

PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL)

K.G.KANNABIRAN MEMORIAL LECTURE

Safeguarding Security and Sovereignty

by

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And

Retired Judge of the Supreme Court of Sri Lanka

At

VIDYODAYA SCHOOL AUDITORIUM

1, Tirumalar Pillai Road, T Nagar, Chennai 600017 (near Valluvar Kottam)

On 9th November, 2014 at 11 am.

Gurur Brahma

Honourable Chairman, distinguished guests,

my dear Bharathian brothers and sisters!

We are gathered here today to remember one of India's greatest human rights' leaders and jurist – the late Mr.K.G.Kannabiran. He was the President of your People's Union for Civil Liberties (PUCL) from the year 1994 to 2008. His period of office saw PUCL climbing to great heights as a human rights' organisation. He was, I am told, deeply humble and humane as a person, passionately and intensely committed to protecting democracy and human rights, not just in India but across the globe. He was absolutely fearless in opposing the stifling of freedom and crushing of dissent. He was an uncompromising professional when it came to law and legal practice. He had, no doubt, inspired many generations of human rights' activists and lawyers in India. Moreover he was a human rights' advocate in every sense. He spent the major part of his professional life as a Counsel for the Defence and was held in high esteem. He appeared for Naxalites, RSS members and all others who needed his assistance. In Andhra Pradesh alone he appeared on behalf of some five hundred detainees between 1975 and 1977. He gave opposition to the Emergency. He was elected as the President of the Andhra Pradesh Civil Liberties' Committee and served in that capacity for fifteen years. His association with the PUCL was legendary. He was able to articulate and advocate many legal principles that sought to give effect to the directive principles of the Indian Constitution.

He passed away in 2012.

To be invited to speak at *his* memorial oration, from across the Palk Strait, is indeed an honour, albeit, an intimidating one. Not only because of Mr.Kannabiran's stature or the dedicated and discerning audience gathered here today, but also because, having retired from the Supreme Court a

decade ago and having borne the mantle of a politician for the last one year, perhaps I could face the charge that I have abandoned virtue for vice, reason for passion and justice for expediency!

Quite apart from my inadequacy to contribute meaningfully at the Memorial Oration of a humane being who has been described as the face of the civil rights' movement of the world's largest democracy, I must confess that speaking at an event organised by the PUCL, and particularly one in memory of Mr. Kannabiran, poses certain difficulties. Human rights' advocates tend to adopt a moral high ground in their discourses. It is often said that one adopts moral high ground when one has no other ground to rely on! Could that be the case with human rights' advocates – particularly those who often decry security and sovereignty? I, personally, cherish these values.

All too often human rights' advocates forget that it was that model of American virtue, Abraham Lincoln, who is credited with first using the phrase "the Constitution is not a suicide pact," when he suspended the writ of *habeas corpus* during the American Civil War. It was articulated formally in the legal context around ninety years later in Justice Jackson's dissent in a free speech case, ***Terminiello v. City of Chicago***, where he chided the majority of the Court thus:

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a *little practical wisdom*, it will convert the constitutional Bill of Rights into a suicide pact.

There are many followers of this '*little practical wisdom*' across the globe.

In the aftermath of the attack on Pearl Harbour the US Supreme Court upheld as constitutional, curfews imposed on persons of Japanese descent in ***Hirabayashi v. The United States*** and supported the internment of more than 100,000 persons of Japanese descent through its well-known decision in ***Korematsu v. The United States***. The respected Justice Hugo Black stated categorically that the case had nothing to do with racial prejudice thus:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this. (Unquote)

In the UK, in ***Liversidge v. Anderson***, the House of Lords held that they would defer to the decision of the Home Secretary the question of whether he had reasonable cause to believe that the detention of Liversidge was necessary. The celebrated Lord Denning followed the decision in ***R. v. Secretary of State, ex parte Hosenball***, in a deportation case, supporting judicial deference in matters of national security. In his work *Landmarks in the Law*, he termed *Liversidge* as a decision made against the background of the danger the UK was in at the time and the necessity to combat the enemies in their midst.

In Sri Lanka too our courts have amply demonstrated their *little practical wisdom*. When nearly three hundred and fifty thousand Tamils were incarcerated in open prison camps immediately after the end of the War, a public interest petition was filed claiming that there was no legal basis for such detention and that detention without detention orders was illegal. The Supreme Court and the

Attorney General are reported to have queried, with what must have been of great concern to them, whether the Petitioners in the case were seeking to imperil the detainees further by insisting that detention orders be issued on them. The Attorney General on behalf of the State explained the great threat to security that these people could pose if they were allowed to get back into society for there were sure to be terrorists in their midst. Surely the lives of 22 million were worth more than the discomfort of a few hundred thousand? The Court reserved order on whether leave should be granted. That was five years ago. It still needs to be pronounced!

In essence are we not dealing with that famous law school conundrum of a ticking time bomb? Should we torture a terrorist who has information on when a time bomb would explode and kill millions of innocent lives and thus save them or do we make a suicide pact with the bill of rights and die? Can any human rights' advocate, who claims to have the interests of humans at heart, claim that innocents should be sacrificed at the altar of blind subservience to the law? Of what use is liberty without security? Is not security the essence of all rights – the foundation upon which all other rights rest?

This brings us to our next question – who are those who seek to espouse these human rights' values? Are not human rights essentially a Western concept? Why should we, who have histories and civilisations that date back to antiquity, subscribe to new-found notions of countries that enslaved and colonised most of the world? Is this not neo-colonialism supported by NGOs that are simply “human rights’ hit men”? What right do other countries and international organisations have to dictate terms to individual countries? Does it not infringe upon the sovereignty of States? Is not sovereignty the most sacred element of Public International Law – the foundation even? Are not slogans of R2P or Responsibility to Protect simply cloaks for imperialist interventions?

Mr. Dilip Sinha, the Permanent Representative of India to the United Nations in Geneva, in explaining India's abstention at the United Nations Human Rights Council vote on the Resolution on “Promoting reconciliation, accountability and human rights in Sri Lanka” in 2014, said

It has been India's firm belief that adopting an intrusive approach that undermines national sovereignty and institutions is counterproductive. Any significant departure from the core principle of constructive international dialogue and cooperation has the potential to undermine efforts of Human Rights' Council for promoting universal respect for the protection of human rights and fundamental freedoms.

The Sri Lankan Government's response was more direct:

Sri Lanka categorically and unreservedly rejects this draft resolution, as it challenges the sovereignty and independence of a Member State of the UN, violates principles of international law, based on profoundly flawed premises, and is inimical to the interests of the people of Sri Lanka.

The assault of human rights on sovereignty is not something only imagined by countries with a colonial hangover. Britain's former Lord Chief Justice, the aptonymic Baron Judge, recently said that the European Court of Human Rights is undemocratic and undermines the sovereignty of Parliament. He went on to say that

In any country which embraces the principle of democracy, and certainly in the United Kingdom, ultimate authority over constitutional and societal questions is not vested in a body of judges, however wise and distinguished, and even if the system for their appointment is beyond criticism.

It is not clear whether the learned Judge Baron Judge was implying that sovereignty is the province

of only those countries that 'embrace the principle of democracy' -whatever that phrase might mean – but the idea is clear – the European Court of Human Rights is not welcome as it erodes parliamentary sovereignty. While parliamentary sovereignty is not the same as state sovereignty the critique is essentially the same.

Surely this is distinguished company following *little practical wisdom!* Should not human rights' advocates reassess their positions? Should not they endeavour to gain some *practical wisdom?*

Alas, I too seem to lack this *little practical wisdom!*

More than a decade ago as a Judge of the Supreme Court of Sri Lanka, I held, in ***Nagamany Theivendran v. The Attorney General***, that confessions under the Prevention of Terrorism Act or PTA in Sri Lanka required **corroboration** to establish the commission of the offence. The PTA, similar to the infamous Indian Terrorist and Disruptive Activities (Prevention) Act or TADA, made admissible, confessions made to police officers of a certain rank and imposed the burden of proving that any such statements were involuntary, on the accused. Perhaps it was my years of experience as an original court Judge, seeing the circumstances under which such confessions were coerced, that blunted my wisdom – for I was alone in my reasoning, though my brother judges agreed with me that the confession in that particular case lacked congruity and consistency. But they would not advocate corroboration.

Let us at this stage, look a little deeper at some of the cases highlighted by me earlier, for history is a patient teacher, repeating herself often. 40 years after ***Hirabayashi*** and ***Korematsu*** new information unearthed by Peter Irons, a political science professor, showed that the Government knew that there was no military reason for the exclusion order but withheld information from the US Supreme Court. The US Congress gave compensation to the surviving internees. The convictions were overturned though the Supreme Court decisions were not. US President Bill Clinton awarded the highest civilian honour – the Presidential Medal of Freedom – to Fred Korematsu in 1988. On the 24th of May 2011, the acting US Solicitor General confessed that the office of the Solicitor General had erred in the ***Hirabayashi*** and ***Korematsu*** cases and considered them blots on its history. A year later, US President Barack Obama awarded Hirabayashi the Presidential medal of freedom.

In England, it is Lord Atkins' famous dissent in ***Liversidge v. Anderson*** that chastised judges for being "more executive minded than the executive" that is the proper law today. His words were powerful:

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

Lord Diplock held in a later case that "the time has come to acknowledge openly that the majority of this House in ***Liversidge v Anderson*** were expediently and, at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin was right."

In Sri Lanka, when the Presidential elections were announced in late 2009, shortly after the Attorney General's officers waxed eloquent on the perils of releasing the hundreds of thousands of hapless Tamils, nearly 250,000 were suddenly released. Those who were perilous to the entire nation as potential bloodthirsty terrorists were now safe voters! In one of its most cowardly acts, the Supreme Court of Sri Lanka is yet to make order on whether leave to proceed should be granted or not in this case even though five years have passed. To give this dastardly act some context, leave to proceed

is usually granted or refused by Bench Orders of single sentences and reasons seldom given. To reserve order and not pronounce it for 5 years is an act of unforgiveable cowardice.

Let me hasten to add that the Supreme Court of Sri Lanka was not always lily-livered. In 1937 in the celebrated case of *In re Bracegirdle* the Court did not shy away from taking on the Governor of Ceylon in a *habeas corpus* application holding that the Governor's powers were not untrammelled and struck down the arrest and detention of Bracegirdle as illegal. Perhaps timorousness set in with the so-called autochthonous Constitution of 1972 or First Republican Sri Lankan Constitution, where judicial review was repealed and secularity snuffed out in contravention of the entrenched provisions of the previous Constitution. It was a Constitution that was passed by excluding the Tamils not only from its creation and promulgation, but from its application as well. One of the reasons for abolishing the appeal to the Privy Council in the 1972 Constitution was the same reason that was articulated by Baron Judge in England recently – that recourse to a supra-national legal entity eroded sovereignty. The Government of the time was clearly concerned about the possibility of a repeat of the Privy Council decision in *Kodeswaran v. The Attorney General, (1969)*, which directed the Supreme Court to answer constitutional issues instead of hiding behind technicalities.

In India, as Mr. Kannabiran pointed out, the intellectual rigour displayed by the Indian Supreme Court in dealing with property rights was missing when dealing with the right to liberty, such as the rights to free speech, association and assembly. Some of its decisions were understandable – Justice A. N. Rai was pole vaulted over three senior judges and made Chief Justice – clearly for his role in leading the dissent in the *Kesavananda Barathi* case, where the majority held that Parliament's amendment power could not be utilised to alter the basic structure of the Constitution. When faced with serious intimidation and interference it stumbled, but then once the danger had passed the Indian Supreme Court took steps to safeguard itself from interference and took on a robust role.

In Sri Lanka we have taken things a step – or rather an entire flight of steps – further – when we impeached our Chief Justice last year. The Court of Appeal based on the Supreme Court's special interpretation on a reference made to it, struck down the impeachment without a judicial inquiry, as unconstitutional. The Chief Justice was given around 1000 pages of evidence at 4.30 p.m. and asked to present her defence by 1.30 p.m. the next day by the Parliamentary Select Committee that heard her matter. Eager witnesses were hurriedly summoned when the Chief Justice's legal team and the few honourable members of the Select Committee walked out of the shambolic proceedings. Parliament proceeded to impeach the *de jure* Chief Justice and a *de facto* Chief Justice was put in her place. At the time of such appointment the Court of Appeal order supported by the Supreme Court's decision was in full force and effect. Not a single judge of the Supreme Court had the courage to refuse to sit with the *de facto* Chief Justice despite the judicial orders in existence that made the appointment a nullity. The Supreme Court itself thus disrespected its own judgement and in my view acted in contempt. To compound matters, the *de facto* Chief Justice himself nominated the Supreme Court Bench to hear the appeal preferred by the Attorney General against the Court of Appeal order that struck down the impeachment. Such was the blatant disregard for the edict of justice being seen to be done. The Supreme Court did not think it improper that the *de facto* Chief Justice, the direct beneficiary of the impeachment, could hear and determine cases, even though the appeal, which would determine the validity of his appointment, was pending. After several months the Supreme Court reversed its decision and that of the Court of Appeal and held that the impeachment was now valid. Since then a spate of political and highly irregular appointments have been made to the higher judiciary with scarcely a murmur from the Bench!

Getting back to the issue of national security, Professor Conor Gearty, pointed out “**The first concern is often now centered on security, with human rights fitting in the conversation only in so far as they can be seen not to detract from this prior focus**”. In an era of National Security primacy, rulers of all kinds have found it to be a sanctuary for the prosecution of their “own counter

terrorism/insurgency” efforts suspending civil liberties and extending their authoritarian tendencies through the manipulation of the instruments of a democratic state.

Let us focus on the question that is oft asked of human rights’ advocates. **Is not national security more important than liberties and freedoms?**

In my view, the question is wrongly framed for National Security cannot be separated from liberties and freedoms. People could be kept safe in a maximum-security prison – does that justify imprisonment? The issue arises from our understanding of security and from the manner in which we believe security concerns should be addressed. As Robert McNamara, former US Secretary of Defence once said **“We have come to identify “security” with exclusively military phenomena, and most particularly with military hardware. But it just isn’t so.”** Looking at National Security and how it is pursued in the contemporary sense we could see that McNamara was not far off the mark. In an era of globalization and transnational threats ranging from Terrorism to Ebola, threats of all manner have become an issue of National Security. I would define it, not as “National Security”, which is really an euphemism for “Regime Security”, but “human security”, which is the type of security I cherish. As the UNDP’s 1994 Human Development Report argued, ensuring freedom from fear and freedom from want for all persons is the best path to tackle the problem of global insecurity. The definition of human security was framed along seven themes: economic security, food security, health security, environmental security, personal security, community security and political security.

According to a 2008 WHO study 3.4 million people die each year from water, sanitation and hygienic causes. Less than 18,000 people died around the world due to terrorism in 2013 and that year had a considerable spike because of an increase in violence in Iraq. Even snakebites kill more people than so called terrorist activities every year according to the WHO. Why is it that water security is not an issue? Why is hygiene not an issue?

I was very pleased to hear the recent emphasis placed by the Indian government on hygiene, going back to what Gandhiji did from his days in South Africa. In Sri Lanka we have an epidemic of Chronic Kidney Disease, which has reached this stage because for nearly two decades nothing has been done about the problem, the root causes of which relate to water, nutrition and health facilities. Despite years of warning on the instability of the land in areas where low income groups have been provided line-housing from during British times, no action was taken resulting in the deaths of many unfortunate people two weeks ago in a land slide in Sri Lanka. I visited the affected area just a few days ago.

We may ask the question Post-war how many people have been killed due to private terrorist activities? What is the budget allocated to defence and what is the amount allocated to ensuring safe accommodation?

If security is viewed as Human Security instead of Regime Security we would be able to resolve many of the so-called tensions between liberty and security. As I mentioned earlier, the release of 250,000 Tamils who were held in open prisons without any legal basis just before the Presidential election in 2010 demonstrates a classic case of how Regime Security is given primacy. The people were incarcerated primarily to prevent the flow of information about the atrocities committed during the war and to ensure a change in the demography. Free flow of that information would have undermined the rhetoric of the “zero-casualty” and “humanitarian mission” and would have led to calls for prosecution for grave breaches of humanitarian law. The principle of command responsibility posed a serious risk to the regime. However, winning the election was a greater requirement for the regime and the possibility of gaining a significant number of votes as gratitude for release was the thinking behind the sudden release. If Human Security was at the forefront the release could have

been expedited months earlier.

If Human Security were foremost in their mind the Government of Sri Lanka would not have engaged in the “bait and switch” chicanery by announcing to the world that it has abolished the draconian Emergency Regulations in 2011, whilst persisting with the equally draconian PTA. In fact, as Human Rights Watch reported the then Attorney General had confirmed that the lapsing of the Emergency Regulations will **not** mean a change in detention practices, stating “No suspects will be released and there is no change even though the Emergency has been allowed to lapse.”

As I have repeated on numerous occasions the militarisation of the North of Sri Lanka, where I am the Chief Minister, takes place not due to any real security threat, but to maintain a stranglehold over the populace; to subjugate them and make them compliant; to stifle any form of democratic or political dissent. If Human Security were the guiding principle the military would not be taking over people’s lands, cultivating them with the owners having to buy the produce from their own land and building hotels and golf courses when the dwelling homes of the people devastated by the war remain like pock marks in the Northern landscape. Today cases involving more than 2100 petitioners are pending before the Court of Appeal and the Supreme Court regarding the acquisition of 6381 acres of land in Valikamam North where an illegal High Security Zone for the Sri Lankan armed forces has been set up. Despite such legal actions pending before the highest court in the country, the Army continues to destroy whatever is left of the buildings, homes, holy places or hallowed school premises inside the High Security Zone. In fact when I, as the Chief Minister, tried to visit such places of vandalism I was politely told by the armed personnel manning those areas to obtain permission from the Secretary of Defence who happens to be a brother of the President. Such is the sorry state of our sovereign State’s security concerns!

If Human Security was at the forefront the people would be allowed the freedom of association without needing to worry about the military – they need not grit their teeth and invite military officials even for school functions. There would not be a need for foreign passport holders to obtain special permission to visit the North. This requirement was brought about barely a month ago – not because of any security threat but because of the UN inquiry and the fear that more evidence would be collected.

If Human Security was at the forefront, Sri Lanka would not have contributed to the lexicon with terms such as “white vanned” for government sponsored or sanctioned abductions and “grease devils” for trouble makers who escape from the civil authorities for unleashing terror on the general populace and mysteriously seeking refuge in Army camps. Surely it could be seen that these are counter-productive to security? We have long advocated a phased withdrawal of the military and the handing over of administrative matters to the civil forces according to a transparent timeline. How can Human Security exist when the people are under an occupying force? And indeed the North and East of Sri Lanka are under an occupying force!

If Human Security were at heart there would be no systematic and continual rape and torture of Tamil men and women by the Armed Forces as recent reports show. The BBC reported a man stating, **“They would put my testicles in the drawer and slam the drawer shut. Sometimes I became unconscious. Then they would bring someone and force me to have oral sex with him. Sometimes if we lost consciousness during the torture they would urinate on us”**. Another woman describes being photographed and fingerprinted and then kicked, beaten with batons and pipes, burned with hot wires and cigarettes, submerged in a barrel of water until she thought she would drown suffocated by having a petrol-soaked plastic bag put over her head, before being repeatedly raped by men in army uniform. Her relatives managed to bribe and secure her release after 20 days of this torture. Just a few days ago a man was arrested for trying to gather evidence for the investigations being carried out by the Office of the High Commissioner for Human Rights. Is this

evidence of Regime Security or Human Security? Or is this the new norm under which security imperatives rule the day? A norm under which embedding military in civilian life under the guise of civil-military programs blurring the boundaries between civilian and military life along the lines of highly militarised states like Pakistan and other states elsewhere?

This is what Mr.Kannabiran envisaged when he spoke of the State as a terrorist.

“State violence under the cover of ‘law and order’ and ‘security of the state’ has been far more extensive in scale and destructiveness than private violence. State violence does not come to an end with the abatement of private violence. It continues its course to ensure that there is no protest, because its purpose is political. The population must be reduced to apathy and conformism, because participation in decision making is viewed as a ‘threat to democracy’.

State violence in Sri Lanka continues. The Tamils, though the worst affected by far, are not the only ones. When poor Sinhalese from the South dared to protest about the contamination of their water in Weliveriya the military was unleashed on them with fatal results. Other minorities such as Muslims and Christians have been targeted with a view to project a government that is representative only of the Sinhala Buddhists and to portray new enemies and targets. As Plato observed in the Republic **“When [a tyrant] has disposed of foreign enemies by conquest or treaty, and there is nothing to fear from them, then he is always stirring up some war or the other, in order that people may require a leader.”**

In Sri Lanka as in Pakistan and other states, we are witnessing the growth of National Security apparatus as a distinct power centre within a democratic system where secrecy and industry’ interests dominate as the nexus between military, industry and institutions of governance gain primacy. Lacking democratic oversight, the protection of democratic values and civil liberties has now become a process of bargaining with the dominant power centre, the security apparatus. In the case of Sri Lanka the fact that a single family controls the power centres, political and military, adds a new dimension to the state Mr.Kannabiran took on.

I state these instances because they give a clear view of how Regime Security supplants Human Security as a governing principle. The false dichotomy between security and freedoms can be avoided or minimised if Human Security becomes the guiding principle. I therefore respectfully disagree with Lord Denning when he held in *Hosenball*

There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England.

Lord Denning’s confidence in England is admirable but misplaced. Whether it be the trial of Sir Thomas More for treason in the 16th Century or the war in Iraq in the 21st there have been numerous dubious instances where National Security considerations have provided the cover for various activities. Lord Denning himself remarked in 1964 in resisting a claim that an official document should be privileged from disclosure, **“A practice seems to have grown up, that all a Home Secretary has to do is to give a certificate and pronounce a spell to make it taboo.”**(Unquote) I see no reason why the Defence Secretary will behave any differently from the Home Secretary!

I disagree with Lord Denning on his second assertion as well – that Courts should defer to the judgement of the Executive. As Oliver Wendell Holmes said **the life of law has not been logic; it has been experience.** It is our different experiences that mould our opinions. Lord Denning seems

to acknowledge this when he recognises that National Security is a convenient cover in many jurisdictions and to that extent we are in agreement. He doesn't state what judges ought to do in those circumstances. Much of the UK case law tends to defer to the Executive on questions of security, possibly as a result of their confidence that the Executive would not misuse such power. I wonder whether the level of confidence will remain after the **Chilcot Report** on the inquiry into the war in Iraq is released.

The reason why I don't think Court should be deferential to opinions of the Executive is mainly because of my experience with the Executive using National Security as a convenient cover and my understanding of how this has occurred throughout history, as I explained earlier. But equally important is the recognition that curbing individual freedoms and giving the Government excessive power is setting the stage for a tyrant to abuse that power. Well-meaning people tend to argue that restrictions on fundamental freedoms will have to be made to ensure the protection of the people themselves. Thus they will state that it is necessary at times to hold people without legal authority. What they fail to see is that every time such aberration takes place, the Government sets a precedent to breach the law. This empowers unscrupulous elements to abuse that power. Could the presence of J. Edgar Hoover as the Director of the FBI in the US at that time be the reason for the culture of misinformation and secrecy of *Korematsu* and *Hirabayashi*? Did that allow the hounding of "communists"? Could the Watergate scandal have arisen 30 years later because of the gradual rise in impunity of the Executive in the US? These are difficult questions to answer. I would, however, wager that the Executive in Sri Lanka was emboldened by the series of decisions made by the Sri Lanka Supreme Court in supporting Bills and Constitutional amendments and holding with the Executive in Fundamental Rights' cases, so much so that the leader of that very Supreme Court herself became a victim of the Executive's wrath when she finally refused to tow the line. These are, in Mr. Kannabiran's words, the wages of impunity. Every time Courts sanction illegal acts or fail to scrutinise the acts of the Executive properly they contribute to the culture of impunity. Every such step strengthens the Executive and progressively weakens the judiciary and erodes democracy.

The Sri Lankan judiciary has fostered a culture of impunity in many ways; sometimes very insidiously. One practice was how the Supreme Court dealt with Fundamental Rights' cases dealing with illegal arrest and detention. The Court makes much fanfare in asking the Attorney General to check with the defence authorities to see if the person could be indicted or released and to expedite that process. The argument was that this was an efficient way of ensuring that the defence establishment and the Attorney General would evaluate the matters expeditiously. What this did was to allow arbitrary arrests and detentions to continue with no fear of consequences except in rare cases. It also ensured that there were no findings against the Government, which could be used in international fora to show the widespread human rights' abuses that were going on.

It gives me great pain to say that the Judiciary in Sri Lanka, of which I was a part for a quarter of a century, has failed in preventing a culture of impunity and has contributed directly to the Executive's authoritarian rise. The Judiciary also played a major role in foisting a second-class citizenship on the Tamil Speaking Peoples. It has shown a systemic bias against minorities as the recent research by three fearless lawyers show. Dr. de Almeida Guneratne, Kishali Pinto Jayawardena and Gehan Gunatilleke in their excellently researched book ***The Judicial Mind in Sri Lanka – Responding to the Protection of Minority Rights*** describe how the judiciary as an institution failed the minorities in not only National Security cases but in relation to the language rights, land and housing rights and religious rights. The book authored by non-Tamils concludes that the rise of Tamil militancy in Sri Lanka cannot be divorced from institutional failure, including that of the Judiciary, to address genuine grievances, because, barring a few exceptions, the Judiciary's treatment of minorities was fundamentally different to the general dispensation on the issue. Their findings with regard to the Judiciary's role in public security related cases is also revealing. From 1947 to 1979 the Court did not appear to be racially biased but was conservative. From 1979 to 2009 (i.e. until the conclusion of

the war) the Court was inconsistent in its findings but what is disturbing is that while the progressive cases were invariably those where majority community members were involved, the regressive and oppressive decisions tended to be where minority community members were involved. Post-war the Court transcended its anti-minority bias and instead became completely deferential towards the Executive.

The regressive and oppressive measures against the Tamils did not just occur in the judicial arena. It also extended to the legislative sphere. As I alluded to earlier, the 1972 Constitution

(a) made the Tamil speaking citizens of North and East of Sri Lanka second class citizens overnight;

(b) unilaterally abrogated the post independent pacts entered into by the elected Tamil Leadership with the majority community Prime Ministers to resolve the ethnic conflict such as the Bandaranaike – Chelvanayagam Pact of 1957 for Regional Councils in the North and East and then Dudley Senanayake-Chelvanayagam Pact of 1967 for devolution;

(c) it institutionalised structures of discrimination which resulted in the denial of right to land, right to education and rights to development and resulting disillusionment and disenchantment and frustration of the Tamil youth and

(d) made the Tamil leadership (against the backdrop of Sinhalisation of the governance structures in Sri Lanka to the detriment of the Tamils) unable to secure an equitable and sustainable political settlement via democratic means. Such were the main causal factors for the genesis of the rise of Tamil militancy in Sri Lanka.

This study on the failed judicial system and our experience with the constitutional process shows how over time impunity can grow and get out of control. The Courts would not have realised when they ignored the injustice heaped on minorities that they were setting the stage for injustice to be heaped on all communities in the future. This is a function of untrammelled power; evidence of the propensity for impunity to grow exponentially. It is precisely for this reason that I do not support deference to the Executive. I remain suspicious of the concentration of power and believe that the Judiciary must always have oversight over the functions of the Executive. It has to be constantly vigilant and should ensure that the Executive knows that it would have to justify its actions or be taken to task.

The answer to our first question then is recognising that the question is wrongly framed. We should take steps to address security concerns whilst ensuring liberties and freedoms. The first step is to inculcate the idea of Human Security into our thinking and ousting Regime Security from policy considerations. The second step is ensuring the rule of law and maintaining judicial oversight to ensure that no arm of the State is unaccountable or allowed to cloak itself in secrecy. This would ensure that there are no false dichotomies in *practice*. Judges and policy makers are not there to answer Law School conundrums but to address the issues before them. Let us postpone answering hypotheticals to the day we come across a case where liberties and freedoms cannot be adequately safeguarded whilst providing human security. **Courts**, as one of our more illustrious Chief Justices held, **are not academies of law, but courts of justice.**

When one points out the injustices indulged in by the State, one is invariably termed a terrorist, naxalite, communist, imperialist, separatist or whatever term that is in vogue at the time to demonise and silence critics. Human Rights' organisations and civil society groups are oft termed western lackeys and conspirators. Critics are viewed as fifth columnists seeking to undermine the Sovereignty of State. This brings us to the question of Sovereignty.

At the outset I wish to point out that the labels and agendas of people who advocate human rights are largely irrelevant. In logic, arguments of this kind are termed *ad hominem* and are devoid of

merit. Let us look at the substance of the argument instead.

Let us look at the principle of Sovereignty. Again I cherish this principle, but the sovereignty I cherish is that of the people and the rule of law and not that of the artificial construct of the State. Sovereignty of the State is the remnant of the divine right of Kings from the days when sovereigns ruled. What we should focus on is ensuring that the people are sovereign and that the rule of law is sovereign. The necessity for the rule of law and the consequence of the absence of it leading to a culture of impunity has already been discussed. How do we ensure that the people are Sovereign? What happens if the majority wish to impose their will on a minority? This is where we have to go back to our concept of Human Security to ensure that no group is disadvantaged and that there is political security.

It is easy to speak of Sovereignty of the State in lofty terms but that doesn't mean the world has to turn a blind eye as it did in Rwanda when nearly 800,000 Tutsies were massacred in just a hundred days? President Clinton considered it one of his greatest foreign policy failures. In a damning internal report by Charles Petrie, the UN was criticised for failing in its mandate to protect civilians in Sri Lanka in the final months of the War and the events were termed a "grave failure" for the UN. Contriteness is admirable, but is not prevention preferable? If India had not intervened in 1971 would not the genocide of Bangladeshis continued unabated? A State is morally entitled to claim sovereignty only when it is ensuring the sovereignty of its people and the rule of law by ensuring Human Security. In my view Sovereignty of the State is a representative sovereignty sustained by the sovereignty of the people in that State. This is not to say that countries should be entitled to use internal disturbances as a ruse to interfere, but that Sovereignty should never be allowed to be a shield against violations of international law.

In any event, it should be understood that in today's context Sovereignty of the State has become largely irrelevant. As Luis Moreno Ocampo, the former Chief Prosecutor of the ICC for nearly a decade stated on BBC's Hard Talk around September 20th, 2014, the world order is changing where Sovereignty of States is being eroded with greater power being given to supra-national institutions. In an age of treaties and the recognition of greater *jus cogens* norms is Sovereignty still relevant? The very existence of international law in a sense is a restriction on State Sovereignty. For *pacta sunt servanda* to be obligatory as Customary International Law, States are the subjects of International Law and to that extent are not Sovereign. Still further in today's interconnected world the problem in one country spreads to another very fast, as can be seen in the Middle East. The cultural, linguistic and religious affinities across borders internationalise issues. The moment an issue in one country has trans – boundary effects the matter ceases to be a purely domestic issue and all countries affected by it have a stake in the matter.

Let us take the situation of the Tamil-speaking peoples of Sri Lanka. They were majorities in their areas of historical habitation from time immemorial, but they became minorities in the context of the whole of Sri Lanka. They have been discriminated against, politically marginalised, brutalised in war and even the Courts have a systemic bias against them and has consistently failed to protect them. Majoritarian policies have marginalised, disempowered and alienated them. How is their security preserved? How is their Sovereignty as human beings preserved, especially since the Sovereignty of the rule of law has been eroded?

As Avishai Margalit and Joseph Raz cogently argue, any idea of human well-being beyond the satisfaction of biological needs, must give consideration to culture, which is created by collectives. If culture is recognised then it follows that it should be protected politically. If it is entitled to protection, Collective Security is also an essential part of Human Security. If it is a part of Human Security then it is but rational that culturally cohesive groups should have the right to govern themselves, for it is only they who can best protect their culture. It is this right that is self-determination. This has been recognised by successive Sinhalese leaders in the past. Even though he was to pass the Sinhala

Only Act 30 years later as the Island's Prime Minister, Mr.S.W.R.D. Bandaranayake, was reported by the Ceylon Morning Leader of 17th July 1926, to have argued that **“the Tamils, the Low--Country Sinhalese and the Kandyan Sinhalese had lived for over a thousand years in Ceylon and had not shown any tendency to merge. They preserved their language, their customs, and their religion”**, and to have stated firmly that he was **“convinced that some form of Federal Government would be the only solution”**.

When a group of people are threatened as a group it only strengthens their pre-existing right to self-determination. The level of threat that the Tamil Speaking Peoples have faced in Sri Lanka exponentially strengthens the right to self-determination.

In Sri Lanka national processes have failed and no reasonable person could be expected to have any confidence in the internal processes. Barely a week ago even the usually euphemistic Commonwealth Secretary Mr. Kamallesh Sharma spoke of the lack of independence of the Elections Commissioner in Sri Lanka and the need for reduction of the Military activities in civilian life in the Northern Province. I know both these issues first hand.

It is a testament to the courage of my people in the Northern Province that they voted overwhelmingly for the Tamil National Alliance despite the terror and misinformation unleashed by the Sri Lankan military and associated militant groups. An entire newspaper was fabricated on the morning of the election, an entire village was prevented from voting, candidates were attacked, voters were bribed, beaten and intimidated and yet they voted. I have already spoken of the usurpation by the military of virtually every civilian activity in the Northern Province.

As I stated earlier, the judiciary has been beaten into submission – literally as well – the Secretary of the Judicial Services Commission who was seen as supportive of the impeached Chief Justice was assaulted outside his son's school. The public service has been completely politicised. Completing one year in office as the Chief Minister, I can attest to the interference by the Governor who was the Military Head of the Province during the War and the parallel administration that goes on. The Chief Secretary to the Provincial Council, the chief public servant in the province, was appointed in violation of the law and continues in service, despite our objections. Just recently when important mobile services were being arranged for our people the Chief Secretary kept away, along with several others, citing sudden meetings at the Presidential Secretariat. Projects are agreed on the basis of political expediency and as election gimmicks without carrying out comprehensive needs' assessments or having transparent overarching plans or engaging with the relevant stakeholders.

The Sri Lankan Government method of dealing with issues is showcased with the way it is dealing with the UN investigation into violations of humanitarian and human rights' law. It attempted to canvass global opinion against the UNHRC Resolution and failed thrice. If Sri Lanka thinks that such a procedure undermines its Sovereignty and is illegal, it could request the General Assembly or the Security Council to refer the matter to the International Court of Justice for an Advisory Opinion. It could perhaps even seek to take the movers of the resolution before the ICJ, with their agreement, for a decision on the issue. As a worst-case scenario it could even withdraw from the UN, even though there are no formal provisions in the UN Charter for withdrawal. Instead Sri Lanka seeks to play the petulant scofflaw refusing to comply with its obligations. Worse still is the way in which it deals with the investigation itself.

In the last few weeks Sri Lanka is openly arresting and intimidating those who are trying to collect evidence for the investigation. The basis appears to be that the evidence is false – is that not a decision to be made at the stage of evaluation? If we had proof that the evidence was false – is not the best course of action to forward proof of such falsity to the Office of the High Commissioner of Human Rights? The State does not want to allow the evidence to leave the shores of the country –

just as in the incarceration of the 350,000 Tamils, the primary aim was to let no evidence leave the shores.

So what can the Tamil Speaking Peoples of Sri Lanka do? They have no succour from the internal mechanisms. They have no confidence in the Judiciary, which not only has a history of holding against them, but which has become entirely subservient to the Executive in the last 5 years. I believe it was The Times that once opined of the House of Lords, **"If our liberties are to be protected by them, they would prove a leaky umbrella."** We now have a sieve not merely a leaky umbrella. If the world had lent its ear to the plea of SJV Chelvanayagam in 1974, when he addressed the international community in his missive to the Commonwealth Heads attending the 20th Commonwealth Conference in Sri Lanka in 1974, much tragedy could have been averted. Explaining the systematic marginalisation of the Tamils and arguing that decentralised structure of government alone will make it possible for a participatory democracy where power will be people's power rather than state power, he warned:

This memorandum is presented to you in the hope that through you, world conscience will be awakened to the present plight of the Tamils in this country, who are being systematically subjected to a denial of human rights, various forms of racial discrimination and other practices which could lead to the genocide of the Tamils.

What should other countries do when they see this type of injustice; this type of violation of the Charters and Conventions and Protocols that Sri Lanka has signed? What should India do given its ancient and shared history with Sri Lanka? What should India do when it has nearly a hundred thousand refugees from Sri Lanka whose individual and collective rights are being denied by Sri Lanka?

It was the trans-boundary effect of tens of thousands of refugees pouring into India, in addition to the violation of international humanitarian law that prompted India to intervene in Sri Lanka in the 1980s and incidentally the intervention was also geared towards India securing her National Security and National interest. The legal relationship between India and Sri Lanka has been cemented further through the Indo-Lanka Accord. Indo-Lanka accord is an international agreement between two countries and the Government of India played the role of representing the collective interests and rights of the Tamils of North East. Hence it could be stated the government of India had played the role of a guarantor and underwriter of the Accord, bearing in mind the key aims such as addressing Indian strategic interests, Sri Lankan Sovereignty and the collective rights of the Tamils of the North East.

The military, political and intelligence assistance given by India to Sri Lanka during the final stages of the War, were clearly based on the premise and/or promise that there would be a meaningful political solution. Not only was that the promise made to India, on more than one occasion, but it was also the solemn undertaking issued to the international community of nations as represented by the Secretary General of the UN. As the Joint Statement issued by the Government of Sri Lanka and the Secretary General of the UN recorded in May 2009:

The Secretary-General welcomed the assurance of the President of Sri Lanka contained in his statement in Parliament on 19 May 2009 that a national solution acceptable to all sections of people will be evolved. President Rajapakse expressed his firm resolve to proceed with the implementation of the 13th Amendment, as well as to begin a broader dialogue with all parties, including the Tamil parties in the new circumstances, to further enhance this process and to bring about lasting peace and development in Sri Lanka.

The well being of the Tamils in Sri Lanka, thus, has an international dimension and cannot be

suppressed on the basis of Sovereignty.

Perhaps when Mr. Sinha spoke about undermining domestic processes he was not fully aware of India's previous stances on issues as well as the domestic processes in Sri Lanka. India has taken country specific stances as dictated by principle as well as national interest. As Hardeep Puri, India's former representative to the United Nations noted in an opinion piece in the Hindu:

Following the anti-Tamil riots in Colombo in 1983, New Delhi mustered sufficient courage to spearhead a resolution against Sri Lanka in the Sub-Commission on Prevention of Discrimination and the Protection of Minorities. We vote in favour of similar resolutions against Israel only because they deal with gross and systematic violations of human rights of Palestinian people in the occupied territories. We have never hesitated to take a position on country-specific resolutions whether on DPRK or Iran, whenever our national interest so demanded.

As regards the domestic processes, if the High Commissioner of Sri Lanka to the United Kingdom could be assaulted by a Member of Parliament of Sri Lanka in New York, if the victorious Army Commander could be dragged across the streets like a common criminal, if the Chief Justice could be impeached in a despicable manner, can there be any hope for Tamils? It was only because of India's insistence that elections were held in the Northern Province last year having been postponed every year since the end of the War. It was only because of pressure from the United Kingdom that a minion of the regime was prosecuted and convicted for murder and rape. In the absence of external pressure there can be no hope of the Sri Lankan Government changing its recalcitrant position. We, in the Northern Province, remain open to co-operation, but have only faced broken promises and interference.

India has legal and moral obligations to ensure the welfare of the citizens in Sri Lanka. It should do so by holding the Sri Lankan government to its promises to India and to its obligations under International Law. It should do so by lending its support to international processes that are in furtherance of justice and truth. It should do so by supporting the return of the rule of law and democracy to Sri Lanka. It should do so by prevailing upon the Sri Lankan government to stop the harassment and abuse of minorities; to return to civilian life; to reverse the militarisation. It should do so by urging the repeal of the odious Prevention of Terrorism Act of Sri Lanka, as India herself did with the TADA and the Prevention of Terrorism Act (POTA).

India's obligations apply *a fortiori* with regard to the vulnerable Tamils, towards whom it has a fiduciary duty. It should do so by ensuring that the Tamil Speaking Peoples are not subject to torture and harassment; that their lands are returned; that the occupying force that is in their lands of habitual residence be withdrawn; that the urgent psycho-social needs of a war-ravaged society are addressed; that the safety of our women and children are ensured. It should do so by ensuring that the right of self-determination of the Tamil Speaking Peoples of Sri Lanka is realised within a united Sri Lanka. It should do so by ensuring that a proper 13 Plus Plus amendment is introduced into a Constitution shed of its unitary character. In so doing India would do well to take heed of the prophetic words of the Tamil leaders' letter of 28th October 1987 to Prime Minister Rajiv Gandhi, pointing out the violation of the Indo Lanka Accord and the insidious manner of the Sri Lankan government's dealings, the gross inadequacy of the 13th Amendment and the likelihood of abuse of its provisions. They predicted then that the North and the East would be separated, that the legislative powers of the Provincial Council will be sabotaged, that the Governor who was supposed to be ceremonial will play an interfering role, and the farcical nature of the 13th Amendment. India's actions as suggested would be in furtherance of Human Security and People's Sovereignty. It is critical to understand addressing the inadequacies of the 13th Amendment necessarily entails revising the Constitution bearing in mind that Sri Lanka is a multi-ethnic, multi-religious and multilingual

society. It should recognise and enshrine the collective interests and rights of the fraternity of communities that comprise our beloved but bloodied isle. This is where lessons of constitution making by the far-sighted leaders of Bharat are indeed a shining example – The spirit and deed in which the multi-ethnic, multi-religious, Indian body politic was preserved through a secular constitution, perhaps based on the premise of unity in diversity in post independence India.

The PUCL has a proud tradition of upholding the values of Human Security and People's Sovereignty. More importantly it appears to be acutely aware of the interconnectedness of our peoples. It has functioned on the basis that injustice anywhere is injustice to humanity. I am indeed indebted to the PUCL for its numerous efforts to ensure the realisation of these values vis-à-vis Sri Lankans. The PUCL has advocated that Sri Lanka be made accountable for war crimes; that the food and economic security of the one hundred thousand Sri Lankan Tamil refugees in Tamil Nadu be ensured; that the steps to deport Lankan refugees should be stopped; that support be given to the UN Probe – the list is endless.

We share a common vision – that of Human Security and Sovereignty of the People and the rule of law. It is a lofty vision and as Justice Khanna proclaimed **“Eternal vigilance is the price of liberty and in the final analysis, its only keepers are the people. Imbecility of men, history teaches us, always invites the impudence of power.”**

I salute Mr.Kannabiran's and the PUCL's eternal vigil.

Thank you.

Justice C.V.Wigneswaran