

Policy Studies 28

Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy

N. Manoharan



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List of Acronyms

ACTC	All Ceylon Tamil Congress
CGES	commissioner general for essential services
DJV	Deshapremi Janata Vyaparaya (Patriotic People's Movement)
EPRLF	Eelam People's Revolutionary Liberation Front
EROS	Eelam Revolutionary Organization of Students
IPKF	Indian Peace Keeping Force
IRA	Irish Republican Army
JVP	Janatha Vimukthi Peramuna (People's Liberation Front)
LTTE	Liberation Tigers of Tamil Eelam
MDMK	Marumalarchi Dravida Munnetra Kazhagam (Renaissance Dravidian Progressive Federation)
MPCS	multi-purpose cooperative societies
PLOTE	People's Liberation Organization of Tamil Eelam
PMK	Pattali Makkal Katchi (Working People's Party)
PSO	Public Security Ordinance
PTA	Prevention of Terrorism Act
SLFP	Sri Lanka Freedom Party
TELO	Tamil Eelam Liberation Organization
TUF	Tamil United Front
TULF	Tamil United Liberation Front
UF	United Front
UNP	United National Party

Executive Summary

When confronted by armed militancy, states often consider it necessary to enact special legislation to deal with such threat. This poses a dilemma for democratic states. Governments have to safeguard the state's territorial integrity and sovereignty as well as the security of citizens and at the same time be mindful not to slip into repression and authoritarianism. It is generally assumed that the "criminal justice model" that relies on the rule of law is the best option for democracies in addressing this "democratic dilemma."

This study investigates the efficacy of counterterrorism laws in Sri Lanka, which is one of the few democratic countries to simultaneously face two different kinds of armed rebellions (from the majority Sinhala and minority Tamil communities, led respectively by JVP and LTTE). Sri Lanka has made extensive use of counterterrorism laws with varied results. Counterterrorism legislation contributed effectively to quelling the JVP insurrection but worked negatively in respect to the Tamil rebellion led by the LTTE. It further alienated the minority Tamil community and strengthened the LTTE insurgency. Why was the Sri Lankan state able to defeat one insurgency but not the other? Was it because of nature of counterterrorism laws and their enforcement, or was it because of differences in the characteristics of the two groups and their support base?

The study advances two arguments. First, it posits that the process of enactment and enforcement undermined the legitimacy and effectiveness of counterterrorism legislation. Second it argues that the insurgency rooted in the discriminated minority community was able to deploy the counterterrorism legislation and especially its brutal enforcement to its advantage to enhance its legitimacy in the minority community and simultaneously undermine the legitimacy of the government in Colombo.

Sri Lanka's counterterrorism laws were enacted without much public consultation and debate, or expert or judicial scrutiny, thus forfeiting much required public legitimacy at the outset. Without due regard for local conditions and ground realities, most of the provisions of these legal mechanisms were borrowed from similar laws of other countries. The judiciary also failed in its duty of verifying whether counterterrorism legislation complied with "due process of law" and "rule of law." Further, the enormous discretionary powers entrusted by these laws to the security forces were blatantly misused. The misuse was greater in the case of Tamil militancy, engendering phobia of the Sinhala government and military throughout the Tamil community. Safeguard mechanisms were not effective in preventing or ameliorating the abuses.

Unlike the Sinhala militant group (JVP), the shortcomings in counterterrorism laws and their enforcement were converted effectively by the Tamil militant groups, especially the LTTE, to their advantage. The counterterrorism laws of Sri Lanka increased the isolation of the Tamil community. Popular support made a crucial difference in the efficacy of counterterrorism legislation. Compared to Sinhala militancy, the Tamil militancy enjoyed broad popular support within its constituency. In addition, support from Tamil diaspora made a significant difference. Tamil vernacular media played a crucial role in highlighting the human rights violations as a result of counterterrorism laws. Unlike the JVP, the LTTE controlled territory of its own where the writ of the Sri Lankan state was not in existence and because of which the LTTE could strengthen itself. The LTTE was also a much stronger entity in terms of organization, leadership, motivation, and fighting capabilities. It was and remains far superior to the JVP. The language gap also handicapped the Sri Lankan security forces, which were overwhelmingly Sinhala. They could not deal with the Tamil militancy as they could with the Sinhala militancy.

The study concludes that to be effective, counterterrorism legislation must be enacted and enforced with adequate consideration to due process and should not be discriminatory or undermine the rights of citizens. Such laws must be perceived as legitimate in the affected communities, and be subject to scrutiny, oversight, and periodic review. Laws that repress citizen rights and/or alienate communities, and which are enforced in a discriminatory manner, are likely to be counterproductive as has been the case in Sri Lanka.

Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy

“...all the provisions of law...the Anti-terrorism Act, the Emergency legislation...did not prevent the growth of terrorism and finally you had to succumb to the intervention of the Indian Army. So please learn a lesson from the North. Do not carry out the same thing in the South.

Anil Moonasinghe, Sri Lankan MP, 1988¹

In the 1980s Sri Lanka was confronted with two armed militancies.²

In the north, the government faced a minority Tamil militancy led by the Liberation Tigers of Tamil Eelam (LTTE). In the south it faced a majority Sinhala militancy led by the Janatha Vimukthi Peramuna (JVP), or People's Liberation Front. Sri Lanka was one of the few democratic countries in the world to face two different kinds of armed rebellion simultaneously. In countering these rebellions, the Sri Lankan government enacted and deployed several counterterrorism laws with varied results.

In April 1971, the first-ever armed insurrection led by the JVP to seize power on the island of Sri Lanka occurred. However, aided by Emergency Regulations, the then United Front (UF) government was able to crush the revolt by force. The JVP rose again, this time with more ferocity,

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between 1987 to 1990. Once again, the state was able to put down the insurgency successfully through coercion backed by a host of counterterrorism laws. Meanwhile, since the mid-1970s, Tamil youth in the north of the island, frustrated by the lack of state response to their rising grievances, had started taking to violence to achieve separation. The UF government, which had crushed the JVP insurrection successfully, tried to do the same to suppress Tamil militancy, but in vain. When the United National Party (UNP) came to power by voting out the United Front in 1977, it tried a two-pronged approach: accommodation and repression. On the one hand, the government took some steps to address the grievances of the minority community. On the other hand, it used indiscriminate force against the militants by arming the security forces with new counterterrorism laws. In addition to existing emergency powers, the government enacted several legislations including the Proscription of the Liberation Tigers of Tamil Eelam and Similar Organisations Act of 1978 and the Prevention of Terrorism Act of 1979. Existing criminal laws, like the Criminal Procedure (Special Provisions) Act of 1978, were amended to make them more stringent. These measures contributed to the quelling of the JVP insurrection but not the Tamil militancy which continues to this day.

Why was the Sri Lankan state able to crush one insurgency but not the other? Was it because of differences between the two groups or because of differences in their support bases? Were the counterterrorism laws inadequate or were there problems in their enactment and enforcement? This study seeks to answer these questions and draw lessons from the Sri Lankan experience. It advances two arguments. First, it posits that the process of enactment and discriminatory enforcement undermined the legitimacy and effectiveness of counterterrorism legislation, especially against the LTTE. Second, it argues that the insurgency rooted in the discriminated minority community was able to deploy the counterterrorism legislation and especially its brutal application to its advantage to enhance its legitimacy and undermine that of the Colombo government in the minority community

Democracies and Legal Response

The intrinsically undemocratic nature of armed militancy presents a unique challenge to democracies.³ Militants have no regard for human rights; they have their own “code of conduct” and seek to destroy the very structures and institutions that form the basis of democratic life. Militants often view democracies as “soft,” usually on the grounds that “their publics have low thresholds of cost tolerance and high ability to affect state policy” (Pape 2003: 349). As Paul Wilkinson puts it, militancy “is the

most flagrant form of defiance of the rule of law. It challenges government's prerogative of the monopoly of armed force within the state. Militants attempt to replace the laws of the state by their own laws of the gun and the kangaroo court" (Wilkinson 1974:12). In short, militancy is the antithesis of democracy. That being the case, is it possible to address this "undemocratic" problem within the framework of democracy?

This is the "democratic dilemma" faced by every democratic country confronted by armed militancy. On the one hand, the democratic government has to protect the territorial integrity and sovereignty of the state, and provide for the security of its people from arbitrary violence by the militants. If it fails to meet these challenges, its authority and credibility are undermined. On the other hand, if the government slips into repression and authoritarianism in the process of combating militancy, a democratic government alienates the population and loses its legitimacy.⁴ The challenge then is for a democratic government to address this dilemma without becoming undemocratic in the process.

It is generally assumed that the criminal justice model is the best option for democratic governments seeking to overcome the democratic dilemma. Armed militancy inevitably involves a commission of crime, and since democracies have well-developed legislation, systems, and structures to deal with crime, the criminal justice system should be at the heart of their counterterrorism efforts (Clutterbuck 2004: 141). Legal regimes, so goes the rationale, enable "fair" prosecution of perpetrators and supporters of militant acts; open, public trials stigmatize terrorists and their supporters, thus deterring others from committing militant acts. Fair trials increase public faith in the government, while at the same time undermining the armed militants' justification of their actions in terms of fighting a repressive regime. "Judicial review" ensures that the legal response is in accordance with the rule of law, and juries reinforce community standards of fairness. The adversarial process exposes ineffective or arbitrary law enforcement. Overall, the checks and balances in the system maximize efficiency and at the same time ensure that innocents are not penalized. It is further argued

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democratic governments*

that prisons or rehabilitation centers can help militants to get back into the mainstream when they are released after their prison terms. Thus, the criminal justice model in the traditional sense is supposed to act against militancy at two levels: “deterrence” and “correction.”

It is commonly found, however, that the existing criminal laws are not adequate to equip the institutions of government, especially the security forces, to deal with the rising sophistication of militancy. Militants are now widespread, well networked, with support links all over, and more organized in terms of technology and resources. Added to this is a new dimension in the shape of a criminal-militant nexus of dangerous proportions. So, to deal with this well-armed, far more dangerous enemy, exclusive counterterrorism legislation is required to supplement the existing criminal laws, because what is at stake is not just law and order but the very existence of state and society. Inasmuch as armed militancy tends to exploit the very values of democracy, special counterterrorism legislation seeks to plug the loopholes that militants take advantage of.⁵ In this way, the deterrence value of the existing criminal laws is raised to a new level. Moreover, the extraordinary laws introduce a new aspect—prevention—to the existing deterrence and correction strategies of the criminal justice model. In other words, the counterterrorism laws aim to prevent militants from committing violent acts.

Five categories of such counterterrorism legislation can be distinguished:

1. Emergency provisions built into constitutions to meet emergency situations.
2. Laws of proscription that criminalize banned militant groups and a range of undesirable activities that are detrimental to the safety of the state and its people.⁶
3. Special laws against militancy like the USA Patriot Act, the British Prevention of Terrorism Act, and, until recently, India’s Prevention of Terrorism Act.
4. Laws that give immunity and additional special powers to the security forces, such as India’s Armed Forces Special Powers Act.
5. Other dedicated legislation, such as laws on control of finances, money laundering, drug trafficking, and so on.

To what extent, however, is such counterterrorism legislation effective in preventing, reducing, or eliminating acts of armed militancy? How do we evaluate its effectiveness?

Evaluating the Efficacy of Counterterrorism Legislation—Three Levels of Operation

As noted earlier, counterterrorism laws operate at three levels: prevention, deterrence, and correction. Efficacy is evaluated in terms of how far counterterrorism laws are able to prevent and how far they are able to “deter” militants from committing attacks.⁷ Efficacy also depends on how far these laws aid in “correcting” the militants and bringing them into the mainstream.

Prevention

This aspect is gaining currency of late in the counterterrorism laws of various countries and in fact has become high priority. “Prevention” is predominantly “act or resource-oriented” (except in cases when a militant is taken into preventive custody based on clear evidence that he or she would be involved in attacks if not confined), while deterrence and correction are “offender-oriented.” The target of prevention is the whole environment in which a particular militant act occurs, rather than the act itself or its perpetrator. The main function is to make the environment as unfriendly and as difficult as possible for militants.⁸ W. W. Minor calls this “target hardening,” and Oscar Newman terms it “defensible space.”⁹ Provisions in counterterrorism laws providing for prohibited/security zones, checkpoints, surveillance, curfews, preventive detention, proscription, obstructing the flow of financial and other resources, and so on, fall under this category.

The important question, however, is how far such counterterrorism laws are effective in successfully preventing militant acts. It is true that preventive methods are able to give some immunity to targets, but only to a certain extent. States have found this strategy useful, especially in preventing hijacking by making screening and surveillance compulsory in their legislation. The major problem with this strategy, however, is “crime displacement”: in response to the state’s combat strategies, militants shift either their target or mode of attacks. Moreover, such “displacement” goes on depending on the lessons learned by both the state and the militant groups from previous successes or failures. One of the main “crime displacement” methods adopted by some militant groups is the suicide attack, which is “qualitatively different, appearing almost supernatural, extremely lethal, and impossible to stop” (Sprinzak 2000: 66).

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operate at three levels:
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and correction***

Preventive detention provisions in counterterrorism laws, which are far more stringent than those in normal criminal laws, try to target “sleepers” or would-be militants, who could be detained based on suspicion or on information available well in advance of the occurrence of a particular militant act. Since preventive detention provisions do away with the presumption of innocence, there is more likelihood of their misuse by law enforcement. They could be used to settle personal scores or for political interests or just indiscriminately against a particular ethnic group. The main issue is the basis for “suspicion” and who decides on “suspects.” Ironically, the militants are rarely detained, and eventually only innocents fall prey to detention provisions.

Proscription is aimed at making it a crime to support or to be part of any militant organization (Chesney 2005: 1–2). By criminalizing a particular group, it sends a clear message to the people that the proscribed group has been engaging in unlawful and dangerous activities and that associating with that group or its members is tantamount to committing a criminal offense. In that case, the proscribed militant group might find it difficult to operate. However, militant organizations tend to react to banning in one of two ways: either the group goes underground and intensifies its violent response, or it changes its name and continues its activities as before. Either way, the net effect does little to bring down the level of violence by the organization. It is also difficult for a government subsequently to negotiate with an organization that it has defined as criminal.

The strategy of creating no-go or high security zones, adopted, for example, by Israel, the United States (at its seaports immediately after the September 11 attacks and currently in Iraq), and Sri Lanka, is comparatively the most successful preventive measure. Recent studies, however, suggest that the side effects of creating such zones are enormous. For instance, displacement of families from the zones and consequent denial of their livelihood tend to drive those affected into the camp of the militants, who successfully exploit such conditions to their advantage.

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security zones...is
comparatively the most
successful preventive measure***

The main issue is that once a no-go or high security zone is created, government forces occupy it indefinitely, keeping the displaced in a state of perpetual uncertainty.

Deterrence

Deterrence, or “moral condemnation,” is considered the most important strategy of counterterrorism laws. This is evident from the fact that it figures in the preamble or statement of objectives of most counterterrorism laws. The objective is to increase the likelihood of militant acts meeting with social indifference or contempt by inflating their wickedness or increasing the severity of punishment. This does not mean that the existing criminal laws lack deterrence. But counterterrorism laws aim to enhance the deterrence value to a

new level in three ways: increasing punishments for existing crimes; increasing the power of the security forces, especially in arrest and detention; and minimizing due process, including doing away with trial by jury.

Yet is it possible to deter militants whose basic objective is to oppose the very rules and norms of the state they are fighting against? Brehm and Brehm’s theory of “psychological reactance” helps us to analyze the deterrence value of counterterrorism laws. According to this theory, deterrence produces a “deterrence curve,” with a positive slope, and a “defiance curve,” with a negative slope. Whether a particular form of deterrence works or not depends on the net effect of the two curves (if the positive slope is steeper than defiance curve, it works).¹⁰ If deterrence affects a critical freedom of a particular community or group, that community might choose to defy the deterrence. Militants tend to exploit this tendency in people by provoking maximal deterrence of the state and in turn gaining popular support and legitimacy for their struggle. Al-Qaeda’s depiction of the U.S. “war on terror” as “just another crusade” is a good example.

Mass support is thus the critical variable in this level of operation. If a militant group enjoys the support of its community, “moral condemnation” won’t work. Especially in the case of ethnic conflicts, the members of the militant groups, taking advantage of mass support, operate like fish in the water. This gives rise to what is known as “community suspicion”—suspecting the whole community as militants—and indulging in harassment en masse, either to obtain information or to deter people from helping militants. But such “community suspicion” in turn drives even law-abiding people of that particular community into the militants’ camp, either for security or to express their opposition to such oppressive or discriminatory laws. The state not only loses legitimacy in the eyes of the alienated ethnic group, but the militants get a fertile ground for recruitment. For instance, the internment policy of the Stormont government in

***Deterrence...is considered
the most important strategy***

Northern Ireland convinced Catholics that it was discriminatory and repressive. This sentiment provided a powerful recruiting space for the IRA (Irish Republican Army) among Catholics, and militant violence escalated in the aftermath of the introduction of the policy. Thus, the inability of the legal framework to distinguish clearly between perpetrators of militant acts and other members of the community is likely to have a profound impact on the consciousness and ideological coherence of the community. A casual offender or innocent might become a permanent and committed deviant if exposed to legal processing, especially when systematically treated as a deviant and stigmatized as such. Those affected by counterterrorism laws are often motivated to fight against the regime responsible for such laws because that is the only way to get past such laws. In these circumstances, the law itself breeds illegality.

In this context, it is pertinent to look carefully at what makes certain communities reject laws. Peter Singer presents two grounds for obeying laws in democracies: “participation” and “democratic procedure” (seen as a fair way of achieving a compromise between competing and legitimate claims).¹¹ If these two elements are not found, then that particular law is bound to be a failure. The main aim of the militants, therefore, is to reinforce their case by showing that the state authority is in fact illegitimate for some reason, divesting the rulers of either a legal or a moral claim to obedience (Lloyd 1991: 29).

Security forces are important actors at this level of operation, because “at all levels of society human law has depended for its ultimate efficacy on the degree to which it is backed by organised coercion” (Ibid.: 41).

Security forces here include armed forces, the paramilitary, and the police. The police force is normally involved in countering militancy with the help of extraordinary laws. Using troops or paramilitary force instead of the police blurs the mandates of the two different forces and results in two kinds of trends: militarization of the police mandate and “policification” of the military mandate (Crelinsten 1998: 399–400).

***Using...paramilitary
force instead of the police
blurs the mandates***

A country’s armed forces are trained for an external security role and should be used only in emergencies where maximum use of force is needed. They should be employed in an internal security role only on an exceptional basis.

By means of counterterrorism laws, however, the state attempts to bring within a legal framework the existence and inevitability of fighting

an “eternal enemy.” It is by using this concept that the state keeps up the motivation of its fighting arm and mobilizes resources to counter armed militancy. Didier Bigo calls this “a militarisation of the societal,” whereby the same coercive solutions are proposed for any number of social problems (Bigo 2000: 171–205). To maintain the value of deterrence, counterterrorism laws entrust security forces with wide discretionary powers, often in addition to immunity from prosecution, which often results in indiscriminate repression. Indiscriminate repression might quell militancy, but along with that, it may also destroy community, friendship, justice, and the common good, some of the very qualities espoused by democracies (Holmes 2001: 21). In the end, it paves way for a situation where the state loses the confidence of the public and legitimacy. David Bonner puts this idea succinctly:

***counterterrorism laws
entrust security forces with
wide discretionary powers***

Special legal provisions pose dangers to democratic systems. The use of emergency powers can become a habit; it may de-sensitise the population to the problems of human rights involved and increase authoritarian tendencies in law and society; extraordinary laws can become defacto permanent features; new procedures may become the norm for criminal procedure; the dividing line between emergency laws and ordinary laws may become difficult to draw; such special laws may be used to cope with ordinary crimes, and the dangerously seductive illusion of emergency laws may indeed represent a victory for the terrorists and insurgents.¹²

Grant Wardlaw is not far from truth when he observes, “To believe that depriving citizens of their individual rights and suspending the democratic process is necessary to maintain ‘order’ is to put oneself on the same moral plane as the terrorists who believe the ‘end justifies the means’” (Wardlaw 1989: 69).

At this juncture, it is important to note that the judiciary impinges immensely on the deterrence strategy of counterterrorism laws. It is the judiciary that can help address the “democratic dilemma” by ensuring that democratic rights of citizens are not trampled, and that the rule of law is observed by government institutions and agencies, especially the security forces. In addition to speeding up the trial process, the judiciary

also acts as a watchdog to prevent the misuse of counterterrorism laws by other branches of the government, especially law enforcement agencies. But the main issue, however, is that counterterrorism laws often limit the

***counterterrorism laws often
limit the role of the judiciary***

role of the judiciary to a bare minimum in two ways: by eliminating or diluting judicial review and by incorporating minimal due process as against optimal due process. Minimal due process reduces the accountability of government's coercive apparatus, resulting in abuse of provisions of laws

for political ends by flouting built-in safeguards and exploiting discretionary powers. This leads to what has been termed the "dialectics of legal repression"—the appearance of formal legal rationality and at the same time the abandonment of it.

There are other issues that arise during the process of trial of cases under counterterrorism laws. Speedy trial is hampered by the workload of courts. Some countries deal with this problem by setting up special courts. But the legitimacy of such courts can be open to question. They may be perceived by the affected minority as serving the interests of the dominant community. If no witnesses come forth to testify against militants, whether out of fear or out of sympathy for the militants' cause, how can the prosecution frame charges? For this reason, some countries provide in their counterterrorism laws for acceptance of confessional statements as evidence. But such arrangements sometimes give rise to extraction of confessions through torture.

Correction

Being at the lower end of priority of operation, the main aim of "correction" is to induce change in the attitude of militants and thereby moderate their radical views. This strategy lays emphasis on the basic trust in the ability of man to rehabilitate himself to proceed toward a readaptation of his behavior. On release, therefore, he or she is expected to abandon the militant cause in question and reintegrate into the society. But there are a number of issues that arise in this level of operation.

First, how far can hardcore militants be rehabilitated? There is the likelihood, moreover, that they may influence ordinary prisoners and recruit them while in prison. For instance, many determined and motivated people joined the ranks of the IRA post-internment. To avoid this, militants may be segregated, but such an exercise might help the segregated militants to organize and plan within the prison walls. Internment becomes a kind of "staff college" for the militants, enabling them to regroup (Wilkinson

2001: 116). Inside the cell, they have ample time to discuss various issues and strategies to be followed after their release.

Second, are prison conditions better for correction? There are two aspects involved in imprisonment: imprisonment as punishment, and imprisonment for punishment. In the first, solitary confinement and denial of societal contacts are regarded as punishment. In the second, apart from the first aspect, added humiliations are considered part of punishment. The second by default gets activated owing to poor prison conditions, resulting in the counterproductiveness of the whole corrective system.¹³ At times, counterterrorism laws suspend normal prison rules and make militant prisoners ineligible for certain concessions available to normal prisoners.

Third, while the purpose of confinement is to incapacitate a particular militant from committing or helping to commit a violent act, how long is he or she to be confined, especially in a protracted conflict? Even if militants are arrested, they tend to be released sooner or later in exchange for hostages or as concessions during negotiations. The real victims are innocents who have no link with any kind of militancy. Ultimately, the success of this level of operation depends on how the entire correction process is devised and executed.

Deploying this analytical framework, this monograph examines the Sri Lankan case to determine the efficacy of the counterterrorism laws used by the Sri Lankan state against two militancies. Sri Lanka is also chosen as a case study for two other specific reasons. First, although Sri Lanka has often been described as a model Third World democracy, with high social indicators, it has faced ethnic secessionism for nearly three decades. Second, the legal traditions of Sri Lanka combine (Dutch and British) colonial law with an attempt to adopt legislative models of other countries in the recent times.

The Sri Lanka Case: Legal Responses and How They Worked

The Background

Sri Lanka is a multiethnic society, with a population of about 20 million as of 2006.¹⁴ The people of the island are broadly divided into six categories: Sinhalese account for 74 percent of the total population; Sri Lankan Tamils, 12 percent; Indian Plantation Tamils, 5 percent; Muslims, 7 percent; Burghers, 1 percent; and aboriginal tribes, an insignificant number. The above categories are not monolithic in nature and consist of many divisions. On the basis of religion, the Sinhalese are either Buddhist or Christians, Tamils (both Sri Lankan and Plantation) are either Hindus or Christians, and Muslims are divided along sectarian lines. Burghers are

mostly Christians, and aborigines follow their native faith. As far as language is concerned, Sinhalese mostly speak Sinhala, which belongs to the Indo-European group of languages with a mix of vocabulary and syntax of Dravidian languages. Tamils (both Sri Lankan and Plantation) speak Tamil, a Dravidian language. Muslims speak Sinhala and Tamil, and Burghers speak English. The aborigines converse in native tribal languages (Baxter et al. 1987: 302–6). As far as caste is concerned, Sinhalese distinguish themselves into Goyigama (agriculture), Karava (fishing), Durawa (toddy tappers), and Salagama (cinnamon peelers) in that order of dominance. The Sri Lankan Tamil community is divided along lines similar to the Sinhalese caste system into Vellala (land-owning), Karayar (fishing), and groups like the Pallas and Pariars, who do menial jobs. Caste distinctions are not visibly found in other ethnic categories. On the basis of geographical location of population, Sinhalese may be “Kandian” or “Low Country”; Sri Lankan Tamils geographically identify themselves as Jaffna Tamils, East Coast or Batticaloa Tamils, and Colombo Tamils; Plantation Tamils may be either up-country or low-country. The Muslims are divided into eastern and mainland; Burghers are largely urban, and aborigines live mostly in the jungles of central and southeastern Sri Lanka.

The *Mahavamsa* and *Culavamsa* chronicles trace Sri Lanka’s history to the arrival of the banished, half-leonine Prince Vijaya from Vanga (modern-day Orissa/Bengal) with 700 followers. But it was Devanampiya Tissa (268–31 B.C.E.) who was responsible for converting the majority of Sri Lanka’s population to Buddhism. There was constant interaction with the Indian subcontinent in terms of intermarriage, religion, migration, and literature in the succeeding centuries. Various invasions from southern India and the resulting internecine strife led to the division of Sri Lanka into three kingdoms, which centered around Kotte in the far south, Kandy in the center, and Jaffna in the north.¹⁵ None of these three kingdoms were powerful enough to overpower the others and unify the island, and this status quo continued until the arrival of Portuguese in 1505 C.E.

Without any territorial or political ambitions, and with the sole aim of mercantilism and missionary expansion, the Portuguese found Sri Lanka strategically very significant. The Dutch, who were expanding their spice trade from their Indonesian base, subsequently ousted the Portuguese from the island in 1658. Their noteworthy contribution to Sri Lanka was in the judicial and administrative systems (Wilson 1979: 4–5). Through the Treaty of Amiens, Sri Lanka became the “first crown colony” of Great Britain in 1801; the Kandyan Convention of March 1815 brought the island under British sovereignty. The acceptance of most of the recommendations of the Colebrooke-Cameron Report of 1833 led to wide-ranging

reforms of Sri Lanka's administrative, educational, judicial, and economic systems, which continued for over 100 years. Plantation crops like tea and coffee were introduced successfully on the lines of the Jamaican plantation system, which transformed the island's economy from subsistence to a profitable plantation system. At the social level, while there was social mobilization and modernization owing to Western influences, Buddhist revivalism was taking place as a simultaneous reaction to Christian missionary activities.¹⁶ On the political front, reforms were slowly introduced, and local elites were gradually accommodated in the administration. Universal adult franchise was introduced in 1931 under the Donoughmore Constitution, which ushered in participatory democracy. The postcolonial Constitution, which was drafted by the Second Royal Commission (known as the Soulbury Commission) came into effect on February 4, 1948, the day Sri Lanka achieved independence. Sri Lanka opted not to become a republic, and the governor-general represented the British monarch as the head of the state (Jupp 1978: 3–4).

Things looked good for the first few years after independence. Unlike in other newly independent states, there were periodic elections, with smooth transfer of power, without any incidents of violence or subversion. Impressive economic growth and a high human development index prompted even developed Asian states like Singapore to look to Sri Lanka as a model. Not surprisingly, Sri Lanka was referred to as a “model of Third World Democracy” (Ibid.). Challenges, however, slowly emerged. After independence, the first spark, albeit a minor one, concerned the status of Plantation Tamils.¹⁷ The first postindependence government of Sri Lanka under the United National Party (UNP) virtually made the community both stateless and voteless by three pieces of legislation: the Ceylon Citizenship Act of 1948, the Indian and Pakistani Residents Act No. 3 of 1948, and the Ceylon Parliamentary Elections Amendment Act No. 48 of 1949. Surprisingly, the All Ceylon Tamil Congress (ACTC), representing Sri Lankan Tamils, supported the move. This prompted a vertical split in the Congress, with S. J. V. Chelvanayagam forming the Federal Party, which went on to dominate the Sri Lankan ethnic politics, overshadowing the ACTC.

Earlier, dissensions within the UNP led to one of its stalwarts, S. W. R. D. Bandaranaike, forming the Sri Lanka Freedom Party (SLFP), paving way for a two-party system in the country. The most explosive

Sri Lanka was referred to as a “model of Third World Democracy”

issue came in the form of “Sinhala Only Act” introduced by Bandaranaike soon after his election as prime minister in 1956 to fulfil his election promise of making Sinhala the only official language, as against the existing two-language policy (Tamil and Sinhala). This precipitated protest from the minority Tamil community, whose education and employment privileges were affected. The government responded by signing the Bandaranaike-Chelvanayagam Pact on July 26, 1957.¹⁸ But Bandaranaike unilaterally abrogated the pact owing to protests from the Buddhist clergy. The island experienced intercommunal strife in 1956 and 1958, which claimed around 350 lives,¹⁹ setting the tone for the future militarization of its society.

Bandaranaike’s assassination by a Buddhist monk in 1959, arising out of the same issue, propelled his widow, Sirimavo, into politics. Yet another attempt to assuage the feelings of the Tamil community, the Senanayake-Chelvanayagam Pact of 1965,²⁰ failed owing to the government’s inability to implement the agreement. The gulf between the Tamil and Sinhalese communities started widening. The United Front government’s

“Standardisation Policy,” advanced by Sirimavo Bandaranaike in 1971, acted as another wedge in the widening gulf. The new education policy privileged Sinhalese students in higher education, as against Tamil students, whose careers also depended on gaining professional degrees. The policy was in response to an insurrection led by the JVP, making most use of frustrated unemployed youth, which was crushed ruthlessly. The United Front government

***[The 1972 Constitution]
unambiguously depicted
Sri Lanka as a Sinhala
Buddhist-dominated state***

further went ahead in enacting the first republican Constitution in 1972, which unambiguously depicted Sri Lanka as a Sinhala Buddhist-dominated state. With this, the political struggle of Tamils entered its final phase of seeking self-determination. The Federal Party transformed itself into the Tamil United Front, which later became the Tamil United Liberation Front (TULF) following a resolution passed at Vaddukoddai in 1976.²¹ But the struggle was to be by nonviolent means.

Persistent frustration, however, led Tamil youth “to abandon the Gandhian doctrine of *ahimsa*, which they realized was irreconcilable with revolutionary political practice. . . . Confronted with [a] political vacuum and caught up in a revolutionary situation created by the concrete conditions of intolerable national oppression, the Tamil youth sought desperately to create a revolutionary political organization to advance the task of national liberation” (Balasingham 1983: 23–25). The central argument

was that an unresponsive state had to be dismembered by means of war in order to satisfy minority ethnic aspirations (Rajanayagam and Banda 1994: 30). Young Tamils organized themselves into groups and started attacking symbols of state power, assassinating progovernment personnel, and carrying out bank robberies and ambushes of security personnel in the north-eastern part of the island. At the height of the insurgency in the mid 1980s, there were five major and nearly thirty splinter groups. Prominent among them were the Tamil Eelam Liberation Organisation (TELO), the People's Liberation Organization of Tamil Eelam (PLOTE), the Liberation Tigers of Tamil Eelam (LTTE), the Eelam Revolutionary Organisation of Students (EROS), and the Eelam People's Revolutionary Liberation Front (EPRLF). Uncritical belief in militancy and sympathy for the militants gradually rose among the Tamil people, especially after the July 1983 riots (Spencer 1984: 191–92).

Successive Sinhala-dominated governments failed to give the moderate Tamil leadership enough room for maneuver to handle the crisis, especially when the militants' popularity among the Tamils was growing. Colombo's intermittent gestures for talks were only to buy time to deal with the militants. Sinhalese society believed that only a military victory over the Tamils would ultimately secure Sri Lanka's territorial integrity. The fulfillment of this Sinhala Buddhist nationalist desire was thus entrusted to the armed forces. The central message, readily accepted by the ethnically mobilized masses, was that this ethnic war had historical antecedents and was just and imperative. This combination of state power, religion, mythology, and popular ethnic prejudice laid firm ideological and popular foundations for the militarization of the state in the 1980s.

On their part, the Tamil militants justified their violence on various counts. The LTTE, for instance, describes itself using the metaphor of the hydra, which regenerates itself tenfold if its head is cut off. This imagery was meant to counter the Sri Lankan military leaders' resolve to eradicate or crush the militants by force (Trawick 1999: 140). In the follow-up to such vows, the government's primary tactic was the so-called Guatemalan game plan of inflicting terror on the ethnic minority population until the "sea" in which the LTTE "fish" swam was effectively poisoned (Ibid.).

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With the massive ingress of Sri Lankan Tamil refugees into Tamil Nadu after the 1983 riots, India could not remain unaffected.²² In view of its national security interests in the region, New Delhi offered its good offices to resolve the conflict through peaceful negotiations. At the same time, the Indian intelligence agencies both armed Tamil militants and trained them “in field craft, marksmanship, use of explosives and handling of telecommunications equipment” (Kadian 1990: 105). The militants then took on the Sri Lankan forces with more confidence, in what is known as Eelam War I.²³ This, in turn, gave the Sri Lankan armed forces an excuse to use more terror in the north to restore “law and order.” It also resulted in the militants taking the law into their own hands and indulging in indiscriminate executions of “traitors,” extortion, robberies, and assassinations in the Tamil-dominated areas.

The failure of various peace missions prompted India to enter into an accord with Sri Lanka “to establish peace and normalcy” in Sri Lanka.²⁴ Under the accord, India sent the so-called Indian Peace Keeping Force (IPKF) to the island. Unable to fully implement the agreement, however, the IPKF in due course became embroiled in the armed conflict, fighting the same Tamil guerrillas whom the Indian establishment had trained not long before. The IPKF’s operations, especially against the LTTE, became one of the reasons for the exacerbation of violence in Tamil society.

In a surprising turn of events, the Sri Lankan state then turned against India and secretly aided the LTTE against the Indian peacekeepers.²⁵ There was also widespread violence in the south, led by the JVP, in protest against the IPKF. This second insurrection was once again suppressed by force, but not before claiming thousands of lives, including that of its leader Rohana Wijeweera, between 1987 and 1990. When the IPKF left Sri Lanka, the so-called Eelam War II broke out between the LTTE and the Sri Lankan security forces in June 1990. The UNP government under R. Premadasa was determined to achieve peace by annihilating the Tamil militants, especially the LTTE. The government went to the extent of aerial bombing of civilian areas and economic blockade of the Jaffna peninsula to achieve its objective. Colombo was much later to recognize this as a mistake. Eelam War II ended in a stalemate.

The succeeding People’s Alliance government in 1994, headed by Chandrika Kumaratunga, initially looked promising. She won election on a peace platform and seriously initiated talks with the LTTE during 1994–95 based on comprehensive devolution proposals. This spell of peace efforts got support even from the war-weary security forces. The talks broke down, however, resulting in Eelam War III, and after the security forces achieved some spectacular victories in 1995 and early 1996,

Chandrika became convinced of the rightness of what was called the “war-for-peace” program.

Jaffna was wrested from the LTTE in December 1995. But the security forces started facing reverses, starting in July 1996, with the launching of the LTTE’s “Oyatha Aligal” (Unceasing Waves) operation, in three phases.²⁶ The major blow to Colombo came with the fall of Elephant Pass in April 2000. The LTTE also tried in vain to recapture Jaffna. Thereafter, a stalemate continued on the military front, with the LTTE ensconced in the Wanni region and the government forces on the Jaffna peninsula.

On February 22, 2002, with Norwegian mediation, a ceasefire agreement was entered into between the Sri Lankan government, led by Ranil Wickremasinghe, and the LTTE chief Velupillai Prabhakaran. However, the cease-fire agreement has virtually been abrogated since March 2004, when the LTTE split, after its eastern commander Vinayagamoorthi Muralitharan (aka Colonel Karuna) fell out with the leadership of the so-called Wanni Tigers, and with the assumption of Sri Lanka’s presidency by Mahinda Rajapakse in November 2005. As of November 2006, there has been a state of “undeclared war” on the island.

A Tale of Two Militancies

Both Sinhala and Tamil militancies are primarily youth revolts that arose owing to the inability of successive Sri Lankan governments to address the sociopolitical and economic grievances of the youth, perceiving them as merely “law and order” problems (Perera 1998b: 4). A basic distinction between these two militancies, however, is that while the one is ethnonationalistic, the other is ideological. It is pertinent to understand at least briefly the characteristics and support bases of each of these militancies to analyze the effectiveness of Sri Lanka’s counterterrorism laws and why they worked differently in each case.

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Tamil Militancy

The rise of armed militancy in the Tamil community was necessarily an extension of ethnic politics between the majority Sinhala and minority Tamil communities. The failure of Tamil moderate politics to articulate and win the rights of Tamils gradually led to a situation where militant youth took over the movement. Members of the student wing of the predominant moderate party, the Tamil United Liberation Front (TULF), took to violence, forming various militant groups to fight for separation.

At one time, thirty-seven groups existed; five were prominent: LTTE, TELO, EPRLF, PLOTE, and EROS. Irrespective of the group, the militants were referred to as the “boys.” In the fight for hegemony among these groups, the LTTE emerged as the most powerful militant organisation (Wilson 2000: 27). At present, it is the only Tamil militant group that exists. The other groups either connived with the Sri Lankan armed forces against the LTTE (PLOTE, EPRLF, and TELO) or merged with the LTTE (EROS).²⁷ It is significant, therefore, to look at the LTTE.

The aim of the LTTE is to establish a separate Tamil state (Eelam), which will be socialist and casteless, through armed struggle.²⁸ Lenin’s conception of self-determination and the revolutionary vanguard forms the organization’s basic ideology. Earlier, the LTTE’s struggle was defined in Marxist terms, but as Veluppillai Prabhakaran rose to prominence, its Marxism “withered away.” The class war transformed into a race war. The tiger symbol used by the LTTE, an allusion to the symbol of the South Indian Chola Empire, highlights its Tamil links.²⁹ The Tigers’ ideology of violence is drawn from the Dravidian National Movement in Tamil Nadu in the 1950s and 1960s and marks a revival of the martial culture of long-suppressed military castes of South India, such as the Maravars.³⁰ The “cult of martyrdom” and the ideology of vengeance are based on such appeals to a heroic past.³¹ Prabhakaran has profoundly influenced the LTTE, however, as regards to its members’ characteristic paranoia, fanatical bravery, relentless pursuit of vengeance, and disregard for human life. Death is immaterial to LTTE cadres, who carry cyanide capsules strung around their necks and are expected to use them when captured so as to avoid any risk of revealing information under torture.³²

After beginning as a handful of youths, the LTTE now has over 10,000 hardcore cadres. It is the only Sri Lankan militant group to have separate land, sea, and air wings. Apart from these, there are also separate artillery, commando, armored, intelligence, medical, and welfare units. The group also has a separate wing for women fighters.³³

At the macro level, the Tigers’ strategy has four key components:

- Preparing for war in peacetime, in line with the Maoist doctrine of retreat and recuperate
- Attempting to attain total control over the Tamil struggle to gain legitimacy as the sole representative of Sri Lankan Tamils³⁴
- Subordinating the political struggle to the military one³⁵
- Combining guerrilla and conventional warfare tactics in battle

In addition, the Tigers make use of suicide bombings. Though many militant groups use this tactic, the LTTE is one of the few to have adopted it as an article of faith.³⁶ A separate unit, known as the “Black Tigers,” organizes suicide attacks on civilian and military targets and seeks to eliminate key leaders by this means.³⁷

For the Tigers, Prabhakaran is supreme. At the helm is the military wing, which reflects classical Maoist doctrine by emphasizing discipline and the absence of a formal ranking system.³⁸ The Central Committee is the highest decision-making body, with Prabhakaran as its chairman. The structure has both political and military wings to manage Tamil-dominated areas of the northeast. Area commanders with many years of fighting experience are allowed sufficient autonomy to take care of tactical matters.³⁹

The LTTE’s popular support comes from three sources: its intra-Sri Lankan Tamil constituency, the Sri Lankan Tamil diaspora, and other Tamils, including those in India. The paws of the Tigers extend from Canada and the United States in the West to Australia in the East. The linkages are owing to the presence of the Tamil diaspora in those countries, which is estimated at around a million, who fled from the ethnic conflict in Sri Lanka.⁴⁰ Of late, owing to crackdowns on the Tigers by the United States, Canada, India, Europe, and South Africa, the support base of the LTTE has dwindled. The Tigers’ links are now largely confined to some western European countries, like Britain, Germany, and the Nordic countries, in addition to Australia, Thailand, Myanmar, Cambodia, and South Africa, but not at the governmental level.⁴¹ India, which was once highly sympathetic to the LTTE, outlawed the organisation soon after the assassination of its prime minister, Rajiv Gandhi, by the Tigers. As of now, only a tenuous linkage continues in Tamil Nadu for political purposes.⁴²

The LTTE’s funds come from three major sources:

1. Diaspora contributions: The major source of funding is by Sri Lankan Tamil expatriates living in developed countries.⁴³
2. Taxation: The LTTE also collects “taxes” from the people living in the Tamil-dominated northeast of Sri Lanka. Significant sums also come from the checkpoints on the A-9 highway as a “transit tax” to let goods, vehicles, and people travel to and from the north and the south.⁴⁴
3. Commercial activities: At the legal level, the Tigers run businesses like restaurants and shipping operations in various parts of the world.⁴⁵ The LTTE also, however, earns huge amounts of money through gunrunning and human trafficking (Davis 1996). It is this

large funding that has enabled the LTTE to increase its firepower by acquiring sophisticated weapons and weapons systems, including surface-to-air missiles. The Tigers also use weapons captured from the Sri Lankan security forces.

The LTTE now entirely controls two districts (Mullaitivu and Killinochi) and partly controls four (Mannar, Vavuniya, Trincomalee, and Batticaloa), besides maintaining political offices in Amparai and Jaffna. In the areas under its control, it runs a de facto state, collecting taxes, maintaining law and order, pronouncing justice through its own civil and criminal procedure codes, and imposing customs duties on vehicles and persons passing through its territory.

Sinhala Militancy

While numerous Tamil groups have represented Tamil militancy, the JVP has been the unique face of Sinhala militancy. Formed in 1965, the JVP came into being as a result of the prevailing socioeconomic crisis and the failure of established left parties—the Trotskyist Lanka Equal Society Party, or Lanka Sama Samaja Party (LSSP), and the Communist Party—to address the crisis politically. The JVP's ideology vacillated between left and right. On the one hand, it claimed to represent leftist ideology ranging from Marx to Che Guevara and latter-day “Trotskyism without

Trotsky.”⁴⁶ Its leftist claim was symbolized by the color red, populist welfarism, and opposition to globalization. The first insurrection by this group in April 1971 in fact drew its inspiration from the successful Cuban revolution led by Fidel Castro.⁴⁷ On the other hand, the JVP's rightist stance was shown in its appeal to Sinhala nationalism and its outlook toward minorities. Its cadre base was predominantly Sinhala, although it initially had a handful of Tamil supporters. Most of the active members of

*[the] JVP has been
the unique face of
Sinhala militancy*

the group were educated, unemployed rural Sinhala, mostly poor—the so-called Fourth Person.⁴⁸ Although there was no caste-based recruitment or domination, lower-caste Sinhalese were attracted to the JVP's agenda far more than the upper caste. This apart, the group also dominated student unions at major Sri Lankan universities.⁴⁹ The JVP held that it “should arm itself to confront the potential threat of a neo-colonial dictatorial regime that could have been established by the pro-U.S. elements of the then UNP government. The movement was able to establish some contacts within the armed forces.”⁵⁰

The JVP's organization was marked by "bureaucratic centralism," rather than "democratic centralism," which means there was no room for questioning or independent critical thinking. In the incipient stage, its leadership consisted of the "Group of 21"—the Central Committee—headed by Rohana Wijeweera.⁵¹ Its cadres' motivation derived largely from five lectures, whose topics were "Capitalist Economic Crisis," "Indian Expansionism," "Independence," "The Left Movement," and "The Path of the Sri Lankan Revolution."⁵² In the early 1970s, apart from the party organ, *Janatha Vimukthi*, its publications included *Rathu Balaya* (distributed islandwide), *Rathu Lanka* (for the working class), and *Rathu Kekulu* (for children). But the mainstream media remained unsupportive of the JVP's agenda.

The JVP used blitzkrieg tactics during its April 1971 insurrection, which was swift, short, and fierce. The modus operandi was to create confusion by capturing all police stations and thus take power.⁵³ Its cadres attacked ninety-three police stations between the 5th and the 11th of April and were able to capture five, but for various reasons, they could get no further. First of all, there was some confusion among the rank and file about the date and timing of the attack. The days that followed April 5th were marked by "confusion, bewilderment, rumour and speculation" (Nadesan 1988: 1). Second, aided by specific intelligence, the government took preventive measures, imposing a state of emergency and arresting top JVP leaders.⁵⁴ Third, the JVP failed to create enough of a mass base before going on the attack.⁵⁵

The JVP organized its 1987–89 rebellion solely based on an anti-Indian agenda. When the IPKF landed on the island, the JVP tried to project "Indian expansionism" as a threat to Sri Lanka. The agenda gradually shifted to rallying against provincial council elections, which the JVP argued would divide the country. Through its front organization, the Patriotic People's Movement (Deshapremi Janata Vyaparaya, or DJV), it issued death threats against anyone who participated in the elections and imposed curfews to prevent people from going to vote. Those who violated the curfew were killed. The strategy worked to the JVP's satisfaction.⁵⁶ Then the JVP turned against UNP members and leaders and demanded that they abandon the UNP or face death. It did not hesitate to align with criminal elements to achieve this objective. The violence was becoming more disorganized, brutal, and irrational. This was too much for the UNP government and the people to bear. Finally, the JVP decided to attack the security forces head on. In August 1989, it gave an ultimatum to all security force personnel to abandon their posts or be killed, along with their family members. This led the security forces to go after JVP members for personal reasons, which proved too costly for the JVP.⁵⁷

Unlike the militant Tamil groups, the JVP did not have any support base in foreign countries. It was perhaps the “nothing foreign” mindset of the JVP since its inception that led it to shun “strategic alliances with other socialist countries,” which it viewed as “not based on proletarian internationalism.”⁵⁸ North Korea allegedly supported the JVP during the 1971 insurrection, but not significantly. Diaspora support was virtually absent.

An Overview of Legal Responses

Rather than recognizing obvious problems of governance and the need for accommodation, the Sri Lankan state has frequently responded to expressions of grievances with repression and violence, which have been viewed simply as law and order or security problems (Uyangoda 2000: 114). Two

the Sri Lankan state has frequently responded to expressions of grievances with repression and violence

JVP insurrections and the rise of Tamil militancy clearly indicated the decline of the Sri Lankan state and its legitimacy. Although successive governments have stressed that militancy would be countered democratically, infusing authoritarian means into the country’s democratic institutions has in practice been considered the best way to confront it (Warnapala 1994: 160). Sri Lanka’s counterterrorism laws, which have been used indiscriminately to deal with any kind of disturbance—

whether labor strikes, election violence, rioting, or insurgency—and not just in extraordinary circumstances, are an example of this. Sri Lankan counterterrorism laws can be placed in five categories, outlined below.

Emergency Provisions

In Sri Lanka, emergency provisions are widely used to combat militancy.

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They are popularly known as “Emergency Regulations” declared under the Public Security Ordinance (PSO) enacted just before independence to deal with the general strike of 1947. The PSO was passed as “an urgent bill” in ninety minutes, despite warning from the floor of the House that “the matter requires careful consideration.”⁵⁹ The situation at that time did not seem to call for stringent provisions such as

detention without trial, search and seizure, immunity from prosecution

for security forces, absence of judicial scrutiny, and so on, to be incorporated into the PSO. The *Ceylon Daily News* argued, however, that the bill was justified because “existing law was inadequate in the event of emergency.” The newspaper asserted “that a Bill giving the Executive the right to make Emergency Laws not to be questioned in any court had to be introduced in the House. But it was action and reaction, cause and effect. . . . The Red Marshals in our midst had thrown [down] the gauntlet, seeking to paralyse the life of their own country. The government picked it up and threw it back wrapped in this PSO” (*Ceylon Daily News*, June 11, 1947: 1). Passage of such a draconian law is partly explained by the fact that the government at the time was dominated by the center-right UNP, which distrusted leftist ideology. In addition, the 1915 Sinhala-Muslim riots and the way they had been dealt with by the British were at the back of the elitist mind.⁶⁰

Irrespective of the party or coalition that headed them, successive governments used the PSO frequently and made its provisions more and more stringent through amendments.⁶¹ The hardening of legalities was dictated by political disturbances that occurred every few years. An amendment in 1959, influenced by the 1958 ethnic riots, conferred additional powers on the chief executive (the prime minister). The 1971 JVP insurrection led to the incorporation of the PSO into the 1972 republican Constitution (Wickremasinghe 2005). The 1978 Constitution simply followed the footsteps of the previous Constitution, although the UNP government, which came to power in 1977, made some changes to the emergency provisions by amending the PSO.⁶² Under the 1978 Constitution, the president is vested with extensive and wide powers to issue regulations. And no court of law can call into question the existence or imminence of a state of public emergency.⁶³ The proclamation has only to be sanctioned monthly by Parliament in accordance with Article 155 of the Constitution. The regulations cover a wide range of activities, some with only remote or no relevance to national security.⁶⁴ Table 1 gives a chronology of declaration of emergencies since independence.

Laws of Proscription

Sri Lanka became one of the few countries to use a separate law to proscribe militant groups when it introduced the Proscription of the Liberation Tigers of Tamil Eelam and Similar Organisations Act No. 16 of 1978. This law gave the president the power to proscribe any organization that, in his opinion, “advocates violence or is directly or indirectly concerned in unlawful activity.” There was no provision for the banned organization to refute the charge or appeal against the ban. To the govern-

Table 1. Sri Lanka's Emergency Declarations since Independence

Serial No.	From	To
1	August 12, 1953	September 11, 1953
2	May 27, 1958	March 26, 1959
3	September 25, 1959	December 3, 1959
4	April 17, 1961	April 4, 1963
5	March 5, 1964	April 4, 1964
6	January 8, 1966	December 7, 1966
7	December 19, 1966	January 18, 1969
8	October 26, 1970	November 25, 1970
9	March 16, 1971	February 15, 1977
10	November 29, 1978	May 28, 1979
11	July 3, 1979	December 27, 1979
12	July 16, 1980	August 15, 1980
13	June 3, 1981	June 9, 1981
14	August 17, 1981	January 16, 1982
15	October 20, 1982	January 20, 1983
16	May 18, 1983	January 11, 1989
17 ^a	June 20, 1989	September 4, 1994
18 ^b	April 1995	July 1997
19	August 4, 1998	May 3, 2000
20	August 12, 2005	to date

Sources: *Gazette of the Democratic Socialist Republic of Sri Lanka*, no. 771/16 (June 17, 1993); Law and Society Trust, *Sri Lanka: State of Human Rights*, various issues; *Sri Lankan Government Gazette*, various years.

^a Restricted to the northern and eastern provinces and certain areas bordering them.

^b Restricted to the northeast, areas bordering it, and the capital, Colombo.

ment's surprise, however, such labeling did not prevent either militant activities or people from joining militant groups. It was this realization that made the government repeal the act.⁶⁵ The government thereafter did not bring in any exclusive law to ban any militant organization; however, it made use of powers under the Public Security Ordinance and Prevention of Terrorism Act (PTA) to proscribe organizations from time to time. The JVP was banned in 1983, immediately after the ethnic riots, using Emergency Regulations. Similarly, the LTTE was proscribed in January 1998 after an attack on the Dalida Maligawa (the Temple of Tooth in Kandy) by introducing the Emergency (Proscription) Regulations of 1998.

This apart, the Sri Lankan government also tried to influence other countries, especially where the Tamil diaspora community is stronger, to proscribe the Tamil militant groups, especially the LTTE. In response, and partly owing to the activities of the LTTE, the Tigers were banned by India, the United States, the United Kingdom, Australia, Canada, and, recently, the European Union, where more than 90 percent of the Sri Lankan Tamil diaspora is concentrated.

Other Legislation

The Criminal Justice Commission Act

On April 6, 1972, one year after the JVP rebellion, the United Front government passed the Criminal Justice Commission Act No. 14 of 1972, which provided for a Criminal Justice Commission to “inquire into generally the circumstances which led to the rebellion”; “to inquire and determine those guilty”; and “to deal with those who [are] found guilty in the manner prescribed by the Act.”⁶⁶ Though the insurrection had begun on April 5, 1971, the period of offenses for trial was stated as being from January 1, 1968 to December 31, 1971. The act was initially to be valid for eight years, and then extended for a further five years, if required. The rationale advanced for setting up a special tribunal was that “the practice and procedure of the ordinary courts are inadequate to administer criminal justice.” Harsh provisions such as the admission of confessions as evidence (Section 11 [2]) and absence of higher appeal were included.

The Criminal Procedure (Special Provisions) Act

Apart from the PSO, the Criminal Procedure (Special Provisions) Law No. 15 of 1978, passed in May 1978, was the first legislation brought in to deal with Tamil militancy. The main objective of the legislation was to “prohibit or restrict the release on bail by certain courts of persons who

surrender or are produced in connection with the commission of certain offences, to prohibit the imposition of suspended sentences of imprisonment on, and the conditional release of, persons convicted or guilty of such offences and to provide for the imposition of a minimum punishment for such offences.”⁶⁷ The duration of the law was specified as one year, but it was extended annually and remains in force today, making it one of those temporary pieces of legislation that become permanent. A 1982 amendment took away the discretion of granting bail from the judiciary and vested it in the attorney general, who is part of the executive.⁶⁸

Special Laws

With the rise of Tamil militancy, the ruling elite saw a need for more special laws exclusively to deal with militancy. The UNP under J. R. Jayewardene, which got an unprecedented five-sixths majority in the 1977 parliamentary elections,⁶⁹ instituted numerous changes. The Constitution was changed; a presidential system was introduced; and markets were opened. Jayewardene wanted to sustain the momentum and wished for a conducive atmosphere for investments. There was, however, one obstacle: the ethnic issue and the rise of Tamil militancy. Jayewardene reiterated over and over again that “if the government is to achieve its goal of national development, then the Naxalites and the terrorists of this country [must] be brought to book.”⁷⁰ He was very confident of crushing militancy by force. Militants were regarded as a “handful of trigger-happy criminals, who have to be hunted out before they [destroy] democratic society” (Balasuriya 1987). The government first proscribed all Tamil militant groups under the Proscription of the Liberation Tigers of Tamil Eelam and Similar Organisations Act of 1978. It also passed a Criminal Procedure (Special Provisions) Act to give more teeth to the existing criminal laws. Armed with this legislation, in addition to emergency powers, Jayewardene dispatched his nephew, Brigadier Weeratunga, to Jaffna as commander of security forces in early July 1979 to “destroy terrorism in all its forms in six months’ time.” When the above measures failed to produce adequate results, Jayewardene was impatient; he proceeded to introduce the Prevention of Terrorism Act without reading the prevailing sociopolitical situation properly.⁷¹

The primary objective of enacting the PTA was stated to be the “prevention of acts of terrorism in Sri Lanka, the prevention of unlawful activities of any individual, group of individuals, association, organisation or body of persons within Sri Lanka or outside Sri Lanka and for matters connected therewith or incidental thereto.”⁷² Minister of Justice Anandatissa de Alwis was categorical: “Terrorism has to be put down; discussion comes afterwards. You cannot discuss the problems of mankind when a man is

about to press the trigger and his pistol is pointed at your head. You have to disarm him before you can talk to him, and that is what this bill seeks to do.”⁷³ The international community was offered the justification that “in bringing this Bill we have followed what has been followed in other countries. . . . The countries I have in mind are the United Kingdom, Germany, France, and Italy. In every one of those countries there are specific laws to deal with these persons [armed militants].”⁷⁴ Sri Lanka was only following the footsteps of other “developed democracies.”

It is important, at this juncture, to mention some of the key provisions of the PTA that were thought imperative to prevent and deter militant activities. The offenses listed in part 1 of the act include attack on, abduction of, or killing of a “specified person,”⁷⁵ criminal intimidation, robbery or mischief committed on government property, manufacture or possession of firearms or explosives, causing racial or communal disharmony through speech or writing, erasing or mutilating of sign boards, harboring a “proclaimed person” or concealing information on the whereabouts of such person,⁷⁶ and preparation, abetment, conspiracy, or incitement to commit the offenses listed above. Most of the offenses listed are part of the existing Penal Code. The difference lies in the penalties. While the first offense in the list (pertaining to killing or abduction of “specified persons”) carries the penalty of life imprisonment, all the other offenses are punishable by five to twenty years of solitary confinement. It is not clear why an offense like murder, which carries capital punishment under normal criminal laws of Sri Lanka, carries only life imprisonment under the PTA. One reason was to show the outside world that the “PTA was less harsh.”⁷⁷ Similarly, it is beyond comprehension why acts like mutilating sign boards, which are normally overlooked or punished by simple imprisonment or a fine, should bear up to twenty years’ imprisonment. A plausible explanation is that the government wished to increase the “deterrence value” of the PTA in relation to such offenses.⁷⁸

What makes the Prevention of Terrorism Act even more draconian, however, are its provisions for forfeiture of the property of those convicted (Section 4), arrest any person (Section 6 [1] [a]), search of any premises or vehicle (Section 6 [1] [b, c]), seizure of any document (Section [1] [d]), prolonged detention (Section 7, 9), restriction of movement of a suspect (Section 11 [1]), trial without preliminary inquiry (Section 15), admissibility of confession as evidence (Section 16), no allowance for bail (except in exceptional circumstances determined by Court of Appeal) (Section 19), immunity of law enforcement personnel from prosecution (Section 26), and precedence of the PTA over all other written laws (Section 28).

Were these provisions consistent with the Constitution? What role did the judiciary play in this regard? Judicial opinion was sought on the constitutionality of the PTA under Article 122 (1) (b) of the Constitution.⁷⁹ Since the bill was introduced as “urgent in the national interest,” according to Article 122 (1) (c), “the Supreme Court shall make its determination within twenty-four hours (or such longer period not exceeding three days as the President may specify).” The Supreme Court ruled that the bill did “not require the approval of the People at a referendum nor is it one within the contemplation of Article 83 of the Constitution.”⁸⁰ It is true that the Supreme Court had two constraints in giving its opinion: time and scope.⁸¹ But, for learned judges, it does not require more than a glance to recognize the consequences of certain provisions of a statute. The Supreme Court either overlooked or chose not to point out to the president and the legislature that the bill was inconsistent with Articles 1, 3, 4, 10, and 11 of the Constitution.⁸² Given that there was no provision for judicial review,⁸³ the judiciary could have gone through the bill a bit more carefully. Thus, it was a failure on the part of the judiciary in the first instance.⁸⁴ The 1978 Constitution was also partly responsible for the problem. It was drafted and enacted in a hurry by a party—the UNP—afflicted with hubris.⁸⁵ The Constitution paved the way for authoritarian leadership by an executive president who enjoyed life-long impunity. It made room for extraordinary laws like the PTA.

The PTA was passed without giving the people enough opportunity to debate and discuss the bill; even parliamentarians were not given an adequate chance to read through the bill, and it was passed in a single day.⁸⁶ The Sinhala majority viewed the PTA as the key to tackling “Tamil

terrorism.” The Sinhalese also did not get the opportunity to realize the depth of the frustration that led the Tamil youth to militancy (Balasuriya 1987: 32). As far as the Tamil moderate leadership, especially the TULF, was concerned, it could not do much to prevent the PTA. During the passage of the bill, the TULF parliamentarians were in fact boycotting the House in

protest against the redrawing of the Vavuniya electoral district.⁸⁷ Moreover, Jayewardene promised the Tamil leadership that the law was only a temporary measure.⁸⁸

*The Sinhala majority
viewed the PTA as the key to
tackling “Tamil terrorism”*

Laws Empowering the Security Forces

Apart from providing immunity to the security forces through the PTA (Section 26) and the Emergency Regulations, the Sri Lankan government introduced two indemnity laws to reinforce the immunity of law enforcement personnel from legal proceedings. The Indemnity Act No. 20 of 1982 was enacted “to restrict the taking of legal proceedings against certain persons in respect of certain acts and matters done or purported to be done with a view to restoring law and order during the period August 1, 1977 to August 31, 1977, consequent upon the existence of widespread disorder and lawlessness in the country.” Later, through the Indemnity (Amendment) Act No. 60 of 1988, introduced on December 17, 1988, the period of the Indemnity Act was extended (from August 1, 1977) to December 16, 1988.

***The Sri Lankan
government introduced
two indemnity laws***

Special Purpose Laws

Control of Financing of Terrorism

The Suppression of Terrorist Financing Act No. 25 of 2005, adopted by the Sri Lankan Parliament on July 7, 2005 to give effect to the UN Convention on Suppression of Terrorist Financing of 1999, of which Sri Lanka is a signatory, is the latest addition to the country’s counterterrorism laws. Under this law, providing or collecting funds for terrorist activities is an offense (Section 3 [1] [2]), punishable by fifteen to twenty years’ imprisonment, in addition to a fine (Section 3 [4]).

In sum, Sri Lanka’s counterterrorism laws are characterized by:

- Emphasis on protection of the state rather than people
- Overreaction to the threat posed and measures that are far more drastic than necessary
- Hasty enactment without much scope for public debate or judicial scrutiny
- Inadequate safeguards against misuse of these laws

How Well Have the Counterterrorism Laws Worked?

As the previous section shows, Sri Lanka’s counterterrorism laws are comprehensive enough to deal with any kind of armed militancy in all its

stages. The main issue, however, is not one of the sufficiency or insufficiency of legal provisions but of their efficacy in combating militancy (Alexander and Nanes 1986: 214). Whether the legal framework against militant activities worked effectively or not is evaluated at three levels: prevention, deterrence, and correction.

Were the Laws Able to Prevent Militancy?

The Sri Lankan state's view of the preventive aspect of legal framework is succinctly put in one of the documents related to the 1971 JVP insurgency: "We know of no country whose Laws require a government to stand and wait when any organisation, whether domestic or foreign, plots to capture state power by the use of physical force."⁸⁹ In general, the provisions in the Sri Lankan counterterrorism laws that aim at preventing militant activities include proscription of militant organizations, declaration of prohibited/security zones, preventive detention or arrest on suspicion, and erection of checkpoints. These provisions are mostly scattered in the Emergency Regulations and the PTA.

Proscription

The Sri Lankan government had been using the strategy of labeling Tamil militant groups as "terrorist" since the late 1970s to undermine their legitimacy and capability. A legal framework for this labeling commenced when the government banned all the Tamil militant groups with the Proscription of the Liberation Tigers of Tamil Eelam and Similar Organisations Act No. 16 of 1978. To the government's surprise, however, such labeling prevented neither spiraling militant activities nor people from joining the militant groups. It was this realization that led the government to repeal the act in 1979 and experiment with the PTA.⁹⁰ The Sri Lankan government also tried to influence other countries, especially those where the Tamil diaspora community is strong, to proscribe the Tamil militant groups, especially the LTTE. In response and partly owing to the activities of the LTTE, the Tigers were banned in India, the United States, the United Kingdom, Australia, Canada, and, recently, in the European Union.⁹¹

Proscription gave the LTTE increased publicity and an aura of power,

however, largely because of the mass support it already enjoyed in the Tamil community, especially in the northeast, notwithstanding that the Tigers committed bank robberies and imposed taxes.⁹² Proscription thus failed to work in the case of the LTTE because of this popular support and the refusal of the

***Proscription...failed to work
in the case of the LTTE***

majority of Tamil community to regard its activities as unlawful.

At the same time, the LTTE is highly sensitive to proscription either by the Sri Lankan government or by the international community. In response, it tries to send two clear messages. First, through diaspora front-line organizations, it seeks to suggest that the LTTE and the Tamil community are inseparable, and that proscription of the LTTE is thus equivalent to marginalizing the whole community.⁹³ Second, it signals that banning the organization has thrown the peace process into reverse.⁹⁴ The LTTE considers that the “worldwide ban against us was due to false propaganda of the Sri Lankan government.”⁹⁵ The Tigers insist that the ban be lifted by Colombo as a precondition to their coming to the negotiating table, but they nonetheless continue to do as they see fit themselves.

Proscription was relatively successful in countering Sinhala militancy. The government proscribed the JVP in March 1971 and during 1987–88 under the PSO, sending a clear signal. Since the JVP did not enjoy support of the people, “moral condemnation” of those belonging to the organization worked.⁹⁶ For political reasons, the government also proscribed the JVP in the aftermath of July 1983 riots, along with other communist parties. Orders were issued to arrest JVP leaders, in an operation code-named “Romeo Whisky.” As a result, the JVP, which had thus far functioned as a political party, went underground. The government’s underlying intention behind the ban was to break the rising political strength of the JVP, rather than being based on credible evidence of its involvement in the 1983 riots. When the JVP leaders’ appeals that the ban be lifted went unheeded, they judged it futile to continue political activity and started organizing themselves and preparing for armed rebellion. It was, thus, the lack of political space that made the JVP resort to arms.

*proscription was relatively
successful in countering
Sinhala militancy*

Zoning

Having learned from the relative success of the use of preventative zoning by Israel, the Sri Lankan government has used the same strategy against the Tamil militancy, especially since the late 1980s. Four categories of zones are declared from time to time, under either the PSO or the PTA: “prohibited zones” and “surveillance zones” in the sea and along the adjacent coast, and “security zones” and “high security zones” on land.⁹⁷

The “surveillance” and “prohibited” zones usually fall around coasts and territorial waters in the northeast dominated by Tamils and Muslims. The main objective behind enforcing these zones is to prevent the LTTE

from getting arms and other supplies by sea from its international network. Those mainly affected, however, have been fishermen.

Security and high security zones in the Tamil-dominated northeast of Sri Lanka were created chiefly to protect military camps, strategic installations, and the lifelines of the security forces in Jaffna—Kankesanthurai harbor and Palaly airport—from LTTE attack. These zones comprise large chunks of territory in the Jaffna peninsula surrounding or encompassing eighteen strategic military installations, covering about 190 square kilometers, and they have led to displacement and economic hardship for nearly 130,000 people.⁹⁸ Those displaced live either with relatives or in refugee camps. Apart from this, there are large tracts of agricultural land in these zones, depriving many farmers of their livelihood. About 16,027 farming families have been affected. S. Paramanathan, president of the Consortium of Humanitarian Agencies, notes that Jaffna has a long historical tradition of land use, and that people wish to keep their own land and the houses they have inherited.⁹⁹

The mood of the displaced persons, especially those living in camps, was conspicuously antiestablishment. One obvious question that came up over and over again was: “Security for whom? For us or for the armed forces?”¹⁰⁰ The displacement and consequent plight of the people has provided fertile ground for the LTTE both for recruitment and to strengthen its case against the presence of government armed forces in Jaffna. While there is a military dimension to the LTTE demand, it tries to project the issue as a humanitarian one. During his Heroes’ Day speech on November 27, 2003, Prabhakaran said: “Under the cover of high security zones, the Sinhala armed forces are occupying residential areas and social, economic and cultural centres. . . . As several villages, houses and roads are entrapped by occupation, several thousands of internally displaced are unable to return to their residences. Unless this problem is resolved there, there is no possibility of normalcy and social peace being restored in Jaffna.”¹⁰¹

Both fishermen and farmers who lost their livelihoods owing to the carving out of zones by the government in the northeast mostly look to the LTTE for protection and employment. The main issue is that people are not aware when their areas have been designated as zones and when they are lifted.¹⁰² This leads to harassment by the security forces when the ordinary civilians inadvertently trespass on “prohibited areas.” The Tigers cite this as one of the reasons they seek “control of land and seas by us in our homeland.”¹⁰³ This strategy was not used by the state in the case of the JVP.

Preventive Detention

Provisions pertaining to preventive detention and arrests based on suspicion are blank checks given to the security forces. There are no clear guide-

lines in Sri Lanka's counterterrorism laws as to whom to detain as a "preventive measure" and whom to arrest based on suspicion. Discretion is vested in security personnel. This led to mass arrests, especially of youths.¹⁰⁴ Disappearances became normal, because nobody knows who the arresting person is and where the victim is taken to. "We searched all over the island" became a common refrain of the kin of the disappeared.¹⁰⁵

As a result, over a period of time, there was fear just of being an ordinary civilian Tamil aged between 16 and 40. Young men felt safer as militants in the jungle than at home or at work, where they saw themselves as "sitting ducks to be caught by the security forces any time." Some of them did not wish to join the Tigers, but their parents forced them to leave home for their own safety.¹⁰⁶ The strength of the militants in terms of numbers swelled as a result of this "push factor."¹⁰⁷

In the face of severe criticism of indiscriminate arrests, especially from the international community, President Chandrika Kumaratunga directed the armed forces in July 1997 to issue "arrest receipts" on any arrests under the Emergency Regulations and to report the arrest to the Human Rights Commission of Sri Lanka within forty-eight hours.¹⁰⁸ These instructions, however, are just "directives" and do not have legal backing. Moreover, the directives did not provide for penalties in cases of noncompliance by the security forces.

Prevention strategies under the counterterrorism laws worked fairly well, if not totally, in the case of JVP insurrections. During the 1971 insurrection, the state used the state of emergency declared on March 16, 1971 extensively as a preventive measure. The police conducted raids and arrested suspected persons just before the rebellion broke out on April 5, 1971. One of those arrested was the JVP leader Rohana Wijeweera himself.¹⁰⁹ Though the JVP was able to capture some police stations and hold them for a few weeks, in the end, the government forces recaptured them and incarcerated all the JVP members involved in the violence. Communication among the insurgents broke down, which ultimately resulted in the failure of the revolution. This was

Disappearances became normal

Prevention strategies...worked fairly well...[against] JVP insurrections

also the case during the second JVP rebellion. One main difference was the greater number of those who disappeared (*athurudahanwoowo*) as a result of preventive detention in the 1987–90 rebellion. But most of the disappearances were the result of political vendettas or personal animosity. A wide range of actors were involved. The state was thus not the sole perpetrator of disappearances.¹¹⁰

Table 2 indicates disappearances in Sri Lanka related to both the militancies.

Checkpoints

Yet another borrowing from Israeli tactics in Sri Lankan counterinsurgency operations is erecting checkpoints as a preventive measure against militant attacks. Before the ceasefire in February 2002, numerous checkpoints dotted most of the northeast and Colombo. But they could not prevent LTTE's suicide attacks on the Central Bank or the World Trade Centre in Colombo or assassination of President Premadasa and several others, including an attempt on the life of President Chandrika Kumaratunga. Being a major source of harassments and arrests, the checkpoints alienated the people further.¹¹¹

While the Sri Lankan state learned from Israel, the LTTE imitated Palestinian tactics of “criminal displacement” by suicide attacks, targeting highly protected Sri Lankan Army camps and checkpoints. Inasmuch as checkpoints usually symbolize harassment to Tamils in the northeast, the LTTE attacks them to win local support.¹¹² One of the reasons the ceasefire agreement signed in February 2002 enjoyed overwhelming support among Tamils was that it provided for the substantial removal of checkpoints.¹¹³

*the Sri Lankan state learned
from Israel, the LTTE
imitated Palestinian tactics*

However, even during the ceasefire, about 40 percent of violations committed by the government forces related to harassment at checkpoints.¹¹⁴

In comparison to the Tigers, JVP members were not strongly motivated enough to go in for suicide attacks. Checkpoints were effective, especially in urban areas, during the 1987–90 JVP insurrection. Despite severe inconvenience to people, there was not much resentment of the security barriers, which were regarded as a “necessary evil” to face the threat.¹¹⁵

Were the Laws Able to Deter Militancy?

Despite their “preventive” provisions, Sri Lanka's counterterrorism laws lay more emphasis on “deterrence value.” Elements of “deterrence” in the Sri

Table 2. Disappearances in Sri Lanka, 1983–2006

Year	Number disappeared	Area	Circumstances
1971	. . .	central, east, and south	First JVP insurrection
1983–87	860	northeast	Eelam War I
1988–90	45,000 (approx.)	central and south	Second JVP insurrection
1990	4,774	northeast	Commencement of Eelam War II
1991	410	northeast	Eelam War II
1995	55	Eastern Province, Colombo	“Operation Rivirasa” of Eelam War III
1996	648	Jaffna	When security forces regained Jaffna peninsula during Eelam War III
1997	100	north and east	Eelam War III
1998	67	Jaffna	Eelam War III
1999	147	Jaffna	Eelam War III
2000	78	Jaffna	Eelam War III
2001	55	Vavuniya, Trincomalee	Eelam War III
2002–4	None	—	Ceasefire signed in February 2002
2005	20	northeast	Renewed violence after December 2005
2006 (until November 2006)	1,000 (approx.)	northeast	Escalation of violence leading to “low-intensity war” and later, since July 2006, “undeclared war”

Sources: Compiled from annual reports of Amnesty International, Human Rights Watch, and the Asian Legal Resource Centre, reports of the Presidential Commission on Disappearances, various reports of the Working Group on Enforced or Involuntary Disappearances, University Teachers for Human Rights (Jaffna), Committee for the Investigation of the Disappeared, and Human Rights Commission of Sri Lanka.

Lankan counterterrorism laws include arrest without warrant, seizure of property, incommunicado detention and inaccessibility, disposal of bodies without inquest, prolonged trial, no bail or habeas corpus, evidence based on confession, economic blockade, and wide discretionary powers and immunity to the security forces.

Seizure

Seizure of property, movable or immovable, on conviction of any person under the PTA is considered a “bad clause” by the Tamil community and “good leverage of deterrence” by the Sri Lankan state.¹¹⁶ It is considered so because of its inherent character of collective punishment. On seizure of whatever possession, the family members or dependents of those convicted are denied their livelihood and possessions, including their place of dwelling. This again led to displacement of the entire family. There are numerous cases of families moving to LTTE-controlled areas after losing their property in such seizures in government-controlled areas. To the Tamil community, which values and cherishes traditional property, such seizures are unbearable. Section 18 (10) of the Emergency Regulations states: “Where any property is seized or detained under the provisions of this regulation the person effecting the seizure or detention shall issue a receipt in respect of such property to the person from whose custody such property was seized or detained.”¹¹⁷ No such receipts are issued, and compensatory methods are not in place. Such seizures “go against the norms of natural justice.”¹¹⁸

Such seizures were not, however, prevalent in the case of Sinhala militancy. On the other hand, there was grabbing of property from the kin of disappeared JVP members by private individuals, not by the state (Perera 1998).

Disposal of Bodies without Inquest

Both the PTA and the Emergency Regulations provide for disposal of bodies without a postmortem. They were inserted to avoid “unnecessary legal complications to the security forces that arise if inquests were conducted by medical practitioners.¹¹⁹ This led to large numbers of disappearances. The kin of those disappeared are not sure whether the victim is alive or dead and continue to live in a state of uncertainty. Section 55F of the Emergency Regulations, which provided for this “convenience” to the security forces, is the most dreaded provision.¹²⁰ Such

***the PTA and the
Emergency Regulations
provide for disposal of bodies
without a postmortem***

provisions led to numerous mass graves, like Chemmanai in the case of the Tamil militancy, and Embilipitya and Sooriyakanda in the case of the southern Sinhala militancy. Though disposal of bodies and consequent disappearances were more common in the case of the JVP insurrection, the issue was publicized internationally by the Tamil militancy. The Sri Lankan Tamil diaspora especially has been very active in highlighting disappearances in Sri Lanka at many international forums.¹²¹

Economic Blockade

This provision under the Emergency Regulations has been used since early 1987 in the case of the Tamil militancy, but not vis-à-vis the Sinhala militancy. Under it, the Sri Lankan government banned the transportation of forty-two essential items into the north, including medicines, fertilizers, chemicals, and fuel. Although the announcement was only in respect to the north, the Sri Lankan Army banned transportation of several essential items to the east as well. Food, medicines, and other items of survival were allowed, but since 1995, the government has controlled the distribution of these items on the grounds that they were falling into the hands of the militants.¹²² Even during 2001, the government maintained a long list of prohibited “war-related” items, such as plaster of paris, intravenous liquid supplies, bandages, and some drugs.¹²³ Such blockades intensified with the introduction of the Emergency (Restriction of Transport of Articles) Regulations, No. 1 of 1991 in August 1991. Since August 2006, the government has closed the A-9 highway that links the Jaffna peninsula with the rest of the island, triggering a shortage of essential goods for nearly 600,000 people in the peninsula. NGOs and international humanitarian groups that sought to take these items to “uncleared areas” needed permission from local officials, as well as from the Ministry of Defense. Even the International Committee of the Red Cross was allowed to transport food only with military permission, which normally took several days to obtain (Asian Human Rights Commission 1998).

The denial of basic items was intended:

- as a tool of punishment
- to reduce the supportive mechanisms and stamina of the rebels; and
- as a weapon of war to break down civilian support to the rebels by attracting the former to government-controlled areas

However, these objectives of the government have not been fully achieved, because the rebels grab some of the relief materials sent to the

areas under their control. The real effect on the ground is that such restrictions on food have resulted in a drastic fall in the standard of living and severe malnutrition among the population in the north. This is evident from a memorandum prepared for the fiftieth Session of the UN Commission on Human Rights in February 1994:

As a result [of the embargo] over 1500 Tamils including 2000 children died of disease in Jaffna hospitals. Electricity has been cut off for over three years and all industries and education have been consequently affected. The ban on fertilizer has drastically affected agricultural activity in the north. Telephone lines to the north were disconnected in 1986 and newspapers from the north are not allowed into the south and journals and books from the south are prohibited to the north. Radios and televisions cannot be used as a result of lack of electricity. Ban on paper has affected education and printing industry. As a result of the economic blockade around 200,000 people have lost their employment.¹²⁴

In addition, the ban on agricultural implements like tractors and chemical fertilizers has resulted in a dearth of food productivity in these regions for the past many years.¹²⁵ The restrictions on items such as cement, batteries, and currency has also had a negative impact on the relief work of the NGOs in the rebel-controlled areas.¹²⁶

The Security Forces and Immunity

The security forces play an important role in maintaining the deterrence level of Sri Lanka's counterterrorism laws, which give them wide powers and a free hand to operate against militants, with immunity from legal proceedings with regard to whatever is done by them during such operations. The main burden of tackling any armed militancy in general in democracies lies with the police forces. But in Sri Lanka, it is often the armed forces, rather than the police, that deal with the armed militants. The main fear expressed was that the security forces would get used to the special powers if allowed to use them for a long time. As far back as 1979, a Sri Lankan parliamentarian observed: "If you allow Emergency Regulations to continue for an indefinite period the agency enforcing this regulation will become so accustomed to it that they will find it difficult to differentiate between Emergency Regulations and the ordinary law of the country."¹²⁷ One example of this is the habit of searching without warrant even in places where a state of emergency is not in force. The armed forces were starting to treat the Emergency Regulations as the norm as early as the

1970s. “The officers individually may be good or bad. But when you let loose the Army, they will behave in the way that they normally behave,” an MP observed in 1979.¹²⁸

But how far have extraordinary powers and immunity for the security forces acted as deterrence against militancy in Sri Lanka? There are two answers. In the case of Tamil militancy, the added powers to the security forces have only worsened the situation, for three reasons: First, the ethnicization and politicization of the security sector has resulted in a mindset among the security services’ personnel that any means, no matter how ruthless, can be used in curbing the forces that challenge the sovereignty of the state (Wickremasuriya 1999). They bring with them the hubris of Sinhala hegemonism, nurtured in schools and temples. Second, such mindsets are not changed during the training period, which is short and limited. The aim of the training is to produce a fighting force against Tamil militants rather than to mold a protective arm.¹²⁹ As a result, new recruits are not made aware of the procedures to be followed to avoid possible violations while performing their complex tasks, and of the need to respect them. This lack of understanding is identified as the major reason behind most of the violations by the security forces after an arrest and before the suspect is produced before a judicial authority.¹³⁰ Third, their social isolation and a siege mentality amidst a hostile population, whose language is alien, have contributed to the perception of the security forces as a “Sinhala-dominated occupation force” by the Tamil community (Jayaweera 1991: 65–66). The lack of Tamils in the security forces has reinforced this idea.

In the case of Sinhala militancy, however, none of these factors existed. Security forces handled the JVP insurrections of 1971 and 1987–90 high-handedly, using special powers granted by the Emergency Regulations. When the JVP started targeting security force personnel and their family members after August 1989, it was a do-or-die battle for the government forces.¹³¹ “Operation Combine” went on full swing. Paramilitary units like the Green Tigers, Black Cats, Yellow Cats, Red Army, and Ukussa operated alongside the security forces against JVP members with the utmost impunity. This deterred both the members and sympathizers of the JVP.¹³² At the same time, unlike in the northeast, the security forces laid more emphasis on winning the hearts and minds

In the case of Tamil militancy, the added powers to the security forces have only worsened the situation

of the people. Major General Cecil Waidyaratne, who headed “Operation Combine,” sent a clear message to the security forces on “do’s” and “don’ts” in dealing with the southern militancy.¹³³ “Let us be guided by

*the security forces laid
more emphasis on winning
the hearts and minds of
the people [in the south]*

the principle of minimum force,” he instructed. “Use no more force than necessary even if it means to risk your own self. . . . Your approach and attitude when clearing towns and villages should be totally different to what you would do when tackling known enemy hideouts. . . . Even if you come under fire you should not resort to spraying areas with fire. You must surround such places and get the subversives to surrender even

though such process is time consuming and risky.”¹³⁴ The “hearts and minds” approach of the security forces helped them to get good intelligence on JVP members in hiding.

Did the Counterterrorism Laws Help
Rehabilitate the Militants?

Emphasis on the aspect of “correction” in Sri Lanka’s counterterrorism laws has not received much attention. There are indeed some provisions that aim at “correcting” militants and returning them to normal social life. But the main question is how far those provisions influenced the militancy in general. Did they achieve the intended objectives?

In the case of Tamil militancy, there is a room for setting up “rehabilitation centres” run by the government for young Tamil militants between the ages of sixteen and twenty-one. Detainees are regularly lectured on the importance of a normal social life. The detainees are also given a chance to do some social work in nearby village areas to give them a sense of community feeling in action. However, these “rehabilitations” are not conducted from the point of view of “correction.” In practice, the way the detainees are treated negates any correction value.¹³⁵ On October 25, 2000, for instance, a Sinhalese mob attacked Tamil detainees held at the Bindunuwewa rehabilitation center, killing twenty-seven and injuring fourteen. This brought out the reality of government-sponsored correction programs, where detainees live in fear rather than having any hope for their future.¹³⁶ In normal prisons, the situation is no better. The killing of fifty-three Tamil prisoners in Welikade prison in July 1983 is still as fresh in people’s memory as the 1983 ethnic riots. Ironically, the Emergency Regulations provide for directions from the secretary to the Ministry of

Justice to prison chiefs to alter or suspend any of the prison provisions relative to those detained under the PTA or the Emergency Regulations.

As mentioned earlier, the Criminal Justice Commission Act dealt with the correction process in the aftermath of the 1971 JVP insurrection. A total of 2,919 persons were brought to trial before the Criminal Justice Commission. Of these, 2,506 pleaded guilty and were released, except for those whose involvement was considered serious. There was much emphasis on the correction process, but it was not pursued with seriousness. For instance, an order issued by the justice secretary on January 9, 1975 under Section 5 of the PSO deprived the militants of the normal automatic remission of one-third of their prison sentences. This was seen as a vindictive act against the insurgents.¹³⁷ With the assumption of power by the UNP in 1977, the Criminal Justice Commission Act was repealed, and all prisoners were released without any conditions. Thus, there was a break in whatever correction process had been contemplated and implemented by the previous government. In the second insurrection, many JVP cadres used the cease-fire declared on September 27, 1989 to surrender.

Conclusion

Analyzing the efficacy of counterterrorism laws against the two militancies in Sri Lanka produces many interesting findings. Sri Lanka's counterterrorism laws are comprehensive enough to tackle every aspect of militancy. But the most prevalently used legislation for any kind of disturbance—the Emergency Regulations and the Prevention of Terrorism Act—was introduced in haste without much public debate or expert scrutiny. The “urgency” of a situation cannot be used as an excuse for hasty enactment of counterterrorism laws. What is required is careful drafting that foresees the likely effects and side effects of such laws. The draft should be widely circulated and given sufficient time for parliamentary and public scrutiny. In that case, a government can expect wider acceptance by the people than when laws come as a surprise. Simultaneously, the laws should be submitted for intense judicial examination.

This brings us to a pertinent issue of the quality of the judiciary to which such scrutiny is entrusted. As has been noted above, Sri Lankan courts failed to check the repressive character of the country's counterterrorism laws. Lack of independence and undue political interference were partly responsible for this. However, in some cases, such as the *Joseph Perera vs Attorney General*, *Boosa Prison*, the Krishanthi Kumaraswamy case, and the Velu Arshadevi case,¹³⁸ the judiciary was bold enough to address human rights aspects of counterterrorism laws. But such checks seem like exceptions and not the norm. It is imperative

***Sri Lankan courts failed to check
the repressive character of the
country's counterterrorism laws***

that in a democracy, the judiciary should be independent, assertive, proactive, and free of political interference. It is also important that justice be done speedily. In the words of British Prime Minister William Gladstone: "Justice delayed is justice denied."

"One size does not fit all" is what one is provoked to say when looking at the legal transplants in the Sri Lankan counterterrorism

laws. While the PSO has strong colonial legacies, the PTA is dominated by provisions borrowed from similar legislation in Britain and South Africa. Every country should deal with the threats of militancy in its own way by taking into consideration the local conditions and not just imitating other countries. The laws should confirm the "rule of law" and "due process of law." If the response does not conform to democratic norms, it might cause a credibility gap for the government.

The very name "Prevention of Terrorism Act" sent wrong signals to the Tamil minority community, who had already lost trust in the state. The provisions of these laws entrusted the security forces with enormous discretionary powers, which were blatantly misused. This inflicted more wounds by creating "uniform phobia" among Tamils. Thus, the PTA and the Emergency Regulations further undermined the legitimacy of the state and its institutions. They were seen as part of a "grand design for legitimising repression." The safeguards were not adequate to prevent misuse of the legislation; the judiciary mostly pronounced "political justice";¹³⁹ and bodies like the Advisory Board (provided for under Section 13 of the PTA) and the Human Rights Commission were not sufficiently empowered to prevent arbitrary application of these laws. Had these safeguards worked by giving some sense of justice to the Tamil community, it might have reduced the number of those who favored militancy. Most important, the special laws hid the rot throughout the criminal justice system.

The net effect was that the PTA and Emergency Regulations increased both the isolation of the Tamil community and the number of LTTE sympathizers and recruits. Those who fled their homes felt safer among the militants than being at home or at work. Even if some of the youth did not wish to join militancy, their parents forced them to leave the country or to join any militant organization just to escape the grip of these laws.

Unlike the Tamil militant groups, especially the LTTE, the JVP failed to exploit conditions resulting out of legal repression successfully. This was

partly because the JVP did not fully enjoy the support of its (Sinhalese) constituency. In many cases, the local population helped the armed forces to gather intelligence on members of the JVP, something that has not occurred in the case of the Tamil militancy. Owing to diminished popular support, the JVP found it difficult to operate from hiding, despite large tracts of jungle in the south. On the other hand, the LTTE has long controlled large chunks of territory in the northeast of Sri Lanka, where the writ of the Sri Lankan state hardly runs at all. From 1990 to 1995, the Tigers controlled the whole of the Jaffna peninsula; later, since 1998, after being confined to small tracts of jungle, the LTTE came fully to control the two districts of Killinochi and Mullaithuvu and partly to control the districts of Mannar, Vavuniya, Batticaloa, and Trincomalee. With Kilinochchi as capital, the LTTE runs a de facto state (referred by the government of Sri Lanka as “uncleared areas”) with its own army, police, judiciary, media, and other administrative mechanisms. Some Sri Lankan state-run institutions operate in the LTTE-controlled areas, but strictly under the supervision and guidance of the LTTE. This is a crucial factor in the inability of the state forces to overcome the LTTE.

*the LTTE runs a
de facto state*

As far as fighting capability goes, the JVP was ill-equipped; its weapons were mostly captured from security forces or from private individuals or private security personnel. The group could not sustain an arms flow the way the LTTE does through its international network. In addition, the LTTE has well-established military training academies like those of professional armies. The JVP also lacked international propaganda and funding support, especially from the diaspora, whereas the Sri Lanka Tamil diaspora has been very efficient and aggressive in its support of Tamil militant groups.

It is important to note that the resort to armed means by Tamils was evolutionary and gradual, as against the JVP’s sudden outburst. This gradualness prepared the Tamil community mentally for the shift away from constitutional means toward armed means; this aspect was missing in the case of the Sinhala militancy. Tamil media and diaspora worked effectively in publicizing the baneful effects of the counterterrorism legislation both domestically and internationally. In addition, oral traditions in the Tamil community passed down the stories of those affected by these legal instruments to the next generation. The JVP lacked such support systems, both internally and externally.

*the JVP lacked such
support systems*

Above all, there was a difference in how the security forces used counterterrorism laws in the two cases. While meticulously following the “winning hearts and minds” approach in dealing with the southern militancy, the security forces failed to do so in the case of the Tamil militancy. Language was one of the critical variables that determined the behavior of the security forces, apart from consistent provocations by the LTTE. Ethnically mixed forces could have avoided such problems. If a single ethnic group in a plural society dominates the security forces, it may resort to biased law enforcement. Proportional representation, at least approximately, is the best solution. Good laws remain good if the people who implement them are good. The provisions should be clear and unambiguous enough not to give law enforcement enormous discretionary powers. There should not be any political interference either. Maximum use of police should be considered in implementing counterterrorism laws. The use of armed forces, which are trained to wage war, should be avoided in maintaining law and order. They should be summoned only in the case of extreme emergency. Proper safeguards should be built in to prevent any kind of misuse by law enforcement.

The laws should be kept dynamic enough to undergo periodic review, depending on the changing situation. There are two ways of doing this: a built-in “sunset” clause in the law itself or a separate body to provide a periodic review. The British Prevention of Terrorism Act has a provision for annual revision, where the government has to justify the extension of the law for the succeeding year. Sri Lankan counterterrorism laws indeed underwent changes, but they became tougher and tougher over a time, disregarding realities on the ground or the effects of such laws on the people. The main reason why counterterrorism laws failed to work in the case of Tamil militancy is the lack of legitimacy of those laws among the Tamil people. Prior lack of trust in the Sri Lankan government and legal repression that arose out of counterterrorism legislation reinforced the Tamil community’s disregard for the state’s legislation.

The rehabilitation of JVP members who pleaded guilty to involvement in the 1971 rebellion was partly successful. The tactic of releasing those who pleaded guilty worked. Many militants came forward to plead guilty and share information on the insurrection, which helped prosecution. This is confirmed by Italy’s example of giving discretionary powers to the judiciary through *pentiti* (repentant) laws to reduce sentences if convicted militants provide evidence leading to the arrest of active militants. This helped police to crack down on Red Brigade cells and columns. But in the case of Tamil militancy in Sri Lanka, rehabilitation was not given much emphasis by the state.

Postscript

With the promulgation of Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No 7 of 2006 on December 6, 2006 yet another legal weapon has been added to the existing legal arsenal against terrorism.¹⁴⁰ The new counter terrorism legislation is just another version of existing PTA, except that for the first time ‘terrorism’ has been defined. Section 16 (i) of the Regulations defines terrorism to mean any unlawful conduct which:

- (a) Involves the use of violence, force, coercion, intimidation, threats, duress, or
- (b) Threatens or endangers national security, or
- (c) Intimidates a civilian population or a group thereof, or
- (d) Disrupts or threatens public order, the maintenance of supplies and services essential to the life of the community, or
- (e) Causing destruction or damage to property, or
- (f) Endangering a person’s life, other than that of the person committing the act, or
- (g) Creating a serious risk to the health or safety of the public or a section of the public or,
- (h) Is designed to interfere with or disrupt an electronic system, and which unlawful conduct is aimed at or is committed with the object of threatening or endangering the sovereignty or territorial integrity of the Democratic Socialist Republic of Sri Lanka or that of any other recognized sovereign State, or any other political or governmental change, or compelling the government of the Democratic Socialist Republic of Sri Lanka to do or abstain from doing any act, and includes any other unlawful activity which advocates or propagates such unlawful conduct.

However, the definition is broad and vague enough to give enormous room for abuse by the security forces. The new law also introduces “specified terrorist activity,” which includes, “offences specified in the Prevention of Terrorism Act, offences under the Public Security Ordinance No. 25 of 1947 and Regulations made thereunder (sic), offence under section 3 of the Prevention of Money Laundering Act No. 5 of 2006, offence under section 3 of the Convention on the Suppression of Terrorist Financing Act No. 25 of 2005, and offences under sections 114, 115, 116, 117, 121, 122, 128, 129 of the Penal Code.” In fact, the new regulation

has increased the scope of the law by incorporating provisions from all other existing laws used against militancy.

The safeguard mechanism in the new law is in the form of an “Appeals Tribunal” that comprises the Secretaries to the Ministries of Defense, Finance, Nation Building, Plan Implementation, and Justice (Sec 14). The

Tribunal is empowered “to affirm, vary or rescind conditionally or unconditionally the decisions made” by the Competent Authority. However, this safeguard measure is not credible as the members of the Tribunal are Presidential nominees and may be hesitant to rule against the wishes of the Executive. The Judiciary should have been made responsible for this Tribunal instead of

making this wholly an Executive affair. It remains to be seen if this safeguard measure will prevent human rights abuses. To conclude, by introducing yet another emergency legislation, the government in Colombo has once again failed to learn lessons from the pages of history.

*Colombo has once again
failed to learn lessons*

Endnotes

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1. Anil Moonasinghe [Sri Lanka], *Hansard* (Parliamentary Debates), April 7, 1988.
2. To keep the scope broad and to avoid the definitional ambiguities associated with the word “terrorism,” the term “armed militancy” is preferred.
3. “Democracies” are those societies distinguished by freedom of belief, expression, organization, demonstration, and other civil liberties, including protection from armed militancy; a rule of law under which all citizens are treated equally and due process is secure; political independence and neutrality of the judiciary and other institutions of “horizontal accountability” that check the abuse of power, such as electoral administration, audits, and a central bank; an open and pluralistic civil society, including not only associational life but the mass media as well; and civilian control of the military.
4. Boaz Ganor, “Preface,” in Adiri 2005.
5. Militants especially take advantage of the freedom—of expression, movement, and association—available in democratic systems. The rule of law and due process of law make prosecution of militants difficult, and free media give them the publicity they need. William Eubank and Leonard Weinberg (2001) demonstrate that most militant incidents occur in democracies, and that generally both the victims and the perpetrators are citizens of democracies. Quan Li (2005) has found that although militant attacks are less frequent when democratic political participation is high, the kind of checks that liberal democracy typically places on executive power seem to encourage militant actions.

6. Dickson 2005: 16–17.
7. “Efficacy” here means the capacity or power to produce the desired effect.
8. Minor 1975 brings out this aspect of prevention as a mode of preventing hijacking.
9. See Minor 1975 and Newman 1973, which applies this to designing dwelling places to make them unfriendly to criminal activities.
10. For detailed exposition, see Brehm and Brehm 1981.
11. See Singer 1973.
12. Bonner 1985: 14–20.
13. For detailed exposition on this aspect, see Crelinsten et al. 1978: 35–38.
14. As of 2001 census, the population stood at 18,728,000. See for details www.statistics.gov.lk/index.asp (accessed July 7, 2006).
15. See K. M. de Silva, “Historical Survey,” in de Silva 1979.
16. See John D. Rogers, “Historical Images in the British Period,” in Spencer 1990.
17. Also known as “Indian Tamils,” “Upcountry Tamils,” or “Tamils of recent Indian origin,” this community of people were brought by the British from South India to work on coffee, tea, and rubber plantations. Although they speak Tamil, they are culturally and socioeconomically different from the indigenous Tamils of the north and east of Sri Lanka.
18. Popularly known as the “B-C Pact,” the agreement provided inter alia for the recognition of Tamil as the language of a national minority and the language of administration of the two Tamil provinces, the establishment of a regional council for the Northern Province and of one or more for the Eastern Province, direct elections to regional councils, and for Parliament to delegate wide-ranging powers to the regional councils over subjects ranging from agriculture, industries, land development, colonization, and water projects to taxation and borrowing.
19. For a detailed account of the 1958 riots, see Vittachi 1958.
20. Called the “S-C Pact,” it addresses issues of language, establishment of district councils, and colonization.
21. The Vaddukoddai Resolution inter alia stated: “This convention resolves that restoration and reconstitution of the Free, Sovereign, Secular, Socialist State of TAMIL EELAM, based on the right of self determination inherent to every nation, has become inevitable in order to safeguard the very existence of the Tamil Nation in this Country.”
22. Prime Minister Indira Gandhi, while rejecting Bangladesh type intervention in Sri Lanka on behalf of the Tamils, said in the Indian Parliament: “India stands for the independence, unity and integrity of Sri Lanka. . . . However, because of the historical, cultural and other such close ties between the peoples of the two countries, especially between the Tamil community of Sri Lanka and us, India cannot remain unaffected by the events there.” See Wilson 1988: 203.
23. This continued for four years (1983–87) until the IPKF landed in Sri Lanka in July 1987.
24. The Indo-Sri Lankan Accord was signed by Indian Prime Minister Rajiv Gandhi and Sri Lankan President J. R. Jeyewardena on July 29, 1987 in Colombo. For details of its provisions, see Muni 1993; Suryanarayan 1991; Seevaratnam 1989.

25. When he became president in 1988, Ranasinghe Premadasa, who as prime minister at the time of its signing had opposed the Indo-Sri Lankan Accord, asked the IPKF to vacate the island.
26. In the first phase (from July 1996), the Tigers wrested Mullaitivu from the government; during the second phase (from September 1998), they overran Kilinochchi; and in the third phase (from November 1999), the entire Wannu region was captured.
27. TELO and a section of EPRLF are currently allied with the pro-LTTE political group the Tamil National Alliance.
28. Velupillai Prabhakaran, interview with Sudeep Mazumdar, *Newsweek*, August 11, 1986.
29. Velupillai Prabhakaran, interview with Anita Pratap, *Sunday*, March 11–17, 1984.
30. Maravars were listed as a criminal caste by the British colonial government of India. For details, see Schalk 1997.
31. For details, see Roberts 1996.
32. When trapped by police while attempting a bank robbery on June 5, 1974, Sivakumaran, one of the leaders of the Tamil Student League, swallowed the cyanide capsule he carried and died instantaneously. This method was later adopted by the LTTE. See Hellmann-Rajanayagam 1994.
33. Women began to figure in the LTTE after 1983 in the Vituthalai Puligal Magalir Munnani (Women's Front of Liberation Tigers) and later as Suthantira Paravaigal ("Birds of Freedom"), a name coined by Thileepan, a male LTTE leader. A journal of the same name was started during this period to raise national consciousness and social awareness among Tamil women. Women initially performed paramilitary and supporting roles but were used in combat after 1985. Their first operation was conducted in July 1986 (the Adamban Offensive) against the Sri Lankan Armed Forces. Later, in 1987, exclusive training camps for women were set up, and their secondary and tertiary leadership was structured by 1989. Women account for nearly one-third of the LTTE's estimated total cadre strength and serve in all units—fighting, political, administrative, and intelligence. There is no discrimination based on gender when it comes to training and combat operations. Tamilini (political head of the women's wing of the LTTE), interview, Kilinochchi, July 30, 2005.
34. The LTTE thinks that only it is "capable of leading the Tamil community," and it has eliminated almost all groups and leaders opposed to it. Tamil groups that operate outside the orbit of the LTTE are branded "traitors."
35. Prabhakaran observed of the LTTE's military imperative, "When we say . . . , 'They will use the army to attack us, we will resist and counterattack and we will protect you,' well . . . only when we actually do it, do we establish our political credibility and role. That is why we have given due attention to military affairs in our organization. . . . Only a political organization with military strength is capable of effective resistance." Velupillai Prabhakaran, interview with N. Ram, *The Hindu*, September 5, 1986.
36. The LTTE has the distinction of having carried out the greatest number of suicidal attacks of any militant organization in the world. Since July 5, 1987, when the first Black Tiger, Captain Miller, drove a truck laden with explosives into a Sri Lanka Army garrison in Nelliyadi in Vadamaradchi, Jaffna, 273 Black Tigers have died.

- According to LTTE sources (Tamilnet, July 5, 2006), 194 of the Black Tigers who died on mission up until June 25, 2006 were Black Sea Tigers; 56 Black Sea Tigers were women; and 18 of the 79 Black Tigers who died during attacks on land were women.
37. Notable victims of the Black Tigers include India's Prime Minister Rajiv Gandhi (1991), Sri Lanka's President R. Premadasa (1993), many Sri Lankan ministers and parliamentarians, and officers of the Sri Lankan armed forces.
 38. The LTTE usually reveals the ranks of its cadres only posthumously. But, of late, especially during the ceasefire, the ranks of regional commanders are mentioned.
 39. Some commanders, like Karuna, enjoyed more independence of operation. Karuna's break with the LTTE leadership has led it to favor more central supervision of local Tiger leaders.
 40. The Sri Lankan Tamil diaspora is broadly divided into two: those who left the country before the intensification of ethnic conflict (roughly before 1983) and those who fled after that. The LTTE draws much of its support from the latter.
 41. After imposing a travel ban on LTTE official delegations in September 2005, the European Union banned the militant group in May 2006. Canada proscribed the Tigers in April 2006.
 42. Tamil Nadu parties that continue to support the LTTE include the Renaissance Dravidian Progressive Federation (Marumalarchi Dravida Munnetra Kazhagam, or MDMK), led by V. Gopalaswami; the Working People's Party (Paattali Makkal Katchi, or PMK), headed by Ramadoss; the Freedom Leopards (Viduthalai Chiruthaigal), led by Thirumavalavan; and the Tamil National Federation (Tamil Desiya Kazhagam), headed by P. Nedumaran.
 43. The LTTE gets nearly U.S.\$2 million per month from the Sri Lankan Tamil diaspora based mainly in North America and Europe.
 44. It is estimated that the LTTE collects around 300 million Sri Lankan rupees monthly in this way.
 45. V. Jayanth, *The Hindu*, March 29, 2000.
 46. The characteristics described here pertain to the JVP during 1971 and 1987–90 and not to the present JVP as a political party, which is not of concern to this study.
 47. Much to the surprise of the JVP leadership, the Sri Lankan media and intelligence agencies initially called this group a "Che Guevara movement."
 48. David 2005. The "First Person" is rich; the "Second Person" is a professional, a teacher or an NGO employee; the "Third Person" belongs to the lower middle class, with a few acres of land or a small job; the "Fourth Person" is poor or displaced and struggles to meet his day-to-day needs. It is the last category that falls easy prey to militant recruitment.
 49. For a detailed exposition of JVP and student politics, see Government of Sri Lanka, *Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces*, Sessional Paper No. 5 (Colombo: Dept. of Government Printing, 1997), ch. 11, pt. 4.
 50. Lionel Bopage, senior leader of the JVP from 1968 to 1984, interview, *Lines*, May 2003.

51. See Moore 1993.
52. Completed in 1968, these lectures were the basis of future JVP theory, but some of them underwent changes from time to time, especially “Indian Expansionism” and “The Path of the Sri Lankan Revolution.” Initially, the lectures were delivered by Rohana Wijeweera himself; later party workers were responsible for the dissemination of the ideas throughout the island.
53. For more details on the first JVP insurrection, see Alles 1977; Dubey 1988; Arasaratnam 1972; Halliday 1971; Wilson 1972; Kearney and Jiggins 1975; Warnapala 1975.
54. Although dominated by left-leaning parties, the UF government called the insurrection an “unprecedented situation created by a group of narrow-minded people, conspiratorially organized, who had launched an effort by force of arms to displace the duly constituted government of the day in order to replace the entire system of parliamentary democracy.” *Ceylon Daily News*, April 30, 1971.
55. In his evidence before the Criminal Justice Commission, Rohan Wijeweera himself admitted that in April 1971, “the revolutionary preconditions for the seizure of power by the proletariat and for an armed revolutionary struggle were absent. . . . It had not reached a stage where the masses saw no other solution but revolution. . . . the JVP had not yet reached the stage where the masses could see it as a real alternative to the government, accept its leadership and join in the class under its banner.” See for the full text of the statement made by Rohana Wijeweera before the Criminal Justice Commission, November 2, 1973, www.jvpnet.com/publi/we-may-killed.html (accessed July 4, 2006).
56. Interview with a former JVP member who requested anonymity, Colombo, August 11, 2005.
57. Jagath P. Senaratne, “The JVP and Tamil Secessionist Insurrections of Sri Lanka and the Naxalite Insurrection(s) of India: A Provisional Comparative Assessment” (paper presented at the Workshop on the Naxalite Movement organized by the Observer Research Foundation, Chennai, India, January, 28–29, 2005).
58. “JVP’s Foreign Policy.” *Lanka Guardian* 3, no. 22 (April 1981): 18–19.
59. Statement by Dr de Zoysa, *State Council Debates*, June 10, 1947, col. 1,942. The member further warned: “Let us not pass laws in a panic, or to deal with panicky conditions. The law is a reflection of your actions, of your decisions, as statesmen and politicians. If you rush into passing laws of this nature, intending to prevent disorder and safeguard the subject, remember that such laws can be turned into weapons to harass the people of the country. I maintain in spirit the proposed laws is against the established legal system of this country.” *Ibid.*, cols. 1,940–41.
60. Communal riots that broke out between Sinhalese and Muslims were dealt with ruthlessly by the British, who feared a “German conspiracy” and even revolution. Imposing martial law, the colonial administration incarcerated almost all Sinhalese leaders. It was a Tamil leader—Sir Ponnambalam Ramanathan—who went all the way to England to plead the case for Sinhalese. The postindependence leadership believed that imitating colonial methods was appropriate to deal with “disturbances” of any kind.
61. An amendment introduced in 1949 fixed a time limit of one month for Emergency Regulations unless they were extended by Parliament, with the obligation to inform

- Parliament within ten days of a declaration of emergency, and no detention without trial. But such toning down of emergency provisions was exceptional.
62. The changes include approval by Parliament within fourteen days of proclamation of a state of emergency, its automatic termination in three months if not approved by a two-thirds majority, precedence of certain fundamental rights over Emergency Regulations, and judicial remedy.
 63. Introduced through Article 154 (J) (2) of the 13th Amendment in 1987.
 64. The regulations range from maintenance of essential services to law and order.
 65. In this regard, the then minister of justice, Devanayagam, observed in Parliament: “This Government enacted Act No. 16 of 1978, wherein they proscribed the LTTE and similar organisations. . . . From 1971 to 1978, just before we introduced the Bill, crimes of various kinds totaled 75. After the enactment of the Bill and up to now, crimes of all kinds total 54. Within seven years there were 75 crimes, but within a year there were 54.” See [Sri Lanka], *Hansard* (Parliamentary Debates), col. 1,437, July 19, 1979.
 66. The Criminal Justice Commission established on May 16, 1972 consisted of five Supreme Court judges: H. N. G. Fernando (chief justice), A. C. A. Alles, V. T. Thamotheram, H. Deheragoda, and T. W. Rajaratnam. D. Wimalaratne briefly served in place of T. W. Rajaratnam.
 67. See Preamble of the Criminal Procedure (Special Provisions) Law, No. 15 of 1978, certified on May 23, 1978.
 68. “Criminal Procedure Code (Special Provisions) Amendment Bill Passed,” *Ceylon Daily News*, December 25, 1982.
 69. The UNP won 140 seats out of a total of 168, a majority that even the “father of the nation,” D. S. Senanayake, failed to get. The TULF, representing the minority Tamils, emerged as the second largest party, with 18 seats, and Srimavo Bandaranaike’s SLFP was reduced to a mere 8 seats.
 70. “JR Seeks People’s Co-operation to Bring to Book Naxalites and Terrorists,” *Sun*, December 15, 1982.
 71. Some scholars go to the extent of arguing that after coming to power in 1977, Jayewardene pursued institutionalized political violence, and that this mode of governance and control was perfected by his successor, Premadasa. See, e.g., Obeyesekere 1984; Perera 1997.
 72. See the Preamble of the Act.
 73. Statement by Anandatissa de Alwis, [Sri Lanka], *Hansard* (Parliamentary Debates), July 19, 1979, cols. 1,506–7.
 74. [Sri Lanka], *Hansard* (Parliamentary Debates), July 19, 1979, col. 1,438. Also see Trade and later National Security Minister Lalith Athulath Mudali’s statement on September 6, 1983, *Sun*, September 7, 1983.
 75. See part 9 of the PTA for the definition of “specified person.” Included were the president; judges of Supreme Court, Court of Appeal, High Court, district courts, magistrate’s courts, primary courts, or any other court of first instance; officials of a foreign state or international organization; members of Parliament or local authorities; members of the Special Presidential Commission; jurors, counsel, or officers of court; and any member of the armed forces, police, and any other forces charged

- with the maintenance of public order. The list thus covers almost everyone working with the government.
76. “Proclaimed person” means anyone proclaimed by the inspector-general of police by proclamation published in the Gazette to be a person wanted in connection with the commission of any offense under this act. See PTA Section 3.
 77. Tamilmaran, senior lecturer at Colombo University, interview, Colombo, July 3, 2005.
 78. Poologasingham, senior lawyer based in Jaffna, interview, Jaffna, July 22, 2005. This view coincided with opinions by the Attorney-General’s Department, Colombo, July 31, 2005.
 79. Article 122 (1) (b) says “the President shall by a written reference addressed to the Chief Justice, require the special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. A copy of such reference shall at the same time be delivered to the Speaker.”
 80. Article 83 reads “Notwithstanding anything to the contrary in the provisions of Article 82 – (a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article, and (b) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with the provisions of paragraph (2) of Article 30 or of paragraph (2) of Article 62 which would extend the term of office of the President or the duration of Parliament, as the case may be, to six years, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.”
 81. A time period of just three days was provided for by Article 122 (1) (c), and Article 120 (c) states: “Where the Cabinet of Ministers certifies that a Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires approval by the people at Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraphs (1) and (2) of Article 82.”
 82. Article 1 states that Sri Lanka is “Democratic Socialist Republic”; Article 3 articulates that “sovereignty is in the People and is inalienable”; Article 4 specifies that the sovereignty of the People shall be exercised and enjoyed in, apart from other things, “the fundamental rights which are by the Constitution declared and recognised”; Article 10 talks of “freedom of thought, conscience and religion”; and Article 11 states: “No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
 83. As per Article 80 (3), “Where a Bill becomes a law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.”
 84. It is said that the then chief justice, N. D. M. Samarakoon, before his appointment as chief justice, was a member of UNP Central Committee and was closely aligned with the ruling UNP.

85. Jehan Perera, interview, Colombo, July 4, 2005.
86. A senior lawyer informed the author that it took just a week to come up with and pass the act.
87. The TULF MPs were protesting against the government's moves to redraw the Tamil majority Vavuniya district to include Sinhala areas of the adjacent Anuradhapura district for electoral advantage, on the pretext of "better administration."
88. A school of thought among Tamils still believes that moderate Tamil leadership indirectly supported the bill to "keep the 'boys' under their control."
89. Judgment of the Criminal Justice Commission (Insurgency), Inquiry No. 1, 1976, 221.
90. See note 65 above.
91. For detailed discussion on the politics of proscription, see Nadarajah and Sriskandarajah 2005.
92. Balakumaran (an LTTE leader who formerly headed EROS), interview, Kilinochchi, July 29, 2005.
93. International Tamil Foundation, letter to the government of the United Kingdom dated February 7, 2001 on the proposed proscription of the LTTE.
94. In his letter dated May 30, 2003 to the then prime minister, Ranil Wickremasinghe, the LTTE's chief negotiator, Anton Balasingham, stated: "Though your government has de-proscribed our organisation and substantial progress has been made in the peace process and that we have renounced violent struggle and war, the continuous hard-line attitude adopted by powerful international governments against the LTTE under their proscription laws casts a negative impact in promoting peace and ethnic reconciliation in Sri Lanka."
95. Kannan, deputy district political head of the LTTE, Jaffna District, interview, Jaffna, July 26, 2005. Many analysts link this view of the LTTE with the assassination of former Foreign Minister Lakshman Kadirgamar, who led the Sri Lankan government's campaign of international ban on the LTTE.
96. Ashok Silva, Faculty of Law, Open University of Sri Lanka, interview, Colombo, June 22, 2005.
97. There is a dispute as to the legality of high security zones; the government claims that they were declared under the PTA, but legal experts assert that such zones are illegal.
98. D. B. S. Jeyaraj, *Frontline* 20, no. 2 (January 18–31, 2003).
99. S. Paramanathan, president, Consortium of Humanitarian Agencies–Jaffna, interview, Jaffna, August 2, 2005.
100. Inputs culled from refugee camps at Mallakam, Allaveddy, and Manipay, July 2005. A sample of fifty refugees was taken from all the three camps put together.
101. www.eelamweb.com/leader/messages/herosday/2003/english (accessed July 10, 2006).
102. Padmarajah, fisherman, interview, Batticaloa, July 14, 2005.
103. LTTE police chief Nadesan, interview, Kilinochchi, July 29, 2005.
104. Asked about the basis for suspicion, a Sri Lanka Police sergeant said: "It is simple! A young person with [a] short haircut, dark in complexion and wearing 'Bata' chapels [footwear] must be a terrorist."

105. N. Kandasamy, director, Centre for Human Rights and Development, interview, Colombo, August 10, 2005.
106. Sivanayagam, interview, Bandaramulah, Batticaloa, July 18, 2005.
107. Balendran Rasaih, interview, Navalkudah, Batticaloa, July 17, 2005.
108. Sri Lankan President Chandrika Kumaratunga, directive dated July 11, 1997, Section 6 (ii).
109. It was the arrest of the JVP leader that left the organization without a head and added to much confusion.
110. Rohana Wijeweera was one of those “disappeared.” Following a series of arrests, the security forces succeeded in laying hands on Wijeweera, who was living in disguise as a tea planter in Ulapane under the name of Attanayake. Unlike the series of arrests of JVP leaders, one arrest did not lead to another in the case of the LTTE. The Sri Lankan security forces have never ever arrested the LTTE chief Velupillai Prabhakaran.
111. Numerous cases of harassments at checkpoints are reported in the human rights literature. The most notable case is that of the disappearance of Krishanthi Kumaraswamy and her kin at Chemmanai checkpoint. This case led to unearthing of mass graves at Chemmanai. Ilancheliam, district judge, interview, Vavuniya, August 2, 2005.
112. Arunthakaran, interview, Chemmanai (Jaffna District), July 25, 2005.
113. See Clause 2.5 of the ceasefire agreement.
114. For details of statistics and break-ups, see www.slmm.lk (accessed October 20, 2006).
115. Simon Ranaweera, retired policeman, interview, Maharagama, August 19, 2005.
116. Tamilmaran, interview, Colombo, July 3, 2005.
117. Emergency (Miscellaneous Provisions and Powers) Regulations, No. 4 of 1994, *Gazette of the Democratic Socialist Republic of Sri Lanka*, No. 843112, November 4, 1994.
118. Ilancheliam, district judge, interview, Vavuniya, August 2, 2005.
119. Interview with a senior Sri Lankan Army commander who requested anonymity, Colombo, August 18, 2005.
120. This notorious section is known widely as “famous fifty-five” among the legal community.
121. See Gunaratna 1998.
122. Distribution was controlled through the commissioner general for essential services (CGES) and multi-purpose cooperative societies (MPCS).
123. See the section under “Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts” in *Sri Lanka: Country Reports of Human Rights Practices, 2001*, Bureau of Democracy, Human Rights and Labor, Washington, D.C., 4 March 2002.
124. Tamil Information Centre (London), “The Human Rights Situation of the Tamil Speaking People of Sri Lanka” (memorandum prepared for the 50th Session of the UN Commission on Human Rights, Geneva, February 1994).
125. *JRS Dispatch*, “Sri Lanka Alert,” September 11, 2001.

126. Bishop of Jaffna, interview, Jaffna, July 27, 2005.
127. P. Ganeshalingam, [Sri Lanka], *Hansard* (Parliamentary Debates), November 6, 1979, col. 1,291.
128. K. Thurairatnam, [Sri Lanka], *Hansard* (Parliamentary Debates), November 6, 1979, cols. 1,202–3.
129. Sivarajah, former policeman, interview, Colombo, June 23, 2005.
130. Major Betty Perera, 233 Brigade, interview, Batticaloa, July 24, 2005. This officer claimed that there were efforts under way to sensitize the security forces on human rights.
131. “The blood relatives of the blood suckers in the Army and Police who are engaged in massacring patriots should take steps to stop this crime immediately,” the DJV proclaimed on April 21, 1989. “If they do not do so, the patriotic people’s armed troops will adopt merciless measures against them as well.” Quoted in Chandraprema 1991: 283.
132. Interview with a former senior Sri Lankan Army official who requested anonymity, Colombo, August 19, 2005.
133. Under “do’s” General Waidyaratne listed providing medical facilities for villagers, distribution of food, repair of roads, cleaning and color washing hospitals, distribution of clothes to the needy, donating food, respecting the elderly, assistance in agricultural activities, etc. Stealing of valuables, use of abusive language, molesting, rape, killing of innocents, taking over buildings and vehicles by force, use of torture, drunkenness, etc., were described as “don’ts.”
134. General Waidyaratne quoted in Chandraprema 1991: 289–90.
135. Fr. B. H. Miller, interview, Batticaloa, July 15, 2005.
136. Forty-one people were charged with participating in the massacre, but all were gradually acquitted on the basis that there was no evidence to convict them.
137. Interview with a former JVP member who requested anonymity, Colombo, August 2, 2005.
138. In the Joseph Perera case in 1987, the Supreme Court for the first time struck down an Emergency Regulation by ruling that posters critical of the government fell within constitutionally protected rights. In 1992, in the Boosa cases, the Supreme Court sought to remove procedural barriers (under Article 126 of the Constitution) to enable victims of extraordinary legislation to seek justice. The court also directed organizations like the Bar Association of Sri Lanka to provide legal aid to the victims. There was no follow-up action, however. On July 3, 1998, in the Krishanthi Kumaraswamy case, the High Court in Colombo for the first time sentenced members of the armed forces and police to death for human rights violations under cover of the PTA and Emergency Regulations. The Sri Lankan Supreme Court, in a landmark judgment on January 25, 2002, awarded 150,000 Sri Lankan rupees’ compensation to Velu Arshadevi, who was arrested under the PTA and later raped in custody of the Sri Lankan security forces. This was the first time that the court awarded compensation to a rape victim, confirming that rape in custody constitutes torture.
139. I use the term “political justice” here to mean what Otto Kirchheimer calls “politicization of criminal justice.”
140. For full text of the Regulations see www.documents.gov.lk/Extgzt/2006/Dec01.htm

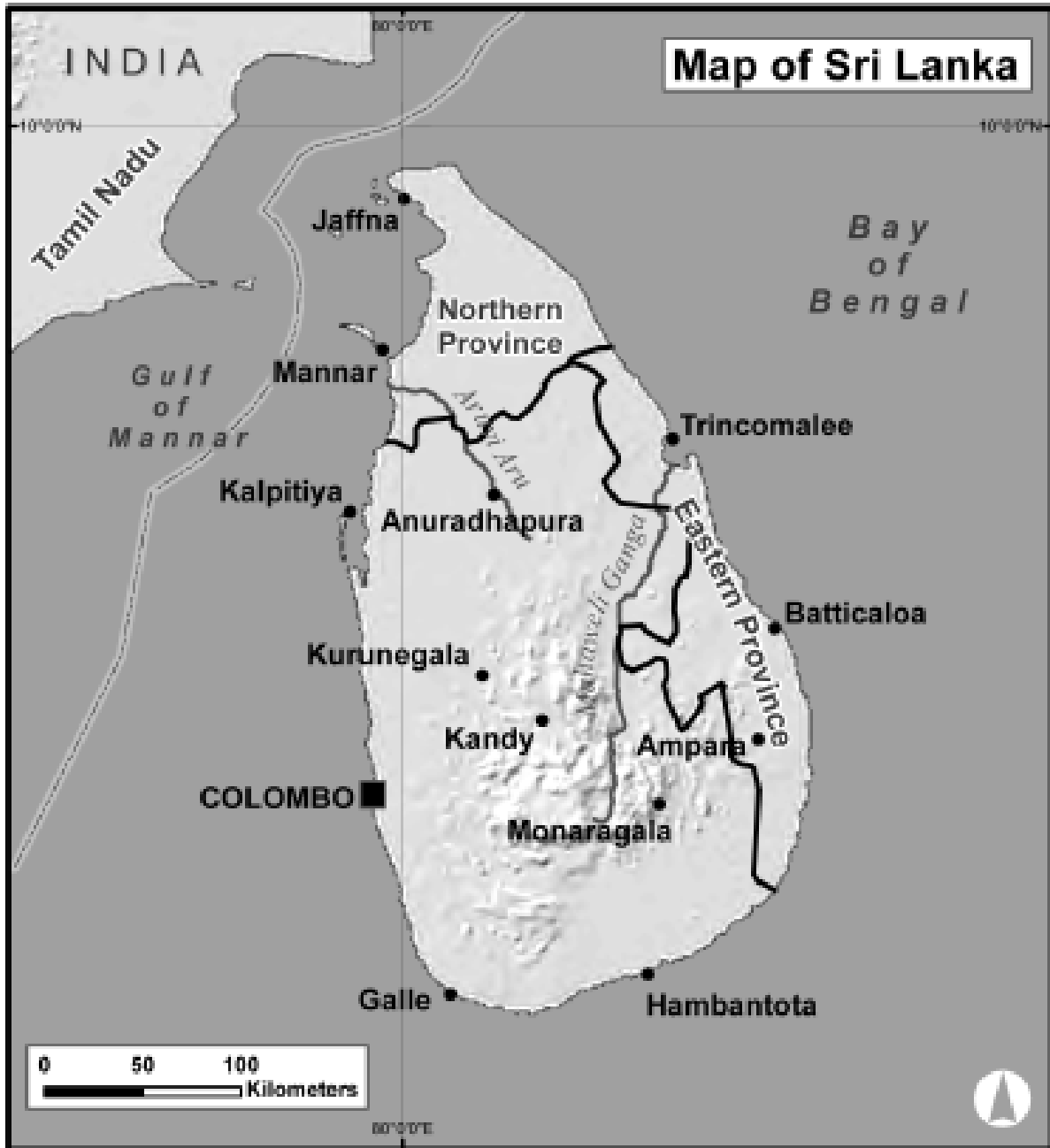
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- Capital Cities
- Cities and Towns
- ~ Provincial Boundaries
- ~ Exclusive Economic Zone

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About this Issue

This study investigates the efficacy of counterterrorism laws in democracies by taking the highly pertinent case of Sri Lanka as an example. It compares the use of counterterrorism laws by the Sri Lankan state against two militancies: the Sinhala militancy led by Janatha Vimukthi Peramuna, and the Tamil militancy spearheaded by the Liberation Tigers of Tamil Eelam. Based on extensive field research, the monograph argues that while the government's extraordinary legislations were moderately effective against the Sinhala militancy, it was counterproductive in the case of the Tamil militancy. The study elucidates various reasons for the difference: the magnitude of popular support, territoriality, political institutions, diaspora activity, the role of the media, the behavior of the security forces, and the character and strength of the groups leading the respective militancies. It suggests wide-ranging policy options in approaching counterterrorism through the "criminal justice model."

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N. Manoharan is Senior Fellow at the Institute of Peace and Conflict Studies in New Delhi. In 2005, he was a Visiting South Asia Fellow at the East-West Center Washington, where this study was written. He can be contacted at mano@ipcs.org.

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