Bandara's affidavit and replaced only with the word "me". By failing to retype the word "said" the sentence is left incomplete, leaving a tell-tale blank space in Bandara's affidavit.

Wimalasuriya does not say that he witnessed Bandara being assaulted. He merely states that he and the second petitioner in Application 155/92, Dayaratne, "heard Janaka" Bandara "being beaten." There is no affidavit from Dayaratne supporting Bandara's complaint of assault. Nor is it supported by anyone else.

Bandara has said that he was already on the stairs when he was ordered to be brought up. If, as he says, he lost his balance and was "thrown a few feet away and fell down", he must have fallen down the stairs and, if so, sustained serious injuries? There is no complaint of such injuries. In paragraph 4.9 of his affidavit, Bandara states that due to the beating he received, a section of the right sole of a foot was numb. He says he was told by his family doctor that some nerves had been damaged and that he was treated for his ailment. Bandara has not filed an affidavit or medical report from the doctor. However, he filed an affidavit to meet the third respondent's denial of assault but in doing so merely reaffirmed what he had said in his earlier affidavit in broad, general terms. He filed a supporting affidavit from his sister who, on 1st March 1992, accompanied by her mother, saw him at the Police Station. However, she does not report him to have been in pain. She merely says he was handcuffed to a bannister and that she was not permitted to speak to him. From a "practical point of view" (*Abeywickrama* v. *Dayananda*, (*supra*)) why did he not adduce supporting medical evidence?

In this state of the evidence, I entertain very real and substantial doubts about the truth of Bandara's allegations of assault and I therefore declare that he has not established that his rights guaranteed by Article 11 of the Constitution have been violated.

Wimalasara's Case

Rev. Wimalasara (150/92) in paragraph 3.1 of his affidavit stated that he fell asleep after dinner and woke up "around 1.30 p.m. (sic.) when the OIC started shouting "Ko ara thalpitiye eka mehata genen." He says he was then taken upstairs into a room where he was made to sit next to Sergeant Chumley. There was, he says, "an RWPC near a typewriter." Wimalasuriya continues as follows: "The OIC came up to me wearing a pair of shorts and a T shirt smelling of liquor. He said: "galopiya paaharaya sivura, tho eththe kiyapiya, netham thova vedi thiyala maranava." He made me sit on the floor and kicked me on my neck, saying that I was hiding some guns. I denied this. After that he went out. I heard him beating someone else. Sergeant Chumley then beat me saying: me vidihe kata uththara vissak vithara gannava, udeth retath danduvam denava, ehtha kiyapiya. He also hit me on my neck and back."

Bandara, Nandana Perera and Wimalasuriya, as we have seen, said that the third respondent made a speech about Wijeweera and the assassination of Wimalasara's predecessor at the temple. This did not awaken Wimalasara. He woke up only when he was ordered to be fetched. Wimalasuriya's version (155/92, 4.4) is that after his speech, the third respondent said: " 'onna oya hamuduruva huthige puthava mehata ganing sivura galola' and went upstairs. Rev. Wimalasara (from the temple) was taken up. I heard Rev. Wimalasara being beaten . . . I and the second petitioner could hear Sergeant Chumley taking down Rev. Wimalasara's statement. I heard him shouting and the sound of assault."

Was the order to disrobe in the terms stated by Wimalasara or by Wimalasuriya? Where was Wimalasara disrobed, if at all? Was Wimalasara who was at first seated next to Sergeant Chumley later ordered to sit on the floor to be kicked on his neck? No other petitioner says he saw Wimalasara disrobing or being disrobed or

being kicked. Wimalasuriya says he "heard" Wimalasara being beaten. On what basis did Wimalasuriya come to that conclusion? Wimalasara says that after he was kicked on the neck, the third respondent went downstairs. Wimalasuriya, however, states that the OIC proceeded to kick and hit Chandana, ordered Bandara to be brought up and beaten, he then beat Dayaratne and trampled him, spoke to and beat Chandana again and then, after all that, "the two of them", the third and fourth respondents, went downstairs. "Meanwhile", Wimalasuriya says, he and Dayaratne "could hear Sergeant Chumley taking down Rev. Wimalasara's statement. I heard him shouting and the sound of assault." If the third and fourth respondents went downstairs, the assault could not have been made by them. Wimalasara says that Chumley beat him, but Chumley has not been made a respondent and he has been given no opportunity of stating his case. As it was observed in *Alwis* v. *Raymond and Others* [131], "natural justice demands that we should refrain from coming to any finding or order as to the involvement or liability of such a person." In any event how did Wimalasuriya, who was downstairs, conclude that he "heard" Chumley taking down the statement? In the light of the inconsistent versions of what was supposed to have taken place, and in the absence of corroboration, I cannot hold that the alleged assault on Wimalasara has been established.

Paranavithana's Case

Paranavithana (155/92) has not personally filed an affidavit, but at paragraph 3.3 of the petition filed in his name as one of several petitioners, and in several affidavits filed by other petitioners in a narration of events regarding the arrest at the temple in identical terms, and it seems to me, in a highly artificial way (M.D. Daniel 147/92, 2.4, Dayananda 148/92, 3.4; Bandara 152/92, 3.3; Chandanarathna 153/92, 2.4; Wimalasuriya 155/92, 3.3. Cf. Seneviratne 146/92, 5.3) he is supposed to have been "slapped" by the fourth respondent at the time of arrest. Rathana does not mention the incident. Even assuming it to be true, I cannot regard such a trivial act as a violation of Article 11. Nor, for the same reason, can I regard the alleged subsequent (M. D. Daniel 147/92 3.5: Dayananda 148/92 4.4) slap given at the police Station as a violation. Seneviratne (146/92 6.2) said that Paranavithane was hit with a stick. In the

petition in Application 155/92 in which Paranavithana is the third petitioner, the Attorney-at-Law who has signed the Application states: "I verily believe and have been informed that the OIC had beaten the third petitioner that night. He had been assaulted and kicked and had been beaten with the pole that SI Piyarathana was carrying." It is strange that Rathana, outside whose cell Paranavithana was kept, did not see the incident or if he did why he chose to ignore it in his affidavit. Nor does Seneviratne mention Paranavithana being kicked. No violation of Paranavithana's rights guaranteed by Article 11 of the Constitution have been established.

Dayananda's Case

Sunny Dayananda (Application 148/92) says in paragraph 4.3 of his affidavit that the third respondent came up to him and hit him on the face. Then he hit him on his knees "and the head many times (over 20) with the stick saying "baya venna epa, thuvala venne ne, thuvala venne nethi vidihatagahanna api igenaganay thiyenne." Seneviratne (146/92, 6.2) says: "He hit Sunny 25 times on the head with the same stick saying, "Thuvala venne ne, thuvala novenna gahana heti api igena genay thienne." Nandana Perera says (151/92, 3.5): "Next he went up to Sanidayananda and hit him on the face. Then he hit him on the head many times (over 20) with the stick saying "baya venna epa, thuvala venne ne, thuvala venne nethi vidihata gahanna api igenegenay thiyenne." Chandanaratne (153/92, 3.3) says: "Next he went up to Sanidayananda and hit him on the face. Then he hit him on the head many times (over 20) with stick saying "Baya venna epa, thuvala venne ne, thuvala venne nethi vidihata gahanna api igenagenay thiyenne." What sort of credibility can one be reasonably expected to attach to affidavits prepared in this way? And what does one make of the following statement in paragraph 4.4 of the affidavit of Bandara (152/92): "He kicked me once more and said "Meeta vediya gehavoth ila eta kedenava, guti kannavath puluvan ekek nemey, viplava karanna heduvata." Did the third respondent act with restraint because when it came to Bandara's turn he had forgotten to use the special skills relating to assault he was supposed to have acquired? If the observations in the **Greek** case quoted in **Velmurugu** and in **Abeywickrama** guided the person who prepared the affidavits supporting Dayananda's

allegations, it is a matter for regret that he chose to ignore the observations of Wanasundera, J. in *Thadchanamoorthi* with regard to the supposed techniques of assault, and the observations of G. P. S. de Silva, J. in *Abeywickrama* on the question of proof.

The "stick" with which the man was supposed to have been hit, "over 20" times, according to those who appear to have given up counting at a certain point in time, and exactly 25 times according to Seneviratne, needs to be described in order to understand the felt need on the part of the deponents to introduce the supposed boast by the third respondent of the skills he had learnt in hitting people without leaving incriminating injuries. The stick was said to be "about four feet long, and slightly thicker than a brook-stick" which the fourth respondent was carrying and from time to time handed to the third respondent for beating someone. (Wimalasuriya 155/92, 4.4; Seneviratne 146/92, 6.2; M. D. Daniel 147/92, 3.4 and 3.6; Dayananda 148/92, 4.4 and 4.5; Rathana 149/92, 4.1; Nandana Perera 151/92, 3.5; Bandara 152/92, 4.4; Chandanaratne 153/92, 3.3, 3.4). There is no medical evidence to support the allegation of the assault (see the observations of G. P. S. de Silva, J. in *Abeywickrama* v. *Dayaratne* quoted earlier). If he was assaulted in the manner alleged on the night of 27th February, surely the marks of the assault must have been evident at the time of his release on 17th March? The lapse of time could not have obliterated or made uncertain the harm sustained? Why was no medical evidence submitted? In the circumstances, I hold that Sunny Dayananda has failed to establish that his rights under Article 11 of the Constitution have been violated.

Rathana's Case

Athureliya Rathana (149/92) in paragraph 4.1 of his affidavit states that after dinner he fell asleep. He says: "I woke up around 1.30 a.m. upon hearing the sound of someone being beaten. Mulinda also got up. A little while later, the OIC came up to the cell and said: "Kawda methenta dennek damme? Moo kawda?" He then took out Milinda and beat him. After that he removed my robe and beat me, using his fists. He also kicked me and banged my head against the wall. SI Piyarathana was carrying a stick. I started chanting the "karaniya

metta suthra". He said "thoge karaniya muththa" (sic.) "and continued to hit me. He also said "Mo (sic.) thamay naayakaya, ara kollo okkama amaruve demme moo. Huthige puthava maranava, balla." After that I heard him beating several others."

Seneviratne, who shared a cell with Rathana, (146/92, 6.2) says that after he himself was assaulted by the third respondent, "He then pulled Rev. Rathana and started hitting him. Rathana started saying the 'karaniya metta sutta' and the OIC continued to hit him saying "Karaniya metta; thota dennang karaniya huththa." Seneviratne does not mention the disrobing, nor the allegation that Rathana was kicked and that his head was banged against the wall. Nor does Seneviratne mention the alleged statement about Rathana's role in misleading the others and the vituperative words referred to by Rathana.

M. D. Daniel (147/92, 3.5), Dayananda (148/92, 4.4) and Nandana Perera (151/92, 3.4) say that the third respondent asaulted Seneviratne. "Then I heard him saying "galavapang hamudurvange sivura, tho thamay mun serama amaaruve danne" and started assaulting the priest. Rev. Rathana started telling the Karaniya metta sitra" (sic. – this is how it is in the affidavits of Daniel, Dayananda and Nandana Perera). "The OIC said "Karaniya metta, thoge karaniya huththa." and continued to beat him using foul language." Neither Daniel nor Dayananda nor Nandana Perera make reference to Rathana being kicked or of his head being banged against a wall. And whereas Rathana says he was disrobed by the third respondent, Daniel, Dayananda and Nandana Perera say they heard the third respondent ordering someone to remove the robe, adding at that time a statement relating to Rathana's responsibility for getting the others into difficulties. However, according to Rathana, that statements came **after** the Karaniya-metta-sutra episode.

Ranawake (154/92, 4.5) has yet another version. He does not say he saw him doing so but that he "heard" the third respondent "beating Rev. Rathana saying "sivura galopiya huththige putha." Rev. Rathana started chanting the (sic.) "Karaniya metta Sutra" and the OIC said "Karaniyametta, thoge karaniya huththa." I heard people being beaten up and cries of pain and the voices the OIC and SI Piyarathana using bad language for about 1 hour . . ." Was Rathana

disrobed by the third respondent, or ordered to be disrobed by a third party or ordered to disrobe himself? was he disrobed at all?

Wimalasuriya is one of the seven petitioners in SC Application 155/92. The only affidavit filed with the petition is that of Wimalasuriya. In paragraph 4.4 of that affidavit he says: "I and the other petitioners heard the OIC abusing Rev. Rathana – "Ko oya hamuduruvo huththige putha? Oka thamay me kollo okkoma amaruve demme." While he was beating Rev. Rathana, he started chanting the Karaniya metta suthra. The OIC said "Karaniya metta? thoge karaneeya huththa." The third respondent was not looking for Rathana; and so a question with regard to where Rathana was, or trying to establish his identity seems hardly probable. Wimalasuriya does not say a word about the alleged disrobing of Rathana, nor about the precise nature of the assault alleged by Rathana.

Chandanaratne (153/92, 3.3) says he saw Seneviratne being kicked by "him" and that "he" hit him with the stick the fourth respondent was carrying and heard him saying certain things to Seneviratne. Were the references to "him" and "he" to the third respondent? Chandanaratne makes no mention at all of what was supposed to have happened to Rathana.

If the attempt of Athureliya Rathana, the petitioner in S.C. Application 149/92 to seek solace at a time of personal crisis by the recitation of the karaniya metta sutra was, in the manner described, met with coarsely expressed disapproval by the third respondent, I am of the opinion that such conduct was extremely disappointing and deplorable. Nevertheless it did not constitute a violation of Rathana's rights guaranteed by Article 11 of the Constitution. According to his own affidavit, he was a well-seasoned man who by experience was fortified against the sort of things he experienced so as not to be disturbed by them. Even if the things he complains of did take place, they could not have reached such levels of intensity so as to have broken his moral resistance. Indeed, he is supposed to have observed with perspicacity, that even a cuff or two was not something of an unexpected or shocking nature. The evidence does not in my opinion establish that Rathana's rights under Article 11 of the Constitution had been violated.

Seneviratne's Case

Malinda Seneviratne (146/92) in paragraph 6.2 of his affidavit says that he was put into Rathana's cell "around 7.30". Rathana (149/92, 4.1) confirms this. Nandana Perera (151/92, 3.3) says that dinner was served "around 10 p.m." and that "By this time Malinda had been put in the same cell as Rev. Rathana." However, Daniel (147/92, 3.5) and Dayananda (148/92, 4.4) state that Seneviratne was put into Rathana's cell after dinner. All the petitioners, including Seneviratne and Rathana, agree that dinner was served at 10 p.m.

It is sufficient to assume that at sometime before dinner was served – 10 p.m. – or not long thereafter, Seneviratne was placed in the same cell as Rathana, although one begins to become cautious about Seneviratne's ability to accurately recall the events of that night.

Caution begins to turn into doubt as I proceed to further consider Seneviratne's affidavit. He says, "I was woken by the sound of someone being beaten by someone who was shouting in filth. I heard him say "umbalava ada mas karanava, Hama galavanawa huththige puthage." I was terrified. Rev. Rathana said: "baya venna epa. gutiyak dekak kanna vey. Bayada?" I said "ne, upset ekak ne." Not one of the other petitioners refers to what Seneviratne says he heard at the time of waking. Ranawake says (154/93, 4.4) that one of the threats uttered was **"Thova ada mas karanava".** However, it appears from Ranawake's affidavit that remark was made at about dinner time, while he was eating his meal. Later 154/92, (444.5), after the alleged assault on Seneviratne and Rathana and others, the third and fourth respondents were supposed to have abused the petitioners "for about 1 hour". And after that the OIC went up to Ranawake's cell with a stick and said: "mata den hathi, heta udeta thova mas karanawa." Nandana Perera (1511/92, 3.5) says the threat "Heta mas karanawa" was made. However, that was said according to Nandana Perera **after** the third respondent had inquired how Seneviratne had come to be put into the cell occupied by Rathana. That questioning, according to Seneviratne, was after he had conversed with Rathana **soon after waking up.**

After referring to his conversation with Rathana, Seneviratne states as follows: "About 10 minutes later the OIC of the Police Station, Mr. Karunatillake, came near the cell and said: "Kawda methannata dennek damme, gannawa moova (that's me) eliyata." I was asked to come out and he assaulted me beating me with his fists (I got blows on my face, back and upper arms). He was smelling of alcohol (sic.). While he was hitting me he was shouting in filth: "Umbalava marana eka sulu deyak yako. Kariyo ayeth patangannada hadanawa veda?" Finally, he kicked me (?)" (sic.) "and instructed one of the policemen to tie my wrists and beat me on against (sic.) the wall of the room." Seneviratne then gives his version of the alleged assault on Rathana and says: "åfter that he hit Paranavithana with the stick that SI Piyarathana was carrying and he came up to me and said "Tho emarican karaya neda. Api dannawa tho emarikavata giye ay kiyala.". He kicked me again and hit me on my fingers with the stick (it was about 4 feet long and slightly thicker than a broom stick), handed to him by SI Piyarathana."

Rathana (149/92, 4.1) says the OIC said: "Kawda methenata dennek damme, Moo kawda? "He then took out Malinda and beat him." None of the other things mentioned by Seneviratne are referred to by Rathana, his cell-mate.

Daniel (147/92., 3.5) however says that when the OIC came to the cell he hit Paranavithana on the face **before** dealing with Rathana and Seneviratne and not **afterwards** as Seneviratne recalls. Moreover, Daniel (147/92, 3.5) and Nandana Perera (151/92, 3.4) say that the third respondent, seeing Seneviratne, asked "Me mokada?"; to which someone replied "Oya ara ingreesi guruwaraya". It was then that the OIC was supposed to have asked who put them together. Dayananda (148/92, 4.4) supports the version of Daniel and Nandana Perera.

According to Daniel, Dayananda and Nandana Perera, the OIC said "emarican karayava gannava eliyata", and not "moova gannava eliyata", as Seneviratne states. Neither Daniel nor Dayananda refer to the threats which Seneviratne says were made when he was being assaulted.

The alleged second assault on Malinda Seneviratne is referred to in an identically worded paragraph in the affidavits of Daniel (147/92, 3.6) and Dayananda (148/92, 4.5). The first sentence of those two paragraphs are as follows: "He next came up to Malinda again, kicked him saying. "Emarican karaya, api dannava tho emericavata giye ay kiyala" and hit him with the stick that Piyarathna was carrying."

Chandanaratne (153/92, 3.3) says nothing else about Seneviratne's case except as follows: "I saw him come up to Malinda and kick him saying "Émarican karaya, api dannawa tho emaricavata, giye ay kiyala" and hit him with the stick that Piyarathana was carrying."

Ranawake (154/92, 4.5) has a unique version. He says "I heard him say: "thoda emaricaven aave?" and beating Malinda".

Wimalasuriya (155/92, 4.4) has merely this to say: "I and the other petitioners saw while the others heard Malinda and Sani Dayananda being beaten".

The evidence relating to Seneviratne's case has too many inconsistencies to make it probable. In any event, even assuming that he may have received a blow or two, it was probably not something that so troubled or distressed him as to cause discomposure. When Rathana told him that a blow or two might be expected and inquired whether he was afraid, Seneviratne replied "ne upset ekak ne". Seneviratne has failed to establish that his rights under Article 11 of the Constitution have been violated.

Chandanaratne's Case

Chandanaratne (153/92, 3.3) states that their hands were not untied to enable the petitioners to eat. He kept his head on his knees and tried to sleep while he was on the stairs. Around 2 p.m. he was "awaken by the sound of someone shouting in pain." After relating his version of the alleged assaults on Seneviratne, Dayananda and "a priest", he says that "all of a sudden the OIC kicked me on my head

several times saying: "mokoda yako katha karanne?" When he was with his head on his knees "without looking back or saying a word." He says he was in a state of "complete shock", and "extremely down hearted". He says "his head was full of all kinds of fearful thoughts "remembering films I had seen of people being beaten" and felt his "body was burning".

After some time (Chandanaratne says 3.4) the OIC came up to him and said "Moova lihagena varella, oka eththa kiyanawa". He was then taken upstairs where the third respondent made him sit down, bent his neck and started beating him. He then took the stick from the fourth respondent and hit him on his knees while kicking his ribs. After some time he stopped hitting him, threatened to break his skull in two, asked him about the meeting in the temple and his occupation, "lectured" him "at length" about the JVP, ordered him to be re-chained and said: "Thopita hariyata gehuve ne. Thava davas anoovak innavane, eththa nokivoth thopi serama ivaray."

Bandara (152/92, 4.4) does not mention the alleged kicks for talking. However he says "Chandana" was questioned about his family, after which the OIC "kicked and hit Chandana and hammered his head many times again (sic) the wooded (sic) hand rail of the staircase." After referring to other incidents, Bandara says "Chandana who had been beaten earlier also was brought up again and beaten again by the OIC."

Dayananda (148/92, 4.5) and Daniel (147/92, 3.6) each make a single reference in identical terms to Chandanaratne: "I heard him beating Chandana again"

Seneviratne (146/92, 6.2) says he heard the third respondent asking that "Chandana be freed. He was taken up and assaulted for about 20 minutes".

Bandara and Seneviratne seem to exaggerate Chandanaratne's own story. Chandanaratne does not complain of his head being struck on the rail nor does he complain of an assault lasting twenty minutes.

In my view of the evidence, I have serious doubts about the truth of Chandanaratne's allegation and I hold that Chandanaratne has failed to establish that his rights guaranteed by Article 11 of the Constitution have been violated.

Declaration in respect of Article 11

For the reasons given, I declare that none of the respondents, including the third and fourth respondents, have violated the fundamental rights of any of the petitioners guaranteed by Article 11 of the Constitution.

Infringements of Article 14(1) (a)

When the matter was supported on 11.5.92 for leave to proceed, learned Counsel for the petitioner moved to amend the petition by adding the following additional averment; "The respondents above-named by their action as aforesaid have violated the petitioner's freedom of speech and expression guaranteed by Articles 14(1) (a) of the Constitution." Learned Counsel further moved to amend the prayer "(b)" by adding a reference to Article 14(1) (a).

The amendments were allowed and leave to 'proceed was granted in respect of the alleged violations of Articles 11, 13(1), 13(2), 14(1) (a) and 14(1) (c) of the Constitution. Duly amended petitions with notice to the Attorney-General were filed on 18th May 1992.

According to the petitioners, when they were about to resume their discussions after lunch, a police party stifled any further proceedings by arresting and incarcerating them. According to the third and fourth respondents, the petitioners had resumed their discussions, but after listening to them for a time, further discussion was prevented by arresting and detaining them.

In either case, the petitioners', claim that their rights under Article 14(1) (a) of the Constitution were thereby violated: Article 14(1) (a) provides that "every citizen is entitled to the freedom of speech and expression including publication."

The solicitude shown by this Court for the freedom of speech and expression in such decisions as *Ratnasara Thero v. Udugampola* [153]; *Joseph Perera v. Attorney-General* [35] *Deniyakumburugedera Sriyani Lakshmi Ekanayake v. Inspector Herath and Others* [27]; *Abeyratne v. Edison Gunatilleke and Others* [154] ; *Dayasena Amaratunga v. P. Sirimal and Others* [36]; and *Shantha Wijeratne v. Vijitha Perera and Others* [17], should be sufficient assurance of its importance. However, one notes with genuine dismay that transgressions continue.

Yet this hardly comes as a surprise. When one considers the struggle of the U. S. Supreme Court from the now famous "footnote 4" of the opinion of Chief Justice Stone in *United States v. Carolene Products Co.* [155] to *Brandenberg v. Ohio* [156] and *Hess v. Indiana* [157] in interpreting the First Amendment, so as to be able to evolve guidelines that, on the one hand protect free speech, and on the other, the safety of the State, one begins to have some sympathy for law enforcement officers "on the beat" who may, given the curricula in schools and other institutions, have at best a vague ideal of the values of freedom of expression and little else to guide them.

It is not easy to understand the system of freedom of expression as envisioned by the language of the Constitution. As Professor Thomas Emerson observed (**Toward a General Theory of the First Amendment,** 1963 72 Yale LJ 877, 894): "The theory of freedom of expression is a sophisticated and even complex one. It does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation, but for each new situation."

I appreciate the dangers of encapsulation. Yet I shall endeavour to call attention to some matters of importance in understanding Article 14(1) (a) and the cognate provisions of the Constitution that are relevant to the circumstances of the matters before me. I shall endeavour to focus attention on the three intrinsic bases of the right to freedom of expression, namely, the desire to discover the truth, the need of every man to achieve personal fulfillment, and the demands of a democratic regime.

The very first Article of the Constitution proclaims Sri Lanka to be a **democratic** State. "Democratic" is derived from the Greek words

demos meaning "the people" and **kratos** meaning "rule". "Democracy is the rule of the people. Although at a time when the Greek States had small populations and limited franchise it was possible for the people to directly decide every important issue, today, with large populations, and universal suffrage, in an infinitely more complex society, the people cannot do so. For practical reasons, the people must act in a modern democracy through their elected representatives. Although, as Article 3 of the Constitution says, Sovereignty is with the people, the right to make political decisions is not exercised directly by the whole body of citizens but through representatives chosen by and answerable to them.

And so Article 4 of our Constitution provides, among other things, that the legislative power of the people shall be exercised by Parliament consisting of elected representatives of the people; that the executive power of the people shall be exercised by the President elected by the people, and that the judicial power of the people shall be exercised by Parliament, which consists of elected representatives of the people, through courts and tribunals and institutions.

Although the system of self-Government thus envisaged is one in which the representatives of the majority of electors are entrusted with the powers of the State, such powers are exercised within a framework of constitutional restraints designed to guarantee all citizens the enjoyment of certain fundamental rights which are set out in Chapter 11 of the Constitution. These rights, including the right of free speech, are important both as values unto themselves, benefitting the individual, and as having an instrumental value, bringing aggregate benefits to society.

Freedom of thought and expression is an indispensable condition if Sri Lanka is to be more than a nominally representative democracy. Speech concerning public affairs is more than self-expression: it is the essence of self-government. To make an informed and educated decision in choosing his elected representative, in deciding to vote for one group of persons rather than another, a voter must necessarily have the opportunity of being informed and educated with regard to proposed policies. The election of representatives is based on an appeal to reason and not to the emotions. Party symbols

and faces on posters merely stand for ideas. That sometimes is not the case in practice; but a system of government based on representative democracy assumes it to be so. There can be no appeal to reason without the freedom to express ideas and propagate them and discuss them with a view to forming private opinions and mobilizing such ideas to be accepted in the competition for the right to represent the people. How else can a voter be convinced of the validity and benefit of what a candidate says he stands for and promises to espouse? (As to the way in which public opinion is mobilized though party politics, see the observations of Sharvananda C.J., in *Gooneratne v. De Silva and the A.G.* [158]).

He must be able to freely and openly, without previous restraint or fear of harassment, discuss such matters and obtain clarification so as to be able to form his own judgment on matters affecting his life.

Moreover, it is only by discussion that proposals adduced can be modified so that the political, social and economic measures desired by the voter can be brought about. The right of free speech enhances the potential of individual contribution to social welfare, thus enlarging the prospects for individual self-fulfilment.

And in between elections it is only through free debate and exchange of ideas that the elected majority can be made to remain responsive to and reflect the will of the people. In respect of a few, exceptional matters the Constitution insists that the people shall directly decide the matter at a Referendum. However there are many other matters of public concern which arise in between elections which cannot be decided by universal suffrage but are nevertheless matters on which the individual citizen must communicate his ideas if representative democracy is to work. The election of representatives does not imply that such representatives may always do as they will. Members of the public must be free to influence intelligently the decisions of those persons for the time being empowered to act for them which may affect themselves. Every legitimate interest of the people or a section of them should have the opportunity of being made known and felt in the political process. Freedom of speech ensures that minority opinions are heard and not smothered by a

tyrannizing majority. It is the only way of enabling the majority in power to have an educated sympathy for the rights and aspirations of other members of the community. The health of a society of self-government is nurtured by the contributions of individuals to its functioning. It is the way that makes possible the valuable and distinctive contribution of a minority group to the ideas and beliefs of our society.

Moreover, in a representative democracy there must be a continuing public interest in the workings of government which should be open to scrutiny and criticism. Indeed, a central value of the free press, free speech, and freedom of association and assembly lies in checking the abuse of power by those in authority.

The unfettered interchange of ideas from diverse and antagonistic sources, however unorthodox or controversial, however shocking or offensive or disturbing they may be to the elected representatives of the people or any sector of the population. however hateful to the prevailing climate of opinion, even ideas which at the time a vast majority of the people and their elected representatives believe to be false and fraught with evil consequences, must be protected and must not be abridged if the truth is to prevail. Freedom of speech does not mean the right to express only generally accepted, but also dangerous, aggravating and deviant ideas which the community hated and from which it recoiled. As Justice Jackson of the United States Supreme Court once observed: "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." Wide open and robust dissemination of ideas and counter thought are essential to the success of intelligent self-government.

No person or group of persons, not even majorities, can claim to have a monopoly of good ideas. Many a strange and singular idea has in time, through argument and debate, had the power to get itself accepted as the truth. Most people once believed Galileo to be a dangerous food and a large number of people with fanatical zeal behind the iron curtain once founded their systems of Government on the philosophy of Marx and Lenin until Glasnost opened the way to

the free flow of information and ideas and the collapse of a repressive system. There is a vital societal interest in preserving an uninhibited market place of ideas in which truth will ultimately prevail. (*Red Lion Broadcasting Co. v. FCC*) [159]. An assumption underlying Article 14(1) (a) is that speech can rebut speech, propaganda will answer propaganda and that free debate of ideas will result in the wisest policies at least for the time being.

Indeed, the initial justification for a system of free speech was its value in preventing human error through ignorance. In 1644, John Milton, during his battle with the English censorship laws, in his tract, **Aeropaqitica, A speech for the Liberty of Unlicensed Printing to the Parliament of England, said:**

> "Though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?"

In 1859, Hohn Stuart Mill in his essay **On Liberty** expanded Milton's arguments by his recognition of the public good – the public enlightenment – which results from the free exchange of ideas. He said:

> "First, if any opinion is compelled to silence, that opinion for aught we can certainly know, to be true. To deny this is to assume our own infallibility. Secondly, though this silenced opinion be in error, it may, and very commonly does, contain a portion of the truth; and since the generally prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth had any chance being supplied. Thirdly, even if the received opinion be not only true but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension of feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled ..."

Among the earliest and best known judicial articulations of the value of free speech in promoting the search for knowledge and truth is that of Justice Holmes in his dissenting opinion in *Abrams v. United States* [60]. He said:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a result with all your heart you naturally express your wishes in law and sweep away all opposition. To all opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. [Only] the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, congress shall make no law abridging the freedom of speech. Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered [here].

An equally well known judicial articulation of the values of free speech was the opinion of Justice Brandeis, (with Justice Holmes concurring) in *Whitney v. California* [39]. Although freedom of speech

is recognized as one of the pre-eminent rights of democratic theory and the touchstone of individual liberty, the framers of the American Constitution (1787) felt no need to include in the original document a provision upholding a general theory of freedom of speech. It was in 1791 by the First Amendment – the progenitor of Article 14(1) (a) (b) and (c) of our own Constitution – that provision was made that "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble ..." Justice Brandeis, said:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you wish and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

One may think what one may wish, but no intelligent person in his senses articulates everything he thinks. As Stanford J. observed in

Gitlow v. New York [29]. "It is a fundamental principle, long established, that freedom of speech and the press which is secured by the Constitution, does not confer an absolute right to speak or publish without responsibility, whatever one may choose." And those who cannot restrain themselves are in many ways prevented by law from speaking as they think, for the societal value of speech must on occasion be subordinate to other values and considerations. As Professor A. Meiklejohn **(Free Speech and Its Relation to Self Government)** once observed, the constitutional provision relating to free speech "is not the guardian of unregulated talkativeness." Laws restraining speech are commonplace. The limitations imposed by the law of defamation are well known. Laws against perjury, extortion and fraud prohibit speech. So does much of the law of contracts. Indeed, no one contends that citizens are free to say anything, anywhere at any time. As Holmes, J. observed, in *Schenck v. United States* [161] , a decision cited with approval in *Mallawarachchi v. Seneviratne* [40]. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic." Certain forms of speech, or speech in certain contexts, or laws or regulations not intended to control the content of speech but incidentally limiting its unfettered exercise, have often been considered outside the scope of constitutional protection. As Justice Brandeis observed in *Whitney v. California* [39], a decision followed in *Ekanayake v. Herath Banda* [27]; and in *Amaratunga v. Sirimal* [36] :

> "The right of free speech, the right to teach and the right of assembly are of course, fundamental rights ... But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral."

In *Dennis v. United States* [58] Chief Justice Vinson said:

> "Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any

principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence ... Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

It has never been doubted that when the Government is in the throes of a struggle for the very existence of the State, the security of the community may be protected. (Per Holmes J. in *Abrams v. U.S.A.* (supra); *Whitney v. California* (supra), *Gitlow v. New York* (supra). *Near v. Minnesota*[162].

Article 15 of the Constitution makes it very clear that the rights of free speech, (14) (1) (a), assembly (14) (1) (b) and association (14) (1) (c) are not absolute. Article 15 provides, *inter alia*, as follows:

(1) ...

(2) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

(3) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (b) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy.

(4) The exercise and operation of the fundamental right declared and recognized by Article 14(1) (c) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy.

(5) ...

(6) ...

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

(8) The exercise and operation of the fundamental rights declared and recognized by Article 12(1), 13 and 14 shall, in their application to members of the armed Forces, Police Force and other forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

After balancing interests, albeit at a very general, wholesale level, the makers of the Constitution have in Article 15 made a threshold, exclusionary categorization, *inter alia*, of the varieties of speech, assembly and association that are not protected absolutely but the exercise and operation of which may be limited by law. Where restrictions in respect of those classes are imposed by an **Act of Parliament** we are precluded from inquiring into or pronouncing upon or in any manner calling in question the validity of such an Act on any ground whatsoever (Article 80(3) of the Constitution). Article 15(7) of the Constitution provides that "law" includes regulations made under law for the time being relating to public security. While it is a matter for the President and not Courts of Law to decide whether there is a state of Emergency and to decide that regulations may be necessary or expedient to deal with such a situation – See *Yasapala v. Wickramasinghe* [163] ; *Abeywardene v. Perera* [164], yet, in certain circumstances, the validity of the regulations may be subject to

judicial scrutiny. (See *Siriwardene v. Liyanage* [71]; *Joseph Perera v. A. G.* [35]. See also *Wickremabandu v. Herath* [26]).

In addition to restrictions prescribed by law in respect of the categories referred to by the Constitution, there may be utterances that are no essential part of any exposure of ideas and are of such slight social value as a step in truth that any benefit that may be derived from them is outweighed by the social interest in order and morality. (*Chaplinsky v. New Hampshire* [165]). Thus it has been said that resort to rude epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution. (*Cantwell v. Connecticut* [166]). What value is to be attached to a speech claiming protection and whether the right is outweighed by competing state interest and societal concerns is a matter for the determination of the Court having regard to the circumstances of each case, for speech interacts with too many values, in too many complicated ways to be subject to a single formula.

The respondents did not deny that a necessary consequence of the arrests and detentions was a termination for the time being of the expressive and communicative activities of the petitioners and a probable chilling of such future activities. However, they denied the averments of the petitioners that there was a contravention of Article 14(1) (a)

The respondents did not seek to justify the alleged violations of Article 14(1) (a) by reference to any law made in accordance with Article 15 or otherwise proscribing the use of language designed to prevent any substantive evil which expressly required, empowered or enabled them to extinguish or in any way temporarily limit the petitioners' rights under Article 14(1) (a) of the Constitution. Nor are these appeals from convictions for offences committed under any law. In these proceedings Regulation 23(a) of 1989 was the principal provision relied upon by the respondents as a justification. That Regulation makes it an offence to conspire to overthrow the Government of Sri Lanka otherwise than by lawful means. Attempting or preparing to overthrow or doing any act or conspiracy to do or attempting or preparing to do any act "calculated to overthrow" or with the "object or intention of overthrowing", or as a "means of

overthrowing" the Government otherwise than by lawful means are reached by the provisions of the Regulation. That provision does not control the content of speech but incidentally limits its exercise in certain circumstances.

The respondents arrested the petitioners and prevented them from proceeding with their discussions. Although they were not by express statutory provision empowered to prohibit the use of speech advocating the overthrow of the Government, yet if there were utterances directed to inciting or producing imminent action to overthrow the Government otherwise than by lawful means and such utterances were likely to incite or produce such action, the respondents were entitled to terminate the discussion. (Cf. *Brandenberg v. Ohio* [156]; *Hess v. Indians* [157]).

As we have seen in discussing the question of arrest in relation to the violation of Article 13(1), there was no action to overthrow the Government by unlawful means being advocated at all. The petitioners had no purpose of helping to make the Ratawesi Peramuna an instrument of terrorism or violence which would menace the peace and welfare of the State. They were not engaged in the development of an apparatus designed and dedicated to overthrow the Government by unlawful means. The petitioners were considering matters of personal concern and were anxious to mobilize public opinion to accept their views so that they might replace those in power with other representatives who may give effect to their views. They were critical of what they regarded as a "sorry scheme of things" and, like Omar Khayyam, wanted to remould things nearer to their "heart's desire". This was, as we have seen in considering the question of the violation of Article 13(1) of the Constitution, perfectly legitimate, even with regard to agitations for changes of the Constitution which permitted a supposed unsatisfactory state of affairs. (See especially the reference to the comments of Jefferson). Moreover, as we have seen, such activities, for several reasons in a democratic society such as our own, in addition to the "safety-valve" aspect referred to earlier, must be regarded as not only permissible and highly desirable, but also as necessary.

DECLARATION AND ORDER IN RESPECT OF ARTICLE 14(1) (A)

For the reasons explained I declare that the fundamental right of freedom of speech and expression guaranteed by Article 14(1) (a) of the Constitution were violated by the respondents in respect of Malinda Channa Pieris the applicant in S.C. Application 146/92; M. D. Daniel the applicant in S.C. Application 147/92; Singappuli Hewage Dayananda, the applicant in S.C. Application 148/92; Athureliye Rathana (Ranjith), the applicant in S.C. Application 149/92; Kuruwitage Nandana Perera, applicant in S.C. Application 151/92; Jayasinghe Mudiyanselage Janaka Priyantha Bandara, the applicant in S.C. Application 152/92; Pallimulla Hewa Geeganage Pradeep Chandanaratne, the applicant in S.C. Application 153/92; Ranawake Arachchige Patali Champika Ranawake, the applicant in S.C. Application 154/92 and the following applicants in S.C. Application 155/92, namely, Avalikara Galappathige Muditha Malika Wimalasuriya, Gileemalage Janaka Priyantha Dayaratne, Karunaratne Paranavithana, Weerasekera Mudalige Anura Weerasekera, Rev. Kalupahana Piyarathana, Rev. Ambalanthota Premarathana and Rev. Kuthulgala Upali.

I make order that each and every one of the persons named in the preceding paragraph – Wimalasara, the applicant in SC Application 150/92 is not included – shall be severally paid a sum of Rs. 5000 by the State for the violation of the right of free speech guaranteed by Article 14(1) of the Constitution.

VIOLATION OF ARTICLE 14(1) (C)

The petitioners state that by arresting and detaining them, their rights guaranteed by Article 14(1) (c) of the Constitution were violated. Article 14(1) (c) provides that "Every citizen is entitled to the freedom of association."

Free speech is so linked with other rights guaranteed by the Constitution that one might say with Justice Cardozo that it is "the matrix, the indispensable condition of nearly every other form of freedom." (*Palko v. Connecticut* [167]). And freedom of association is equally linked with other freedoms including freedom of thought,

conscience and religion, including the freedom to have or to adopt a religion or belief of his choice (Article 10), the right not to be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth (Article 12(2) and the right of free speech and expression (14) (1) (a), the freedom of peaceful assembly (14) (1) (b), the freedom to form and join a trade union (14) (1) (d), the freedom to manifest his religion or belief in worship, observance, practice and teaching (14) (1) (e), the freedom to enjoy and promote his own culture and to use his own language (14) (1) (f) and the freedom to engage by himself or in association with others in any lawful occupation, profession trade, business or enterprise. Group association does advance the enjoyment of certain rights.

For instance, effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. Freedom of expression includes not only the individual's right to speak, but also his right to advocate, and his right to join with his fellows in an effort to make that advocacy effective. (See *NAACP v. Alabama* [168]; per Haarlan J. in *NAACP v. Button* [169]). Freedom of speech, freedom of assembly and freedom of association are cognate rights. However the right to freedom of association is a general, independent constitutional right recognized specifically by Article 14(1) (c), and not merely one that is keyed to the exercise of the right of free speech.

Freedom of association is protected in two distinct senses: (a) freedom of expressive association and (b) freedom of intimate association. (*Roberts v. United States Jaycees* [170]). There is no indication in the petitions as to how Article 14(1) (c) was violated.

In the *Roberts case* [170] Brennan J. pointed out that in one line of decisions the Court had concluded that "choices to enter into and maintain certain intimate human relationships in safeguarding the individual freedom that is central to our constitutional scheme," should be protected. This type of freedom of association is concerned with the formation and preservation of certain highly personal relationships connected with family relationships and personal decisions such as the freedom to choose one's spouse. The freedom of intimate association is deemed important enough to be

constitutionally protected because certain kinds of personal bonds play a critical role in the culture and traditions of a nation by "cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. The personal affiliations that exemplify these considerations [are] distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."

The Ratawesi Peramuna, lacking these qualities, seems remote from the concerns giving rise to this constitutional protection. It was, as the petitioners say, a "broad front" comprising persons from all sections of the community. As Rathana (SC Application 149/92) states in paragraph 2.5 of his affidavit "we tried to bring together the alternative forces in the opposition – intellectuals, students, artists, youth, workers, farmers etc." There was neither selectivity nor seclusion. There is no evidence of the number of members., but Bandara states in his affidavit in Application 152/92 paragraph 2.1 that he "along with a large number of students" strongly supported it." I therefore hold that the petitioners' freedom of association in the sense of intimate association was not violated.

The right of association is not only guaranteed by the Constitution to protect the freedom of intimate association but also as an indispensable means of preserving other individual liberties concerned with a wide variety of political, social, economic, educational, religious and cultural ends. The associational rights connected with certain matters are expressly referred to in the Constitution. The right to form and join a Trade Union is referred to in Article 14(d). The freedom in association with others to manifest his religion or belief is referred to in Article 14(1) (e). The freedom to enjoy and promote his own culture and to use his own language in association with others is referred to in Article 14(1) (f). And the

freedom so engage in association with others in any lawful occupation, profession, trade, business or enterprise is referred to in Article 14(1) (g). However no specific mention is made of the freedom of expressive association. What the Constitution does is to state in Article 14(1) (a) that every citizen is entitled to the freedom of speech and expression, including publication, and then recognize the indispensable means of preserving individual liberties guaranteed by the Constitution, including the fundamental right of the freedom of speech and expression, by declaring in Article 14(1) (b) the fundamental right of freedom of peaceful assembly; and in Article 14(1) (c), the fundamental right of freedom of association. In essence the petitioners' complaint in the matters before us is that their right of association for the advancement of certain beliefs and ideas was violated by their arrest and detention.

There was in the matters before us no direct call to desist from expressive activities as there was in *"Mudiyanselage Tillekeratne Bandara Ekanayake v. Edison Gunatilake and the Attorney-General*[17]. The fact that the respondents took no direct action to restrict the right of the petitioners and members of the Ratawesi Peramuna to associate freely in orderly group activity however, does not end the matter. Freedoms such as these are protected not only against obvious and heavy-handed frontal attack, but also from being smothered or stifled or chilled by more subtle interference. We need to consider the probable deterrent effect of the arrest and detention even though such effect may have been unintended. In delivering the opinion of the Court in *NAACP v. Alabama,* (*supra*) Justice Harlan said:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process clause of the 14th Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. The fact that Alabama [has] taken no direct action [to] restrict the right of petitioner's members to associate

freely does not end inquiry into the effect of the production order, [1] in the domain of these indispensable liberties, whether of speech, press or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental [action]."

In the matters before us, the arrest and detention of the petitioners must be regarded as entailing the likelihood of a restraint upon the exercise by them of their right to freedom of association in much the same way as manifestations of hostility to their activities by the armed persons who stole their posters at Matara. The arrest and detention was in my opinion likely to adversely affect the ability of the petitioners to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce some of them to withdraw from the Peramuna and dissuade others from joining it because of fear of police action. It must also have certainly had a chilling effect on the expressive and associational activities of those who had the temerity to continue to be members of the Ratawesi Peramuna.

The right to associate for expressive purposes, is not absolute. (See Article 15(4) and Article 15(7) quoted above). However, the Ratawesi Peramuna was not an organization whose members or adherents were engaged in purposes prejudicial to national security or the maintenance of public order or in other unlawful activities. The Peramuna was not a proscribed organization. No justification existed for the violation of the petitioners' associational rights relating to their expressive activities.

DECLARATION AND ORDER IN RESPECT OF ARTICLE 14(1) (C)

I therefore declare that the fundamental right of the freedom of association guaranteed by Article 14(1) (c) of the Constitution were violated by the Third and Fourth respondents in respect of Malinda Channa Pieries, the applicant in SC Application 146/92; M. D. Daniel, the applicant in S.C. Application 147/92; Singapulli Hewage Dayananda, the applicant in S.C. Application 148/92; Athureliyage Rathana (Ranjith), the applicant in S.C. Application 149/92; Kuruwitage Nandana Perera, the applicant in S.C. Application

151/91; Jayasinghe Mudiyanselage Janaka Priyantha Bandara, the applicant in S.C. Application 153/92; Ranawake Arachchilage Patali Champika Ranawake, the applicant in S.C. Application 154/92 and the following applicants in S.C. Application 155/92, namely, Avalikara Galappathige Muditha Mallika Wimalasuriya, Gileemalage Janaka Priyantha Dayaratne, Karunaratne Paranavithana, Weerasekera Mudalige Anura Weerasekera, Rev. Kalupahana Piyarathana, Rev. Ambalanthota Premarathana and Rev. Kuthulgala Upali.

I make order that each and every one of the persons named in the preceding paragraph shall be severally paid a sum of Rs. 5000 by the State for the violation of the right of freedom of association guaranteed by Article 14(1) (c) of the Constitution.

WIMALASARA'S CASE IN RESPECT OF ARTICLES 14(1) (A) AND 14(1) (C)

According to paragraph 2.3 of Wimalasara's affidavit dated 15th April 1992, by the time he woke up in the morning on 27th February 1992, the other petitioners "had already started the discussion." Wimalasara says: "I went back to bed since I was still very ill." When the Police arrived at 2 p.m. he was still asleep and "woken up and taken by a man carrying a gun to the room where the others were."

Wimalasara, in support of his affidavit dated 3rd November 1992 made in response to the affidavits of the Third and Fourth respondents, submitted the affidavit of Jayalin Silva dated 3rd November 1992 who came to the temple at about the time of the arrest to visit Wimalasara who was in ill-health. Jayalin Silva states that Wimalasara was fetched from the residential quarters of the priests and taken to the place where the meeting was being held.

In paragraph 4 of his affidavit dated 3rd November 1992, Wimalasara states as follows: "I totally deny the police version that officers stood by the windows of the room, listened to our conversation and took down notes. I state that this is a fabrication by the police including the alleged conversation that took place in the room. I specifically deny that we talked of overthrowing the government."

Seneviratne (146/92, 5.3) expressly states that Wimalasara "did not participate in the discussion."

How was this man who says he was "very ill" and went to sleep, (other petitioners too state that Wimalasara was ill and asleep – see e.g. Daniel, 147/92, 3.1; Dayananda 149/92, 3.6); Rathana (149/92, 2.10), Nandana Perera (151/92, 2.6); Bandara (152/92, 3.4); Chandarathana (153/92, 2.5); Ranawake (154/92, 4.3); and Wimalasuriya 155/92, 3.4) waking up only when the police arrested him at 2 p.m. and then taken to the meeting place where the resumption of the meeting was interrupted, able to deny that the police listened to "**our** conversation"? How did he know that? Why did he say "I specifically deny that we talked of overthrowing the Government" instead of simply and truthfully saying that he did not know what was going on?

What Wimalasara seems to have been earlier trying to point out was this (See paragraph 2.2 of his affidavit dated 15th April 1992): He had come to know Rev. Piyarathana (petitioner No. 5 in application 155/92) and through him Rev. Rathana (petitioner in application 149/92), Daniel (petitioner in application 147/92) and Champika Ranawake (petitioner in application 154/92). Ranawake came to the temple and asked for permission to have a discussion at the temple. Since Piyarathana, Rathana, Daniel and Ranawake "were also going to attend and", as he says, "since I was convinced that they were not subversives, I didn't mind." Wimalasara, appears to have been detached from the political activities of the other petitioners not only on the occasion of the arrest, but also generally.

Rev. Rathana in his affidavit (149/92 paragraph 2) says that he informed Wimalasara of the proposed meeting, Rathana and Ranawake (154/92 in paragraph 3.9) say: "He was only aware that we were going to have a discussion on the following day. He knew nothing about the nature of the discussion. He is not a political activist. We did not make much of this since some of us have been frequenting this temple and since it was noted for political meetings, being the temple of Rev. Pohaddaramulle Pemaloka who was killed by the JVP ..."

Significantly, Wimalasara alone makes no mention in this affidavit of previous knowledge of, or participation in, the activities of the Peramuna or of its so-called "crises."

DECLARATION IN WIMALASARA'S APPLICATION IN RESPECT OF ARTICLES 14(1) (A) AND 14(1) (C)

In the circumstances I hold that Rev. Thalpitiya Wimalasara, the applicant in S.C. Application 150/92 was in no way deprived by the respondents of his right of free speech guaranteed by Article 14(1) (a) of the Constitution. He did not participate in the discussion simply because he was as he says "very ill" and chose to go to sleep and not because he was prevented by the respondents from speaking or listening at the meeting.

Nor was he deprived by the respondents of his right of freedom of association guaranteed by Article 14(1) (c). There was no suggestion of any violation of the right of intimate association. Nor was there any association for expressive purposes. He was a friend of some of the petitioners and did not, as he says "mind" them meeting at the temple, but he was not a member of the Ratawesi Peramuna and, as Rathana and Ranawake say, "he knew nothing about the nature of the discussion." Wimalasara did not in his petition or earlier affidavit filed in support of his petition claim to be united to the members of the Peramuna by any community of interest. He had in no way joined them or combined with them for any purpose nor was he connected with them in thought in the enterprise undertaken by the Ratawesi Peramuna.

The fact that Wimalasara was not a participant at the meeting nor affiliated with the Peramuna were taken into account in ordering enhanced payments to be made to him for the violation of his rights guaranteed by Articles 13(1) and 13(2) of the Constitution. At least as a matter of fairness Wimalasara could not have had it both ways, despite his manifestly false second affidavit of 3rd November 1992. Either he was in with them or he was not. The evidence, including his own was that he was not of the Ratawesi Peramuna fold.

COSTS

I make order that Malinda Channa Pieris, the applicant in S.C. Application 146/92; M. D. Daniel, the applicant in S.C. Application 147/92; Singapulli Hewage Dayananda, the applicant in S.C. Application 148/92; Athureliye Rathana (Ranjith), the applicant in S.C. Application 149/92; Rev. Thalpitiye Wimalasara, applicant in S.C. Application 150/92; Kuruwitage Nandana Perera, the applicant in S.C. Application 151/92; Jayasinghe Mudiyanselage Janaka Priyantha Bandara, the applicant in Application 152/92; Pallimulla Hewa Geeganage Pradeep Chandanaratne, applicant in S.C. Application 153/92; Ranawake Arachchige Patali Champika Ranawake, applicant in S.C. Application 154/92 and the following applicants in S.C. Application 155/92, namely, Avalikara Galappathige Muditha Malika Wimalasuriya, Gileemalage Janaka Priyantha Dayaratne, Karunaratne Paranavithana, Weerasekera Mudalige Anura Weerasekera, Rev. Kalupahana Piyarathana, Rev. Ambalanthota Premarathana and Rev. Kuthulgala Upali be each and severally paid by the State a sum of Rs. 5000 as costs.

WIJETUNGA, J. – I agree.

GOONEWARDENE, J.

In his judgment Amerasinghe J. has dealt with the issues that arise for consideration and there is nothing I need add in that regard. I concur with him as to his findings and the relief granted to the petitioners.

Relief ordered.