

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Declaration under and in terms of Article 157A(4) of the Constitution (As amended by the Sixth Amendment to the Constitution) of the Democratic Socialist Republic of Sri Lanka.

Hikkadu Koralalage Don Chandrasoma

G -16, National Housing Scheme,

Polhena, Kelaniya.

Petitioner

SC SPL No. 03/2014

Vs.

1. Mawai S. Senathirajah

Secretary,

Illankai Tamil Arasu Kadchi,

30, Martin Road, Jaffna.

1(a) K. Thurairasasingham

Secretary, Illankai Tamil Arasu Kadchi,

30, Martin Road, Jaffna.

(Substituted 1st Respondent)

1. Mahinda Deshapriya
Commissioner of Elections,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.
2. Hon. Attorney General,
Attorney General's Department
Colombo 12.

Respondent

Before : Priyasath Dep, PC.CJ
Upaly Abeyrathne, J
Anil Gooneratne J.

Counsel : Dharshan Weerasekera with Madhubashini
Rajapaksha for Petitioner.
K. Kanag-Iswaran, PC with M.A. Sumanthiran,
Viran Corea and Niran Ankertel for 1A Respondent.
Nerin Pulle, DSG with Suren Gnanaraj, SC for AG.

Argued on : 18.02.2016

Written Submissions

filed on : 18.04.2016 & 03.05.2016

Decided on : 04.08.2017

Priyasath Dep, PC,CJ.

The Petitioner filed this action under and in terms of Article 157A (4) of the Constitution (as amended by the Sixth Amendment to the Constitution), seeking a declaration that the Illankai Tamil Arasu Kachchi (hereinafter referred to as "ITAK") is a political party which has as its "aims" and "objects" the establishment of a separate State within the territory of Sri Lanka.

The Petitioner by his Petition dated 27th March 2014, prayed for following reliefs:

- i) A declaration that ITAK is a political party which has as one of its "aims" and "objects" the establishment of a separate State within the territory of Sri Lanka.
- ii) An order that the ITAK and its members, in consequence of the declaration issued under Article 4 of the Sixth Amendment to the Constitution [157A (4)] are subject to the provisions of Article 5 of the Sixth Amendment to the Constitution of Sri Lanka. [157A (5)]

The Petitioner stated that the Constitution of ITAK which is in Tamil marked P1 and the subsequent amendment effected to the Constitution in 2008 which is in Tamil marked P2, were filed at the Elections Commissioner's office'. English translations of P1 and P2 are marked as P3 and P4.

In Rule 2 of the Constitution of ITAK P3 (English translation) which refers to the objective of ITAK reads as follows:

The objective of this party is to establish political, economic and cultural liberation among Tamil speaking people by way of forming autonomous Tamil Government and autonomous Muslim Government as part of united federal Sri Lanka in accordance with the principles of self –determination.

Note: There will be a full guarantee in regards to Religion, language rights and fundamental rights for the minorities residing in the states which will be connected.

The Petitioner submitted that the amendment marked P2 replaced the word 'Federal' with the word 'Confederation'. The translation which is P4 provided by the Petitioner replaced the word 'Federal' and inserted the word 'Confederation'.

The Petitioner stated that the replacement of words in Rule 2 by the said amendment to the ITAK Constitution indicates a shift in the "aims" and "objectives" of ITAK. It is further stated by the Petitioner that the full statement of the present "aims" and "objectives" of the ITAK, subsequent, to the above amendments, is to establish a separate State within Sri Lanka. The English translations of said documents were marked P3 and P4.

The Substituted 1st Respondent submitted that P2 did not substitute the word 'Confederacy' in place of 'federal'. In view of the contrasting positions taken by the Petitioner and the Substituted 1st Respondent, the Court called upon the learned Deputy Solicitor General to assist Court and an order was made for the translation of P1 and P2 by the Official Languages Department. The translation which is filed of record in February 2015, marked as X1.

At this stage it is relevant to refer to Article 157 A of the Constitution which was introduced by the Sixth Amendment to the Constitution which reads as follows:

- (1) - "No person shall, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka."

(2) - "No political party or other association or organization shall have as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka."

(3) Any person who acts in contravention of the provisions of paragraph (1) shall, on conviction by the Court of Appeal, after trial on indictment and according to such procedure as may be prescribed by law, -

(a) be subject to civic disability for such period not exceeding seven years as may be determined by such Court;

(b) forfeit his movable and immovable property other than such property as is determined by an order of such Court as being necessary for the sustenance of such person and his family;

(c) not be entitled to civic rights for such period not exceeding seven years as may be determined by such Court; and

(d) if he is a Member of Parliament or a person in such service or holding such office as is referred to in paragraph (1) of Article 165, cease to be such Member or to be in such service or to hold such office.

(4) - "Where any political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka, any person may make an application to the Supreme Court for a declaration that such political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka. The Secretary or other officer of such political party or other association or organization shall be made a respondent to such application."

The Petitioner also relied on the Political Resolution unanimously adopted at the 1st National Convention of The Tamil Liberation Front held at Pannakam (Vaddukoddai Constituency) in 1976 known as Vaddukoddai Resolution which was marked as X2 and the translation of Manifesto of the Tamil United Liberation Front (TULF) at the General Elections of 1977 marked as X5. The Vaddukoddai Resolution and the TULF Manifesto advocated the establishment of a separate state of Tamil Eelam. The ITAK associated with the Vaddukoddai Resolution and a constituent party of the TULF. The other parties are All Ceylon Tamil Congress and Ceylon Workers Congress. The Petitioner's contention therefore is that the explicit statements made in documents marked P1, P2 and X2, X5 and the reasonable inferences drawn from them indicate that the Respondent harbours an intention of creating a separate State within the territory of Sri Lanka.

The main contention of the Petitioner in this case is that on consideration of the totality of the definition of "objectives" contained in Rule 2 of the ITAK Constitution marked P1 and the subsequent amendment contained in document marked P2, indicates that the arrangement of government ITAK seeks is not a "federal" government but a "confederation" form of government which connotes the unity of two separate States and thereby ITAK is in fact advancing a separate sovereign State. It was further submitted that the fact that ITAK advocates an arrangement of government for Sri Lanka where Provincial Governments rather than the Central Government will guarantee the fundamental rights of the residents of those provinces, coupled with the statements in the Vaddukkottai Resolution is suggestive of a "confederation" rather than a "federal" form of government.

As Article 157A (4) refers to 'Where any political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka....', It is relevant to consider the meaning of aims and objects.

In the Oxford Advanced Learner's Dictionary (9th edition, 2015) the words "aims" and "objects" are defined as follows"

- "aim" noun : the purpose of doing; what is trying to achieve
- "object" noun : an aim or a purpose

On an examination of records it is noted that document marked P2 contains a series of amendments made to the ITAK Constitution in 2008 where the following words with Sanskrit origin were deleted and replaced by appropriate pure Tamil approximation of such words:

	Sanskritized	Pure Tamil Alternative Word
Article 2 -	"samashthiyin"	"innaipaatchiyin"
Article 3 -	"angaththuvam"	"uruppurimai"
Article 4-	"podhu kaariya sabhai"	"podhuchchabai"
Article 5 -	"kaariyatharisi"	"seyalaalar"
Article 5-	"thanaathikari"	"porulaalar"
Article 11 -	"visheda"	"sirappu"

The Substituted 1st Respondent submitted that that the Petitioner's initial claim was based on an erroneous translation of the 2008 amendments to the ITAK Constitution marked P4. The said amendment to Rule 2 as appearing in document marked P4 is reproduced below:

"Rule – 2

- a) Objective – by the substitution, for the word "**federal**", with the word "**confederation**". (Emphasis added)

Insert a sentence

“Full guarantee to Religious and language rights to the minority Ethnic Nationalities residing in the autonomous government which is to be established in the homeland of Tamils”.

b) Insert a sentence as Policy 5

“Establish a good relationship with Sinhala people and the Country on the basis of co-existence and collaboration”.

The Substituted 1st Respondent submitted that the Petitioner has erroneously translated the amendment to Rule 2 in ITAK Constitution where the word “samashthi” was replaced with the words “inaipaatchchi” as “confederation”. This is further demonstrated through the official translation provided by the Official Languages Department marked X1.

The official translation provided by the Official Language Department is as follows:

“Rule 02 Objective: in (a) repealing the word “*Samashthi (federation)*” and substitution of the word “*inaippadchi (federation)*”. (Emphasis added)

The Substituted 1st Respondent drew attention of this Court to Rule 2 of the ITAK Constitution as Amended in 2008, which begins with the phrase “aikkiya Illangai inaipaatchchiyin angamaaga...” which means “...as a part of a federation of a United Sri Lanka (as appearing in X1). ”

This Court is therefore of the view that the amendment effected to Rule 2 in the ITAK Constitution in 2008 by deleting the word “samashthi” and replacing same with the word “inaipaatchchi” does not connote a change in the meaning.

The Petitioner in paragraph 32 of Petition states that, “in the absence of an explicit statement in the ITAK’s Constitution that ITAK does not and will not support or endorse the “autonomous governments” it intends to form, exercising their right to secession,

the only inference to be drawn is that if the ITAK has as its "objectives" the forming of a "confederation" of such autonomous governments, it intends that the separate units of that confederacy remain Independent States, and hence, has the "objective" of forming such States."

When this Application was taken up for hearing, the learned Counsel for the Petitioner conceded that the official translation before this court does read "federation" and not "confederation". It was also the contention of the Counsel for the Petitioner that "federation" and "confederation" mean the same thing though the Counsel for the Petitioner did not pursue this line of argument at the initial stage. The Black's Law Dictionary (page 611, 6th Edition) defines "Federal Government" as follows –

"The system of government administered in a nation formed by the union or confederation of several independent states.

In strict usage, there is a distinction between a *confederation* and a *federal government*. The former term denotes a league or permanent alliance between several states, each of which is fully sovereign and independent, and each of which retains its full dignity, organization, and sovereignty, though yielding to the central authority a controlling power for a few limited purposes, such as external and diplomatic relations. In this case, the component states are the units, with respect to the confederation, and the central government acts upon them, not upon the individual citizens. In a *federal government*, on the other hand, the allied states form a union (*e.g.* United States), not, indeed, to such an extent as to destroy their separate organization or deprive them of *quasi* sovereignty with respect to the administration of their purely local concerns, but so that the central power is erected into a true national government, possessing sovereignty both external and internal, - while the administration of national affairs is directed, and its effect felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity, as citizens of the nation. The distinction is expressed, by the German writers, by the use of the

two words "*Staatenbund*" and "*Bundesstaat*"; the former denoting a league or confederation of states, and the latter a federal government, or state formed by means of a league or confederation."

In the determination *In Re the Thirteenth Amendment to the Constitution (1987 2 SLR 319)* following view was expressed by Sharvananda, C.J. , with reference to the concept of federalism: "The term "Unitary" in Article 2 is used in contradistinction to the term "Federal" which means an association of semi-autonomous units with a distribution of sovereign powers between the units and the center. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that the sovereignty is undivided – in other words, that the powers of the central government are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the absence of subsidiary law-making bodies, but it does mean that they may exist and can be abolished at the discretion of the central authority. It does therefore, mean that by no stretch of meaning of words can those subsidiary bodies be called subsidiary sovereign bodies and finally, it means that there is no possibility of the central and the other authorities coming into conflicts with which the central government, has not the legal power to cope.....".

The Substituted 1st Responded submitted that advocacy for sharing sovereignty along federal lines does not tantamount to demanding a separate State. Instead, as per the interpretation of federalism in the judgment given by Chief Justice Sharvananda, in the Thirteenth Amendment Determination, it is merely a "distribution of sovereign powers between the units and the centre" unlike in a unitary State where sovereignty is undivided.

The Learned Counsel for the Petitioner at the hearing and in the written submissions based his argument on Vaddukkottai Resolution which advocated establishment of a separate State. The contention of the Learned Counsel for the Petitioner was that the

ITAK has unconditionally and unambiguously endorsed all resolutions of the TULF going back to 14 May 1976.

In regard to this submission the Substituted 1st Respondent in his written submissions took up the position that the claims to territorial statehood made in the Vaddukkottai Resolution adopted over forty (40) years ago in 1976, at the 1st National Convention of the Tamil United Liberation Front (hereinafter referred to as "TULF") presided by Mr. Chelvanayakam, Q.C., and Member of the TULF and not by ITAK. It is further observed that the TULF is not a party to the proceedings in the instant case. Thus, the Vaddukkottai Resolution is irrelevant to the present case.

This is an appropriate stage to refer to the policies of Tamil political parties during the pre and post independence era. G.G.Ponnambalam, the then leader of the All Ceylon Tamil Congress submitted before Soulbury Commissioners equal representation proposal which came to be known as " fifty- fifty demand". According to this proposal the Majority and the minorities should have equal representation. Soulbury Commissioners rejected this proposal and introduced section 29 to the Constitution to safeguard the interest of the minorities. In the first Cabinet of Independent Ceylon, G.G. Ponnambalam and C.Sunderalingam of the Tamil Congress held cabinet portfolios under D.S.Senanayake, the 1st Prime Minister of Ceylon. During this period two significant acts were enacted in Parliament. The Citizenships Act of 1948 deprived citizenship rights of a large number of estate workers of Indian origin. They became stateless persons overnight. Thereafter Parliamentary Election (amendment) Act was passed in 1950 which gave voting rights only to citizens. As a result a large number of estate Tamils of Indian origin lost their citizenship and franchise. Tamil leadership felt that section 29 of the Constitution is not an adequate safeguard to protect the rights of the minorities. This led to the formation of the Federal Party (ITAK) under the leadership of S.J.V. Chelvanayagam which advocated the establishment of a federal state.

The Federal Party had negotiations with the Sinhala parties and in 1957 then Prime Minister and Chelvanayagam entered into an agreement which came to be known as

Bandaranayake- Chelvanayakam Pact wherein the prime minister agreed to establish regional councils subject to the approval of the Parliament . Due to the strong opposition from the Sinhala majority, the prime minister was forced to abrogate the pact. Similarly in 1965 Chelvanayagam entered into an agreement with then prime minister Dudley Senanayake which came to be known as Dudley Senanayake-Chelvanayagam Pact wherein the prime minister agreed to establish district councils. This pact was also abrogated due to the strong opposition of the Sinhala majority.

The ITAK supported the Vaddukodai Resolution and became a member of the TULF which in 1977 Election Manifesto advocated the establishment of a separate state known as Eelam. The TULF did not accept the 1972 and 1978 Republican Constitutions.

In late 1970s witnessed the emergence of Tamil youth militant groups engaged in an armed struggle to established a separate state . The militant group Liberation Tigers of Tamil Eelam(LTTE) after liquidating the rival militant groups claimed to be the sole representative of the Tamils. The other militant groups and political parties were neutralized or marginalized. In order to end the conflict and establish a lasting peace the Government of Sri Lanka was compelled to have talks with LTTE (eg. Thimpu Talks in 1985) and enter into a Ceased Fire Agreement in 2002. The war ended in 2009 with the defeat of the LTTE. The question that arises for consideration is whether the political party ITAK had abandoned the separatist movement and advocate the establishment of a federal state within a united Sri Lanka or not .

The Learned Counsel for the Substituted 1st Respondent had conceded that it is an undisputed fact that the course of Tamil politics underwent an episode during which the call for a separate State was taken up and that Members of the ITAK also adopted a similar position and that some members had refused to take oath under the Sixth Amendment to the Constitution and as a result lost their seats in Parliament. From 1983-1988 there were no Tamil representatives from North and Eastern Province in Parliament, District Councils and local bodies.

It was further submitted on behalf of the Substituted 1st Respondents that this situation however changed with the enactment of the Thirteenth Amendment to the Constitution and that several Members who lost their seats in Parliament returned to Parliament after subscribing to the oath prescribed by the Sixth Amendment to the Constitution and that every single sixteen (16) Members belonging to ITAK in the current Parliament have subscribed to the oath prescribed by the Sixth Amendment and also that several who were Members of Parliament on previous occasions have also subscribed to the oath several times.

The Seventh Schedule refers to Oath/ affirmation to be taken or subscribed under Article 157A and article 161(d) (iii) of the Sixth Amendment to the Constitution. It reads thus:

“ Ido solemnly declare and affirm/swear that I will uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka and that I will not, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.

The 1st Respondent Mavai Somasunderam Senathiraja, then General Secretary and current President of the ITAK in his affidavit dated 16th September 2014 tendered in this case stated under oath that “it is axiomatic that neither the ITAK nor the Tamil National Alliance can be said to have as its aims and/or objects the establishment of a separate State within the territory of Sri Lanka”. This indicates that the ITAK no longer supporting or advocating the establishment of a separate state.

Further, it is stated in the 2013 Election Statement released in advance of the Northern Provincial Council Elections by ITAK which contested elections under the banner of the Tamil National Alliance (hereinafter referred to as “TNA”) in alliance with several other parties but under the ITAK name and symbol, under the heading “Tamil People and the Present Constitutional Arrangements” as follows:

“ We are as a People are thus concerned about our historical habitats, our Collective Rights that accrue to us as a People and as a National and our entitlement to exercise our right to determine our destiny to ensure self-government in the Tamil Speaking North-East of the country *within a united and undivided Sri Lanka.*”(Emphasis added)

Thereafter, after delineating the party’s position on “Our Stand on a Political Solution”, it is stated as follows:

“All that has been stated above shall be enacted and implemented *within the framework of a united and undivided Sri Lanka.*”(Emphasis added)

It is also noted that identical statements as cited above was also included in the 2015 Election Manifesto of Tamil National Alliance.

The Substituted 1st Respondent submitted that Election Statements and manifestos it is manifestly clear that the ITAK is seeking a solution “within the framework of a united and undivided Sri Lanka.”

On the other hand, the Petitioner alleged that “self-determination involves attaining an Independent State, or, reciprocally, if the people asserting self-determination freely choose to remain as part of another State, they retain the right to secede at their will, because the only reliable way for a people to fully control their political status, as well as their economic, social and cultural development, is in an Independent State. Therefore the right to secede is an integral component of the right to self-determination, even though, at any given point in time, the people who have acquired the right to self-determination might not assert their right to secession.”

The Learned Counsel for the Petitioner referred to two covenants on human rights adopted by the United Nations in 1966. They are International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural rights, and both these Covenants proclaimed the right of self-determination in the Common Article 1 which reads as follows:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

The Learned Counsel for the Substituted 1st Respondent underscores the fact that it is “peoples” who are repositories under international law for the right to self-determination and thus the ITAK hold that the Tamil people are a “people” in terms of the above international covenants, and therefore, it is axiomatic that the Tamil people are also entitled to the right to self-determination.

The Petitioner and the Substituted 1st Respondent both referred to Canadian Supreme Court Judgment in ‘Reference re Secession of Quebec’ (1998) 161 DLR(4th)(385). In that reference the main question that has to be determine is whether under the Constitution or under international law can the National State assembly, legislature or the Government of Quebec effect the secession of Canada unilaterally? The following passage in the Judgement is relevant to the application before this Court.

‘The Court was also required to consider whether a right to unilateral secession exist under international law. Some supporting the affirmative answer did so on the basis of recognized right to self determination that belongs to “ all peoples”. Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the “ people” issue because , whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises the principle of self-determination of people at international law where “ a people” is governed as apart of colonial empire; where “ a people” is subject to alien subjugation, domination or exploitation; and possibly where “ a people” is denied any meaningful exercise its rights of self-determination within the state of which it forms a part. In other circumstances , peoples are expected to achieve self- determination within the framework of their existing state. A state whose government represent whole of the people or peoples resident within its territory, on the basis of equality and without discrimination and respects the principle of self-determination in its internal

arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states”.

In *Federalism and Diversity in Canada* by Ronald L. Watts published in *Autonomy and Ethnicity – Negotiating Competing Claims in Multi-ethnic States*” Edited by Yash Ghai, at page 48) it was stated:

“where all the evidence points to the fact that, if there had not already been provincial autonomy, the movement for secession would have been much stronger, not weaker. It is not insignificant that referendum results and repeated recent public opinion surveys have persistently pointed to the fact that a large majority of Quebeckers want greater autonomy, but combined with continued association with the rest of Canada”

In the 2010 *Kosovo Advisory Opinion* delivered by the International Court of Justice, Judge Cancado Trindade in a separate opinion in page 184 held as follows:

“Recent developments in contemporary international law were to disclose both the external and internal dimensions of the right of self-determination of peoples: the former meant the right of every people to be free from any form of foreign domination, and the latter referred to the right of every people to choose their destiny in accordance with their own will, if necessary – in case of systematic oppression and subjugation – against their own government. This distinction challenges the purely inter-state paradigm of classic international law. In the current evolution of international law, international practice (of States and of international organizations) provides support for the exercise of self-determination by peoples under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonization. Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation.”

Based on the above opinion the Substituted 1st Respondent submitted that it is clear that the right to self-determination has an internal dimension, in that it could be

exercised within the country to the benefit of a "people" inside the country. Thus, the invocation of self-determination does not amount to a demand for a separate State, as the right is sometimes to be used internally within the territory of an existing State.

It is established that there is a clear distinction between words 'federation' and 'confederation'. The main issue in this case is whether advocating the establishment of a federal state tantamount to establishment of a separate state. It is relevant to consider the manner the federal states were formed in various parts of the world. United States of America, Australia and Switzerland are federal states. Thirteen States which were former colonies of the Great Britain joined to establish United States of America. The reason for uniting under one state is to promote trade and to ensure the security of the States. Six States in Australia in fear of pacific powers united to establish a federal state. In order to remove linguistic and regional differences Swiss federation was formed. Great Britain, France and Italy are examples of unitary states.

The labelling of states as unitary and federal sometimes may be misleading. There could be unitary states with features or attributes of a federal state and vice versa. In a unitary state if more powers are given to the units it could be considered as a federal state. Similarly in a federal state if the centre is powerful and the power is concentrated in the centre it could be considered as a unitary state. Therefore sharing of sovereignty, devolution of power and decentralization will pave the way for a federal form of government within a unitary state. The Thirteenth Amendment to the Constitution devolved powers on the provinces. The ITAK is advocating for a federalist form of government by devolving more powers to the provinces within the framework of a unitary state. Advocating for a federal form of government within the existing state could not be considered as advocating separatism.

It is established that the ITAK support or advocate the establishment of a federal State within united Sri Lanka. It does not , support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka as envisaged under Article 157A of the Constitution. Therefore Petitioner is not entitle to a declaration under Article 157A (4) of the Constitution.

Application dismissed. No Costs.

Chief Justice

Upali Abeyrathne J.

I agree

Judge of the Supreme Court

Anil Goonerathne J.

I agree.

Judge of the Supreme Court

