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An Eager Embrace: Emergency Rule and Authoritarianism in Republican Sri Lanka

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Introduction

Much of Sri Lanka's post-independence period has seen governance under states of emergency. The invocation of the Public Security Ordinance (PSO)¹ by successive governments was a common feature of political life and, indeed, an integral aspect of the political culture of the republic. Several generations of Sri Lankans have grown up and have been socialised into political and public life in an environment fashioned by states of exception replete with attendant symbols and imagery. Images of police with automatic weapons, military check-points, barbed wire, lengthy periods of detention (often administrative detention) mainly of the political 'other', the trauma of political violence and the ever-present sense of fear became the 'normal'. The state of exception has become the norm in Sri Lanka from the 1970s onwards.

The permanency of the state of exception was further consolidated when the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA) was converted into a permanent law in 1982.² Although not an emergency regulation, the PTA conferred extraordinary powers on the executive branch (e.g. powers of arrest and detention) to deal with what it recognised as acts of terrorism. That in combination with the ever-present emergency powers, which were sanctioned by the Constitution, provided a formidable legal framework to entrench the state of exception. The omnipotence of the executive presidency created by the second republican constitution (1978) amplified the potency of those exceptional powers.

Sri Lanka had become the quintessential 'National Security State', the vestiges of which have not been shaken off even five

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¹ The Public Security Ordinance, No. 25 of 1947 (as amended).

² Section 29 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 declared that the law will be operative only for three years from the date of commencement. However, that provision was repealed by the Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No.10 of 1982.

years after the end of the civil war in the north-east in May 2009. In short, ruling under extraordinary powers has become the dominant ethos of governance in Sri Lanka. When many a country enacted anti-terrorism laws in the aftermath of 9/11, Sri Lanka could boast of the dubious distinction of being an experienced ‘elder’ state in such matters with a substantial corpus of extraordinary laws, attendant state practice, and jurisprudence.

Nearly fifteen years ago, i.e. when rule under emergency in Sri Lanka had reached close to twenty years of existence, I published an article examining judicial responses to state violence emanating from the prevailing states of exception.³ There I argued that the Supreme Court, after an initial period of deference to the executive, had gradually changed its original stance and had by the late 1980s become an advocate for establishing the rule of law within the context of emergency. Witness to the continuing states of emergency and the accompanying abuse of authority, the court began to strictly scrutinise executive use of emergency powers. In a string of fundamental rights judgments, the court laid down limits on the restriction of constitutional rights under emergency powers. Admittedly, the court had the advantage of a greater degree of judicial independence then and the incumbency of a few activist justices, in particular the late Justice Mark Fernando.

The objective of this essay is to expand the scope of enquiry by examining the evolution of the public security discourse in Sri Lanka’s constitutional debates in the past century, and how the makers of both republican constitutions of Sri Lanka, *contra* the Independence Constitution (the Soulbury Constitution), embraced that debate and gave constitutional expression to states of exception. It will examine how constitutional provisions on public security were used instrumentally under both republican constitutions by successive political regimes and how such instrumentalisation negated fundamental tenets of democratic governance. The essay, however, will not engage in a study of specific legal technicalities pertaining to the operation of emergency powers.

³ D. Udagama, ‘*Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*’ (1998) *Harvard Human Rights Journal* 11: pp.269-294.

First, I will place the evolving constitutional debate on public security in Sri Lanka in historical perspective. Thereafter, I will examine the three constitutions that have operated in post-independence Sri Lanka in relation to public security, and then move on to state practices that evolved in operationalising states of emergency. In order to place such provisions and practices in broader relief, those will be assessed against the yardstick of international human rights law obligations of Sri Lanka. The discussion will then move on to whether the anticipated system of checks and balances operated satisfactorily to blunt the force of this exceptionalism. In particular, judicial scrutiny of emergency measures will be focused on. The final part of the chapter will set out conclusions and prognostications.

Historical Perspectives: An Ironic Legacy

Republicanism and States of Emergency

One of the major ironies of republicanism in Sri Lanka is that rule under states of emergency, or rule by exception, became the norm in the republican era than during any other period of modern political history, British rule included. While the British colonial authorities too used exceptional laws to good measure in order to deal with dissent, as in the case of declaring martial law during the 1848 riots in the Kandyan regions, there was a quick return to the *status quo ante*. That episode saw the colonial authorities court martial and execute several persons and banish others among the harsh measures taken to quell the rebellion. However, as Kumari Jayawardena points out, the high-handed policies of the administration gave rise to vehement protests by some officials who went so far as to demand the recall of Governor Torrington. Eventually, the colonial government's policies were subject to a Parliamentary Committee of Enquiry whose members included future Prime Ministers Gladstone and Disraeli.⁴ While the injustices perpetrated by and the harshness of colonial rule cannot be gainsaid, it also has to be recognised that there often were

⁴ K. Jayawardena (2010) *Perpetual Ferment: Popular Revolts in Sri Lanka in the 18th and 19th Centuries* (Colombo: Social Scientists' Association): pp.105-109.

corrective countervailing checks from within the official system and through protests of anti-colonial elements in British civil society.

A state of emergency was already in existence when the Republic of Sri Lanka was declared on 22nd May 1972 with the adoption of the first republican constitution.⁵ On 16th March 1971, a state of emergency was declared under the PSO by the left-leaning United Front (UF) government⁶ of Prime Minister Sirima R. D. Bandaranaike to deal with the growing insurgency of the Janatha Vimukthi Peramuna (JVP).⁷ What is not common knowledge, however, is that a state of emergency had been declared a few months prior to that by the UF government for purposes of demonetisation. It was a policy spear headed by the then Minister of Finance Dr N. M. Perera, a stalwart of the Trotskyite Lanka Sama Samaja Party (LSSP). The Emergency Regulations (ERs) adopted on 26th October 1970⁸ for that purpose required the invalidation and surrender of existing currency notes. The demonetisation policy was adopted in pursuance of the socialist reform agenda of the government with the objective of flushing out ‘black money’ in the market. Although the Prevention of the Avoidance of Tax Act came into effect on 1st November 1970, the emergency was extended on 25th November for another month.⁹ That emergency powers were resorted to for such a regular purpose, and that too by a régime with strong Marxist partners, gives an insight into the governing ethos of the strongly republican UF coalition. The Left’s embrace of the PSO while in office is palpably ironical in that left-wing political parties in Sri Lanka had consistently opposed the adoption and operation of the PSO.¹⁰

⁵ In general see S. Wickremasinghe, ‘*Emergency Rule in the Early Seventies*’ in A.R.B. Amerasinghe & S.S. Wijeratne (Eds.) (2005) *Human Rights: Theory to Practice* (Colombo: Legal Aid Commission): p.375.

⁶ The United Front government comprised the left of centre Sri Lanka Freedom Party headed by Prime Minister Bandaranaike, the Trotskyite Lanka Sama Samaja Party (LSSP) and the Communist Party of Ceylon (Moscow Wing).

⁷ See Prime Minister’s statement in Parliament explaining the reasons for the declaration of a state of emergency on 16th March 1972 in the Hansard, Vol.93: Col.2207 – 2211 (23rd March 1971).

⁸ Gazette No.14929/9 of 26th October 1970.

⁹ Wickremasinghe in Amerasinghe & Wijeratne (2005): p.378.

¹⁰ Further developed below.

The state of emergency declared on 16th March 1971 was already in operation when the first JVP insurrection took place on 5th April 1971. The insurrection was quickly crushed using extraordinary powers under emergency, giving rise to widespread allegations of serious human rights violations including prolonged (often administrative) detention, torture, and involuntary disappearances.¹¹ It was, in fact, in the aftermath of that violence that the Civil Rights Movement (CRM), the first non-governmental human rights organisation in the country, was formed. It was to consistently question abusive actions of the UF government and its successors under continuing states of emergency.¹² The CRM and other subsequently formed human rights organisations had work cut out for them in the coming decades. States of emergency continued to operate in the island from the early 1970s until September 2011 with only brief interludes.

There was a long interregnum between July 2001 and August 2005 during which rule by emergency powers lapsed. The loss of the parliamentary majority of the People's Alliance (PA) government headed by incumbent President Chandrika Bandaranaike Kumaratunga paved the way for the lapse of emergency on 4th July 2001.¹³ That month there was no motion presented to parliament to extend the existing state of emergency. However, a series of regulations under the PTA were gazetted commencing on the same date to compensate for that gap in extraordinary powers, one of which proscribed the Liberation Tigers of Tamil Eelam (LTTE). Additionally, the President using powers under Part III of the PSO called out the armed forces to maintain public order in specified areas and also designated certain services as essential services within the meaning of PSO.¹⁴ Arrests and detention pertaining to the security situation were covered by provisions of the PTA.

¹¹ See Amnesty International, *Report on a Visit to Ceylon*, September 1971.

¹² See for CRM interventions in its early years S. Wickremasinghe & M. Fonseka (Eds.) (1993) *21 Years of CRM* (Colombo: Civil Rights Movement publication).

¹³ L. Nasry, 'Emergency Exit', *The Sunday Times*, 8th July 2001.

¹⁴ Parliament of Sri Lanka (2001) 'Maintenance of Public Order: Orders and Regulations' in Hansard, Col.1707 (6th July 2001).

Thereafter, the Norwegian brokered ceasefire between the government of Sri Lanka and the LTTE came into effect in February 2002, and lasted until August 2005. Under the Ceasefire Agreement 2002,¹⁵ the PTA was to cease application and arrests were to be made under the normal law (clause 2.12). However, a state of emergency was again declared in August 2005 consequent to the assassination of Foreign Minister Lakshman Kadirgamar.¹⁶ Although at that time the Ceasefire Agreement was technically in force, for all practical purposes it had irretrievably broken down much earlier. The Ceasefire Agreement itself was officially abrogated in January 2008¹⁷ by the government of President Mahinda Rajapaksa and the government's military offensive to crush the LTTE intensified.

The prolonged states of exception lasting nearly four decades were justified by successive governments primarily on the basis of political violence and uprisings, both in the south and in the north-east of the country. Emergency powers were also used from time to time to crush labour unrest.¹⁸ The JVP uprisings in the south (1971 and 1987-88) were spearheaded by disgruntled Sinhala youth of the majority ethnic community. The uprising in the north and the east, which eventually metamorphosed into a civil war that lasted 26 years, was launched by disgruntled Tamil

¹⁵ The Ceasefire Agreement (2002), available at: <http://peaceinsrilanka.lk/negotiations/cfa> (accessed 23rd December 2014).

¹⁶ The proclamation of the state of emergency was published in Gazette No.1405/13 of 13th August 2005. ERs under that state of emergency were published in Gazette No.1405/14 of 13th August 2005.

¹⁷ The Government of Sri Lanka officially announced its intention to withdraw from the Ceasefire Agreement (2000) on 2nd January 2008. The Agreement stood terminated on 16th January 2008. For '*Statement by the Ministry of Foreign Affairs*' in that regard see:

http://www.priu.gov.lk/news_update/Current_Affairs/ca200801/20080118cfa_st_and_terminated.htm (accessed 23rd December 2014).

¹⁸ For example, President J.R. Jayewardene invoked emergency powers on 16th July 1980 to deal with a general strike. The Emergency Regulations promulgated for that purpose included the death penalty for some offences, admission of confessions made to police officers and the freezing of trade union accounts. Eventually, approximately 40,000 workers lost their jobs as they were deemed to have vacated their jobs. The July 1980 strike is considered to be a turning point in trade unionism in Sri Lanka. The CRM issued a statement urging the government not to use emergency powers as a weapon to oppose legitimate trade union rights of trade unions. See Wickremasinghe & Fonseka (1993): para.119.

youth of the major minority ethnic community in the country. That universal sense of disquiet and disgruntlement, stemming from a sense of marginalisation based on reasons that vary (class, caste, ethnicity), reflect the inability of the political elite to engage in effective nation-building after the grant of independence in 1948. In *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*¹⁹ provides ample discussion and in-depth analyses on the failure of the 1972 Constitution to establish an inclusive form of republicanism. It is trite that the constitution itself exacerbated existing ethnic cleavages and suspicions by adopting a strong majoritarian orientation.

The ensuing political fragmentation set in motion violent opposition to the state. The state in turn, unfortunately, thought fit to respond violently through the entrenchment of rule by exception rather than through attempts to find effective solutions via consultative democratic processes. Thus, this vicious cycle continued for decades with the violations caused by extraordinary laws adding to and amplifying the original set of grievances. Even though emergency is no longer in force, the overpowering impact that rule by extraordinary powers has had on the collective psyche and political imagination of Sri Lankans will continue to haunt the nation for quite a long time to come. Militarisation of many spheres of civilian activity has become the norm at present.²⁰

¹⁹ A. Welikala (Ed.) (2012) *The Sri Lankan Republic at Forty: Reflections on Constitutional History, Theory and Practice*, Vols. I & II (Colombo: Centre for Policy Alternatives).

²⁰ For example, at present the subject of urban development comes under the Ministry of Defence. The powerful Secretary of Defence, Gotabhaya Rajapakse, brother of President Rajapakse oversees urban development activities. More significantly, all students who have qualified to enter the public university system in the country have to follow a mandatory two week “Leadership Training Program” conducted by the military in military camps across the country. “Leadership Training” programs for principals of public schools are also being conducted in military camps. Upon completion of such trainings they have been conferred with the military title of “Brevet Colonel”. The recent death of such a trainee principal brought out torrents of protests from the public. However, the late principal had thought that by securing a military title he could attract more attention to the school. See report at: ‘*Writing on the Blackboard for Military Principals*’, *The Independent* <<http://www.theindependent.lk/news/375-writing-on-the-blackboard-for-military-principals>>. The military strategy that secured victory over the LTTE in 2009 is officially idealized as the model for success in all spheres of activity.

Self-Rule and the Ready Embrace of a Strong Public Security Regime

If republican politics spawned an era of rule by exception, that political irony was clearly portended by the manner in which local politicians who were agitating for self-rule readily embraced a strict public security regime on the eve of independence from British rule. The PSO was rushed through the State Council (the legislature under the Donoughmore Constitution of 1931) and adopted on 11th June 1947.²¹ Ceylon gained independence a few months later, on 4th February 1948. All political parties which formed governments in independent Sri Lanka have displayed a ready inclination to govern under the law of the exception. Particularly ironical was the eventual reliance on the PSO by the left politicians when they later assumed political power as coalition partners of the UF government in 1970.²² All Marxist parties in Sri Lanka, whether represented in the State Council or not, were avowedly against the adoption of the PSO. They consistently saw it as a 'reactionary' piece of legislation calculated to crush the left parties and the labour movement.²³

The popular perception is that the PSO was a product of the colonial British establishment adopted to crush political activism of its 'native' colonial subjects. On the contrary, it was essentially a creature of 'native' politics masterminded by the local political elite then waiting in the wings to replace the British. The primary motive for its adoption appears to be the crushing of radical activism of the Marxist parties. When the PSO was adopted the State Council was led by D.S. Senanayake, who went on to become the first Prime Minister of independent Ceylon a few months later.

Under the progressive constitutional reforms proposed by the Donoughmore Commission, the previous Legislative Council of Ceylon was replaced by a State Council consisting of 50 locally elected representatives, eight nominees of the Governor and three

²¹ The legislative debate accompanying the adoption of the PSO is most enlightening. Hansard, Vol.1: Col.1980-2026 (1947).

²² See, *supra*, text at fns.8-9, which describes how Dr. N. M. Perera (LSSP), Minister of Finance of the United Front government implemented a policy of demonetization under a state of emergency in 1970.

²³ See debate in Parliament on the amendment of the PSO in March 1949. Hansard, Vol.5: Col.2012-2026 (1948-1949).

Officers of the State (Chief Secretary, Legal Secretary, and Financial Secretary). The local representatives were to be elected on the basis of universal adult franchise that the Donoughmore Constitution (1931) had introduced. Aside from the historic granting of the vote to all adults, the new constitution had done away with the previous communally-based election system. Even though the new constitutional scheme conferred overriding powers to the Governor, in practice the Board of Ministers elected by the State Council wielded considerable authority.²⁴

When the PSO was debated at bill stage in the State Council in June 1947, leading political figures in the independence movement such as D.S. Senanayake, S.W.R.D. Bandaranaike, and George E. de Silva were its major defenders. Efforts by fellow Council Members Bernard Aluwihare and Dr A.P. de Zoysa to introduce amendments to the bill that would make the proposed public security regime less harsh were consistently defeated by the bill's proponents. Mr. Aluwihare's attempts to introduce amendments that would cap the duration of a proclamation of emergency, require approval of such a proclamation by the State Council, and remove a clause that excluded judicial review of executive action under a state of emergency were all defeated by majority vote. So was an attempt made by Dr de Zoysa to remove a clause that permitted the suspension or amendment of existing laws through emergency regulations. Eventually, the Bill was adopted 33-7.²⁵ The following pithy comment of W. Dahanayake, Member for Bibile perhaps best captured the irony of the move:

“I say that this Bill is something which no civilized society would consent to, least of all an Assembly of hon. Members. Yet I would conclude my remarks by saying that those who have approved this Bill are all honourable men.”²⁶

²⁴ J.A.L. Cooray (1995) *Constitutional and Administrative Law of Sri Lanka* (Colombo: Sumathi Publishers): pp.25-29.

²⁵ The State Councilors who opposed the Bill were: B.H. Aluwihare, W. Dahanayake, A.P. de Zoysa, R.E. Jayatilaka, V. Nalliah, G.G. Ponnambalam, and S.A. Wickremasinghe. Hansard, Vol.1: Col.2025 (1947). Members of the Board of Ministers voted for the Bill.

²⁶ Ibid.

During the debate in the State Council the opponents of the bill chided the government for adopting such drastic measures because of their fear of political opponents (the Marxists) and the threat of widespread strikes (orchestrated by them).²⁷ Historian K.M. de Silva confirms those as the underlying reasons for the hasty passage of the bill. He points out that D.S. Senanayake "... paid exaggerated importance to the presumed threat from the left and took extraordinary steps to meet it."²⁸ The wave of general strikes and industrial agitation that took place in the period 1945-47 under the leadership of the LSSP had shaken the political establishment. The passage of the PSO and also the Trade Union (Amendment) Act, No. 15 of 1948, which tightened up rules in regard to registration of trade unions, were in response to that perceived threat.²⁹ That the left parties were serious political contenders at the 1947 general election held in August-September that year is a vital factor that cannot be overlooked.³⁰ Rather than serve British colonial interests, the adoption of the PSO, from all indications, appears to have been a home and home affair.

The PSO was subsequently amended several times.³¹ In the context of the above discussion of the politics of the era, it is of interest that the government of Prime Minister D.S. Senanayake – now firmly ensconced as the first government in independent Ceylon – moved amendments to the PSO in 1949 to soften or ‘democratise’ the PSO by accommodating certain amendments that were previously suggested by the likes of Aluwihare and de Zoysa back in 1947. Among some of the improvements were the requirement that a proclamation of emergency had to be communicated to Parliament for its approval within ten days and also the removal of the extraordinary power of arrest without warrants. The left parties, while welcoming the relaxation of some

²⁷ See, in particular, speeches of Dr A.P. de Zoysa and Dr S.A. Wickramasinghe during the debate on 11th June 1947. Hansard, Vol.1: Col.2022-2023 (1947).

²⁸ K.M. de Silva (2005) *A History of Sri Lanka* (Vijitha Yapa & Penguin Books): p.605.

²⁹ Ibid: p.605-606.

³⁰ Ibid: p.606-607. In fact, the left-wing parties did so well at the 1947 general election that eventually the leader of the LSSP Dr N.M. Perera became the first Leader of the Opposition in independent Ceylon.

³¹ The Public Security Ordinance No.25 of 1947 was amended by Acts No.22 of 1949, No.34 of 1953, No.8 of 1959, No.28 of 1988 and Law No.6 of 1978.

harsh provisions, nonetheless voted against the amendments citing their abiding disapproval of the PSO as a ‘reactionary’ piece of legislation aimed at silencing political opponents.³²

The PSO was again amended in 1953 and 1959. Both amendments were subsequent to political violence experienced in the country. A successful left-led *hartal* (stoppage of work) which took place in 1953 in response to the curbing of food subsidies ended in violence with several losing their lives. Again, in 1958 there were ethnic riots in the backdrop of the rising tide of ethno-nationalism in national politics.³³ Predictably, emergency powers were widened in the aftermath of those violent incidents. For example, under the 1953 amendment a state of emergency could be declared by the Governor-General in view of an ‘imminent’ public emergency. Part III of the PSO, which provides extraordinary powers to the executive, such as calling out the armed forces even without declaring a state of emergency, was introduced by Act No. 8 of 1959.

In January 1978 the government of the then Prime Minister J.R. Jayewardene moved extensive amendments to the PSO incorporating several safeguards citing abuse of emergency powers by the previous United Front government³⁴ which governed the country under states of emergency from March 1971 – February 1977.³⁵ The 1978 amendments were mainly focused on increasing legislative oversight over the declaration and continuation of states of emergency. The requirement of parliamentary approval for extending a state of emergency beyond thirty days was introduced by Law No. 6 of 1978. While the 1978 amendments were salutary, their significance was lost in practice as Parliament became nothing more than a rubberstamp of the powerful executive presidency under the 1978 Constitution.

Despite the adoption of progressive amendments to the PSO in 1978, in July 1979 the government of President J.R. Jayewardene rushed the Prevention of Terrorism (Temporary Provisions) Bill

³² Hansard, Vol.5: Col.2012-2026 (1948-1949) (debate held on 29th March 1949).

³³ de Silva (2005) at pp.608-612 and 626-638.

³⁴ Hansard, Vol.26: Col.616-618 (1978) (debate held on 31st January 1978).

³⁵ See Wickremasinghe & Fonseka (1993): p.19.

through Parliament as an ‘urgent bill’, denying public comment or, indeed, adequate study of and comment by the parliamentary opposition. The legislative move was justified by the government, citing increasing radicalisation of Tamil political groups in the north. It was the turn of the Sri Lanka Freedom Party (SLFP) (the main constituent party of the previous UF government) now in the parliamentary opposition to protest the adoption of that harsh law.³⁶ The PTA did not define ‘terrorism’ inasmuch as the PSO failed to define a ‘public emergency.’ It did confer extraordinary powers of arrest and detention by the police; permit administrative detention for up to 18 months and admission of confessions; impose a restrictive bail regime and punishments including forfeiture of property; and permit the prohibition of publications. The PTA was made permanent in 1982.³⁷ With the imposition of emergency rule on 18th May 1983 (one month before the ethnic pogrom of July 1983) and its continuation³⁸ through the years of the armed conflict in the north and east, the combined force of the PTA and emergency powers made for a lethal legal framework permitting governance under the law of exception.

It is abundantly clear that from its inception the PSO – and indeed the public security discourse in the country – were used in a politically instrumental manner by successive governments. The once principled opponent in the political opposition saw infinite merit in the relevance of the PSO when in power. As observed above, the most notable exemplars of this cynical trend were the left parties while serving as coalition members of the UF government in the early 1970s. The public security regime was continually used for purposes of consolidating political power in the guise of protecting the public from various ‘threats.’ Politics of

³⁶ See statement made by Maithripala Senanayake, MP (SLFP) during the debate on the Prevention of Terrorism (Temporary Provisions) Bill held on 19th July 1979 reproduced in B. Bastiampillai, R. Edrissinghe & N. Kandasamy (Eds.) (2008) *Sri Lanka Prevention of Terrorism Act (PTA): A Critical Analysis* (Colombo: CHRDR): pp.273-277.

³⁷ See, *supra*, fn.2.

³⁸ It is noteworthy that a 1988 amendment to the PSO facilitated the continued operation of emergency regulations. Public Security (Amendment) Act No. 28 of 1988 provided for Emergency Regulations made under one state of emergency to continue under a subsequently proclaimed state of emergency.

fear, with a perpetual enemy around the corner, has become the norm. In fact today, contrary to justifiable expectations of a resurgence of liberal politics throughout the post-war years, dissent is identified and chastised by the political establishment as ‘conspiracies.’ Given the parochial political predilections of parties from the political right to the left, the fashioning of a principled public security regime in Sri Lanka with attendant liberal safeguards seems too high an ideal to realise.

The political history of the PSO typifies the ubiquitous tendency in Sri Lankan politics to instrumentalise liberal principles and systems. While on the one hand there is a seeming reliance on liberal democratic principles of governance, there is, on the other hand, the constant spectre of illiberal subversions with scant regard for accountability. This vastly compromised liberal ethos is at the heart of political crises in Sri Lanka. Senator Dr Naganathan succinctly pointed to that disjuncture during the 1949 Senate debate on the PSO:³⁹

“I want to emphasize again the fact that this Government, when copying provisions from the various emergency laws existing in the world, have omitted those very necessary safeguards which are contained in those laws ... Under the British Emergency Powers Act [1920] ... those regulations [emergency regulations] cannot be passed without the knowledge of Parliament ... Here they have full power for one month to pass any kind of regulation and do anything they like.”

³⁹ Hansard, Vol.2: Col.2623 (1948-1949) (debate on 19th May 1949). See also speech made by Senator Jayasena in the same debate in Col.2623-2624. In an impassioned speech made during the debate on proposed amendments to the PSO in 1953, Bernard Aluwihare, MP, a consistent opponent of the PSO, pointed to the famous Bracegirdle case (1937) 39 NLR 193, in which the attempts of the colonial government of Ceylon to expel an Australian planter with radical political ideas were stalled by judicial fiat. Pursuant to an application for a writ of habeas corpus filed by the LSSP, the colonial Supreme Court found Bracegirdle’s detention and deportation to be illegal as the legal basis of the executive action was found to be faulty. Aluwihare pointed to the irony that the PSO adopted by local politicians had a clause which removed judicial review of executive action under emergency powers. Hansard, Vol.xv : Col.682-688 (1953-1954) (debate held on 18th August 1953).

The Post-Independence Constitutions and States of Exception

The public security regimes under the three successive post-independence constitutions of Sri Lanka provide further confirmation of a political legacy redolent with ironies. Unlike the Independence Constitution, both Republican Constitutions (1972 and 1978) gave constitutional recognition to the PSO and provided a constitutional framework in regard to public security. While on principle that may be salutary, the dilution of checks and balances in those two constitutions, in particular in the 1972 Constitution, made for a harsh public security regime. Even though the 1978 Constitution enjoys the infamy of creating the omnipotent executive presidency, at the inception it nevertheless had better safeguards on public security powers than its predecessor. Eventually, however, the political culture that evolved in the backdrop of an increasingly autocratic executive presidency had scant regard for such liberal niceties. Overall, the republican constitutional and political dispensations in Sri Lanka had not put much stock in liberal principles and practices. Constitutionalism continues to be a constant casualty of that variety of republicanism.

The Soulbury Constitution (Independence Constitution)

The Soulbury Constitution (Orders-in-Council, 1946/47)⁴⁰ adopted by the British colonial authorities on behalf of the soon-to-be independent Ceylon did not contain provision for situations of public emergency. Sir Ivor Jennings, widely acknowledged as the architect of that constitution, in his seminal publication on the Soulbury Constitution makes no mention of discussions or attempts to provide a constitutional framework in that regard.⁴¹ The PSO adopted by the State Council in 1947 was invoked from time to time during the operation of that constitution. The Governor-General was required by the constitution to exercise

⁴⁰ The Soulbury Constitution refers to The Ceylon (Constitution) Order in Council (1946) read together with the Ceylon Independence Act (1947) and The Ceylon (Independence) Order in Council (1947).

⁴¹ I. Jennings (1949) *The Constitution of Ceylon* (London: Oxford University Press).

powers of office “in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty...”⁴² As the Governor-General was the authority which could make a proclamation of emergency under the PSO, it followed then that such powers could be exercised only on the advice of the Prime Minister in terms of British constitutional conventions.

The 1972 Constitution

As pointed out earlier, the first republican constitution of Sri Lanka (1972) was drafted, debated and finally adopted on 22nd May 1972 by the Constituent Assembly during an on-going state of emergency. The state of emergency, which was declared on 16th March 1971 to deal with the JVP insurgency, was still in operation then.⁴³

The constitution which was adopted as an autochthonous instrument had explicit provision for giving constitutional recognition to the PSO and was deemed to be a law enacted by the newly created National State Assembly (legislature). It further provided that the titular President should act only on the advice of the Prime Minister in matters pertaining to a state of emergency.⁴⁴ What is significant here is not only that this was the first autochthonous constitution of independent Sri Lanka, but that the two leading Marxist parties in the country (The Communist Party of Ceylon and the LSSP) played a pivotal role in its formulation as influential coalition partners of the UF government. As discussed above, they were avowedly against the PSO as a ‘reactionary’ piece of legislation while in the political opposition but saw it as a useful tool while in political office.

Unlike other subjects of importance, the constitutional recognition of the PSO was not a subject that was put to a committee of the Constituent Assembly for further scrutiny and reporting back.

⁴² The Soulbury Constitution: Section 4(2).

⁴³ See *supra* text at fns.5-7.

⁴⁴ The Constitution of Sri Lanka (1972): Article 134.

When the draft constitution was presented to the Assembly for adoption, an emotionally charged lone voice, assembly member Prins Gunasekera, questioned the ‘double-faced’ stance of the left on the PSO. Another, assembly member R. Premadasa, wondered why the PSO had to be singled out for special recognition when there was an omnibus provision in the draft (Article 12) which provided continuity for all existing written and unwritten laws. The explanation given by the Minister of Constitutional Affairs (a member of LSSP) was that as the PSO’s operation had implications for other constitutional provisions, including legislative powers of the proposed National State Assembly, its recognition as a law ‘deemed’ to be adopted by that Assembly was necessary in order to avoid an interruption (note that a state of emergency was in operation at that time). Eventually, draft Article 134 on public security was adopted by a vote of 29-2 by the Constituent Assembly without amendment.⁴⁵

*The Sri Lankan Republic at 40*⁴⁶ exhaustively maps and analyses the illiberal trajectories of the 1972 Constitution, which need not be repeated here. Suffice, however, to point out that features of the 1972 Constitution that considerably weakened the independence of the judiciary and the rule of law⁴⁷ denied sufficient checks on the public security regime. That constitutional framework did not provide for legislative oversight of public security measures. In fact, there is no evidence of the states of emergency being debated in the National State Assembly although emergency rule extended for approximately six consecutive years beginning in March 1971. Also, while the constitution’s chapter on fundamental rights and freedoms did guarantee freedom from arbitrary arrest and detention and also the right to life, liberty, and security of the

⁴⁵ Constituent Assembly of Sri Lanka, *Official Report*, Vol.2: Col. 854-863.

⁴⁶ Welikala (2012).

⁴⁷ The 1972 Constitution provided a prominent role for the Cabinet of Ministers in matters involving the appointment and disciplinary matters pertaining to the judiciary and the civil service. Similarly, judicial review of legislation, which was permitted under the Soulbury Constitution, was removed. A Constitutional Court was established with powers to review legislative bills if challenged by the public within a week of being placed before the National State Assembly. That right of petition was lost if the Cabinet deemed a Bill to be ‘urgent in the national interest.’ In general see D. Udagama, ‘*The Fragmented Republic: Reflections on the 1972 Constitution*’ (2013) *The Sri Lanka Journal of the Humanities* 39: p.93.

person, they were subjected to a vaguely-worded limitation regime ‘in the interests of’ national security and public order among other grounds. The constitution did not provide for a specific constitutional remedy to redress violations of fundamental rights.

The regression of democratic guarantees in the 1972 Constitution stood in stark contrast to the idealism with which autochthony was sought to be established by its creators. They were intent on the new constitution being adopted as an autochthonous constitution severing legal links with its predecessor, the Soulbury Constitution. One of the main points of contention in that regard was the perceived entrenchment of Section 29 (2) of the Soulbury Constitution which imposed limitations on legislative powers of parliament in order to prevent religion or community based discrimination. Asanga Welikala has discussed this matter *in extenso* concluding that, in fact, Article 29 (2) was not entrenched, thereby rendering the entire exercise of severing links with the Soulbury Constitution superfluous.⁴⁸ Whether there was a misreading of the Soulbury constitutional scheme or not,⁴⁹ the issue that needs to be addressed is why the ‘constitutional revolution’ that was launched to create the new republic was quick to adopt regressive measures when it was resolute in its rejection of a provision such as Section 29 (2) of the Soulbury Constitution which held out much potential for nation-building.

The 1978 Constitution and the Executive Presidency

The second republican constitution (1978) was paradoxical in its approach to governance. Although it did seem to be bent on

⁴⁸ A. Welikala, ‘*The Failure of Jennings’ Constitutional Experiment in Ceylon: How ‘Procedural Entrenchment’ led to Constitutional Revolution*’ in Welikala (2012): p.145.

⁴⁹ The architect of the 1972 Constitution, Dr Colvin R. de Silva, later admitted that he did not think that Section 29 (2) was entrenched. See C.R. de Silva ‘*Safeguards for the Minorities in the 1972 Constitution*’, a lecture delivered at the Marga Institute, Colombo on 20th November 1986 (A Young Socialist Publication, 1987): p.7.

correcting the assault on checks and balances by its predecessor, the introduction of an all-powerful executive presidency which was not effectively accountable to other branches of government extensively negated those good intentions.

The constitution incorporated a chapter on fundamental rights⁵⁰ which was more detailed than its previous counterpart.⁵¹ Significantly, it introduced a constitutional remedy for violations or imminent violations of fundamental rights.⁵² The right to seek that remedy was also recognised as a distinct right.⁵³ The remedy, however, was limited in scope in that it could challenge only executive or administrative action, had to be brought within a month of the alleged violation, and did not expressly recognise public interest litigation. Nonetheless, it was an improvement over the 1972 scheme and, as we shall see in part 5 of this essay, proved to be the main means of challenging excesses under emergency rule. It is also the case that progressive judgments of the Supreme Court, particularly in the latter part of the 1980s and throughout the 1990s, broadened the scope of the remedy.⁵⁴

The constitution also strengthened the independence of the judiciary by establishing an independent Judicial Services Commission. Previously, the cabinet had a powerful say over the appointment, transfer, dismissal, and disciplinary action over the lower judiciary.⁵⁵ The 1978 Constitution was strengthened in regard to judicial independence with the adoption of the Seventeenth Amendment to the Constitution in October 2001 (adopted with rare unanimity among all political parties represented in Parliament). It established an independent Constitutional Council without the approval of which the President could not appoint justices to the superior courts.

⁵⁰ The Constitution of the Democratic Socialist Republic of Sri Lanka (1978): Ch.III.

⁵¹ However, the right to life guaranteed by the 1972 Constitution was mysteriously dropped from the 1978 Constitution. Freedom from torture, which was conspicuous by its absence in the 1972 Constitution was guaranteed by its successor (Article 11 of the 1978 Constitution) and was also recognised as an entrenched clause (Article 83).

⁵² The Constitution of Sri Lanka (1978): Article 126.

⁵³ Ibid: Article 17.

⁵⁴ Udagama (1998).

⁵⁵ The Constitution of Sri Lanka (1972): Sections 124-130.

Similarly, members of the Judicial Services Commission (other than the Chief Justice who chairs the Commission) could not be appointed by the President without the approval of the Constitutional Council.⁵⁶ Those features of the 1978 Constitution were vast improvements over the scheme of the 1972 Constitution and provided a relatively strong countervailing framework in checking abuse of authority through judicial review.⁵⁷

Chapter XVIII of the 1978 Constitution, which is entirely on the subject of public security, provides for legislative oversight of states of emergency – a feature absent in the previous constitution. In early 1978 (i.e. before the enactment of the 1978 Constitution) the Jayewardene government made significant amendments to the PSO with the stated intention of introducing liberal safeguards to the public security regime.⁵⁸ To a great extent, the constitutional chapter reflects the 1978 amendments to the PSO.

Under the constitutional chapter on public security, the PSO (as amended) is given constitutional recognition. A proclamation made by the President under the PSO declaring a state of emergency is required to be communicated to Parliament ‘forthwith.’ Such a resolution will lapse in 14 days unless approved by Parliament. The resolution once approved will be valid for a period of 30 days from its making unless revoked earlier. Provision is also made to ensure legislative approval in situations where Parliament is either dissolved, adjourned, or prorogued, by requiring its summoning. Originally, the chapter contained a provision that required a two-thirds majority of all members (including those not present) for approval of a proclamation of emergency made when a state of emergency had been in force for a total of 90 days within a consecutive period of six months. However, that provision was removed by the Tenth Amendment to the Constitution adopted in August 1986,

⁵⁶ The Seventeenth Amendment to the Constitution (2001): Article 41 (c).

⁵⁷ It is significant that the Civil Rights Movement of Sri Lanka in a strongly worded public statement (No. 4/8/82) opposed calls made in 1982 by opposition circles for a restoration of the 1972 Constitution. Wickremasinghe & Fonseka (1993): para.155 at p. 41.

⁵⁸ See *supra* text at fn.32.

permitting the extension of an already lengthy period of emergency by a simple majority.⁵⁹

When ethnic violence broke out in Colombo in July 1983, the country was already under the state of emergency declared on 18th May that year. Violence in the north-east intensified thereafter and metamorphosed into a three-decade long civil war. The country was continuously under a state of emergency from then onward with a brief interlude in January 1989 and a longer one between July 2001 and August 2005.⁶⁰ The Tenth Amendment facilitated the prolongation of emergency with greater ease.

Despite the constitutional safeguards and the initial declaration of good intentions by the Jayewardene regime, a culture of authoritarianism, political violence, and governance by extraordinary means was soon institutionalised. An incumbent president⁶¹ who had the privilege of fashioning a constitution according to his own will – and thereby powers of his office – coupled with a parliamentary majority of five-sixths obtained under the first-past-the-post election system of the 1972 Constitution,⁶² proved to be a ready recipe for authoritarianism. Negative features of the 1978 Constitution itself wrought part of the damage. For example, under Article 163 all judges of the

⁵⁹ See for ‘*History of Amendments to the 1978 Constitution*’, <http://www.priu.gov.lk/Cons/1978Constitution/ConstitutionalReforms.htm> (accessed 23rd December 2014).

⁶⁰ See Wickremasinghe & Fonseka (1993): pp.45-57. Also, see *supra* text at fns. 13 and 14.

⁶¹ By the time the 1978 Constitution was adopted, the executive presidency had already been established by the Second Amendment to the 1972 Constitution. The amendment was orchestrated by the government of then Prime Minister J.R. Jayewardene who was elected into office at the 1977 general election. Jayewardene took oaths as the first executive president on 4th February 1978. The 1978 Constitution was adopted on 17th August 1978. See Cooray (1995): pp.75-81.

⁶² A general election was not held immediately after the adoption of the 1978 Constitution. In fact, President Jayewardene sought to prolong the term of the Parliament elected in 1977 under the 1972 Constitution via a referendum. The 1982 referendum is remembered as one of the most violent electoral events held in Sri Lanka. The government declared that it had won the referendum and the incumbent Parliament continued for another six years. The first general election under the 1978 Constitution was held only in 1989.

Supreme Court and the High Courts who held office immediately before the constitution entered into force ceased to hold office. The President then dropped 13 of the former judges and appointed a group of 8 new justices and retained some others.⁶³ The new Chief Justice, Neville Samarakoon, was appointed to that position directly from the bar, ignoring the principle of seniority. Justice Samarakoon who asserted the independence of the judiciary once on the bench was later to be infamously impeached by Parliament through presidential fiat.⁶⁴ Again in September 1983, judges of the Supreme Court and the Court of Appeal were locked out from courtrooms on the basis that they had allegedly failed to take an oath under the Sixth Amendment to the Constitution (which outlawed separatism).⁶⁵ The effectiveness of the much-heralded constitutional remedy on fundamental rights was also seriously undermined by governmental actions in the early 1980s, which blatantly defied judicial orders.⁶⁶

Aside from the rapid erosion of independence of the judiciary, the early 1980s also witnessed the rapid rise of sectarian violence (e.g. the burning of the Jaffna Library in May 1981 in the run-up to the District Development Council election in Jaffna) and the phenomenon of politically affiliated goon squads attacking trade unionists, students and the like who were thought to be anti-government. The practice of rushing crucial legislative bills through Parliament also came to be a common feature during this period. The PTA was one such bill that was rushed through in 1979 as an urgent bill, thereby denying public commentary. The legislative process was instrumentalised to achieve existential political goals of the United National Party (UNP) in power such as the deprivation of civic rights of former Prime Minister Sirima

⁶³ See Wickremasinghe & Fonseka (1993): p.24. The best catalogue of political events during the 1980s and early 1990s is to be found in this publication.

⁶⁴ Ibid: p.47.

⁶⁵ Ibid: p.46.

⁶⁶ E.g., a senior police officer against whom the Supreme Court had made a finding in a fundamental rights case was promoted by the government and in another instance homes of Supreme Court judges who had rendered a judgment against governmental interests were attacked by groups of thugs who appeared to have state patronage.

Bandaranaike who was also thereby denied the right to participate in presidential and parliamentary elections. As opposition to anti-democratic measures mounted, emergency powers were used to crush such moves whether in the north (in the context of deepening ethnic conflict) or the south (as in the crushing of the July 1980 strike).

The nature of presidential politics of the early 1980s set the tone for the future of the presidency. Democratic institutions and processes were subverted for narrow political ends, and so also the law relating to states of exception. The adoption in September 2010 of the controversial Eighteenth Amendment to the 1978 Constitution on the imprimatur of incumbent President Mahinda Rajapakse – which vastly increased presidential powers in the triumphalist aftermath of the end of the civil war – is the brash and unapologetic culmination of the 1980s brand of presidential politics.

The Eighteenth Amendment replaced the consultative model of governance introduced by the Seventeenth Amendment. It made the President the sole authority in charge of appointing judges to the superior courts and, indeed, members to independent bodies, such as the Judicial Services Commission, the Human Rights Commission and the Police Commission. The President has to seek only the ‘observations’ of the Parliamentary Council (as opposed to a binding consultative process as under the Seventeenth Amendment) in matters relating to those appointments. Significantly, the two-term limit of the presidency imposed by the 1978 Constitution was abolished.⁶⁷ An already extraordinarily powerful presidency, made more so by a weak extra-democratic political culture, was thus made constitutionally monolithic. The amendment was rushed through Parliament as an urgent bill and was adopted by a two-thirds majority. That majority was obtained by several opposition MPs crossing over to government ranks prior to the vote. The Supreme Court too sanctioned the bill, with the Chief Justice delivering the unanimous judgment of the Court.⁶⁸

⁶⁷ The Constitution of Sri Lanka (1978): Article 31(2).

⁶⁸ See the Eighteenth Amendment judgment of the Supreme Court, S.C. (S.D.) No. 01/2010, Supreme Court Minutes, 31st August 2010. The reproduction of the

The manner in which the presidential form of government has evolved in Sri Lanka through cycles of political violence and rule by exception gives rise to a legitimate question as to whether, even in the absence of a formal state of emergency, governance is defined more by the rule of exception than the norm. A political ethos that views the constitution, laws and systems as existential tools; that privileges political patronage over meritocracy; extra-legal measures over democratic processes, and views liberal concepts such as the rule of law and checks and balances as inconvenient impediments, is certainly one which has internalised an exceptionalist view of governance.

Major Features of Rule by Exception in Sri Lanka

As pointed out in the introductory part, this essay does not intend to discuss the legal technicalities associated with the adoption or implementation of emergency measures in Sri Lanka. There is already a strong body of literature in that regard.⁶⁹ The Nadesan Centre based in Colombo has engaged in sustained work archiving and analysing emergency regulations.⁷⁰ What is

judgment in Hansard can be accessed at:

<http://www.scribd.com/doc/37191734/SC-Decision-on-Bill-of-18th-Amendment> (accessed 23rd December 2014). It is of interest that the judgment, *inter alia*, took the position that the removal of the term limits of the presidency enhances the right to the franchise of the people (as part of the people's sovereign rights articulated under Articles 3 and 4 (e) of the 1978 Constitution) as it gives people the opportunity to re-elect a person of their choice without restriction. The court did not discuss the theoretical underpinnings or practice relating to constitutional term limits. The judgment was all the more problematic as there already was concern that the Chief Justice's spouse had accepted a lucrative political appointment offered by the incumbent government.

⁶⁹ Chapters on emergency rule in the annual *State of Human Rights in Sri Lanka* published by the Law & Society Trust beginning in 1993 provided analyses and annual updates. In addition, reports by Amnesty International, Human Rights Watch, and the International Commission of Jurists provided important analyses on human rights issues emerging from prolonged rule by emergency. For a theoretical analysis, see A. Welikala (2008) *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo: Center for Policy Alternatives).

⁷⁰ See the Nadesan Centre, *Emergency Law*, DOCINFORM No. 31 (1992), No. 41 (1992) & No. 65 (1994) and the Nadesan Centre (2009) *Emergency Law*, Vol.4 & 5 (Colombo: the Nadesan Centre)). The chapters analysing the

intended to achieve in this part of the essay is two fold: first, it will highlight the salient features of the emergency regimes that were in operation from the early 1970s until the lifting of the last state of emergency in August 2011, and secondly to discuss the impact of emergency measures on human rights and liberal principles of governance. Eventually, the discussion will focus on the manner in which the exception, which is meant to be temporary, fashioned the norm.

Beginning in 1971, proclamations of emergency were continually made by successive regimes under provisions of the PSO empowering the President to do so *in the interests of* “public security and the preservation of public order or for the suppression of mutiny, riot or civil commotion or for the maintenance of essential supplies and services essential to the life of the community” (Section 2). As there are no specific criteria provided to determine the existence of a state of emergency nor a definition of a public emergency, such proclamations can be made on the subjective assessment of the President. As pointed to above, unlike under the 1972 Constitution, proclamations of emergency were presented for parliamentary approval under the 1978 Constitution. However, with its near absolute deference to presidential authority, Parliament ritually approved the renewal of the existing state of emergency every 30 days without meaningful scrutiny of its necessity. It must be admitted that except for a brief period commencing in 2001 successive Presidents have commanded a majority in Parliament. Even then, a robust legislative tradition could have provided a measure of effective scrutiny.

Having made a Proclamation of Emergency invoking Part II of the PSO, by virtue of Section 5 (1) the President could then ‘legislate’ via the adoption of Emergency Regulations (ERs) “as appears to him (*sic*) to be necessary or expedient in the interests” of securing the purposes for which a state of emergency was proclaimed. Section 5 (2) (d) permits the President, *inter alia*, to adopt ERs which would “provide for amending any law, for

operation of emergency laws published in the *State of Human Rights in Sri Lanka* referred to in fn.69, *supra*, were contributed by Nadesan Centre researchers.

suspending the operation of any law and for applying any law with or without modification.” However, Article 155 of the 1978 Constitution provides that no ER can be in contravention of the constitution. That constitutional stricture paved the way for judicial review of ERs.⁷¹

From the early 1970s the practice was that after the declaration of a state of emergency, Emergency (Miscellaneous Powers & Provisions) Regulations (EMPPR) would be adopted providing for wide executive powers covering many areas of activity. Individual ERs would then be added on as and when the President thought necessary. The ERs empowered various officials, such as the Secretary to the Ministry of Defence or specially appointed Competent Authorities, to make emergency orders in order to operationalise emergency powers (Section 6 of the PSO).

Generally, an EMPPR would contain provision for extraordinary powers of arrest and detention that would include arrest without warrant, prolonged detention in police custody, and administrative detention. Most EMPPRs have permitted preventive detention whereby a person could be administratively detained for a lengthy period purely on the basis that the authorised official fears that such person could engage in behaviour inimical to public security *in the future*. While judicial scrutiny of detention was minimal under ERs, they also usually restricted the granting of bail to detainees by ousting traditional judicial discretion in bail matters. ERs also permitted wide powers of search and seizure. Those extraordinary powers paved the way for arbitrary arrests and detention, widespread torture, involuntary disappearances, and custodial deaths.⁷² As Suriya Wickremasinghe observes, emergency powers of arrest and detention were often used against political opponents on flimsy grounds.⁷³ Continuing with that tradition, today dissent is viewed

⁷¹ See *infra* discussion in Part 5.

⁷² A large number of reports by both local and international human rights organisations have documented the impact of emergency laws on human rights and governance in general, see fn.69. See, in particular, International Commission of Jurists (2009) *Sri Lanka: Briefing Paper, Emergency Laws and International Standards*.

⁷³ Wickremasinghe in Amerasinghe & Wijeratne (2005): pp.382-383.

as a security threat (often referred to as ‘political conspiracies’ in the current political lexicon) than a legitimate democratic right.

EMPPRs also altered rules of evidence and criminal procedure in regard to emergency detainees. For example, confessions would be admissible as evidence when the Evidence Ordinance (normal law) would not permit it. Similarly, provisions of the Prisons Ordinance which regulated entitlements of prisoners, such as those which permitted visitation rights and the right to meet lawyers or engage in correspondence, would be deemed inapplicable to categories of detainees. Another particularly sinister ER was that which permitted the police to take charge of dead bodies and dispose of them disregarding normal legal provisions relating to inquests or any other formality. Custodial deaths, for example, went unchecked under those provisions.

EMPPRs also provided for censorship, usually with a Competent Authority being appointed as the official censor. The types of censored news (e.g. news about the civil war) or banned publications would vary from time to time. Trade union rights constantly came under heavy restrictions under ERs. As pointed out above, the PSO, from its inception, was constantly used to crush strikes. Such heavy-handed measures were universally used by both conservative governments as well as left-oriented ones. So, for example, while President Jayewardene crushed the general strike of 1980 using emergency powers and rendered thousands of striking public sector workers jobless, the UF government with Marxist parties as coalition partners similarly crushed the bank clerks’ strike launched in 1972 demanding higher pay and dismissed the striking workers under emergency powers.⁷⁴ The angle that is used in such instances is the extraordinary powers granted during emergencies for the provision of essential services and supplies. If any service is deemed essential in the public interest under an ER, then drastic measures can be taken under emergency powers including the forfeiture of property of striking workers. During the Rajapaksa government, labour strikes and trade union activity critical of the political *status quo* were increasingly characterised as political threats to the regime than the legitimate exercise of democratic rights.

⁷⁴ Ibid: pp.387-388.

The PTA too contains similar provisions, although as part of regular legislation. In other words, it is a 'normal' piece of legislation that permits extraordinary measures in contravention of other existing legislation. The PTA permits, *inter alia*, arrest, search and seizures without warrant; remanding of detainees in police custody; administrative detention up to 18 months and also house arrest; detainees to be kept in *any* 'authorised' place; limits judicial discretion over bail; alters normal rules of evidence and procedure including permitting the admissibility of confessions; and permits censorship of specified news and prohibition of publications. The provisions of PTA are to prevail over any other legislation (Section 28).

When emergency rule prevailed in the country there were three parallel systems under which law enforcement was possible: the normal law, the emergency regime, and the PTA regime. The wide choice of powers available added a new flavour to law enforcement. Officials (not only police officers but others including military personnel authorised by exceptional laws) could strategically pick and choose the legal regime under which action was to be taken. For example, arrest and detention under one regime could technically be converted to an arrest and detention under another as was thought expedient by the authorities, and in that way prolong a person's detention without trial.

As rule by emergency extended for years and then decades, incumbent presidents appear to have treated the use of emergency powers in a routine, if not casual, manner for purposes of general governance. A study conducted in 1993 by the Centre for the Study of Human Rights (University of Colombo) and the Nadesan Centre,⁷⁵ analysing ERs in operation at that time in regard to their compliance with human rights standards, revealed startling executive practices. It was found that subjects such as quality control of salt, setting up of school boards, banking, and forestry were regulated by the President through ERs.⁷⁶ What

⁷⁵ The principal researchers of the study were Suriya Wickramasinghe of the Nadesan Centre and the present author.

⁷⁶ Centre for the Study of Human Rights & Nadesan Centre (1993) *Review of Emergency Regulations* (Colombo: University of Colombo): pp.6-7. The following subjects which had no relation to a state of emergency were found to

emerged was that ruling via fiat of emergency powers had become a habit. Governing in that manner was obviously more convenient than following normal democratic processes, which required time and extensive consultations. Such tendencies give credence to Carl Schmitt's absolutist theory on states of exception, which posits that such situations are beyond the pale of law; they are determined by sovereign authority and are governed purely by the political.⁷⁷

It was also the case that although ERs were gazetted for public notification, there was no central or comprehensive official compilation of ERs. Therefore, it was extremely difficult to identify all operative ERs and also those ERs which had been revoked. The researchers in the 1993 study had to spend a great deal of time attempting to locate all the operative ERs, discovering with dismay that not even the Attorney General's Department – which had considerable powers over detainees under the ERs – had a comprehensive compilation. The primary casualties of that irregularity were obviously the rule of law and democratic governance.

The last state of emergency was permitted to lapse on 31st August 2011, just over two years after the ending of the civil war in May 2009. It was permitted to lapse only after the President had issued regulations under Section 27 of the PTA facilitating executive powers, particularly over detainees, remandees and surrendees.⁷⁸

be regulated by ERs: encroachment on state and private land, adoption of children, banking, commissions of inquiry (including on subjects not relating to emergency), customs, edible salt, finance companies, forestry, issue of driving licenses and validation of driving licenses, prevention of subversive political activity (ER very broadly couched to include non-emergency situations), school development boards and provincial boards of education). The ERs in operation at that time also amended the Monetary Law Act and the Universities Act.

⁷⁷ C. Schmitt (1985) *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press).

⁷⁸ Just before the state of emergency lapsed on 31st August 2011, the following regulations made under the PTA were officially proclaimed by President Rajapaksa: Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam), Regulation and Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) Nos. 1 & 2 of 2011, published in Gazette No.1721/2 of 29th August 2011; Prevention of Terrorism (Extension of Application) Regulations No.3 of 2011, published in Gazette No.1721/3 of 29th August 2011; Prevention of Terrorism (Detainees and Remandees) Regulations

The PTA regulations were similar in scope to the lapsed ERs. Additionally, the President could invoke powers under Part III of the PSO to call out the armed forces even in the absence of a state of emergency.

Sri Lanka does not seem to be able to shake off the legacy of rule by exception. As pointed out earlier, that legacy has made an indelible mark in the governing political ethos. For example, in a recent criminal investigation concerning the murder of a businessman, the suspects, among whom is a Deputy Inspector General of Police, were detained under the PTA.⁷⁹ The case is clearly one which ought to be governed by the ordinary criminal law and criminal procedure. As the PTA does not provide a definition of terrorism, but only a catalogue of offences falling within its purview, there does not appear to be a technical barrier to using the PTA in this instance other than, of course, respect for basic features of the rule of law. The choice of law in this case well

No.4 of 2011, published in Gazette No.1721/4 of 29th August 2011; Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No.5 of 2011, published in Gazette No.1721/5 of 29th August 2011. It is interesting to note that under Section 27 of the PTA it is the minister, and not the President, who is authorised to issue regulations. Under the PTA Regulation No. 4 of 2011, those who were remanded into custody by a Magistrate under ERs could, upon the expiration of the ERs, be held under the PTA. Similarly, a person who was initially detained under ERs could now be detained under a detention order made under the PTA. See comments of the UN Committee Against Torture in its Concluding Observations on Sri Lanka's combined third and fourth periodic report under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/LKA/CO/3-4 (8th December 2011): para.10. The Committee Against Torture which monitors the implementation of the Torture Convention by its States Parties (which includes Sri Lanka) was very critical of the adoption of the PTA regulations before the state of emergency lapsed. It also pointed out that the PTA regulations took away some of the safeguards which had gradually been built into the emergency regime.

⁷⁹ '90 day detention for DIG Vaas', *Ceylon Today*, 12th June 2013, available at: <http://www.ceylontoday.lk/27-34772-news-detail-90-day-detention-for-dig-vass.html> (accessed 23rd December 2014). See also 'Arrest Warrant on DIG's Son', *The Sunday Times*, 13th July 2013, available at: <http://www.sundaytimes.lk/130714/news/arrest-warrant-on-digs-son-52937.html> (accessed 23rd December 2014). In the latter news report, lawyers for the detainee were quoted expressing confusion over whether the criminal investigation of the case against their client was conducted under the normal law as the detention was under the PTA.

illustrates the ordinary tendency of the authorities to use extraordinary measures if it is thought expedient to do so.

The Judiciary and Rule by Exception

The Legal Framework

As previously discussed, the 1978 Constitution put in place certain safeguards to prevent the abuse of emergency powers. One safeguard was parliamentary oversight over the proclamation and extension of a state of emergency. However, the expected check did not materialise as Parliament became a rubberstamp of the executive presidency. The other safeguard was that ERs were subject to provisions of the constitution (Article 155 (2)). It was that constitutional provision which paved the way for judicial review of emergency measures⁸⁰ (both ERs and executive orders made under ERs) notwithstanding any statutory or other bar which excluded such review.⁸¹ Challenges to emergency measures were mounted mainly via the constitutional remedy for violations of fundamental rights over which the Supreme Court has sole and exclusive jurisdiction (Article 126). It is equally possible to challenge emergency measures through the writ jurisdiction over which the Court of Appeal is conferred with jurisdiction by the constitution (Article 140). In fact, before the introduction of the fundamental rights jurisdiction of the Supreme Court under the 1978 Constitution, challenges to the use of emergency powers were made under the writ jurisdiction of courts (e.g. through applications for the writ of *habeas corpus*).

Even though early fundamental rights jurisprudence of the Supreme Court displayed a great deal of conservatism, by the latter part of the 1980s the Court, through a few activist justices, displayed a bolder approach in interpreting rights. The strong rights-oriented interpretation of emergency powers that emerged during that period (and which extended to the 1990s) made a significant contribution to reining in abuse of emergency

⁸⁰ See *Joseph Perera v. Attorney-General* (1992) 1 SLR 199.

⁸¹ Section 8 of the PSO removed judicial review of ERs.

powers.⁸² What is significant about that judicial trend is that it emerged during the tenure of President Premadasa who is widely considered to have governed in a high-handed manner.

Before discussing constitutional jurisprudence on emergency measures, it is important to point out that the legality of such exceptional measures cannot be evaluated only with reference to domestic legal standards. Modern legal systems are compelled to operate harmonising internal and external dimensions of legal obligations of the state. Sri Lanka, having undertaken international legal obligations under international human rights law must necessarily ensure that all measures taken, including measures taken during states of exception, comply with those obligations. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) specifically stipulates clear principles in that regard. As a state party to that treaty,⁸³ Sri Lanka is bound under international law to comply with those principles.

Article 4 of the ICCPR spells out the international law framework on the protection of human rights during periods of emergency. The fundamental principles of that framework are:⁸⁴

- a) That a state of emergency can be declared only when there is a ‘threat to the life of the nation’;
- b) The existence of a state of emergency must be officially proclaimed;

⁸² See Udagama (1998).

⁸³ Sri Lanka acceded to the International Covenant on Civil and Political Rights on 11th June 1980. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, U.N. Doc. E/CN. 4/1985/4, Annex (1985), and ‘The Johannesburg Principles on National Security, Freedom of Expression and Access to Information’, U.N. Doc. E/CN. 4/ 1996/39 (1996), are bodies of principles offering non-binding yet persuasive standards on derogation of human rights during states of emergency. Although not officially formulated by the UN, they have been recognised by the organisation as providing useful guidance on protection of human rights during periods of exception.

⁸⁴ The authoritative commentary (interpretation) of Article 4 of the ICCPR is provided by the UN Human Rights Committee, the body of independent experts set up under the Covenant as a supervisory mechanism. See General Comment No. 29: Art. 4: Derogation during a state of emergency (adopted by the Human Rights Committee at its 1950th meeting on 24th July 2001, UN Doc. HRI/GEN/1/Rev. 9 (Vol.1).

- c) Derogation (temporary suspension) from human rights obligations recognised by the ICCPR is permitted during an emergency only ‘to the extent strictly required by the exigencies of the situation.’ Which rights could be derogated from during an emergency and the extent of derogation are both to be guided by that principle;
- d) Such measures, however, cannot be inconsistent with other international law obligations of states parties and cannot be discriminatory on the grounds of race, sex, language, religion or social origin;
- e) No derogation is permitted from the right to life, freedom from torture, freedom from slavery and servitude, freedom from imprisonment for civil matters, freedom from retroactive penal legislation, the right to recognition everywhere as a person before the law, and the freedom of thought, conscience and religion;⁸⁵
- f) The existence of a state of emergency must be communicated to all other states parties through the intermediary of the UN Secretary-General.

The ICCPR legally obligates states parties to ensure the rights recognized by it to all on its territory and to take measures, including legislative measures, to give effect to those rights at the national level (Article 2). Similarly, when the rights are breached by a state party there must be provision in the national legal system to provide an effective remedy, including judicial remedies. The enforcement of remedies must also be ensured. Under general principles of international law, failure to comply with international law obligations undertaken by a state will attract international scrutiny and commensurate international sanctions. Thus, the obligation lies with a state party to ensure that its derogation regime during a period of emergency is in line with its international law obligations.

⁸⁵ Ibid. The original list of non-derogable rights has been expansively interpreted by the UN Human Rights Committee in its General Comment No.29.

The Evolution of the Supreme Court's Jurisprudence

The requirement of international human rights law obligations having to be operationalised through national legal systems can be effectively discharged only if it possesses the requisite legal provisions, institutions and safeguards. Such a scheme would necessarily require adequate checks and balances, for without that feature systemic oversight and remedies would not be forthcoming. As the centralisation of powers in the executive is the single most threat to human liberties during public emergencies, there must be adequate provisions in the national legal system for checking excesses by the executive. The PSO, however, has expressly excluded judicial review of a declaration of a state of emergency by the President. The Supreme Court too has been very deferential to executive authority in that regard. In *Yasapala v. Wickremasinghe*,⁸⁶ a fundamental rights case decided in 1980, the court was of the opinion that it could not substitute its own view for that of the President who is conferred with the discretion to decide on the necessity to declare a state of emergency in a given situation. It appears that in the court's view, such a decision essentially involves a political question. In the absence of evidence of bad faith or ulterior motive the court's jurisdiction is excluded.⁸⁷

The unanimous judgment of a three judge bench went on to point out that the President is not under a constitutional obligation to disclose the reasons for an emergency proclamation: "Quick and effective action must be the essence of those powers of the President charged with the duty of maintaining law and order."⁸⁸ The court then went on to refer to the presumption *omnia praesumuntur rite esse acta* (all things are presumed to be done in due form⁸⁹), a principle of English public law pertaining to official acts. Whether that presumption essentially rooted in the specificities of the English political and legal culture would have universal validity is questionable. Anyhow, the judgment is very

⁸⁶ *Yasapala v. Wickramasinghe* (1980) 1 Fundamental Rights Reports 143.

⁸⁷ *Ibid*: pp.154-156.

⁸⁸ *Ibid*: p.155.

⁸⁹ A definition of *omnia praesumuntur rite esse acta* is available at: <http://legal-dictionary.thefreedictionary.com/Omnia+praesumuntur+rite+esse+acta> (accessed 23rd December 2014).

symptomatic of the position of the court in the early years of emergency review when one could observe a great degree of deference to the executive. The apex court did appear to place faith in the good intentions of the executive, particularly when a state of emergency had been declared. According to the judgment the burden of proof is on the petitioner to establish bad faith or an ulterior motive on the part of the President.

Commencing in the early 1970s, the Supreme Court permitted challenges to orders made under ERs, but only to determine whether they were made within the confines of what it deemed to be the law and whether there is no bad faith on the part of the executive.⁹⁰ Further inquiry by the court to determine reasonableness of the orders or review of policy based on an objective test was not thought to be within the province of judicial powers.⁹¹ In *Hirdaramani v. Ratnavale*, the court took the position that once an emergency detention order was valid on the face of it, then it was for the detainee to establish a *prima facie* case against the good faith of the issuing authority.⁹² This line of judgments was influenced by the controversial wartime British House of Lords judgment in *Liversidge v. Anderson*⁹³ which held that where a defence regulation permits the Home Secretary to order the detention of certain categories of persons, the courts then could not go into why the Secretary formed an opinion to detain a person as it was completely within executive discretion. But the courts could inquire into bad faith or mistaken identity.

That judgment has now been rejected⁹⁴ in favour of the celebrated dissenting opinion of Lord Atkin in *Liversidge* which was to the effect that in English law every detention is *prima facie* unlawful until proved to be lawful by the detaining authority.⁹⁵ Lord Atkin had taken the same legal position in a previous case

⁹⁰ See Cooray (1995): Ch.31.

⁹¹ See *Kumaratunga v. Samarasinghe* (2) Fundamental Rights Digest 347; *Hirdaramani v. Ratnavale* (1971) 75 NLR 67; *Gunasekara v. Ratnavale* (1972) 76 NLR 316; *Gunasekera v. De Fonseka* (1972) 75 NLR 246.

⁹² *Hirdaramani*, *ibid.*

⁹³ *Liversidge v. Anderson* (1942) AC 206.

⁹⁴ See *R. v. Inland Revenue Commissioner, Ex parte Rossminster Ltd.* (1980) AC 952.

⁹⁵ *Ibid.*: p.23.

whereby the onus of proving the reasons for depriving a British subject of liberty or property was found to be with the authority ordering such action.⁹⁶ The latter judgment was cited with approval by the colonial Supreme Court of Ceylon in the landmark *Bracegirdle* judgment.⁹⁷ In that case the petitioner, a radical Australian labour activist, was detained and ordered to be deported by the British colonial Governor. A writ of *habeas corpus* was sought on behalf of Bracegirdle challenging the detention and deportation orders. The court found that the Governor's powers of arrest, detention and deportation under the law could be exercised only during a state of emergency and in normal times a person could be deprived of liberty only by the judicial process. Accordingly, Bracegirdle was released. However, it is worthy of note that the republican Supreme Court of Sri Lanka was content to follow the stateist approach taken by the majority in *Liversidge v. Anderson* in the decisive decades of the 1970s and early 1980s when the country was ruled more under the law of the exception than not.

That conservative streak of the Supreme Court eventually dissipated and swung in favour of a rights-based approach beginning in the latter part of the 1980s in the face of years of rule by exception. Continuous states of emergency together with the concurrent operation of the PTA saw Sri Lanka's human rights record plummet to an unprecedented low level, particularly in the aftermath of the 1983 ethnic pogrom. Widespread arbitrary arrests and prolonged detention, enforced disappearances, and incidents of torture were reported during that period.⁹⁸ The critical human rights situation in the country was reflected in the large number of arbitrarily disappeared persons. In a report issued in 1992 pursuant to a visit to Sri Lanka, the UN Working Group on Enforced or Involuntary Disappearances estimated that the number of such disappearances recorded between 1983-1992 amounted to approximately 12,000. Going by that estimate, thought by human rights activists to be very conservative, it

⁹⁶ *Eshugbayi Eleko v. Government of Nigeria* (1931) AC 662.

⁹⁷ *In re Bracegirdle* (1937) 39 NLR 193.

⁹⁸ See, Wickremasinghe & Fonseka (1993); also see Asia Watch (1987) *Cycles of Violence: Human Rights in Sri Lanka Since the Indo-Sri Lanka Agreement*. Numerous reports compiled by Amnesty International during that period documented the human rights situation in the country.

concluded that that was by far the “highest number of disappearances reported from any country.”⁹⁹

Joseph Perera v. Attorney-General,¹⁰⁰ the path-breaking judgment which authoritatively articulated the constitutional framework in regard to limits on emergency powers was delivered by the Supreme Court in 1987. A five judge bench pointed out that ERs had to be in compliance with the constitution *per* Article 155 (2). It was opined that, therefore, the court has the power to review the constitutionality of ERs when it was alleged that they violate fundamental rights. Section 8 of the PSO, which ousted judicial review of ERs and emergency orders, therefore, itself is ousted by the constitution. For an ER to be valid, the court must be satisfied through an objective test that it was indeed necessary in the interests of public security, public order and such other grounds specified in the PSO. It must be established that the restrictions imposed by an ER on fundamental rights had a proximate or rational nexus with the objective sought to be achieved by that ER. The burden of proof is on the state to establish that the ER satisfied those criteria. Further, it was held that presidential immunity under Article 80 (3) of the constitution covers only the subjective decision of the President that the promulgation of a particular ER is necessary in the interests of public security/order. The constitutionality of the ER itself, however, is subject to judicial review in terms of the constitution.

The ER in question in the *Joseph Perera* case prohibited the public display and distribution of *any* poster, handbill or leaflet without prior permission of the police. The petitioners, who had organised a meeting on education, and had distributed handbills advertising that event, were eventually arrested. They claimed that they did not have to obtain permission for distribution of the handbill because of the innocuous content. The court agreed holding that prior restraint imposed on freedom of expression by the ER was overbroad in that it impacted on *every* poster, handbill or leaflet irrespective of their characteristics and thereby exceeded the

⁹⁹ ‘Report on a visit to Sri Lanka by three members of the Working Group on Enforced or Involuntary Disappearances’ UN Doc. E/CN.4/1992/18/Add. : para.192.

¹⁰⁰ *Joseph Perera*, op.cit.

limitations permitted by the constitution. The state had failed to establish that the prior-restraint on freedom of expression was proximate to or had a rational nexus to the objective to be sought by the ER. The ER was, therefore, found to be in violation of the constitutional right to freedom of expression (Article 14 (1) (a)). It was also found to be in violation of the right to equality (Article 12 (1)), as it paved the way for arbitrary executive action. The court pointed out that “[a]ny system of pre-censorship which confers unguided and unfettered discretion upon an executive authority to guide the official is unconstitutional.”¹⁰¹

Eleven years later, in another celebrated judgment¹⁰² the Supreme Court struck down an ER which sought to postpone an election. This time the ER was found to be *ultra vires* (outside the powers of) the PSO. Significantly, the court found that the state had failed to establish there was a threat to public security or public order at the time the ER was promulgated. In light of this judgment it is possible to argue that even though the court has refused to review the legality of a proclamation of a state of emergency by the President,¹⁰³ it can still vitiate *the effects* of a state of emergency by striking down ERs if the state fails to satisfy the court that, indeed, at the material time there was no threat to public security/order.

In addition to those judgments which struck down ERs, there is a strong body of jurisprudence of the Supreme Court which questioned and voided many emergency orders made under the authority conferred by ERs by various public officials as being violative of fundamental rights. Such orders included those relating to arrest and detention, censorship, and curtailment of freedom of movement. As the 1978 Constitution does not contain a derogation clause which sets out the limits of derogation of rights during periods of emergency, the court has had to contend with the normal limitations attaching to fundamental rights (Article 15 (7)) which permit, *inter alia*, restriction of rights on the ground of national security and public order. Such restrictions have to be imposed in the ‘interests’ of permitted grounds of

¹⁰¹ Ibid: p.230.

¹⁰² *Karunatiaka v. Dayananda Dissanayake* [1999] 1 SLR 157.

¹⁰³ See text at notes 87-90, *supra*.

limitation and should be ‘prescribed by law.’ ‘Law’ for that purpose includes ERs. The court has had to, therefore, examine whether restrictions on rights imposed under ERs are constitutionally permissible or not. In that regard the rational nexus test stipulated in *Joseph Perera* by the court to determine whether an ER is within constitutional limits has proved to be of vital importance.

What is significant about the judicial reasoning employed in that body of jurisprudence is that – unlike the previous deferential approach of the Court – the onus of proving constitutionality of executive action under emergency powers shifted to the state (e.g. that there were reasonable grounds to issue a detention order).¹⁰⁴ That position is contrary to the court’s previous reliance on the presumption *omnia praesumuntur rite esse acta*. The burden of proof then was on the petitioner who claimed a violation of rights to prove that the authorities had acted in bad faith. This shift in judicial reasoning is of great significance. The judiciary clearly seemed reluctant to have faith in the executive as rule by exception continued for decades, taking a great toll on human rights and the rule of law. The role of the judiciary in reining in executive abuse and excesses under emergency powers in that manner was of pivotal public importance. In many respects, it was the only effective check available to the public under domestic law.

The following two judgments are illustrative of judicial concern about the law of exception becoming the norm and consequent attempts at restoring the ‘normal norm.’ In *Sunil Rodrigo v. Chandananda de Silva*¹⁰⁵ (decided in 1997) the Supreme Court held that the right of a person to be informed of reasons for arrest at the time of arrest, and the right of a detainee to be produced before a judicial authority within a reasonable period of time, could not be overlooked even though the arrest and detention may pertain to preventive detention under ERs. Both those rights, hitherto statutory rights under the Criminal Procedure Code (normal law), were thus elevated to constitutional rights through

¹⁰⁴ See Udagama (1998) for a discussion on this point.

¹⁰⁵ *Sunil Rodrigo (on behalf of Sirisena Cooray) v. Chandananda De Silva* (1997) 3 SLR 265.

Article 13 (1) and (2) of the 1978 Constitution. The court's position was a recognition of the argument that there was nothing to suggest that emergency provisions had permitted the restriction of those rights.

In *Sunil Rodrigo*, the petitioner was an opposition politician who had been arrested and detained under an emergency order issued by the Secretary to the Ministry of Defence using preventive detention powers under operative ERs. The petitioner was not told of the reason for his arrest at the time of arrest and neither was he produced before a judicial officer within twenty-four hours of arrest as is normally required by law. The court found that the Defence Secretary had mechanically issued the detention order without reasonably satisfying himself that the arrest and detention were justifiable. Accordingly, the court voided the Secretary's order as it violated Article 13 (1) and (2) of the Constitution. Justice Amerasinghe pointed out on behalf of the court that it was the bounden duty of the judiciary under Article 4 (d) of the constitution to 'respect, secure and advance' fundamental rights.

In *Rodrigo v. Imalka SI, Kirulapone*¹⁰⁶ the Supreme Court found *permanent* check-points set up under emergency powers to be unconstitutional as they violated the freedom of movement (Article 14 (1) (h)), and the right to equal protection of the law (Article 12 (1)). Permanent check-points had become staple fare for the public during the decades under emergency rule, causing severe inconvenience to the public (including harassment by the security forces¹⁰⁷) although the effectiveness of such security measures were seriously in doubt because of the absence of the element of surprise. Further, the court, engaging in judicial activism, issued guidelines for the setting up of security check-points.

¹⁰⁶ *Rodrigo v. Imalka SI, Kirulapone* SC (FR) No. 297/2007 S.C. Minute of 03.12.2007.

¹⁰⁷ In *Sarjun v. Kamaldeen* SC (FR) No. 559/03 S.C. Minute of 31.07.2007, it was alleged that the petitioner had been arrested at a check-point and tortured for not paying a bribe that was demanded by the security personnel on duty. The Court found in favour of the petitioner stating that while security concerns must be addressed, action in that regard should be taken with the highest concern and respect for human dignity.

Applicability of International Human Rights Law Safeguards

It is noteworthy that in the body of jurisprudence referred to above, the Supreme Court did not refer to the international human rights law framework relating to public emergencies. Even though Sri Lanka has a dualist legal system – and therefore international law has to be transformed into domestic law by the legislature in order to be domestically operative – the Supreme Court had developed a body of jurisprudence in which international human rights law norms were used as persuasive authorities in interpreting fundamental rights.¹⁰⁸ Jurisprudence relating to the use of exceptional powers would have been further refined and enriched from a rights perspective by the use of international norms. It is perhaps some consolation that the ‘rational nexus test’ used in *Joseph Perera* to test the constitutionality of an ER is somewhat akin to the proportionality test employed by international law (*viz.*, derogations of rights have to be ‘strictly required by the exigencies of the situation’ *per* Article 4 of the ICCPR).

UN human rights bodies have regularly assessed the use of exceptional laws in Sri Lanka in the course of overseeing Sri Lanka’s compliance with its international human rights law obligations. In *Nallaratnam Singarasa v. Sri Lanka*,¹⁰⁹ the UN Human Rights Committee¹¹⁰ was presented with an individual communication (petition) submitted to it by the author (petitioner) under the First Optional Protocol to the ICCPR. The communication alleged that Singarasa was convicted of an offence under the PTA on the basis of a confession and was sentenced to 35 years of imprisonment in violation of Sri Lanka’s legal obligations under the ICCPR and that he had exhausted all possible legal remedies under the law of Sri Lanka. It was further

¹⁰⁸ See, e.g., judgments of the Supreme Court in *Weerawansa v. A.G.*, SC (FR) No.730/96, SC Minute of 3.08.2000; *Bulankulama v. Secretary, Ministry of Interior Development* [2000] 3 SLR 243.

¹⁰⁹ *Nallaratnam Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (views adopted in July 2004).

¹¹⁰ The UN Human Rights Committee is established under Article 28 of the ICCPR as a body of independent experts, which is tasked with supervising the implementation of the treaty by States which have legally accepted the treaty.

alleged that under the PTA the burden was on a petitioner to prove that a confession obtained by the authorities was obtained under duress. The committee expressed the view that Sri Lanka was indeed in violation of its legal obligations under the ICCPR and recommended that Singarasa be released or retried. It specifically called for the repeal of provisions of the PTA that made confessions to law enforcement authorities admissible into evidence and which placed the burden of proving that the confession was not voluntary on the detainee.

The Supreme Court was petitioned on behalf of Singarasa when he was neither released nor given a retrial by the authorities in Sri Lanka as called for by the UN body. It was a petition which called for the revision of the previous judgment of the Supreme Court which denied Singarasa a final appeal to review his conviction and sentence (it was pursuant to that denial that Singarasa approached the UN Committee). The revision petition to the court was based on several legal grounds including the ground that the petitioner had a legitimate expectation of being retried or released as the UN Human Rights Committee had made a recommendation to Sri Lanka to that effect. A five judge bench of the court presided over by Chief Justice Sarath N. Silva rejected Singarasa's application,¹¹¹ holding that (a) provisions of the ICCPR were not applicable in Sri Lanka as its legal system was dualist and there was an absence of incorporating legislation, and (b) that the President's ratification of the Optional Protocol to the ICCPR was unconstitutional as it usurped the sovereign judicial powers of the people by recognising the judicial powers of the UN Human Rights Committee. A critique of this controversial judgment requires a separate effort. Suffice to say here that the final result diluted the domestic application of the ICCPR.¹¹²

¹¹¹ *Nallaratanam Singarasa v. Attorney-General* SC Spl(LA) No.182/99, SC Minute of 15.09.2006. The judgment can be accessed at: http://www.srilankahr.net/pdf/sc_judgement1.pdf (accessed on 23rd December 2014).

¹¹² See R. Edrisinha & A. Welikala, '*GSP Plus and Sri Lanka: A Critical Appraisal of the Government of Sri Lanka in respect of Compliance Requirements*' in A. Welikala (Ed.) (2008) *GSP+ and Sri Lanka: Economic, Labour, and Human Rights Issues* (Colombo: Centre for Policy Alternatives and Friedrich Ebert Stiftung).

Less than two years later, however, Chief Justice Silva delivered a judgment to the effect that all the rights recognised by the ICCPR were indeed now part of the domestic law of Sri Lanka.¹¹³ The opinion of the court was sought by the President under Article 129 of the constitution on the domestic legal status of the ICCPR rights in Sri Lanka. The ICCPR Act No. 56 of 2007, was enacted in September that year by Parliament mainly as a response to human rights queries of the European Union in regard to awarding tariff concessions (GSP Plus) to Sri Lanka. The Act incorporated only a few rights recognised by the ICCPR and provided for a remedy by the High Court in the instance of violation of those rights. That stands in contrast to the constitutional remedy provided by the Supreme Court in regard to violations of constitutionally recognised civil and political rights. In March 2008, a five judge bench of the Supreme Court presided over once again by Chief Justice Silva, accepting arguments by the Attorney General on behalf of the state, found that the constitution, statutes (including the ICCPR Act No. 56 of 2007), and judicial decisions of superior courts have given ‘adequate recognition’ in Sri Lanka to the rights in the ICCPR. Further, the court was of the view that those rights are justiciable (actionable in courts) in Sri Lanka under constitutional and statutory provisions.

The combined outcome of Act No. 56 of 2007 and the above judgment was to bifurcate the recognition and protection of civil and political rights in Sri Lanka into constitutional and statutory realms. Hence, some rights are elevated to constitutional heights, while others have the ignominy of languishing in the statutory plane. The latter group of rights faces the distinct possibility of diminution or nullification through the ordinary legislative process. Also, as the state’s submissions are not made a part of the judgment, it is hard to know how each ICCPR right is given recognition in Sri Lanka. Nevertheless, the judgment gives the benefit of claiming ICCPR rights in Sri Lanka “adhering to the general premise of the Covenant”. Consequently, one can compellingly argue that Article 4 of the ICCPR pertaining to

¹¹³ SC Ref. No.1/2008, SC Minute of 17.03.2008. The judgment can be accessed at: <http://www.nation.lk/2008/03/30/special3.htm> (accessed on 23rd December 2014).

rights protection during public emergencies is also now a part of the law of Sri Lanka.

It is noteworthy that a Draft Charter of Rights finalised in 2009 by a panel of experts that was established under the aegis of the previous Ministry of Constitutional Affairs and National Integration contains a carefully crafted derogation clause incorporating safeguards required by international law.¹¹⁴ Overall, the Draft Charter contains an expansive set of human rights guarantees drawing inspiration from international human rights law and also comparative jurisprudence from progressive jurisdictions such as India and South Africa. Although the Charter was drafted pursuant to a pledge given by the *Mahinda Chinthana*¹¹⁵ – the 2005 election manifesto of President Mahinda Rajapaksa – it still awaits adoption.

Conclusion

The use of the law of exception in post-independence Sri Lanka is a phenomenon replete with counter-intuitive realities and huge political ironies. Overall, it raises many questions about the orientation of the political establishment, in particular about the commitment to liberal democracy. Two critical questions which arise are: whether extended rule under states of emergency by successive governments created an authoritarian political culture or whether innate illiberal political tendencies and orientation of the political establishment paved the way for entrenching rule by exception. Perhaps both questions can be answered in the positive. It is possible to argue that a relatively weak liberal political orientation at independence, that viewed democracy in a Kautilyan or Machiavellian manner, eventually paved the way for both the causes that seemingly justified the use of laws of

¹¹⁴ Available at: <http://www.peaceinsrilanka.lk/human-rights/bill-of-rights-final-draft> (accessed on 23rd December 2014). For fuller details see: <http://www.srilankabrief.org/2012/12/2009-fundamental-right-chapter.html> (accessed on 23rd December 2014).

¹¹⁵ *Victory for Sri Lanka, Presidential Election 2005: Mahinda Chinthana, towards a new Sri Lanka*: p.98, available at: <http://www.priu.gov.lk/mahindachinthana/MahindaChinthanaEnglish.pdf> (accessed on 23rd December 2014).

exception and also the abuse of such laws. Poor nation building after independence and weak governance saw the entrenchment of majoritarianism and authoritarianism as essential features of the Sri Lankan state. Cycles of political violence ensued in the form of a nearly three decade old secessionist civil war in the north and two violent insurrections in the south of the country. The prolonged use and abuse of the law of exception in response to that violence, in turn, has entrenched a political ethos that does not put a political premium on liberal safeguards such as checks and balances and independent institutions.

The political environment which prompted the enactment of the PSO on the eve of independence from the British and the manner of its subsequent use by successive political regimes in Sri Lanka amply demonstrate the political instrumentalisation of the law of the exception. Although borrowed from the British, the idea of the law of the exception in practice in post-independent Sri Lanka was and is largely shorn of the accompanying liberal safeguards. Parliamentarians who opposed the inclusion of provisions in the PSO that would pave the way for arbitrariness constantly lamented that gap. What is particularly ironical about the abuse of the law of exception in Sri Lanka is that political parties of every shade of opinion thought fit to do so when holding reins of power. The Marxist parties, for example, which saw the PSO as an instrument of imperialism when used by detractors to quell their political activities, were equally prone to using it when in political office.

A general assumption in regard to rule by exception in Sri Lanka is that emergency rule got entrenched and abused with the advent of the executive presidential system under the 1978 Constitution. However, emergency rule began to define governance and public life in a sustained manner in the early 1970s under the left-leaning United Front government. Although first proclaimed to deal with demonetisation and then with security issues posed by the insurrectionist activities of the JVP in 1971 in the south, emergency rule continued till 1977. There were no safeguards attaching to rule by emergency powers under the 1972 Constitution although it enthroned the legislature as the body with supreme sovereign powers. There is no evidence that the continuing state of emergency was debated in the National State

Assembly (Parliament) during that period. It is indeed a major political irony that strong legal restraints were imposed on emergency rule under the 1978 Constitution running parallel to the introduction of the all-powerful executive presidency. Restraints were introduced through the constitution's chapter on public security by requiring parliamentary approval of a proclamation of a state of emergency, coupled with parliamentary oversight over the continuation of a state of emergency. The constitutional requirement that ERs had to be in compliance with the provisions of the constitution paved the way for judicial oversight of emergency measures. A few months before the constitutional safeguards were enacted, statutory restraints were introduced by amending the PSO in order to introduce parliamentary oversight over the proclamation and extension of emergency. The incumbent UNP admittedly was keen to prevent abuse that they witnessed during the previous UF government. Notwithstanding those good intentions, however, executive practice constantly departed from the salutary aims of the reforms, giving rise to serious human rights violations. Equally problematic was the use of emergency powers to deal with subjects that had no relationship with public security, conveniently avoiding democratic decision-making processes for executive expedience. In short, rule by emergency had become a habit.

The rising tide of human rights violations in the backdrop of extended emergency rule saw the higher judiciary taking a proactive stance in order to protect individual liberties. Legislative oversight on the other hand, although a main feature of the 1978 reforms, came to naught with the subservience of Parliament to the executive presidency. The progressive body of jurisprudence developed by the Supreme Court, beginning in the late 1980s, saw the court reverse its previous deferential stance to the executive during periods of emergency. The court actively interrogated executive action under emergency powers, including the constitutionality of ERs, based on the premise that it was for the state to establish the lawfulness of its actions. As emergency rule became the norm, coupled with the operation of the PTA, the court's efforts to treat measures under such laws as ordinary state action deserving no special consideration by the judiciary is a striking development. However, it has to be noted that such

jurisprudence came about in the backdrop of a relatively high level of judicial independence.

Even though emergency rule lapsed a couple of years after the ending of the civil war in Sri Lanka, the habit of using laws of exception appears hard to shed. The promulgation of regulations under the PTA conferring on the executive some of the extraordinary powers which were previously exercised under emergency rule, and the use of the PTA to deal with ordinary crime coupled with a strong militarising approach *vis-à-vis* various civilian sectors, are strong indicators of such a tendency. The manner in which the political culture in Sri Lanka has evolved does suggest that irrespective of the form of government, whether parliamentary or presidential, rule by exception remains an attractive proposition to the political establishment.

How the apex court will at present respond to possible challenges against the use of PTA or PSO remains to be seen. Needless to say, a robustly independent judiciary has to provide the required checks in order to propel governance toward constitutionalism in this post-war period. Recent troubling events relating to the independence of the judiciary (including a politically-motivated impeachment of the 43rd Chief Justice), however, give much reason for concern.¹¹⁶ One cannot entertain much hope that the passivity of the legislature will change any time soon. In short, the expectation of a return to ‘normalcy’ after years of rule under extraordinary laws through systemic rectification or self-correction that one would generally expect from a liberal democratic system may be too ambitious an expectation in Sri Lanka given the political realities.

It is eventually public opinion that will have to wean the political establishment out of its national security ethos. There cannot be a better substitute for robust public opinion demanding restoration of constitutionalism, in particular the *de facto* operation of the separation of powers and checks and balances (including separation of civilian and military functions), and a focus on the

¹¹⁶ See International Bar Association (2013) *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayaka and the Erosion of the Rule of Law in Sri Lanka* (London: IBA).

primacy of rights and liberties of the people. To the extent that even in this post-war phase public security is viewed through the parochial prism of ethno-nationalism, and hence as a means of defending majoritarianism, the chances of that happening are slim. But if the rejection of majoritarian parties by the electorate at the recently held provincial council elections (September 2014) is anything to go by, there is hope that some degree of liberal normalcy will be demanded even in the south. Although Carl Schmitt's thesis of the permanent state of crisis has been proven right many a time, particularly so by the history of states of exception in Sri Lanka, still it is a worthy challenge to prove that the spirit of human liberties could trump primordial authoritarian compulsions.