

A State of Permanent Crisis

Constitutional Government, Fundamental
Rights and States of Emergency in Sri
Lanka

Asanga Welikala

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This book is dedicated to J.S. Tissainayagam

Table of Contents

Foreword – Dr. Paikiasothy Saravanamuttu	08
Preface	10
1. Introduction	16
PART I The Theory and Practice of Emergency Powers	
2. Theory and Practice: An Introduction to Three Models	30
2.1. Models of Accommodation	32
2.1.1. Classical Models of Accommodation	33
The Roman Dictatorship	33
The French State of Siege	40
The British Concept of Martial Law	42
2.1.2. The Modern Comparative Context:	
Three Categories of Accommodation	45
Constitutional Accommodation	46
Legislative Accommodation	47
Interpretive Accommodation	48
2.2. Business as Usual Model	49
2.3. Extra-Legal Measures Models	51
Carl Schmitt: Sovereign Dictatorship, the Concept of the Political and the State of Permanent Exception ...	55

3. The Neo-Roman Constitutional Model of Accommodation: Comparative Experience	64
3.1. Comparative Experience: Constitutional Issues and Responses	66
3.1.1. What is an Emergency? The Problem of Definition	66
3.1.2. Declaration, Extension and Termination	74
3.1.3. Legal Effects of a Declaration of Emergency	79
3.1.4. Checks and Balances	87
3.2. Comparative Experience: Areas of Concern	92
3.2.1. Constitutional Accommodation: Misuse and Abuse	93
3.2.2. Communal Alienation: Us vs. Them	97
3.2.3. The Concept of Militant Democracy and the Sixth Amendment	101
3.2.4. Normalisation of the Exception	105
4. Standards governing States of Emergency at International Law and Practice	110
4.1. General Observations: International Human Rights Law as a Legislative and Interpretive Framework of Accommodation	116
4.1.1. Definition of Emergency	117
4.1.2. Derogations	121
4.1.3. Common Themes of Treaty Body Jurisprudence	124
4.1.4. Overview of the Derogation Jurisprudence and Commentary of the Human Rights Committee	125
4.2. International Protection vs. National Implementation: The Enforcement Framework of the ICCPR	127
4.2.1. The Human Rights Committee	130
4.2.2. The Reporting Procedure	131
4.2.3. Inter-State Communications	134
4.2.4. Individual Communications	135
4.2.5. Conclusions	137

4.3. International Human Rights Standards in States of Emergency under the ICCPR: The Legal Regime of Derogations	138
4.3.1. The Principle of Exceptional Threat	142
4.3.2. The Principle of Proclamation	145
4.3.3. The Principle of Notification	148
4.3.4. The Principle of Non-Derogability	152
4.3.5. The Principle of Proportionality	160
4.3.6. The Principle of Non-Discrimination	166
4.3.7. The Principle of Consistency	169

PART II The Sri Lankan Experience of Emergency Powers

5. Sri Lanka's Constitutional and Legal Framework regarding States of Emergency	174
5.1. The Constitutional and Statutory Framework: Chapter XVIII and the PSO	177
5.1.1. Emergency Regulations	181
5.2. Special Anti-Terrorism Powers: The PTA	187
5.3. Judicial Review of States of Emergency	191
5.4. General Observations on Constitutional Framework on Emergencies	198
5.4.1. The Definition of 'State of Public Emergency'	199
5.4.2. Declaration, Extension and Termination	201
5.4.3. Legal Effects	204
5.4.4. Checks and Balances	207

6. Fundamental Rights	<i>208</i>
6.1. Chapter II: Sri Lanka’s Constitutional Bill of Rights	<i>209</i>
6.2. General Observations on the Fundamental Rights Framework	<i>211</i>
6.2.1. Structure and Content	<i>212</i>
6.2.2. Judicial Protection of Fundamental Rights	<i>213</i>
6.2.3. Restrictions on Fundamental Rights: Limitations and Derogations	<i>218</i>
6.3. Restrictions on Fundamental Rights: International Standards	<i>220</i>
6.4. Sri Lanka’s International Obligations: ICCPR	<i>222</i>
6.4.1. The Singarasa Case (2006) and Sri Lanka’s International Obligations	<i>225</i>
6.4.2. The Supreme Court Advisory Opinion on the ICCPR (2008)	<i>232</i>
7. Conclusion	<i>236</i>

Annexures

Table of Cases	<i>240</i>
Proclamations and Emergency Regulations	<i>244</i>
Bibliography	<i>250</i>

Foreword

The mandate of the Centre for Policy Alternatives (CPA) is the strengthening of the civil society contribution to democratic governance, peace, and human rights in Sri Lanka through research and advocacy. CPA was founded in 1996 in the belief that democratic governance, peace, and human rights could only be strengthened and protected through the proactive involvement of the citizens of this country in influencing and shaping opinion and policy making on the decisions that affect their daily lives.

This volume by Asanga Welikala, Senior Researcher in the Legal and Constitutional Unit of CPA, is published in this spirit and in the hope that it will contribute towards a better public understanding of the challenges to democratic governance in Sri Lanka as well as inform and inspire efforts that need to be taken to strengthen and protect it.

An entire generation of Sri Lankans have known only emergency rule, except for the few years in which it was relaxed. For others, emergency rule has become the norm and the accepted framework for government. Few however will disagree, when they look back over the decades since independence, that the crisis of the legitimacy of the state, the deterioration in respect for the rule of law and the institutionalisation of a culture of impunity with regard to human rights violations, have deepened over the years and over the last three decades in particular.

The recourse to emergency rule has taken its toll on the political culture, institutions and processes of governance without securing the objectives of security and law and order for which they were, ostensibly, resorted to. Under the guise of national security, regime

security has been prioritised and the state has traversed the full spectrum from protector and provider to predator. Consequently, Sri Lanka's claim to be a functioning democracy has been called into question to the extent that the question of 'state failure' has also been posed in relation to our government and governance.

Labelling of the crisis aside, there is no denying the existence of one. This volume seeks to understand it through an exploration of the tension between the requirements of security and democratic freedoms, the theoretical underpinnings of that tension, and the arguments integral to it as well as their application to the Sri Lankan context. In this respect, it deals with an issue that is squarely on the agenda of policy-making, and political and intellectual debate in a number of democracies, especially since the events of 9/11 and the heightened challenge of terrorism. Our commitment to liberal democracy in Sri Lanka obliges us to engage with this issue, particularly since we have to be especially vigilant that our response to terrorism does not destroy that which we ought to protect, and that which terrorism by definition is committed to destroying.

CPA appreciates the partnership of the Friedrich Naumann Stiftung in this endeavour and to our continuing collaboration in the field of democratic governance.

Special thanks are due to Asanga. His passion for and commitment to liberal democratic ideas and values, as well as his considerable intellectual curiosity are amply reflected in this work. I hope and trust that this volume will be received as a singular contribution to debate and advocacy for democratic governance in Sri Lanka, I believe it is.

Dr. Paikiasothy Saravanamuttu
Executive Director
Centre for Policy Alternatives

Preface

In May and June 1958, in Ceylon, occurred what were up till then the most serious communal riots in Sri Lanka's troubled history of ethnic relations. In retrospect, the events of 1958 were mere portents of the horrors that were to come. A contemporaneous journalistic account of what happened was written by Tarzie Vittachi, editor of Asia's oldest newspaper, the *Ceylon Observer*, satirical columnist, and intrepid political commentator. In the context of the blanket censorship imposed under Sri Lanka's first post-independence experience of emergency rule, the manuscript was published in London under the title *Emergency '58* by Andre Deutsch, in what has now become a classic of Sri Lankan political literature. The book was banned in Ceylon, and Tarzie Vittachi subsequently left the country, under the cloud of death threats.

From a strictly dispassionate academic viewpoint, Vittachi's account is no doubt coloured by his sense of outrage and despair at the communal bestiality that was unleashed, the initially dilatory and subsequently disproportionate response of the State, and the comprehensive failure of democratic political leadership in 1958. However, both the circumstances of the emergency in 1958 and Vittachi's response to it are of enduring significance. Amidst a conflagration of ethnic hatred, banal violence and mass nationalist hysteria, Vittachi's was a lone voice of reason, of moral decency and the courage of deeply held liberal democratic convictions. It is half a century since the watershed of 1958, and a tribute to Vittachi's prescience then is also a parable of the tragedy of ethnic fratricide in Sri Lanka, where his admonitions continue to go unheeded.

The year 2008 also marks the twenty-fifth anniversary of the infamy of Black July 1983, which without doubt epitomises the darkest moment in the contemporary history of Sri Lanka. The unspeakable tragedy of this pogrom, a kind of social delirium tremens that afflicted our society for a few days, and in which we took leave of both our senses and our morality, requires no retelling. It transmogrified our society, and changed the trajectory of its historical evolution onto a path that ensured, and promises, suppurating conflict for years.

Coincidentally, 2008 is the thirtieth year of the Second Republican Constitution of 1978. The legislature, then named the National State Assembly, formally adopted the constitution on 17th August 1978, which was certified on 31st August. In terms of Article 172, the constitution was brought into force on 7th September 1978 by Proclamation of the President.

Virtually for the entirety of the period since then, constitutionally unresolved ethno-political tensions have engulfed Sri Lanka in a violent civil war. One of the defining characteristics of this war has been its lawless nature. Both the State, and over time its principal protagonist, the Liberation Tigers of Tamil Eelam (LTTE) have been less than solicitous about internationally established basic norms of armed conflict, especially those concerning international human rights and humanitarian standards in respect of civilians. Any attention that has in fact been paid to these by the armed adversaries, has been due to international exposure and fear of censure. The consequences have been borne by civilians, primarily those living in the North and East. Conflict in Sri Lanka has also emanated from within the South. Both of the Janatha Vimukthi Peramuna (JVP)'s failed insurrections resulted in massive human rights violations, again perpetrated by both insurgents and the

State, especially during the second rebellion in the period between 1987 and 1991.

Our focus in this book is on the State, and its recourse to emergency powers under constitutional authority in responding to armed challenges. While the responsibility of non-State actors in human rights violations is fully acknowledged, the nature of the political association known as the State is fundamentally different from them. The State, even in a battle for its survival, is not entitled to act outside of the powers we the people, in the exercise of our sovereignty, have given it in the form of a contract by the constitution. Perhaps even more significantly, the State cannot claim the political legitimacy fundamental to its existence without demonstrating commitment to the normative values of the free and democratic way of life. Some of these are written in the constitution, but many others underpin it as the spirit of a democratic society. Straightforward and as universally accepted as this assumption may be in the democratic world, the subscription of governments of Sri Lanka to this principle has not always been scrupulous or particularly manifest. Continuing conflict has created a backdrop in which Sri Lankans have become inured to – and those under the age of about thirty have largely never known anything other than – crisis government under the full gamut of emergency powers. This book is a review of that experience from the perspective of fundamental human rights and the rule of law in the light of comparative experiences.

2007 and 2008 have seen an escalation of military conflict, in which both the State and the LTTE have committed grave human rights violations. For the people of the North and East, it has been a prolongation of the agony of death and displacement they have experienced since the 1980s. The State has pursued its military programme under the dictates of a particularly virulent ethno-

nationalist political ideology (mirroring the monolithic political and militaristic standpoint of the LTTE) that has, outside the theatres of battle, institutionalised a worldview that has little patience for the assumptions regarding human rights, the rule of law and constitutional government during states of emergency at the heart of this book. A corresponding and massive arrogation of an extraordinary array of emergency powers by the State has been the formal and legal result. The more informal, in the sense of 'political', consequence has been the entrenchment of an epistemological discourse of 'patriot or traitor' that has legitimised a culture of impunity and immunity against even the most egregious human rights violations and violators. Civil society in general, and journalists in particular, have borne the full brunt of this dreadful political ideology.

This book is dedicated to one of them, J. S. Tissainayagam, in the fervent hope that he will regain his freedom from incarceration sooner rather than later. Tissa is a friend with whom the author enjoyed many and unapologetically didactic disagreements on questions of politics, but it is plain that Voltaire's *dictum* on the freedom of expression is a value that is nowadays wholly subordinate to the paranoid nostrums of the 'National Security State.'

The basic framework of analysis and many of the ideas expressed in this book were first presented, inchoately and informally, at a seminar organised by the Centre for Policy Alternatives (CPA) at the Sri Lanka Foundation Institute in Colombo on 5th April 2007. A panel chaired by Dr. Paikiasothy Saravanamuttu (Executive Director, CPA), and comprising Mr. Desmond Fernando, President's Counsel; Mr. K. S. Ratnavale, Attorney at Law; Mr. M. A. Sumanthiran, Attorney at Law; and Mr. Rohan Edrisinha (Senior Lecturer, Faculty of Law, University of Colombo, and Director &

Head of the Legal & Constitutional Unit, CPA) responded to the presentation. Thanks are due to the panel for their comments, the quality and rigour of which truly reflected the panellists' distinction, length and diversity of experience in the defence of civil liberties and the rule of law at the Bar, in academe and as members of Sri Lanka's civil society. Thanks are also due to the interventions and lively debate generated by participants at the seminar.

The Centre for Policy Alternatives (CPA) and the author would like to acknowledge with appreciation the financial support for this project given by the Friedrich Naumann Stiftung für die Freiheit (FNF). The author wishes in particular to thank the FNF Resident Representative in Sri Lanka, Mrs. Sagarica Delgoda, and her colleagues at the FNF Colombo office for the great flexibility, understanding and patience they have shown in bringing this book to publication, delays and extensions notwithstanding.

We also thank Dr. Deepika Udagama, Senior Lecturer at the Faculty of Law of the University of Colombo, for reviewing the book, and Dr. Rene Klaff of the FNF for his participation and comments, at the book launch at the 80 Club, on 27th August 2008, which was chaired by Dr. Paikiasothy Saravanamuttu. At CPA, the author would like to thank Anukshi Jayasinha for organising the launch with her customary equanimity; Anja Rupesinghe, Sankhitha Gunaratne and Shamalie Jayatunge for their assistance with proofreading and the preparation of annexures, Joseph Thavarajah for designing the cover, and Sanjana Hattotuwa for help with the technical aspects of production – all rendered with patience and good humour in spite of unreasonable demands on their time; and Kosala Tillekeratne and Globe Printers for their usual rising to the occasion in the rescue of a habitually deadline challenged author.

Needless to say, responsibility for errors that doubtless remain lies with the author.

Almost the entirety of the author's career in Sri Lanka working on what is known in the United States as 'public service law' at the Legal & Constitutional Unit of the CPA has been against the backdrop of emergency rule, its frequent and flagrant abuses, and our responses; apart from a brief interregnum between 2001 and 2004 when the state of emergency lapsed and under the terms of the Ceasefire Agreement of February 2002, the operation of the PTA was suspended. So an *in limine* word of caution is that this personal experience colours the discussion in this book, and for which I offer no excuse.

Asanga Welikala
Colombo
27th August 2008

Chapter 1

INTRODUCTION

Sri Lanka has been governed under emergency powers for the best part of the last three decades. The crisis conditions necessitating recourse by the State to emergency powers are the result of deep-rooted political anomalies of the Sri Lankan State and its constitutional order. These have given rise to two instances of attempted overthrow of the State driven by socio-economic and ideological considerations in the South, as well as the continuing ethno-political conflict and armed secessionism in the North and East of the country.

This book does not seek to examine the political and constitutional dimensions of conflict in Sri Lanka and the anomalies that have created prolonged conflict. Its aim is the more modest one of describing through a coherent analytical framework, the endemic and seemingly permanent state of emergency that Sri Lanka has been and continues to be governed under, with a view to assessing the implications this has had for notions of constitutional government and for the protection of fundamental rights within the current constitutional dispensation.

The legal provision for states of emergency – for government during times of acute crisis – presents a fundamental challenge for

those who believe in the democratic form of government, human rights, and constitutionalism. Balancing the recognition that the State must be empowered to take extraordinary measures to deal with violent challenges and crises threatening the life of the community, is the need to ensure safeguards for the core of the democratic order. Quite simply, it is only the assurance of an appropriate balance between these competing objectives that ultimately justifies the conferral of extraordinary powers on the State. If the State, in response even to armed and violent challenge, is allowed to habitually override the core democratic values of the constitutional order such as fundamental human rights, the rule of law, and the separation of powers, then the moral and political justification for constitutionally providing for emergency powers is fatally undermined. In other words, if the State becomes authoritarian in the exercise of emergency powers, there is nothing left worth defending in the constitutional order.

This central tension between order and democracy pervades the constitutional and legal treatment of states of emergency. The tension provokes questions as to which kinds of limitations and derogations on our rights, to what extent, and how, we are willing to countenance in allowing for measures to deal with a crisis. Implicit too is the notion that crises and emergencies are the 'exception' to the norm of constitutional government, and accordingly, that legal provision for emergency measures be presumptively based on a return to 'normality' as quickly and with as little damage as possible to the democratic order. This recognises that some of the ordinary checks and balances as well as certain liberties may be restricted or even altogether suspended during a crisis, but it does not mean granting a constitutional *carte blanche* to the executive.

The choices imposed by this tension are of course a dilemma faced by democracies and democrats, because authoritarian regimes do not face a choice between liberty and order. To the latter, the only considerations are those such as efficiency, the allocation of resources, and the political and physical survival of the regime. In democracies, the recognition of the need for emergency powers requires an acceptance of an expansion of the role of the executive, by definition at the expense of some facets of democracy. Primarily, this involves the derogation or limitation of some fundamental rights and the suspension of some institutional checks and balances. For the reason that emergency powers are seen as exceptional measures to deal with a crisis, democratic practice and international law seeks to impose temporal, procedural, and substantive limits to emergency powers. Thus the theory and practice relating to states of emergency in constitutional democracies concern certain overarching themes such as the fundamental distinction between emergency and normalcy already mentioned (and accordingly the separation of treatment between exceptional measures and ordinary law and processes). Flowing directly from this is the concern to limit the operation of emergency powers in time; to establish requirements of justification prior to invocation of these powers; the mechanisms for approval, oversight and accountability; and to regulate the substantive reach of emergency powers, especially where fundamental rights are implicated.

The assumption of separation between emergency and normalcy, which embodies the concern to address the tension between these two conditions in a way that equips the State with the adequate capacity to deal with emergencies without sacrificing the essential core of the democratic way of life, constitutes the fundamental analytical perspective of this book. This is subject to the qualifications regarding political culture and the permanence of

the exception discussed below. Nonetheless, a theoretically and normatively coherent, critical understanding of the Sri Lankan situation in the light of comparative experience cannot be undertaken without making this assumption.

At the level of the constitutional and legal framework, the regulation of states of emergency in Sri Lanka appears broadly to comply with at least some of the requirements mentioned above, even if that framework is outmoded in the light of contemporary international human rights jurisprudence and constitutional design trends. This is especially the case with regard to the permissibility and constitutional regulation of restrictions on fundamental rights during emergencies.

However, in the Sri Lankan experience, what is immediately clear is that the presumption of exceptionalism with regard to emergencies cannot form the exclusive basis of an account of states of emergency, because the exception has quite clearly become the norm. Thus the constitutional and legal regulatory framework must be assessed as more or less permanent power-conferring provisions for general governance, notwithstanding their intended purpose as occasionally invoked, special and temporary measures. Actually, this is not a uniquely Sri Lankan problem, in that even in constitutional democracies with relatively strong rule of law and civil liberties traditions, the assumption of separation between an emergency and normalcy are a constant source of theoretical and practical problems. Attention to this issue has increased in the West in the context of governmental responses to terrorism in the aftermath of September 11. However, these problems assume an aggravated form and quality in countries such as Sri Lanka which are characterised by weak rule of law cultures, fundamental anomalies of the State constitutional order that generate internal political conflict, and

indeed, ambiguous social subscription to liberal democratic values.

In Sri Lanka, moreover, while the constitutional and legal framework relating to emergency powers superficially resemble that of a constitutional and democratic order, the culture and practice of these powers relate a different story in respect of the legality of official conduct and of the protection of fundamental rights. Therefore, a proper understanding of Sri Lankan states of emergency must look beyond textual provisions and their judicial interpretation to the more politically sentient cultures and attitudes that inform the exercise of governmental authority.

It has also been the case that even the institutional safeguards envisaged by the constitution have been rendered nugatory by the failure of parliamentary review over executive action, both procedurally and in terms of substantive rule-making. Likewise, both the independence and the capacity of the law enforcement apparatus of the State, including the police, the Attorney General's Department and the judiciary, are once again becoming a matter of international concern. The Supreme Court as the constitutional guarantor of fundamental rights has had a mixed record. It has been a relatively robust defender of fundamental rights in the past, although the tenor of its jurisprudence has not always corresponded with international trends and standards. More recently, however, the Supreme Court has been responsible, *inter alia*, for a shocking retreat from Sri Lanka's international obligations under the International Covenant on Civil and Political Rights and its enforcement framework under the First Optional Protocol. Other mechanisms such as the national Human Rights Commission have become wholly ineffectual in dealing with challenges on the ground. There is very little confidence that the institutions of the State are possessed of the necessary will,

independence or capacity to ensure the protection of the human rights of its citizens against abuse of emergency powers in the context of escalating conflict.

All of these factors coalesce into what is now an executive praxis and culture that is deeply problematic from the perspective of confining executive authority within constitutional and statutory limits as well as fundamental rights protection. The prevailing ethos is one in which violations of fundamental rights are widespread, and which is compounded by the re-emergence of a pervasive culture of impunity. The political backdrop of these developments is the current government's policy and perspective regarding the resolution of the ethnic conflict, which is in essence a counter-insurgency approach, and the manner of its execution since 2005. The reason for disquiet about recent events is that in the pursuit of this strategy, the commitment of the government to protecting fundamental rights and the rule of law appear neither clear nor unequivocal. This is evinced by consistent official rhetoric that places national security considerations over and above democratic values, and policy decisions and executive action that directly violate human rights. There is a perception that the effectiveness and utility of official responses by the government to civil society and international pressure on these counts (for example the appointment of the Presidential Commission of Inquiry into human rights violations (CoI) and the International Independent Group of Eminent Persons (IIGEP), and the acrimonious exit of the latter) are compromised by cynicism, indifference and insincerity. This is exacerbated by the lawless perception created by the operation of security and intelligence apparatuses as well as their paramilitary associates in an unregulated and secretive extra-legal sphere. The consequential atmosphere, in the context of high profile violations such as abductions, beatings and torture, extra-judicial executions,

ethnic discrimination, detentions without charge, internal displacement, and the arbitrary expulsion of civilians from the metropolis, is one in which there is no public confidence in human rights protection and the rule of law, which in turns erodes confidence in and legitimacy of the constitutional order itself.

The issue of the arrogation of extra-legal 'powers' has assumed renewed significance in the context of the escalation of conflict in 2007 and 2008, and evinced in the publicly represented official attitudes to legality, constitutionality, and the equal protection of human rights of all citizens in the avowed fight against terrorism. While of course the policy of the President Rajapakse's administration in respect of resolving the conflict is a radical departure from that of its short-lived United National Front (UNF) predecessor, it must be remembered that impatience with strict legal constraints in the prosecution of counter-insurgency programmes is not something that is unique to the present government. To be sure, the Sri Lankan State has an unenviable record of abuse of emergency powers; in the suppression of the JVP insurrection in the late 1980s and the instances of military abuses in operational areas in the North and East since at least the 1970s. The Jayewardene and Premadasa presidencies, under the current constitutional dispensation, represented an unusually audacious rejection of both legality and liberal values. Thus while the source of its powers remains the constitution – which though imperfect and inadequate is nonetheless a broadly democratic constitutional framework – Sri Lankan governments' interpretation of the political power available to them for the prosecution of war and anti-terrorism programmes seems to exceed the constitution *per se*. It is in this context that a more complete appreciation of the ramifications of Sri Lankan states of emergency must both understand the executive's legal

reinterpretation of its constitutional sphere as well as go beyond to the politics of self-legitimation.

From these preliminary observations it is clear that an analytical framework capable of fully explaining states of emergency in Sri Lanka needs to address a number of factors. Firstly, it must provide a sound theoretical and comparative basis for analysis and critique. Secondly, it must deal with the textual provisions of the Sri Lankan constitutional and legal dispensation and their judicial interpretation. But, thirdly, it must also go beyond legal text and judicial interpretation to an examination of the attendant political culture and official attitudes to the exercise of these powers. The issues relating to the third consideration, however, are so complex and wide as to justify treatment in another book, and are therefore only dealt with in a cursory fashion here.

Accordingly, the analytical framework of this paper draws on the theory, practice and legal scholarship on states of emergency to articulate three models of emergency powers: (a) the models of legal accommodation, with particular focus on the Roman model of constitutional accommodation; (b) the libertarian model of constitutional perfection; and (c) the models of extra-legality, with a particular reference to the work of Carl Schmitt. While the institutional variations of these models as applied in international experience and constitutions are diverse and not necessarily as conceptually neat as the theoretical articulation of the models would suggest, the political challenges and legal problems they seek to address are, perhaps unsurprisingly, remarkably similar. That is, the question of how to rationalise the provision of public authority for dealing with extreme and violent crises; and in constitutional democracies the dilemmatic choices this problem poses for the preservation of the core values of the democratic order, in particular, fundamental human rights and the rule of law.

Having set out the theoretical framework of analysis in this way, the discussion explores the Roman model of constitutional accommodation further, as the model that is the prototype for emergency institutions in the large majority of modern democracies as well as for the standards set by international law and practice, and which also ostensibly informs the text and constitutional assumptions of the Sri Lankan legal framework on emergency rule. The second model, also known as the 'business as usual' model, is of limited application to the Sri Lankan experience, and is only included here for the sake of completeness.

It would seem, given the avowedly democratic, if flawed, character of the Sri Lankan constitutional order, that the third set of models which seek to rationalise an extra-legal basis of emergency powers have no place in a critical discussion of such powers from a liberal constitutionalist perspective. However, the extra-legal model propounded by Carl Schmitt, despite its odious antecedents in Nazi Germany, poses valid and fundamental theoretical challenges to liberals about the nature of politics and law. More pertinent to the Sri Lankan experience, Schmitt is also useful in understanding political attitudes to the use of emergency powers that do not subscribe to, or are less concerned with, liberal democratic anxieties in this regard. Schmitt's work lends philosophical clarity to the 'concept of the political' and the nature of the 'permanent state of exception' in relation to ideological approaches to political power that are based on an emphasis on the executive branch and a strong association of nationalism with the State and its security at all costs. Therefore, the relevance of Schmitt to the analytical understanding of the exercise of emergency powers under the Constitution of 1978 should be self-evident.

In terms of structure, the book sets out the analytical framework as introduced above and identifies the theoretical and practical

issues from comparative experience that must inform a discussion of Sri Lankan states of emergency. Likewise, there is a regulatory framework for states of emergency and derogations from international obligations as set out in the International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka is a signatory; and the First Optional Protocol to the ICCPR which mandates individual communications to the Human Rights Committee, in relation to which the status of Sri Lanka is in doubt following the Supreme Court decision in the *Singarasa Case* in 2006. In addition to these are the norms of general international human rights law. The ICCPR and other provisions of human rights and humanitarian law are peremptory norms of international law by which the Sri Lankan State is bound as a member of the international community of States.

The book then reviews the Sri Lankan constitutional and legislative framework (i.e., Chapter XVIII of the constitution, the Public Security Ordinance, and the Prevention of Terrorism Act) relating to states of emergency (including an overview of Emergency Regulations currently in force), as well as the constitutional bill of rights and its provisions for the restriction of fundamental rights during emergencies. The frame of reference for critique and assessment will be the models set out at the outset and the applicable international standards and comparative experiences.

There is a body of Sri Lankan literature comprising scholarly articles, journalistic commentary, policy briefs, analytical studies, and chapters in legal textbooks concerning states of emergency, many of which have been useful. In particular, J. A. L. Cooray's ***Constitutional and Administrative Law of Sri Lanka*** (1995) and Jayampathy Wickremaratne's recently updated and expanded

second edition of *Fundamental Rights in Sri Lanka* (2006) have been useful.

Needless to say, the revival of interest in emergency powers and concomitant implications for democratic values and liberties has generated a massive body of literature in the West since the events of 11th September 2001. In the scholarly debate in the common law world, two outstanding contributions are the recent book-length treatises by Oren Gross and Fionnuala Ní Aoláin on *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006), and David Dyzenhaus on *The Constitution of Law: Legality in a Time of Emergency* (2006).

The present discussion draws on both books extensively, but especially the former in which Gross and Ní Aoláin develop the three models of theory and practice on emergency rule used here. Their comprehensive work on the theoretical, practical, and comparative dimensions of emergency powers is beyond doubt the best academic text on this subject currently available. Dyzenhaus's book critically illuminates the legal philosophical issues at play, and provides the indispensable jurisprudential resources for those who believe in emergency powers exercised with fidelity to liberal democratic values rather than with mere lip-service to procedural propriety. Also useful has been Jaime Oraá's systematic and comprehensive study of *Human Rights in States of Emergency in International Law* (1992), which elucidates the principles of international law governing derogations from human rights obligations during states of emergency.

PART I

The Theory and Practice of Emergency Powers

CHAPTER II

THEORY AND PRACTICE OF STATES OF EMERGENCY: AN INTRODUCTION TO THREE MODELS

2. Theory and Practice: An Introduction to Three Models

2.1. Models of Accommodation

2.1.1. Classical Models of Accommodation

The Roman Dictatorship

The French State of Siege

The British Concept of Martial Law

2.1.2. The Modern Comparative Context: Three Categories of Accommodation

Constitutional Accommodation

Legislative Accommodation

Interpretive Accommodation

2.2 Business as Usual Model

2.3 Extra-Legal Measures Models

Carl Schmitt: Sovereign Dictatorship, the
Concept of the Political, and the State of
Permanent Exception

In their recent comprehensive study of the theory and practice of states of emergency, Gross and Ní Aoláin¹ have advanced three broad conceptual models that facilitate a more systematic understanding of states of emergency and the competing issues they involve. The typology used by Gross and Ní Aoláin is the analytical framework adopted in this chapter. These are (a) the models of accommodation; (b) the 'business as usual' model; and (c) the extra-legal measures model.

In Gross and Ní Aoláin's exposition of the models of accommodation, they introduce three classical concepts, *viz.*, the Roman dictatorship, the French *état de siege*, and the British concept of martial law. In modern comparative context, they also discuss three categories of accommodation, *viz.*, constitutional, legislative, and interpretive accommodation. Many of these models provide useful theoretical and comparative insights for analysis of the Sri Lankan experience, but we focus more specifically on the neo-Roman models of constitutional accommodation for two reasons: first, because the Sri Lankan constitutional and legal framework (i.e., its textual provisions) belongs within this conceptual category; second, because this analysis and critique of the Sri Lankan framework is premised upon the liberal constitutionalist assumption of separation between emergency and normalcy as discussed in the previous chapter.

The 'business as usual' model, which is based on 'notions of constitutional absolutism and perfection,' entertains no deviation from ordinary rules and norms of legal conduct even in times of emergency. This commitment to the constitutional order is absolute in the sense that there is no substantive difference of

¹ Oren Gross and Fionnuala Ní Aoláin (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge UP); hereinafter Gross and Ní Aoláin

outcome in concrete cases between times of crisis and normality. It is perfectionist in the sense that it presumes that the constitution anticipates every conceivable challenge, including those presented by an emergency.

Finally, the 'extra-legal measures' models are those that are prepared to contemplate extra-legal or even extra-constitutional action during times of crisis. Gross and Ní Aoláin discuss several sources of the extra-legal model, some of which have respectable ethical, moral and political foundations. Indeed, in one view of the British concept of martial law, actions during times of emergency could be entirely outside the ordinary legal system but yet be justified by the necessity and nature of the power used. However, for reasons already canvassed in the previous chapter, we focus on the theoretical challenge to liberal constitutionalism posed by Carl Schmitt in his theory of emergency powers.

2.1 Models of Accommodation

The groups of models represented by the models of accommodation are those that have dominated the discourse regarding the treatment of emergency powers in democratic regimes. These are concerned with addressing the tension between emergency powers and democratic values. More specifically, these models, with varying institutional mechanisms and degrees of equilibrium, seek to strike a balance between the recognition of the need for extraordinary powers during times of crisis and the need to preserve the democratic core of the constitutional order. They are therefore essentially about an appropriate trade-off between the competing values of order and liberty. The overarching objective of emergency powers is the preservation of the constitutional order in a manner that does not,

in the process, destroy democracy. As Gross and Ní Aoláin suggest, “This compromise...enables continued adherence to the principle of the rule of law and faithfulness to fundamental democratic values, while providing the state with adequate measures to withstand the storm wrought by the crisis.”²

2.1.1 Classical Models of Accommodation

The classical prototype of this approach to the accommodation of a regime of emergency powers within the constitutional order is the institution of the dictatorship in the Roman Republic. Other classical models inspired by the Roman prototype are the French *état de siege*, and the British concept of martial law, which have informed legal arrangements for emergency powers in the civilian and common law traditions respectively.

The Constitutional Institution of the Roman Emergency Dictatorship

Even the most cursory review of the constitutional arrangements of the post-monarchical Roman republic in respect of states of emergency reveals why it has been a source of such attraction to political theorists and constitution-makers. Its theoretical assumptions and institutional features continue to inform modern best practice in the constitutional and legal treatment of emergency powers. The Roman constitutional institution of the emergency dictatorship was upheld by Machiavelli as one that “... deserves to be considered and numbered among those that were

² Gross and Ní Aoláin: p.9

the cause of the greatness of so great an empire.”³ In dealing with the question of the need for a strong executive during the drafting of the constitution of the United States, Hamilton invoked the Roman model as worthy of emulation.⁴ In his seminal study of American government during times of crisis, Rossiter claimed that “The splendid political genius of the Roman people grasped and solved the difficult problem of emergency powers in a manner quite unparalleled in all history, indeed so uniquely and boldly that a study of modern crisis government could find no more propitious a starting point than a brief survey of the celebrated Roman dictatorship.”⁵ More recently, even less sanguine observers like Ackerman, who is sceptical about the practicality of the Roman arrangements as a model for the modern world, have conceded that it “...represents the first great experiment with states of emergency” and acknowledges its influence as a ‘political system of checks and balances’ in his own propositions in this regard.⁶

Gross and Ní Aoláin summarise the Roman model and its contemporary relevance in the following manner: “The salient features of the ‘celebrated Roman dictatorship’⁷ – its temporary character, recognition of the exceptional nature of emergencies,

³ Niccolò Machiavelli (1996) *Discourses on Livy* (Trans. H. C. Mansfield & N. Tarcov) (Chicago: Chicago UP): p.74

⁴ *Federalist No. 70* (Alexander Hamilton) in Clinton Rossiter (Ed.) (1961) *The Federalist Papers* (New York: The New American Library): p.423

⁵ Clinton Rossiter (1948) *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton: Princeton UP): p.15

⁶ Bruce Ackerman (2004) ‘The Emergency Constitution’ 113 *Yale Law Journal* 1029 at p.1046

⁷ See Fredrick M. Watkins (1940) ‘The Problem of Constitutional Dictatorship’ 1 *Public Policy* 324 at p. 332

appointment of a dictator according to specific constitutional forms that separated, among other things, those who declared an emergency and those who exercised dictatorial powers on such occasions, the appointment of dictators for well-defined and limited purposes, and the ultimate goal of upholding the constitutional order rather than changing or replacing it – are often regarded as setting the basic guidelines for modern-day constitutional emergency regimes.”⁸

With the fall of the monarchy in 509 BC, the new Roman republic established a form of executive government that was designed to avoid the perils of centralisation of power. The result was an executive branch that was headed by two consuls, who were vested with a vast array of power including that of command over the army.⁹ However, the logic of the system was sustained by two key underlying principles: (a) the principle of collegiality and equal power, and (b) the principle of limited and non-renewable tenure. The first principle meant that each consul enjoyed equal authority and had the same range of powers and responsibilities. It also meant that each had an unlimited veto over the decisions and actions of the other. The second principle established that each consul was elected for a period of one year only without the possibility of consecutive re-election.¹⁰

However, the Romans recognised that this system may not work well in times of grave peril, when the need for swift and decisive

⁸ Gross and Ní Aoláin: p.18

⁹ William E. Heitland (1969) *The Roman Republic*, Vol.1 (Florida: Gaunt): para.70

¹⁰ See Max Cary & Howard H. Scullard (1975) *A History of Rome down to the Reign of Constantine* (3rd Ed.) (New York: St. Martin's Press): p.56, 62-63

action may not be served by a collegial executive which ran the real risk of deadlock. For these occasions, therefore, the Romans devised the institution of the dictatorship, which would concentrate the powers of the State necessary to tide over the threat in a single appointed official.¹¹ It was an innovative attempt to constitutionally revive the essence of the monarchy, albeit for strictly limited purposes and duration. Given what Hamilton described as its 'formidable title' and the connotations of the term in common parlance, it is important to bear in mind that the Latin origin of the term dictator is *dictus*, meaning named, or appointed.¹² In the Roman republic, this title was given to the person exercising powers under the emergency regime for the reason that he was the only magistrate that was appointed. All others including the consuls were elected officials. The dictatorship we are concerned with is that exemplified by Cincinnatus,¹³ not the constitutionally destructive tyrannies of Sulla or Caesar. As Gross and Ní Aoláin observe, "The main thrust of this emergency institution was its constitutional nature. Operating within the republican constitutional framework the dictator was vested with extraordinary yet constitutional powers. Emergency was met with special powers of an authoritarian character, but the employment of such powers and the authority to use them were regulated by law."¹⁴

The dictator was appointed by either one of the consuls, but the consuls were neither replaced nor their powers taken away by the

¹¹ Herbert F. Jolowicz & Barry Nicholas (1972) *A Historical Introduction to Roman Law* (3rd Ed.) (New York: Greenwood Press): p.11

¹² Heitland (1969), op cit., Vol.1, para.148

¹³ Ibid, para. 106

¹⁴ Gross and Ní Aoláin: p.19

dictator.¹⁵ The dictator enjoyed all the plenary powers of the consuls, and had complete command of the army and strategic and tactical decisions. He was free from intercession by the tribunes, senatorial intervention and direction, and unlike all other magistrates including the consuls was not subject to the appellate authority of the centuriate assembly. He also enjoyed immunity from punishment even after the termination of the emergency.¹⁶

The key strength and enduring appeal of the Roman dictatorship lie in the limitations imposed upon it by the constitution as well as conventions. Significant among these was that the appointment of a dictator was allowed only in the face an exceptional and specific threat to the republic, and then only for a short period. The term of office of a dictator was a non-renewable six months, or the expiration of the term of the consul who appointed him, whichever came first.¹⁷ Both Machiavelli and Rousseau were of the view that the features of short duration, set in advance and not liable to extension, were key strengths of the model.¹⁸

Another important restriction was that a dictator was appointed to counter a specific military threat, of usually external origin. However, he could not initiate armed aggression of his own volition; the role of the dictator was a purely defensive one.¹⁹

¹⁵ Andrew Lintott (1999) *The Constitution of the Roman Republic* (Oxford: Clarendon Press): p.111

¹⁶ Rossiter (1948), op cit., pp.19, 25

¹⁷ Gross and Ní Aoláin: pp.21-22

¹⁸ Machiavelli (1996) op cit., pp.76-77; Jean-Jacques Rousseau (1993) *The Social Contract and Discourses* (Trans. G.D.H. Cole) (New York: Everyman): p.296

¹⁹ Rossiter (1948), op cit., p.24

Moreover, the function of the dictator was to ‘maintain and protect the existing constitutional order.’ As Gross and Ní Aoláin state, “The dictator could not use his powers in order to change the basic character of the state or its institutional framework. Significantly, his authority did not extend to the promulgation of new legislation, an authority that was reserved to the Senate.”²⁰ Again, both Machiavelli and Rousseau consider these to be particularly commendable features.²¹

An especially significant set of limitations on the dictatorship were those in relation to the procedures of appointment and of the institutional framework within which emergency powers had to be exercised. The consuls’ discretion in choosing a person for appointment as dictator was circumscribed by the rule that no consul could appoint himself to that office. Moreover, the convention was developed that a consul’s appointment of a dictator would be done on the recommendation of the Senate, and that the imperium of the dictator had to be ratified by a law passed by the centuriate assembly.²² These arrangements reflect the important principle of separation between those who invoke the dictatorship, appoint the dictator, provide his terms of reference and confer his powers in the form of ‘public orders’ on the one hand, and the person who in fact exercises the extraordinary emergency powers, on the other.²³

A final check as Machiavelli saw it, and one which has particular resonance for any discussion on states of emergency in Sri Lanka,

²⁰ Gross and Ní Aoláin: p.23

²¹ Machiavelli (1996), op cit., pp.74, 76; Rousseau (1993), op cit., p.294

²² Jolowicz & Nicholas (1972), op cit., pp.35, 55

²³ Gross and Ní Aoláin: pp.23-24

was the cultural and political ethos of the Roman citizenry which would not tolerate tyranny. Machiavelli fully contemplated the constitutional regulation of emergency powers, but he emphasised the significance of the disposition of the public to reject unconstitutional behaviour as the ultimate guarantee of constitutional government, and especially of the emergency institutions.²⁴

Thus as Gross and Ní Aoláin conclude, “The institution of the dictatorship was alien to the basic constitutional structure of the republic. The system of officers coequal in their powers and able to fully veto each other’s decisions and actions could not comfortably exist with the vesting of absolute power in a single person. The notion of sharing the burdens of governance was clearly at odds with the dictatorship. Hence, although giving the dictator all the powers needed to defend the republic against its enemies, well-defined constitutional restrictions were laid out in order to prevent unwarranted aggrandizement and abuse of the powers of the dictator...”²⁵

The emergency institutional framework of the Roman republic was the first known attempt at constitutionally accommodating and regulating the exercise of powers during a time of crisis. It recognised that crises required extraordinary measures, and that the State must be empowered to preserve and protect the constitutional order. However, this was not to be allowed at the expense of the constitutional order itself, resulting in the establishment of devices that balanced the competing policy objectives within an institutional framework of checks and balances.

²⁴ Machiavelli (1996), *op cit.*, pp.74, 77

²⁵ Gross and Ní Aoláin: pp.20-21

The French Concept of the State of Siege

The French state of siege is the model of emergency powers used in the civil law tradition and finds elaborate expression in various forms especially in the Latin and South American constitutions, where it is known as the *estado de sitio*.²⁶ It is a model that is closely based on the classical Roman emergency institution of the dictatorship. As Rossiter observes, “No instrument of crisis government conformed so closely to the theory of constitutional dictatorship as the famed and widely-imitated state of siege.”²⁷ It was originally conceived of as an instrument for the transfer of powers to the military commander of a besieged fortress to take all measures as are necessary to combat the threat and was also primarily a mechanism of external defence.

After the French Revolution, the character of the institution became more political from what was originally a military mechanism (*état de siege réel*), and was extended to the measures necessary for dealing with internal insurrection as well (i.e., what became known as the ‘constructive state of siege, or *état de siege fictif*). As Gross and Ní Aoláin explain, “The basic idea underlying this institution is that emergencies can be anticipated and counter-measures can be put in place by promulgating comprehensive legal rules *ex ante*. An elaborate legal framework sets forth and prescribes the measures to be taken in order to control or bring to an end any given emergency.”²⁸ The state of

²⁶ See Brian Loveman (1993) ***The Constitution of Tyranny: Regimes of Exception in Spanish America*** (Pittsburgh: Pittsburgh UP)

²⁷ Rossiter (1948), *op cit.*, p.16; see also Joseph B. Kelly & George A. Pelletier, Jr. (1966) ‘Theories of Emergency Government’ 11 ***South Dakota Law Review*** 42 at p.46

²⁸ Gross and Ní Aoláin: p.27

siege is therefore a legal institution of crisis government. As Radin points out, “The vital point is that the state of siege is not a condition in which law is temporarily abrogated, and the arbitrary fiat of a ‘commander’ takes its place. It is emphatically a legal institution, expressly authorised by the constitutions and the various bills of rights that succeeded each other in France, and organised under this authority by a specific statute.”²⁹

While the transfer of powers (in relation to the maintenance of order and the security of the Republic) from political to military authorities during an emergency is the basic premise of the French model, it is subject to critical safeguards that make it neither an automatic nor an unfettered transfer. The procedural requirements and substantive effects of the state of siege are all statutorily regulated and are always subject to (suitably abridged) constitutional rights. Thus, the model contemplates strong requirements of demonstrable constitutional necessity before a state of siege is brought into operation; legislative control over its declaration; limitations in time of its operation; the continuation of constitutional rights except to the extent legitimately restricted under the state of siege; and the preservation of the separation of powers between the executive and legislature and of functions between the civilian and military authorities, including political oversight over and co-operation with the military.³⁰

²⁹ Max Radin (1942) ‘*Martial Law and the State of Siege*’ 30 *California Law Review* 634 at p.637

³⁰ See Gross and Ní Aoláin: pp.26-30; Rossiter (1948), op cit., pp.79-129

The British Concept of Martial Law

The classical concept of martial law in the English common law was originally the same as military law, embodying a system of discipline, governance and criminal justice within the military. It is a typical product of the common law: of precedent, tradition and evolution. Its first political use was by the Stuart kings, who employed it as a system of criminal justice even against civilians, the result of which was the adoption by Parliament in 1628, of the Petition of Right which restricted its application to the military, and over time, to the military in wartime.³¹

While the source, scope and content of martial law has been the subject of much debate, Gross and Ní Aoláin broadly discern two strands of opinion as to the source of martial law, on which the determination of its scope depends. In the first strand, martial law is seen as a matter of the English common law right to repel force by force, which is the same principle as the criminal law doctrine of self-defence. The second school of thought sees martial law as an aspect of the panoply of powers available to the Crown under the royal prerogative.³²

³¹ See Charles Fairman (1943) ***The Law of Martial Rule*** (2nd Ed.) (Chicago: Callaghan): pp.9-19; F.K.M.A. Munim (1989) ***Legal Aspects of Martial Law*** (Dhaka: Bangladesh Institute of Law and International Affairs): p.12; George M. Dennison (1974) '*Martial Law: The Development of a Theory of Emergency Powers, 1776 – 1861*' 18 ***American Journal of Legal History*** 52; Matthew Hale (1987) ***The History of the Common Law of England*** (1713) (Colorado: F.B.Rothman): p.34; Robert Blackstone (1979) ***Commentaries on the Laws of England*** (1765) (Chicago: Chicago UP): p.400

³² Gross and Ní Aoláin: p.31; W.S. Holdsworth (1902) '*Martial Law Historically Considered*' 70 ***Law Quarterly Review*** 117

In Dicey's view, the idea of martial law recognised by the English common law and constitution corresponded to the right and power of the government as well as ordinary citizens to maintain public order with whatever measures are necessary in the circumstances.³³ Gross and Ní Aoláin usefully summarise the Diceyan position which bears full reproduction:

“This ‘English’ martial law has the following characteristics. First, its legal source is the common law right to meet force with force. This right is shared by the government and the citizens. Second, the necessity of the circumstances is the only criterion by which to determine the need for the use of the common law right in any given instance and the extent to which emergency measures may be employed. Any excesses and abuses of power, not necessitated by the exigency, are unlawful and give rise to individual liability of the actors. Since the application of the right to meet force by force is based on the necessities of the particular case, its operation is not dependent on the prior proclamation or declaration of martial law by the government. Third, martial law permits the use of all means necessary for the suppression of an internal rebellion or riot as well as the repelling of an invasion. Yet, it does not allow any punitive measures against the invaders or rioters outside the ordinary legal process. Military tribunals and commanders are not authorised to try such persons or otherwise punish them for their participation in the riot or the invasion. Martial law is of a preventive, rather than a punitive, nature. Finally, the ultimate determination of whether the force employed in

³³ See Edward S. Corwin (1932) *‘Martial Law, Yesterday and Today’* 47 *Political Science Quarterly* 95 at p.97

a particular case was necessary in the circumstances is in the hands of the courts with the burden of proof on the person who invokes the defence of necessity.”³⁴

Dicey’s view is shared by other prominent jurists such as Stephen³⁵ and Pollock, but Dicey and Pollock disagreed upon on the scope of the limits on the exercise of martial law. Whereas Dicey sought to keep the exercise of martial law powers, including the necessity of its invocation, within the common law and the jurisdiction of ordinary judges, Pollock’s more expansive conception would have necessity, as determined by the government, render all actions under martial law legal and immune from subsequent challenge.³⁶

The other view of martial law is that it flows from the royal prerogative.³⁷ According to Gross and Ní Aoláin, the origin of this theory goes back to the Court of the Constable and Marshal which operated under the prerogative. They see evidence of this approach in certain legislative measures against riots and disturbances in Ireland which stipulated explicitly that “nothing in this act contained shall be construed to take away, abridge or

³⁴ Gross and Ní Aoláin: p.32; Albert Venn Dicey (1982) *Introduction to the Study of the Law of the Constitution* (8th Ed.) (Indianapolis: Liberty Classics): pp.182-187, 398-409

³⁵ James F-J. Stephen (1883) *History of the Criminal Law of England* (London: Macmillan): pp.207-208; see also Lord MacDermott (1972) ‘Law and Order in Times of Emergency’ 17 *Judicial Review* 1 at p.21

³⁶ Frederick Pollock (1902) ‘What is Martial Law?’ 70 *Law Quarterly Review* 152 at p.156; see also H. Erle Richards (1902) ‘Martial Law’ 70 *Law Quarterly Review* 133 at p.139

³⁷ Fairman (1943), op cit., pp.1-6; Munim (1989) op cit., pp.7-9; J.V. Capua (1977) ‘Early History of Martial Law in England from the 14th Century to the Petition of Right’ 36 *Cambridge Law Journal* 152

diminish, the acknowledged prerogative of his Majesty, for the public safety, to resort to the exercise of martial law against open enemies or traitors.”³⁸ The philosophical basis of this approach, as we see below, is principally Locke’s theory of the royal prerogative used according to his conception of the ‘public good’ in times of emergency and when measures available under the ordinary law are inadequate or the procedures of the ordinary legal system are too slow.

While some commentators have played down the theoretical debate between these two approaches on the argument that they have similar effects in practice, Gross and Ní Aoláin point out that there is in fact a salience in the distinction. That is, while the Diceyan common law approach considers martial law to be sourced from general principles of the ordinary common law and thereby rejects any notion of extraordinary powers, the royal prerogative argument assumes that emergency powers are exceptional measures that operate outside the sphere of the ordinary legal system. Thus, both approaches raise difficulties when viewed from the analytical viewpoint of the assumption of separation between emergency and normalcy.³⁹

2.1.2 The Modern Comparative Context: Three Categories of Accommodation

In considering modern comparative practice, theory, and legal treatment of emergency powers, Gross and Ní Aoláin use a

³⁸ Gross and Ní Aoláin: p.34 and statutory references; Colm Campbell (1994) *Emergency Law in Ireland, 1918 - 1925* (Oxford: Clarendon Press): pp. 125-148

³⁹ Gross and Ní Aoláin: p.35

classificatory framework that enables categorisation according to whether accommodation is constitutional, legislative or interpretive. Needless to say, it is not intended that any jurisdiction falls exclusively into any one of these categories, but adopting this approach breaks down the field of enquiry into three perspectives in a way that facilitates a more systematic understanding of how emergencies are accommodated under the law.

Constitutional Accommodation

Constitutional accommodation of states of emergency is the approach adopted by the large majority of democracies and is certainly the preferred option among contemporary constitution-makers. As mentioned before, the inspiration for modern regimes of constitutional accommodation is the Roman republic's emergency institutional arrangements, in its basic contours if not its distinctive mechanisms. Thus, modern models of constitutional accommodation are based on the presumption of temporal separation between emergency and normalcy, and seek to provide an *ex ante*, constitutional framework, of general application, to be put into operation in times of crisis.⁴⁰ We shall return to a more detailed consideration of the shared features of comparative regimes that embody the model of constitutional accommodation as the template for analysis of Sri Lanka's arrangements in the next chapter.

⁴⁰ See Ackerman (2004), op cit., p.1037

Legislative Accommodation

One of the problems of constitutional accommodation is that it is difficult, *ex ante*, to anticipate every exigency and thereby to provide for them comprehensively. Therefore constitutional instruments may establish only the general framework required to address the imperatives of a particular crisis and the measures needed to deal with it. In the case of some jurisdictions, there may be no constitutional guidance on states of emergency at all. In both cases, legislation is the most common means by which crises are dealt with under the law.

Legislative accommodation in turn can be of two separate types. Legislation in response to a crisis may modify the existing law to deal with specific challenges presented by the crisis, or alternatively, they can fall under the category of special emergency legislation. As Gross and Ní Aoláin explain, “This model [of special emergency legislation] also adheres to the notion that emergency must be met under the umbrella of the law. Yet, at the same time, it regards ordinary legal norms to be inadequate for dealing with the pressing needs emanating from specific emergencies. Rather than attempting to modify existing legal norms...the effort is directed at creating replacement or supplementary emergency norms that pertain to the particular exigency (or to potential future exigencies).”⁴¹ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, the first British Prevention of Terrorism (Temporary Provisions) Act of 1974 and the Sri Lankan Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 are all examples of legislative responses in an emergency context to specific events and threats.

⁴¹ Gross and Ní Aoláin: p.67

Despite the theoretical rationale for legislative accommodation of crises and emergency powers, comparative experience confirms that of Sri Lanka in relation to these special emergency statutes. They are *ad hoc*, particularistic measures which are often hastily passed without adequate reflection or parliamentary oversight, and once enacted, tend to become permanent.

Interpretive Accommodation

Interpretive accommodation is the response judiciaries may adopt in interpreting exiting constitutional and legal provisions in a way that addresses challenges of a crisis and facilitates the government's reaction. As Gross and Ní Aoláin state, "Existing constitutional provisions, as well as laws and regulations, are given new understanding and clothing by way of context-based interpretation without any explicit modification or replacement. The need for additional powers to fend off a dangerous threat is accommodated by judges exercising 'the elastic power of interpretation'⁴² to give an expansive, emergency-minded interpretive spin to existing norms, transforming various components of the ordinary legal system into counter-insurgency facilitating norms."⁴³

This is a familiar function of judges in the common law systems such as in Sri Lanka. However, the interpretive approach has been particularly significant in jurisdictions with older constitutions such as the United States, which do not contain express and detailed rules regarding emergency powers, thereby requiring

⁴² Richard A. Posner (2003) *Law, Pragmatism, and Democracy* (Cambridge: Harvard UP): p.295

⁴³ Gross and Ní Aoláin: p.72

judges to resolve competing claims of values and institutional responses to emergencies without much textual guidance. On the other hand, a common problem across jurisdictions that resonates in the Sri Lankan experience has been the tendency of judges to defer to the executive in times of emergency, resulting sometimes in the vitiation of the model as one of legal accommodation and appropriate balance between emergency powers and the protection of democratic values, especially fundamental rights.

2.2 The 'Business as Usual' Model

This model, which has its provenance in a particular juridical debate framed by a peculiarity of the constitution of the United States, disallows a departure from the normal legal system under any circumstances. It embodies theories of constitutional absolutism and constitutional perfection. Constitutional absolutism involves unconditional commitment to the constitutional instrument as a fortress of rights which is exemplified by the notions that whatever measures a government may take, they cannot under any circumstances diminish or suspend constitutionally protected rights, and further, that government may not lawfully purport to exercise any special powers in an emergency that are not explicitly conferred on it by the constitution. Constitutional perfection denotes the idea that the constitution reflects a fixed and unchanging balance between liberty and governmental powers, which equilibrium cannot be altered.

Therefore, the constitution, perfect and complete, anticipates every exigency and provides within its framework all the powers as are necessary for government to face any contingency. This model is different from the interpretive accommodation model

discussed above, in that in the latter, emergency-sensitive judicial interpretation of ordinary laws are contemplated, whereas in this model, there is no difference in interpretive outcomes of ordinary law between times of emergency and normalcy.

The famous exposition of this doctrinal position is by Justice Davis (speaking for the majority) of the US Supreme Court in *ex parte Milligan* (1866). He held:

“The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence...”⁴⁴

The majority in *ex parte Milligan* has both its adherents and its harsh critics for a variety of reasons, including for the latter, the naivety and even hypocrisy of holding an idealistic line against the odds of reality. Part of the reasoning of the majority was the product of the peculiarity of the US constitution which, unlike modern constitutions, does not provide explicitly for emergency powers, except to make reference to the congressional power to call out the militia, and the permissibility of the suspension of the privilege of *habeas corpus* under certain conditions. For this and

⁴⁴ *Ex parte Milligan* (1866) 71 US (4 Wall.) 2 at 120-21; for fuller discussion of the debate over *Milligan* and this model, see Gross and Ní Aoláin: Ch.2, esp. p.89 et seq.

other vastly disparate contextual reasons, the Business as Usual model, for all its libertarian attractiveness, is of limited concern to our discussion on states of emergency in Sri Lanka.

2.3 Extra-Legal Measures Models

In international relations, but in some domestic jurisdictions as well, the school of political realism holds that on the fundamental questions of survival and interests of the State, legal niceties must give way to realism, in the sense that there should be no inhibitions on the political action required to ensure the survival, or secure the interests of the State.⁴⁵ This is reflected in such maxims as ‘necessity knows no law’, ‘*salus populi suprema lex est*’ and ‘*inter arma silent leges.*’ Needless to say, both at the level of international relations and law as well as in the domestic sphere, these notions that sanction arbitrary action and unlimited discretion are repugnant to the liberal belief in legal order and political morality.

However, in the Extra-Legal Measures models of emergency powers, it is not necessarily the case that they always sanction a lawless recourse to arbitrary power in times of crisis. Indeed, in the model of extra-legal measures that Gross and Ní Aoláin construct as a case for ‘rule departures’ based on principles drawn

⁴⁵ See for e.g. Jack Donnelly (2000) *Realism and International Relations* (Cambridge: Cambridge UP); Carl J. Friedrich (1957) *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence: Brown UP): p.14

from Jewish law,⁴⁶ Locke's theory of the executive prerogative,⁴⁷ Dicey's 'spirit of law',⁴⁸ and the Weberian ideal-type,⁴⁹ inherent conceptual requirements of institutional morality and legitimation bring the argument for extra-legal emergency measures rather closer to liberal democratic imperatives than some models of accommodation, in particular the theory of constitutional necessity. The doctrine of constitutional necessity for validating emergency measures is borne out of vague, inadequate or absent constitutional provision for emergency powers, with the result that necessity has to be recast as an independent source of constitutional law in general and emergency powers in particular.⁵⁰

In the extra-legal measures model as conceptualised by Gross and Ní Aoláin, it is contemplated that "...public officials may act extra-legally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions."⁵¹ The aim is to "...preserve the long-term relevance of, and obedience to, legal principles, rules and norms. Arguably, going outside the law in appropriate cases may preserve, rather

⁴⁶ Gross and Ní Aoláin: pp.113-119

⁴⁷ Ibid, pp.119-130; see also Mark Goldie (Ed.) (1994) John Locke, **Two Treatises of Government** (London: Tuttle Publishing): 'Introduction to Two Treatises of Government' by Mark Goldie

⁴⁸ Gross and Ní Aoláin: pp.130-132; see also Dicey (1982), op cit., p.273

⁴⁹ Gross and Ní Aoláin: pp.132-134; see also Max Weber (1946) 'Politics as Vocation' in H.H. Gerth & C. Wright Mills (Eds. & Trans.) (1946) **From Max Weber: Essays in Sociology** (New York: Oxford UP): p.77

⁵⁰ Gross and Ní Aoláin: Ch.3

⁵¹ Gross and Ní Aoláin: p.112

than undermine, the rule of law in a way that constantly bending the law to accommodate emergencies will not.”⁵² Thus, this model “...seeks to promote, and is promoted by, ethical concepts of political and popular responsibility, political morality, and candour. To be implemented properly, the model calls for candour on the part of government agents, who must disclose the nature of their counter-insurgency measures. The model then focuses on the need for a direct or indirect popular *ex post* ratification of such activities. The process leading up to such ratification (or rejection) of those actions promotes deliberation after the fact, as well as establishing the individual moral and political responsibility of each member of the relevant community for the actions taken on behalf of the public during the emergency.”⁵³

This argument for extra-legal measures is thus clearly based on a particular view of political morality and ethical conduct. In particular, Gross and Ní Aoláin draw on the quasi-religious Jewish law of Halakhah which permits derogation from the fundamental norms of the Torah and Talmud in exceptional circumstances; the Lockean conception of the ‘public good’ that validates the extra-legal sphere of the executive prerogative, and the Weberian ideal-type of ethical conduct and responsibility that lends legitimacy to political conduct. Likewise, Gross and Ní Aoláin’s argument for extra-legal measures during emergencies is rooted in a particular understanding of institutional politics under normality (or what it ought to be), as their conceptual requirements of candour, *ex post* ratification, deliberation and responsibility reveal.

In societies such as Sri Lanka, where adherence to the rule of law and constitutionality is weak even under conditions of relative

⁵² Ibid

⁵³ Ibid, pp.112-113, emphasis added

normality and in the exercise of ordinary governmental powers let alone emergency measures, it would seem that the assumptions made in respect of political culture and commitment to constitutional behaviour made by Gross and Ní Aoláin do not exist. For example, in Sri Lanka, large parts of the constitution including the procedures for ensuring good governance under the Seventeenth Amendment, or devolution under the Thirteenth Amendment, remain unimplemented, ignored or deliberately violated for reasons other than those pertaining to an emergency threatening the life of the community. Therefore, it is perhaps too much to ask of political culture that it will ensure liberal democratic expectations once normality is restored (if ever), so as to justify the rationalisation of an extra-legal source of power during emergencies.

This particular conception of the extra-legal model lead Gross and Ní Aoláin to argue that the theory of emergency power advanced by Carl Schmitt is not an extra-legal theory of emergency power properly so called, or that it is even a real legal theory. It is a powerful critique of Schmitt, which illustrates the appalling consequences of theories that seek to rationalise absolute power. There is no need for us to pursue this theoretical debate as to whether Schmitt's theories are an extra-legal model properly so called or not. We discuss Carl Schmitt's theory of the state of exception, sovereignty and the concept of the political, as an extra-legal model, for the reasons that Schmitt's critique of liberalism raises profound questions regarding the assumption that law and legality are the source of legitimate political power, and in the Sri Lankan context, the theoretical insights his work gives about notions of extra-legal authority and the permanence of the exception, i.e., the state of emergency.

Carl Schmitt: Sovereign Dictatorship, the Concept of the Political and the State of Permanent Exception

As is well-known, Carl Schmitt was the most prominent legal and political philosopher to have lent intellectual support to the Nazi regime. As will become clear presently, Schmitt's ideas gave a theoretical basis for Nazism's notions of absolute power, its rejection of the forms and values of liberal democracy, and for the re-interpretation of an older concept of German political philosophy on the principle of national leadership (*Fuehrerprinzip*) to fit with the Nazi worldview. Stripped of his Nazi baggage, however, it has become clear to liberal and positivist scholarship in legal and political theory that Schmitt poses some profound questions that require answers rather than dismissals. His concept of the political holds that liberal democratic assumptions about what is the normal condition of human life, including critically the assumption that political power is or can at all times be legally or normatively regulated, are false. Furthermore, his theory of the exception and emergency powers envisages a state of permanent crisis, which is a refutation of the liberal assumption of separation between emergency and normalcy. Finally, his idea of sovereignty, closely related to his theory of the exception, contemplates an absolutist dictatorship as the only realistic institution within a polity during a time of (permanent) crisis.

The relevance of Schmitt to understanding the Sri Lankan experience with states of emergency also needs open justification. It would be a gross overstatement and certainly risk a failure of analytical objectivity to draw too close a parallel between the Nazi regime and the Sri Lankan State. Nevertheless, it can be demonstrated that the Schmittian logic can be applied to the behaviour of the Sri Lankan State in various meaningful ways that

yield real analytical insights about extra-legality and the exercise of power. These insights are most evident in respect of the more salient aspects of his thesis such as the (lack of) traction of liberal democratic values in the political culture of official and popular subscription, the falsity of the assumption of separation between normalcy and emergency, and his argument about the permanency of crisis as the natural condition of politics. In this way, chillingly it must be admitted, the differences between the Nazi regime and the Sri Lankan State become a matter of moral and political degree, i.e., a more-or-less question of egregiousness. Thus while it would be factually wrong and analytically misleading to equate the human rights abuses of the Sri Lankan State to the fundamentally genocidal character of Nazi Germany, for the purposes of an unromantic, sceptical and searching analytical understanding of the behaviour of the Sri Lankan State in times of emergency, it can be treated as a permutation within the Schmittian ontology of political power and statehood. In short, therefore, Schmitt's contribution to political and legal theory should read in abstract and applied to the Sri Lankan conditions and experience, without succumbing to the distraction of his personal association with the Nazi regime.

Schmitt's ideas pertaining to states of emergency are found in two works, *Political Theology*⁵⁴ and *The Concept of the Political*,⁵⁵ which attack liberalism for discounting the importance of (his conception of) the exception by pretending that 'the entire legal universe is governed by a complete, comprehensive and exception-less normative order.' As Dyzenhaus has pointed out,

⁵⁴ Carl Schmitt (1985) *Political Theology: Four Chapters on the Concept of Sovereignty* (Trans. George Schwab) (Cambridge: MIT Press)

⁵⁵ Carl Schmitt (1976) *The Concept of the Political* (Trans. George Schwab) (New Brunswick: Rutgers UP)

Schmitt thought that, "...liberals found unbearable the idea that the rule of law cannot constrain the political, so that they prefer to pretend it constrains while recognising that in substance it does not."⁵⁶ Before discussing Schmitt's model of emergency power, however, it is useful to briefly rehearse his broader ideas about law, politics, and sovereignty upon which it is grounded.

For Schmitt, the concepts of sovereignty and the exception (*Ausnahmezustand*) are closely related, for the "Sovereign is he who decides on the exception."⁵⁷ The concept of the exception determines "...the whole question of sovereignty."⁵⁸ The argument about the nexus between the sovereign and the state of exception, according to Dyzenhaus, "...is meant to make the point that the sovereign is he who decides both when there is a state of emergency / exception and how best to respond to that state. And that decision for Schmitt is one based on the considerations to do with who is a friend and who is an enemy of the state."⁵⁹

Schmitt argues that the existence of exceptional situations negates the forms and basis of liberal legal order, which assumes that pre-existing general norms anticipate all political exigencies, including emergencies. As Dyzenhaus observes, Schmitt's claim is that, "The space beyond law is not so much produced by law as revealed when the mask of liberal legality is stripped away by the political. Once that mask is gone, the political sovereign is shown not to be constituted by law but rather as the actor who has the legitimacy

⁵⁶ David Dyzenhaus (2006) *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge UP): p.35

⁵⁷ Schmitt (1985), op cit., p.5

⁵⁸ Ibid, p.6

⁵⁹ Dyzenhaus (2006), op cit., p.39

to make law because it is he who decides the fundamental or existential issues of politics. So Schmitt's understanding of the state of exception is not quite a legal black hole, a juridically produced void. Rather, it is a space beyond law, a space which is revealed when law recedes leaving the legally unconstrained state, represented by the sovereign, to act."⁶⁰

Therefore, in exceptional situations, political decision-makers cannot be and are not constrained by *a priori* rules. Politics and not law, and political actors unconstrained by legality, constitute the essence and only real actors in the sphere of the political. In his view, "The specific political distinction to which political actions and motives can be reduced is that between friend and enemy."⁶¹ Dichotomising between friends and foes as the basic reducible political relationship means that conflict is inevitable. But the manifestation of this dichotomy in conflict – its most extreme form (i.e., the exception) – gives political life real meaning: "The exceptional case has an especially decisive meaning which exposes the core of the matter. For only in real combat is revealed the most extreme consequence of the political grouping of friend and enemy. From this most extreme possibility human life derives its specifically political tension."⁶² Moreover, since the exception defined in this way "...is sufficiently strong to group human beings effectively according to friend and enemy,"⁶³ every aspect of human existence becomes political. Thus the extreme case of the exception actually becomes the norm of human existence.

⁶⁰ Ibid

⁶¹ Schmitt (1976), op cit., p.26

⁶² Schmitt (1976), op cit., p.26

⁶³ Ibid, pp.37, 38

The centrepiece of Schmitt's model of emergency powers is the sovereign dictatorship, the principal characteristic of which is the suspension of the entire existing legal order.⁶⁴ Significantly, the sovereign dictator acting under emergency powers can "...actively... change the existing legal order and transform it, in whole or in part, into something else."⁶⁵ As Gross and Ní Aoláin observe, "The norm becomes subservient to the exception, thereby reversing the relationship between the two. In fact, Schmitt eliminates altogether the notion of the normal and replaces it with the exception."⁶⁶ By replacing the existing legal order with the exception, Schmitt renders the exception the only valid general rule. The exception as general rule thus is not only norm-less (having replaced the ordinary legal system), it also becomes exception-less: that is, because Schmitt's exception as general rule admits of no separation between normality and emergency (i.e., the state of exception), there can be no exception from the exception.⁶⁷ The consequence is a permanent state of exception (i.e., emergency under the sovereign dictatorship).

In Schmitt's view, legal norms presuppose the existence of a condition of normality. A normal, ordinary state of affairs is not merely a 'superficial presupposition' that jurists choose to ignore or not; it is goes to the 'immanent validity' of legal norms. Thus,

⁶⁴ Carlo Galli (2000) '*Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and its Philosophical and Political Meaning*' 21 **Cardozo Law Review** 1597

⁶⁵ Gross and Ní Aoláin: p.164

⁶⁶ Ibid

⁶⁷ Oren Gross (2000) '*The Normless Exception and Exceptionless Exception: Carl Schmitt's Theory of the Emergency Powers and the 'Norm-Exception' Dichotomy*' 21 **Cardozo Law Review** 1825

“For a legal norm to exist, a normal situation must exist.”⁶⁸ Crisis situations are by definition where the normal state of affairs does not exist; in turn, this invalidates any existing legal norms. This is how, according to Schmitt, the *a priori* rules of the existing legal order ceases operation in, and cannot regulate, the state of exception. Therefore, the state of exception is norm-less.

In the state of exception so defined, the sovereign dictator enjoys unlimited powers; the logical result of an absence of any constraining legal norms. As Gross and Ní Aoláin state, “Such unlimited powers pertain both to his unfettered discretion as to whether an exception does, in fact, exist, and to what measures ought to be taken in order to counter the concrete threat. In taking such counter-measures, the sovereign dictator is not limited by the existing legal order. He may disregard existing norms, but he may also put in place substitute norms. The powers of the sovereign dictator are not confined to the power to suspend, but also encompass the power to amend, revoke, and replace.”⁶⁹

The conflation of the discretion to determine the existence of a state of exception, and the extent of measures needed to deal with it in the hands of the sovereign dictator, has significant outcomes. In the Schmittian political worldview outlined above, the sovereign dictator must always be vigilant against the enemy, who can strike at any time. This requirement of near-paranoia on the part of the sovereign dictator means that the inevitability of an exceptional situation can lead the dictator to declare an emergency at any time. Indeed, since he is the exclusively competent authority on the existence of a state of exception, he can even make it into the general norm. Once the state of

⁶⁸ Schmitt (1985), op cit., p.13

⁶⁹ Gross and Ní Aoláin: pp.164-165

exception has been declared by the sovereign dictator, he both decides which powers he should have and how they should be exercised. There are no norms of any kind, based on a liberal abstract rationality or otherwise, that restrict his exercise of power in any way, apart from the personal attitude to restraint of the sovereign dictator. Thus as Gross and Ní Aoláin conclude, "... while Schmitt's rhetoric speaks of the normal case and of the exception as two separate and distinct phenomena, his theory virtually advocates the complete destruction of the normal and substitution by the exception."⁷⁰

In Kelsen's contemporary critique, he argued that Schmitt's theory of the exception on the basis that its effect was to render the constitution and legal norms, except those relating to emergency powers, is completely redundant. In the context of the Weimar constitution, Kelsen pointed out how Schmitt's theory reduced the constitution to nothing more than Article 48 (which, as we discuss in the next chapter, set out a notorious and much abused regime of emergency powers).⁷¹ Kelsen was perhaps too sanguine about the extent and logical conclusion of Schmitt's argument. The sovereign dictator in the (permanent) state of exception was unbounded by constitutional or legal norms. In the light of this arbitrary norm-setting institution, there is not much use for any constitution.⁷²

From Dyzenhaus's critical look at how liberal legal systems (in this case Commonwealth jurisdictions and the United States) with avowed commitment to the rule of law have responded to Carl Schmitt's challenge – that in times of emergency it is in the nature

⁷⁰ Ibid, p.166

⁷¹ John P. McCormick (1997) *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (New York: Cambridge UP): p.144

⁷² Gross and Ní Aoláin: p.166

of things that what liberals, pretensions notwithstanding, assume to be the rule of law in normal times is suspended wholly or in part – it becomes apparent the challenge remains largely unanswered. On the contrary, Dyzenhaus in fact shows how, “... Schmitt’s challenge is supported by much of the history of the way in which judges in the Commonwealth have failed to impose the rule of law during times of emergency...[and how]...in the United States, academic debate about how best to respond to emergencies stand to support that challenge.”⁷³

From this critical viewpoint, Dyzenhaus goes on to present a powerful argument about a substantive notion of the rule of law that utilises ‘the moral resources of the law’ and which exists within the liberal legal order independently of written constitutional instruments, that can meet Schmitt’s challenge. What is important to note here is that Dyzenhaus’s critique of the inability of the rule of law to meet Schmitt’s challenge even in jurisdictions with comparatively entrenched liberal democratic cultures, should give Sri Lankans pause in thinking about this problem. It is theoretically questionable to criticise the behaviour of the State by reference to ideals such as human rights and the rule of law, without first understanding the full meaning and reach of the analytical ideal. Dyzenhaus indicates how this might be done, in a way that answers Schmitt’s challenge. On the other hand, Schmitt’s conception of the exception gives us the conceptual tools, adapted and appropriately extrapolated to local experience, to understand the behaviour of the Sri Lankan State from an analytical perspective that is different from the familiar liberal critique.

⁷³ Dyzenhaus (2006), op cit., p.16

CHAPTER III

THE NEO-ROMAN CONSTITUTIONAL MODEL OF ACCOMMODATION: COMPARATIVE EXPERIENCE AND INTERNATIONAL STANDARDS

3. The Neo-Roman Constitutional Model of Accommodation: Comparative Experience
 - 3.1. Comparative Experience: Constitutional Issues and Responses
 - 3.1.1. What is an Emergency? The Problem of Definition
 - 3.1.2. Declaration, Extension and Termination
 - 3.1.3. Legal Effects of a Declaration of Emergency
 - 3.1.4. Checks and Balances
 - 3.2. Comparative Experience: Areas of Concern
 - 3.2.1. Constitutional Accommodation: Misuse and Abuse
 - 3.2.2. Communal Alienation: Us vs. Them
 - 3.2.3. The Concept of Militant Democracy and the Sixth Amendment
 - 3.2.4. Normalisation of the Exception

As we noted before, the institution of the dictatorship in the Roman republic has served as the model for modern democracies in devising their constitutional and legal arrangements with respect to emergency powers. The features of the Roman model germane to modern constitution-makers are, in Gross and Ní Aoláin's summary: "temporary character, recognition of the exceptional nature of emergencies, appointment of a dictator according to specific constitutional forms that separated, among other things, those who declared an emergency and those who exercised dictatorial power on such occasions, the appointment of dictators for well-defined and limited purposes, and the ultimate goal of upholding the constitutional order rather than changing or replacing it."⁷⁴

In this chapter, we review a selection of comparative experiences on how to constitutionally accommodate the tension between providing for emergency powers and the preservation of core democratic values. In this regard, it will be seen that in addition to procedural safeguards and institutional checks, many democracies also envisage substantive limitations on the scope of emergency powers, most prominently through the device of a bill of rights. This allows us, in the following chapter, to explore the international legal and directory standards that have been developed in regulating states of emergency.

⁷⁴ Oren Gross and Fionnuala Ní Aoláin (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge UP); hereinafter Gross and Ní Aoláin

3.1 Comparative Experience: Constitutional Issues and Responses

In the design and implementation of a constitutional framework for regulating states of emergency within the rule of law, constitution-makers are confronted with several problems, not least of all the political conditions that frame the historical moment of constitution-making that are unique to each society. However, from a technical point of view, the common themes arising out of balancing emergency powers with democratic values shared across jurisdictions have related to: (a) defining a state of emergency; (b) providing for declaration, extension and termination; (c) the legal consequences of a state of emergency; and (d) establishing appropriate checks and balances for the exercise of emergency powers within the broader constitutional framework of the separation of powers. It is to these issues that we now turn.

3.1.1 What is an Emergency? The Problem of Definition

While the vast majority of democratic constitutional instruments nowadays contemplate and provide, often in some detail, for states of emergency,⁷⁵ it is to be noted that some prominent examples do not. For example, the constitutions of Japan and Belgium contain almost no reference to states of emergency and powers, and the constitution of the United States contains only

⁷⁵ See European Commission for Democracy through Law (1995) *Emergency Powers* (Strasbourg: Council of Europe): pp.4-5; John Ferejohn & Pasquale Pasquino (2004) 'The Law of the Exception: A Typology of Emergency Powers' 2 *International Journal of Constitutional Law* 210 at p.213

indirect and then rudimentary references to this matter.⁷⁶ At the level of the federal constitution, reference is restricted to the congressional power to call out the militia to execute the laws of the union, to suppress insurrection and repel invasions, and the permissible suspension of *habeas corpus* where public safety requires it during times of rebellion or invasion, although some other provisions mention terms such as ‘war’ and ‘time of war.’ There is no special and explicit provision for the functions and powers of any or all branches of government during a public emergency.⁷⁷ The broad consequence has been the need to employ doctrines such as constitutional necessity to rationalise emergency powers.⁷⁸ US state constitutions are different, in that many provide expressly for states of emergency.⁷⁹ The United Kingdom, on the other hand, has no written constitution, which makes ‘constitutional’ accommodation impossible, but its elaborate statutory framework of legislative accommodation makes it a system of quasi-constitutional accommodation.

Having said that, the norm is that the large majority of constitutional democracies do, in fact, expressly provide for states

⁷⁶ Samuel Issacharoff & Richard H. Pildes, (2004) ‘*Emergency Contexts without Emergency Powers: The United States’ Constitutional Approach to Rights during Wartime*’, *ICON*, Vol. 2, No.2, 296

⁷⁷ Henry P. Monaghan (1993) ‘*The Protective Power of the Presidency*’ 93 *Colombia Law Review* 1 at pp.32-38; George Winterton (1979) ‘*The Concept of Extra-Constitutional Executive Power in Domestic Affairs*’ 7 *Hastings Constitutional Law Quarterly* 1 at pp.24-35; Daniel Farber (2003) *Lincoln’s Constitution: The Nation, the President, and the Courts in a Time of Crisis* (Chicago: Chicago UP)

⁷⁸ See esp. Gross and Ní Aoláin: pp.46-54

⁷⁹ Oren Gross (2003) ‘*Providing for the Unexpected: Constitutional Emergency Provisions*’ 33 *Israel Yearbook on Human Rights* 13 at pp. 20-21

of emergency. It is true that the defining 'emergency' is difficult if not impossible. Thus constitution-makers proceed on a hypothesis on what might be involved and what powers may be reasonably needed by the State, balanced by procedural and substantive limitations. These strike different equilibria between legal regulation and political discretion depending on local context and constitutional culture. For the same reasons, they also demonstrate a wide variety of institutional arrangements.

One way of doing this is to provide for a general state of emergency, but restrict its invocation through the explicit specification of aims and purposes. This is the approach of the South African constitution,⁸⁰ which requires a declaration of emergency, in terms of a law passed by Parliament,⁸¹ when 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency',⁸² and then only to the extent emergency powers are necessary to restore law and order.⁸³ Likewise, the Israeli Basic Law provides for one type of state of emergency, but unlike the South African example,

⁸⁰ See Nicholas Haysom, '*States of Emergency*' in Halton Cheadle, Dennis Davis & Nicholas Haysom (2002) *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths): Ch.31

⁸¹ Now the State of Emergency Act 86 of 1995, which repealed and replaced the Public Safety Act 3 of 1953

⁸² Section 37 (1) (a) of the Constitution of the Republic of South Africa Act 108 of 1996 (the 'Final Constitution'). Cf. Articles 180-182 of the Constitution of Ecuador and Article 29 of the Constitution of Mexico

⁸³ Section 37 (1) (b)

neither defines a state of emergency, nor enumerates the conditions under which a declaration becomes legally available.⁸⁴ This is the approach of the Sri Lankan constitution as well. Chapter XVIII of the constitution is entirely a procedural framework, which imposes no objective conditionalities on the presidential discretion in respect of a declaration of a state of emergency. However, these constitutional provisions are premised on the statutory elaboration of, *inter alia*, the presidential discretion with regard to a declaration. Accordingly, the Public Security Ordinance No. 25 of 1947 as amended (PSO) provides that such a declaration may be made where, in the opinion of the President, there exists or imminently exists a state of public emergency which requires emergency powers to be used 'in the interests of public security and the preservation of public order, or for the maintenance of supplies and services essential to the life of the community.'⁸⁵

Other constitutions resolve the definitional problem by providing for a several types of emergency regime. Broadly, these fall into two categories: those that provide for a dual structure of emergency regime, and those that envisage a multiple structure.

Many of the post-communist Eastern European constitutions provide a dual structure of emergency regime,⁸⁶ as do the constitutions of the Netherlands and Portugal. The Dutch constitution differentiates between a 'state of war' and a 'state of

⁸⁴ Articles 38, 39, Basic Law: The Government, 1780 SH (2001); see also Baruch Bracha (2003) 'Checks and Balances in a Protracted State of Emergency - The Case of Israel' 33 *Israel Yearbook on Human Rights* 123

⁸⁵ Section 2 (1) of the PSO

⁸⁶ See Venelin I. Ganey (1997) 'Emergency Powers and the New East European Constitutions' 45 *American Journal of Comparative Law* 585

emergency'.⁸⁷ The former remains undefined, whereas the latter must be defined by statute. The constitution of Portugal distinguishes between a 'state of emergency' and a 'state of siege.' Thus, a state of siege or a state of emergency may be declared 'in cases of actual or imminent aggression by foreign forces, serious threat to or disturbance of the democratic constitutional order or public calamity', whereas a 'state of emergency is declared where the circumstances mentioned in the preceding paragraph are less serious'.⁸⁸

Multiple structure states of emergency are a feature of the Latin and South American constitutions, which determine the extent of emergency powers granted to the government depending on the nature of the emergency. At least nine different states of exception (*estado de excepción*) can be found in these constitutions. These include the state of siege (*estado de sitio*), state of emergency (*estado de emergencia*), state of alarm (*estado de alarma*), state of prevention (*estado de prevención*), state of defence (*estado de defensa*) and state of war (*estado de guerra*). Thus for example the constitution of Guatemala recognises five distinct categories of exception: state of prevention, state of alarm, state of public calamity (*estado de calamidad pública*), state of siege and state of war.⁸⁹ As Gross and Ní Aoláin note, "The mechanism used to distinguish between the various situations is based on general descriptions of factual circumstances that may lead to invoking each particular state of exception. Such factual circumstances include, *inter alia*, external war, breach of the peace and the public order, economic exigencies, and natural disasters, and threats of

⁸⁷ Articles 96 and 103 respectively of the Dutch Constitution

⁸⁸ Articles 19 (2) and 19 (3) of the Portuguese Constitution

⁸⁹ Article 139 of the Guatemalan Constitution

disturbances. In addition, each constitution explicitly details the legal results that arise out of the declaration of each state of exception by way of suspension of individual rights (*suspensión de garantías*) and the vesting of extraordinary powers in the executive branch of government.”⁹⁰

Multiple structure arrangements also feature in Germany, Canada and Spain. The German Basic Law distinguishes between an ‘internal emergency’ (*Innere Notstand*), a ‘state of tension’ (*Spannungsfall*), and a ‘state of defence’ (*Verteidigungsfall*).⁹¹ An internal emergency is where there is ‘an imminent danger to the existence or free democratic basic order of the Federation or of a Land.’ A state of defence may be declared when the ‘federal territory is under attack by armed force or imminently threatened by such an attack.’ The state of tension is not defined in the Basic Law. The Basic Law also allows police co-ordination between Länder forces and the federal military in situations of ‘natural disaster or particularly serious accident’.⁹²

In Canada, the power of the federal government in respect of emergencies form part of the plenary powers allocated under section 91 of the Constitution Act of 1867, which provides for

⁹⁰ Gross and Ní Aoláin: p.42; see also Brian Loveman (1993) *The Constitution of Tyranny: Regimes of Exception in Spanish America* (Pittsburgh: Pittsburgh UP)

⁹¹ Articles 91, 87a(4), 12a(5)-(6), 80a, 115a-1 of the German Basic Law (*Grundgesetz*); John E. Finn (1991) *Constitutions in Crisis: Political Violence and the Rule of Law* (New York: Oxford UP): pp.196-200; Note (1969) ‘Recent Emergency Legislation in West Germany’ 82 *Harvard Law Review* 1704

⁹² Articles 35 (2), (3) of the German Basic Law

legislation for the peace, order and good government of Canada.⁹³ Accordingly, the Emergencies Act of 1988 authorises the federal government to declare four types of emergencies: ‘public welfare emergency’ (natural disasters), ‘public order emergency’ (serious threats to the security of Canada), ‘international emergency’ (involving acts of intimidation towards Canada or other countries), and ‘war emergency’ (real or imminent armed conflict involving Canada or its allies).⁹⁴ The initial and specifically permitted durations as well as the nature and scope of emergency powers so brought into operation, depend on which kind of emergency is invoked.

In Spain, the constitution establishes three distinct states of emergency: the state of alarm (*estado de alarma*), the state of emergency (*estado de excepción*) and the state of siege (*estado de sitio*).⁹⁵ The constitution does not define these, but sets out the authority and procedures for the declaration of each state of exception as well as their initial durations. Elsewhere, the constitution also grants a decree-making power, in cases of ‘extraordinary and urgent necessity’ for the central government to issue ‘provisional legislative decisions’.⁹⁶ Organic Law 4/1981 defines the three states of emergency and describes the circumstances under which each may be declared. Thus, a state of

⁹³ See Peter W. Hogg (1997) *Constitutional Law of Canada* (4th Ed.) (Ontario: Carswell): Vol.1, Ch.17

⁹⁴ Emergencies Act 1988, S.C. 1988, Ch.29, S.80. See also Peter Rosenthal (1991) ‘The New Emergencies Act: Four Times the War Measures Act’ 20 *Manitoba Law Journal* 563 at p.565-573; Eliot Tenofsky (1989) ‘The War Measures and Emergencies Acts’ 19 *American Review of Canadian Studies* 293

⁹⁵ Article 116 of the Spanish Constitution

⁹⁶ Article 86

alarm concerns natural disasters, scarcity of basic commodities or essential services; a state of emergency is declared where 'the free exercise of the citizen's rights and liberties or the normal functions of democratic institutions, public services essential for the community or any other aspect of public order are altered to the extent that the ordinary powers prove insufficient to re-establish or maintain them'; and a state of siege is proclaimed 'in the event of an insurrection or threat of insurrection or an act of force against the sovereignty or independence, territorial integrity and constitutional order of Spain which cannot otherwise be resolved.'⁹⁷

As with any constitutional design options, the choice of arrangements depend upon an assessment of the strengths and weakness of each option in the light of political context. The dual and multilevel classifications of emergencies are aimed at limiting the range of extraordinary powers available to government through a system of calibration. Thus varying degrees of threat are tied to a corresponding cascade of legal powers available. These models therefore are acutely concerned about the equation between power and liberty, legally regulating the increment of the former and corresponding decrement of the latter (especially in regard to constitutionally enshrined fundamental rights) strictly according to the gravity of the threat.

On the other hand, the classificatory approach to the structuring of emergency powers has its disadvantages. Gross and Ní Aoláin point out two broad problems, even assuming, as they say, "that such classification and categorisation are viable projects."⁹⁸ Firstly,

⁹⁷ European Commission for Democracy through Law (1995), op cit., pp. 7-8

⁹⁸ Gross and Ní Aoláin: p.45

the problem of definition plagues this approach with the result that the purported advantage of legally regulating the availability and extent of emergency power is nullified. The substantial ambiguity and overlap between categories result in the use of terms “...that makes the choice...mostly a political issue.”⁹⁹ This is clearly visible in the Portuguese scheme mentioned above. Furthermore, creating a ‘sliding scale of emergency regimes’ may encourage governments to resort more readily to some states of emergency, because the perception that they are ‘not so serious’ make them “...more readily accepted by legislatures, courts and the general public.”¹⁰⁰ The danger of this is that, “This can also act to condition people to live with some type of emergency. Once some kind of emergency regime becomes accepted as the normal way of life, it will be easier for government to ‘upgrade’ to a higher-level emergency regime.”¹⁰¹

3.1.2 Declaration, Extension and Termination

One of the most important lessons of the Roman model is its framework for the declaration, operation and termination of a state of emergency, in particular the functional separation between institutional actors who declare the state of emergency, and those who exercise power under it.¹⁰²

⁹⁹ Ibid

¹⁰⁰ Ibid, pp.45-46

¹⁰¹ Ibid, p.46

¹⁰² Clinton Rossiter (1948) *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton: Princeton UP): pp. 297-306

In comparative experience, this principle finds near universal recognition, although the particular institutional architecture to give effect to it varies widely depending on contextual political factors, the general system and specific structures of government, and constitutional traditions of each jurisdiction. It is important to bear in mind that the distribution of power under the constitutional dispensation as a whole influences the design of arrangements regarding states of emergency. This applies both to the 'horizontal' arrangements at the centre in terms of the separation of power between the executive and the legislature, and in federal-type systems, where more complex 'vertical' arrangements may be in place for mediating between multiple orders of government. Broadly, however, the constitutional provisions for declaration of states on emergency fall into three groups: *viz.*, those that vest the power of declaration in the legislature (usually parliamentary systems), those empowering executive initiative (generally presidential systems), and others that are hybrid.

Prominent among countries that vest the power of declaration in the legislature (although initiation of the process rests with the executive)¹⁰³ are South Africa,¹⁰⁴ Germany¹⁰⁵ and Israel,¹⁰⁶ which are all essentially parliamentary systems.¹⁰⁷ However, in the interests of a rapid response, which the executive is better placed

¹⁰³ For e.g. Article 38 (c) of the Israeli Basic Law: The Government

¹⁰⁴ Section 34 (1) of the South African Constitution

¹⁰⁵ Article 115a of the German Basic Law

¹⁰⁶ Article 38 (a) of the Israeli Basic Law: The Government

¹⁰⁷ See also Article 48 (1) of the Greek Constitution; Articles 78, 87 of the Italian Constitution; Ganev (1997), *op cit.*, pp.587-589 for Eastern European constitutions

to undertake, these jurisdictions may allow a limited power of declaration and even rule-making to the executive, subject to ratification by the legislature.

Reflecting strong political traditions of executive leadership, in Latin and South American constitutions, as well as those of former communist States in Eastern Europe,¹⁰⁸ the power of declaration is vested in the President. Generally, Presidents under these systems are under no formal obligation of prior consultation or approval. Some however, do impose obligations in respect of formal consultation with Cabinet, and notification and approval of the legislature. In France, the President is not required to obtain prior approval of either his Cabinet or of Parliament before a declaration of emergency, but he is expected to consult the Prime Minister and the *Conseil Constitutionnel*.¹⁰⁹ The French President, moreover, merely notifies Parliament of a proclamation; there is no further role for the legislature, although Parliament meets automatically and cannot be dissolved while the emergency powers are in force.¹¹⁰ Likewise, the Sri Lankan President has an absolute discretion not only to proclaim a state of emergency, but also to legislate in the form of emergency regulations, subject to parliamentary approval of the proclamation.¹¹¹

¹⁰⁸ Ganev (1997) op cit., pp.589-592

¹⁰⁹ Articles 16 (1), 19 of the French Constitution; see John Bell (1992) ***French Constitutional Law*** (Oxford: Oxford UP): p.16

¹¹⁰ Ibid

¹¹¹ Article 155 of the Constitution, discussed at length in Chapter 5, *infra*; See also J.A.L. Cooray (1995) ***Constitutional and Administrative Law of Sri Lanka*** (Colombo: Sumathi Publishers): Ch.31; Radhika Coomaraswamy & Charmaine de los Reyes (2004) 'Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience' I.CON, Vol.2, No.2, 272

In the federal parliamentary system of India, the unusual constitutional distribution of power in respect of emergencies¹¹² that gives pre-eminence to the Union over states, places the President of India in a unique position. Under India's parliamentary system, the President is a titular figure, but one of his emergency powers is under certain circumstances to dissolve state governments and impose direct rule. The Indian President, however, can only act on the advice of the Prime Minister.¹¹³

The multilevel emergency regime in the Spanish constitution carries over into the function of declaration, whereby some types of emergency are declared by the executive and others by the legislature. Thus for example, the least serious state of alarm can be declared by the government with notice to the legislature, the next level state of emergency can be declared by the executive but with prior approval of the legislature, whereas the most serious state of siege can only be declared by the legislature on a motion by the government.¹¹⁴

Safeguards are also found in the form of constitutionally stipulated legislative majorities to approve declarations as well as extensions of emergencies. These extend from simple majorities to special majorities that are required for certain types of emergencies and for their extension.¹¹⁵ In his model of emergency powers, Ackerman proposes the device of 'supra-majority escalation'

¹¹² See esp. H.M. Seervai (1996) *Constitutional Law of India* (4th Ed.) (Bombay: Tripathi); Ch. XXIX; *S.R. Bommai v. Union* (1994) 3 SCC 1

¹¹³ Article 352 of the Indian Constitution

¹¹⁴ Articles 116 (2), (3), (4) of the Spanish Constitution

¹¹⁵ Articles 80a and 115a of the German Basic Law; Article 352 (6) of the Indian Constitution

whereby each successive extension of a state of emergency requires ever increasing legislative majorities until a small minority becomes capable of halting further extension.¹¹⁶ A like approach is adopted in the South African constitution where the initial declaration requires only a simple majority, but extensions require the support of a special majority of 60% of legislators.¹¹⁷

An important principle of the Roman model is the duration of the state of emergency, which is required to be short-lived. Thus comparative systems follow one or both of the techniques whereby time limits are set on the operation of a declaration (which is a universal feature), and through extension procedures which require higher standards of justification and approval.¹¹⁸ Some constitutions also set limits to the number of extensions that can be made to the initial declaration as well as limit the number of declarations that can be made within a particular period. The Sri Lankan constitution also contains some of these features such as temporal limits on the proclamation and regular legislative approval. Several other safeguards such as the special majority required for extension and the limitation on the number of declarations during a specified period have been repealed by the Tenth Amendment to the constitution. We shall consider these aspects in greater detail later.¹¹⁹

¹¹⁶ Bruce Ackerman (2004) 'The Emergency Constitution' 113 *Yale Law Journal* 1029 at p.1047-1049: "an escalating cascade of supermajorities"

¹¹⁷ Section 37 (2) (b) of the South African Constitution; see for the position in Sri Lanka prior to the Tenth Amendment to the Constitution, Chapter 5, *infra*

¹¹⁸ For e.g. Article 38b of the Israeli Basic Law: The Government; Section 37 of the South African Constitution; Article 352 (5) of the Indian Constitution

¹¹⁹ Chapter 5, *infra*

Termination of a state of emergency is of obvious importance, and the procedures for declaration usually determine how this occurs. Many constitutions additionally impose a positive duty on the institutional actor having the power of declaration to terminate a state of emergency ahead of its temporal expiry if the threat has abated or there is no legitimate reason why the state of emergency should continue.

3.1.3 Legal Effects of a Declaration of Emergency

The legal effect and consequences of a declaration of a state of emergency for the ordinary constitutional order, comprises the substantive crux of the matter in addressing the tension between emergency powers and democratic values. For constitution-makers, the relevant questions are as follows: (a) Which elements of the normal constitutional order are affected, in whole or in part, or suspended (if at all) by the operation of the emergency regime? (b) What fundamental rights constitutionally protected under normal circumstances can be limited or derogated from during an emergency, and to what extent? (c) How does the institutional framework and balance of the constitutional order change? (d) Are amendments to the constitution under emergency powers permitted, and if so to what extent?¹²⁰

In addressing these questions, the general pattern among liberal democratic constitutions shows that while derogations, within limits, of some fundamental rights as well as greater institutional space for the executive are permitted, a suspension of the constitution or empowering emergency-related constitutional amendments are disapproved of, although emergency measures

¹²⁰ See also Cheadle, Davis & Haysom (2002) *op cit.*, Ch.31

may override ordinary statutes. As Gross and Ní Aoláin note, "...in order to prevent repetition of the mistakes that led to the destruction of the Weimar constitutional experiment...modern constitutional provisions often proscribe any change or modification of the constitution itself during an emergency, or at least any change to, or modification of, the nature of the regime and its core constitutional norms."¹²¹

Nonetheless, two prominent examples of liberal democratic constitutions permitting fairly broad suspension of constitutional provisions during times of emergency are those of the Swiss confederation and the Irish Republic. Under the doctrine of *régime des pleins pouvoirs* (regime of plenary powers), the Swiss federal government can act to safeguard the confederation's security, independence, neutrality or economic interests in emergencies, when the legislature cannot meet or the legislative process can no longer function. While such an extreme assumption of power by the federal government would be deemed unconstitutional normally, in the circumstances it becomes operational, the doctrine offers practically no limits, apart from Switzerland's obligations under the European Convention of Human Rights, on the power of the federal executive.

Likewise, the constitution of the Irish Republic contains a bizarre provision, Article 28.3.3°, which suspends the constitution including fundamental rights in times of emergency through the

¹²¹ For e.g. Article 89 (4) of the French Constitution; Articles 187, 196 of the Belgian Constitution; see Gross and Ní Aoláin: p.60-61. Under Article 155 of the Sri Lankan constitution, the President is empowered to make emergency regulations which can override the provisions of any ordinary law, but not the provisions of the constitution. This is salutary. But in practice, rule by emergency powers have become so endemic, and executive accountability so weak, that emergency rule-making often strays into the sphere of the unconstitutional: see Chapter 5, *infra*

provision of a blanket legal overriding power, to both legislative and executive action during a time of emergency. The only legal limitation on its invocation is its purposes (i.e., grave emergencies), which if bridged allows the government to virtually re-write the constitution through emergency measures. It would seem that the most salient counter against abuse of such provisions is the extra-legal one of deeply rooted liberal democratic cultures in these countries (for example, the Swiss provisions have only been invoked twice: during the two world wars), preventing the unhappy political experiences under such provisions as Article 96 (1) of the Algerian constitution which provides that 'during a period of state of war, the Constitution is suspended [and] the President of the Republic assumes all the powers.'

The principal device of fundamental rights protection in democratic constitutional orders is the bill of rights, which provides a fortified bulwark of citizens' liberty, especially individual rights, against ordinary politics and beyond the reach of democratic majorities. During times of emergency this protection assumes critical significance. Yet at the same time, emergencies are also the times during which the enjoyment of some rights may need to be curtailed. Democratic constitutions adopt one of two techniques in resolving this problem: (a) a positive list approach, whereby the constitution identifies which rights and freedoms may be restricted under emergency powers; (b) the negative list approach, whereby the constitution sets out explicitly which rights and freedoms may not be so restricted even in the midst of acute crisis. Article 15 (7) of the Sri Lankan constitution reflects the former approach, whereas Section 37 of the South African constitution is the international exemplar of the latter. Some constitutions take a mixed approach adopting a positive list for

natural disasters, and a negative list in respect of security-related or man-made crises.¹²²

Indeed, the South African bill of rights (both in terms of breadth and depth of scope, and the general limitations clause) in general, and Section 37 in particular, represents perhaps the best international practice in the protection of fundamental human rights during a time of emergency.¹²³ Among the human rights safeguards built into the South African emergency regime is the procedural framework which gives a central role to the legislature over declaration, and comprehensive judicial review over all aspects of emergencies. On the other hand are the substantive protections including the list of non-derogable rights, the explicit establishment of limits on permissible derogations, and the domestic justiciability of international human rights within the emergency regime. Together, these are what Klug calls the 'own internal rules of interpretation' of the South African bill of rights.¹²⁴ Against such a sophisticated treatment of human rights in states of emergency, the Sri Lankan framework seems rudimentary and primitive.

As in the South African case, some constitutions make reference to the State's international obligations in respect of international human rights instruments and their derogation standards.¹²⁵ These are highly constructive sources of both positive rights as

¹²² For examples of all three approaches, see Gross and Ní Aoláin: p.8

¹²³ Cheadle, Davis & Haysom (2002), op cit., Ch.31

¹²⁴ Heinz Klug, 'South Africa: From Constitutional Promise to Social Transformation' in Jeffrey Goldsworthy (2006) **Interpreting Constitutions: A Comparative Study** (Oxford: Oxford UP): Ch.6 at p.281

¹²⁵ Another example is Article 23 of the Finnish Constitution

well as permissible limitations, and in some countries where domestic institutions are weak in the protection of human rights, provide a very useful means of accountability and sometimes enforcement. This issue has come to the forefront in Sri Lanka following the judgment of the Supreme Court in the *Singarasa Case*, which we will discuss in greater detail below.¹²⁶

Another, wider but intimately related, legal consequence of a state of emergency is the expansion of the executive role within the institutional framework of the State, intensified by the operationalisation of extraordinary powers. As Rossiter notes, "Crisis government is primarily and often exclusively the business of presidents and prime ministers."¹²⁷ One important dimension of this expansion is the conferment of law-making powers on the executive, which would otherwise be unavailable. Most democratic constitutions offset this conferral through procedural mechanisms such as legislative approval or consultation requirements and time limits of validity. Thus, some constitutions provide that Parliament must immediately be summoned upon the declaration of a state of emergency,¹²⁸ or that the legislature may not be dissolved,¹²⁹ or that its term of office be extended during the currency of a state of emergency.¹³⁰

¹²⁶ See Chapter 6, *infra*

¹²⁷ Rossiter (1948), *op cit.*, pp.288-290; see also Edward S. Corwin (1947) ***Total War and the Constitution*** (New York: Knopf): pp.172-179; Arthur S. Miller (1978) '*Constitutional Law: Crisis Government becomes the Norm*' 39 ***Ohio State Law Journal*** 736 at pp.738-741

¹²⁸ Article155 (4) of the Sri Lankan Constitution

¹²⁹ Articles 16, 89 of the French Constitution; Article 289 of the Portuguese Constitution; Articles 169, 116 (5) of the Spanish Constitution

¹³⁰ Article115h of the German Basic Law

However, the significance of this power from the perspective of constitutional accommodation is the permissibility of its substantive reach. That is, executive-made emergency regulations may amend or override ordinary statutes, but they cannot be allowed to remain in force if inconsistent with the constitution, or worse, if they purport to amend the constitution. The Sri Lankan constitution makes this clear: once an emergency is proclaimed and the President assumes law-making powers under the constitution and the Public Security Ordinance (PSO), such emergency regulations have the force of law and can override all ordinary law except the constitution.¹³¹

A more pernicious problem is the executive rule-making power under special anti-terrorism legislation, which operates outside the constitutional framework governing states of emergency. A good example is Sri Lanka's Prevention of Terrorism Act (PTA).¹³² Thus in 2001, when President Kumaratunga's government lost its parliamentary majority, the state of emergency lapsed due to the lack of support from a hostile Parliament.¹³³ Accordingly, emergency regulations made pursuant to the emergency also ceased operation, including the regulations which had proscribed the Liberation Tigers of Tamil Eelam (LTTE). In this matter at least, the executive was not thwarted, because a proscription order could be made under the PTA. The point here is not about the merits of a policy decision to proscribe the LTTE, but the fact that the panoply of powers available to the executive are usually

¹³¹ Article 155 (2)

¹³² See N. Manoharan (2006) *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy*, Policy Studies 28 (Washington DC: East-West Center)

¹³³ See Coomaraswamy & de los Reyes (2004), op cit.

so wide, that other institutional actors (such as Parliament) recede in importance. In a context of nearly non-existent parliamentary scrutiny of statutory instruments, and a generally deferential judiciary especially in respect of emergency regulations, the possibility of executive subversion of fundamental rights and the rule of law is never far away.¹³⁴

Finally, it should be noted that one of the first casualties of a state of emergency in federal countries and devolved polities is the principle of regional autonomy. Emergencies open the floodgates of centralisation, as for example the constitutional experience of the United States has shown. The administrations of President Lincoln in a state of war,¹³⁵ and President Roosevelt in a time a severe economic crisis followed by global war,¹³⁶ left behind precedents of centralisation and pre-eminence of the executive branch that have had an enduring impact on the constitutional evolution of that country. Even the very different federal constitutional culture and practice in Canada and Australia

¹³⁴ Ibid

¹³⁵ Daniel Farber (2003) *Lincoln's Constitution: The Nation, the President, and the Courts in a Time of Crisis* (Chicago: Chicago UP)

¹³⁶ Edward S. Corwin (1947) *Total War and the Constitution* (New York: Knopf): pp.35-37

demonstrate this.¹³⁷ Other federations such as Germany, India and Russia provide explicitly for the suspension of fundamental federal constitutional principles during times of emergency.¹³⁸

While it would seem that the unitary State of Sri Lanka would not encounter these considerations, it is important to remember that one of the central debates about the schema of devolution under the Thirteenth Amendment to the Constitution (1987), has been in respect of the emergency powers framework. Proponents of meaningful devolution have argued that the retention by the centre of wide emergency related powers are a significant fetter

¹³⁷ Herbert Marx (1970) *'The Emergency Power and Civil Liberties in Canada'* 16 **MacGill Law Journal** 39 at pp.57-61; Christopher D. Gilbert (1980) *"There will be Wars and Rumours of Wars': A Comparison of the Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada'* 18 **Osgoode Hall Law Journal** 307; Donald G. Creighton (1944) ***Dominion of the North: A History of Canada*** (Boston: Houghton Mifflin): p.439; Patricia Peppin (1993) *'Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties'* 18 **Queen's Law Journal** 129 at p.131; Rosenthal (1991), op cit., p.576-580; Peter W. Hogg, *'Canada: From Privy Council to Supreme Court'* and Jeffrey Goldsworthy *'Australia: Devotion to Legalism'* in Goldsworthy (2006), op cit., pp.64-66, 85, 102 and p.138

¹³⁸ Article 53 (a) (2) of the German Basic Law; David P. Currie (1994) ***The Constitution of the Federal Republic of Germany*** (Chicago: Chicago UP): pp. 134, 138-139; Donald P. Kommers, *'Germany: Balancing Rights and Duties'* in Goldsworthy (2006) op cit., pp.163, 167, 169, 185; Articles 353, 356, 360 of the Indian Constitution; Durga Das Basu (1982) ***Introduction to the Constitution of India*** (9th Ed.) (New Delhi: Prentice-Hall): pp. 302-316; S.P. Sathe, *'India: From Positivism to Structuralism'* in Goldsworthy (2006), op cit., pp.222, 245, 246, 247-251, 259, 264, 339, 344; Article 88 of the Russian Constitution

on devolution,¹³⁹ whereas opponents of extensive devolution have strenuously held that such retention is essential to safeguard the territorial integrity of the country against attempts at secession by the North and East region.¹⁴⁰ By provisions introduced by the Thirteenth Amendment, presidential emergency powers extend to the issuing of orders and instructions to provincial Governors in respect of actual or imminent public security threats¹⁴¹ and emergency regulations made by the President override provincial statutes.¹⁴² We shall revisit this issue later.¹⁴³

3.1.4 Checks and Balances

It is the challenge of democratic constitution-makers to provide for the exercise of power, particularly executive power that facilitates strong and efficient government, whilst ensuring at the same time safeguards against abuse. This problem applies *a fortiori* to the design of arrangements for states of emergency. The

¹³⁹ Neelan Tiruchelvam, '*The Politics of Federalism and Diversity in Sri Lanka*' in Yash Ghai (Ed.) (2000) ***Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*** (Cambridge: Cambridge UP): Ch.9; Rohan Edrisinha & Paikiasothy Saravanamuttu, '*The Case for a Federal Sri Lanka*' in Rohan Edrisinha & Jayadeva Uyangoda (Eds.) ***Essays on Constitutional Reform*** (Colombo: CEPRA)

¹⁴⁰ H.L. de Silva P.C., Professor G.H. Peiris, Gomin Dayasiri & Manohara de Silva P.C. (2006) Interim Report of Sub-Committee B of the Experts Panel of the All Party Representative Committee, 11th December 2006

¹⁴¹ Article 154J (1) of the constitution. See also Articles 154K (failure of provincial Governors to comply with presidential directions) and 154L (failure of the administrative machinery of a Province)

¹⁴² Article 155 (3A)

¹⁴³ Chapter 5, *infra*

two classic constitutional devices that are deployed for this purpose are judicial review and the separation of powers.

The South African constitution is fairly unusual in subjecting both the declaration as well as law-making and executive action under emergency to full judicial review.¹⁴⁴ Many constitutions seek to implicitly limit or explicitly prevent judicial review,¹⁴⁵ while many are silent on the matter.¹⁴⁶ The Sri Lankan constitution and the PSO oust the jurisdiction of courts to review a proclamation of emergency.¹⁴⁷ However, the Supreme Court in the exercise of its fundamental rights jurisdiction may review emergency regulations for consistency with the bill of rights. The mixed record of the Sri Lankan Supreme Court in this respect is discussed in greater detail below, but generally, there has been a willingness to defer to executive discretion in respect of dealing with emergencies, except perhaps in relation to the most egregious violations.¹⁴⁸

¹⁴⁴ Section 37 (3) of the South African Constitution; Cheadle, Davis & Haysom (2002), op cit., Ch.31

¹⁴⁵ Article 150 (8) of the Malaysian Constitution; Article 28.3.3° of the Irish Constitution

¹⁴⁶ Article 155 of the Sri Lankan Constitution, prior to the Tenth Amendment; see also Stephen Ellman (1989) '*A Constitution for all Seasons*', ***Columbia Human Rights Law Review*** 163

¹⁴⁷ Article 15J (2) of the Constitution and section 3 of the PSO. Section 8 of the PSO also provides that no emergency regulation, order, rule or direction shall be called in question in any court, although this does not oust the jurisdiction of the Supreme Court to review such acts for constitutionality and consistency with fundamental rights.

¹⁴⁸ Chapters 5 and 6, *infra*

This is again, a common pattern elsewhere as well. As Gross and Ní Aoláin state, “...practice shows that domestic courts tend to support the government’s position either by invoking such judicial mechanisms as the political question doctrine and standing to prevent themselves from having to decide the matter brought before them on the merits, or, when deciding a case on its merits, accepting the government’s position. That tendency of the courts becomes even more pronounced when they deal with cases *durante bello* as opposed to deciding them when the crisis is over.”¹⁴⁹

Paradoxically, as Gross and Ní Aoláin point out, this could at least notionally lead to greater openness to judicial review on the part of governments: “This constitutional experience, which is shared by nations worldwide, may suggest that the judicial review of emergency powers ought to be welcomed by governments as it confers a certain degree of legitimacy on the government’s actions without exposing the executive to substantial risk that its actions

¹⁴⁹ Gross and Ní Aoláin: p.63; In *Korematsu v. United States* (1944) 323 US 214 at p.224, Frankfurter J. stated: “...therefore the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless.” However, Jackson J., dissenting, compared such legal modifications to a “...loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” (at p.246). See also *Hirabayashi v. United States* (1943) 320 US 81. In the United Kingdom, much the same judicial thinking applied in the majority decision in *Liversidge v. Anderson* (1942) AC 206, where the issuing of an administrative detention order by a Minister was held to be a matter solely for executive discretion, barring positive evidence of *mala fides* or mistaken identity: per Lord Wright at p.261. The *dicta* of Goddard L.J., in *Greene v. Secretary of State* (1942) AC 284 in the Court of Appeal was cited with approval: “...where on the return an order or warrant which is valid on its face is produced, it is for the prisoner to prove the facts necessary to controvert it.”

may be curbed by the judiciary.”¹⁵⁰ It has not been the Sri Lankan experience, however, that governments, even from a perception of self-interest, have quite adopted this attitude to judicial review.

The situation is hardly better at the level of legislative oversight over executive exercise of emergency powers. In addition to the immanent constitutional role of legislatures in holding government to account under the separation of powers through ordinary mechanisms such as question time, the committee system and so on, most modern democratic constitutions elaborate arrangements for legislative oversight of states of emergency as well.¹⁵¹ Indeed, one of the stronger regulatory features of the Sri Lankan emergency framework is that it places Parliament in a central accountability role.¹⁵² This promise, however, has not been fulfilled in the Sri Lankan experience in practice.¹⁵³

In comparative experience, there are several factors that have affected the failure of legislative oversight. Primary among these are the inherent weaknesses of the constitutional instruments

¹⁵⁰ Gross and Ní Aoláin: p.63

¹⁵¹ Samuel Issacharoff & Richard H. Pildes, *‘Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime’* in Mark Tushnet (Ed.) (2005) ***The Constitution in Wartime: Beyond Alarmism and Complacency*** (Durham: Duke UP): p. 161

¹⁵² Articles 155 (4), (5), (6), (7), (8) of the constitution; section 5 (3) of the PSO

¹⁵³ Coomaraswamy & de los Reyes (2004), op cit, pp.273, 277; see also Charles L. Black, Jr., (1960) ***The People and the Court: Judicial Review in a Democracy*** (New York: Macmillan): pp.56-86; Ronen Shamir (1990) *‘Landmark Cases’ and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice’* 24 Law and Society Review 781

themselves, which do not provide a sufficiently robust legal framework for legislative oversight. Other factors relate to political and democratic cultures, including undue deference to leadership and tolerance of authoritarianism. There is also what Gross and Ní Aoláin call the ‘consensus generating effect of emergencies’ and Russett the ‘rally round the flag effect’¹⁵⁴ whereby in times of grave peril, the dynamics of electoral politics impel even parliamentary oppositions to support the government: “...it is likely that the emotional effects of emergencies (such as fear or rage) and the desire to appear patriotic to voters will lead legislators to support vesting in the government broad and expansive authorisations and powers and to do so without delay.”¹⁵⁵ The resonance of this observation in the Sri Lankan context needs no emphasis. The dangers of this psychological and political effect undermining the expectations of the separation of powers was seen by Madison early on when he observed that “...an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions”,¹⁵⁶ and argued that the logic of the US constitution’s system of checks and balances must be so devised as to give “...those who administer

¹⁵⁴ Bruce Russett (1990) *Controlling the Sword: The Democratic Governance of National Security* (Cambridge: Harvard UP): pp.34-38

¹⁵⁵ Gross and Ní Aoláin: p.65

¹⁵⁶ *Federalist No. 49* (James Madison) in Clinton Rossiter (Ed.) (1961) *The Federalist Papers* (New York: The New American Library): p.315; see also Karl Popper (1971) *The Open Society and its Enemies* (5th Ed.) (Princeton: Princeton UP): Vol.1, pp.43, 198; Eugene V. Rostow (1945) ‘The Japanese American Cases – A Disaster’ 54 *Yale Law Journal* 489 at pp. 490-491

each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹⁵⁷

The rationale for entrusting the executive branch with the function and powers to deal with emergencies are well-known. Hamilton and Jay, for example, adduced the advantages of secrecy, dispatch, and access to broad resources of information.¹⁵⁸ It is the most visible organ of government in the frontline in times of emergencies. This structural advantage has been reinforced by other aspects of modern democratic practice such as party political systems. The executive dominance of the legislature in parliamentary systems is buttressed by the modern party political system, and even in presidential systems such as the United States, this has undercut the competitive separation advocated by Madison.¹⁵⁹

3.2 Comparative Experience: Areas of Concern

In the previous section, we considered the constitutional design aspects of addressing emergency powers within the rule of law under the model of constitutional accommodation. Within the broad category of liberal constitutionalism, various constitutional choices are possible depending on political objectives and

¹⁵⁷ *Federalist No. 51* (James Madison) in Rossiter (Ed.) (1961), op cit., p. 319; Tushnet (2005), op cit., p.2674

¹⁵⁸ *Federalist No. 64* (John Jay) and *Federalist No. 75* (Alexander Hamilton) in Rossiter (Ed.) (1961), op cit., pp.392-393, 451-452

¹⁵⁹ In *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 US 579 at 653, Jackson J. observed, “Party loyalties and interests, sometimes more binding than law, extend [the president’s] effective control into branches of government other than his own, and he may win, as a political leader, what he cannot command under the Constitution.”

historical considerations, and they in turn shape governance and political cultures in the exercise of emergency powers. In this section, we turn to some of the political consequences of emergencies which in spite of, and in some cases, because of constitutional frameworks continue to pose serious challenges to liberal constitutionalist assumptions about the separation between emergency and normalcy, and commitment to the protection of human rights and the rule of law during times of crisis.¹⁶⁰

3.2.1 Constitutional Accommodation: Misuse and Abuse

As we saw, the objectives of providing for emergency powers that are flexible in the face of adversity, yet sufficiently robust to protect human rights and the rule of law, constitute the rationale for the models of accommodation, in particular constitutional accommodation. As Gross and Ní Aoláin state, “...the argument is made that the benefits of accommodation exceed the potential costs of invoking such models of emergency rule. The models avoid constitutional and legal rigidity in the face of crisis, allowing governments to act responsibly, within a legal framework, against threats and dangers. Operating within the confines of a legal system also means that mechanisms of control and supervision against abuse and misuse of powers – such as judicial review and parliamentary oversight over the actions of the executive government – are available and functioning.”¹⁶¹ Against these

¹⁶⁰ Jackson J. also observed that, “...emergency powers tend to kindle emergencies.”, *ibid*, at p.650

¹⁶¹ Gross and Ní Aoláin: p.81

normative expectations of the accommodative approach, practical experience suggests that confronted with the exigencies of a crisis, the models have not always been able to withstand the depredations of assertive executives, rendering them meaningless, apologetic and unprincipled.¹⁶²

Constitution-making involves anticipation of future exigencies, but it cannot ensure official and political compliance with the letter, and more importantly, the spirit of the constitutional instrument, however great the perspicacity of its drafters and howsoever perfect and elegant its text. Thus, the experience that judges and legislators have been unable to assert their institutional role, so as to meaningfully give effect to constitutional safeguards during times of emergency, is as much or more a matter of politics as of constitutional law. As Friedrich observed, "There are no ultimate institutional safeguards available for insuring that emergency powers be used for the purpose of preserving the constitution...All in all the quasi-dictatorial provisions of modern constitutional systems, be they martial rule, state of siege or constitutional emergency powers, fail to conform to any exacting standard of effective limitations upon a temporary concentration of powers. Consequently, all these systems are liable to be transformed into dictatorial schemes if conditions become at all favourable to it."¹⁶³

Indeed, the subversion of constitutional arrangements by usurpers and autocrats is as old as the idea of constitutional government itself. The institution of the emergency dictatorship of

¹⁶² See Eric A. Posner & Adrian Vermeule (2003) '*Accommodating Emergencies*' 56 *Stanford Law Review* 605, at p.607

¹⁶³ Carl J. Friedrich (1968) *Constitutional Government and Democracy: Theory and Practice in Europe and America* (4th Ed.) (Massachusetts: Blaisdell): p.570

the Roman republic itself was sabotaged to serve unconstitutional and illegal ends, first by Cornelius Sulla during his reign of terror between 83 and 79 BC, and then by Julius Caesar commencing 48 BC. Both used the forms and powers of the constitutional dictatorship while doing away with its limitations and purposes.¹⁶⁴

In the modern era, the best-known example of how a democratic constitution was instrumentally used to destroy democracy and the constitutional order is that of the Weimar constitution in inter-war Germany, through its notorious Article 48.¹⁶⁵ The Weimar constitution was a liberal democratic constitution that essentially followed the Roman model of constitutional dictatorship, interpolated with the German empire's doctrine of the state of war, in respect of its emergency provisions set out in Article 48. This provision included some excessive powers for the President of the Republic, including the use of the military to enforce public order, exercisable at his sole discretion. Article 48 also allowed the suspension of critical fundamental rights. Theoretically, there were some explicit limitations on the exercise of these powers such as the subjection of the President to impeachment proceedings, as well as other constraints implicit from the constitutional scheme. Neither the legislature nor the courts

¹⁶⁴ William E. Heitland (1969) *The Roman Republic*, Vol.2 (Florida: Gaunt): para.905-907; Max Cary & Howard H. Scullard (1975) *A History of Rome down to the Reign of Constantine* (3rd Ed.) (New York: St. Martin's Press): p.274-280; Herbert F. Jolowicz & Barry Nicholas (1972) *A Historical Introduction to Roman Law* (3rd Ed.) (New York: Greenwood Press): p.56

¹⁶⁵ Rossiter (1948), op cit., pp.33-73; Hans Mommsen (1996) *The Rise and Fall of Weimar Democracy* (Chapel Hill: North Carolina UP); Peter L. Lindseth (2004) 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s - 1950s' 113 *Yale Law Journal* 1341 at p.1361-1371

proved able, or indeed willing, to check the executive under the extensive use of Article 48, originally used to address Germany's severe economic crises following World War I.¹⁶⁶ This set the precedent for the Nazis once they had taken a foothold within the democratic institutions, to use the constitution itself to demolish democracy and (what remained of) the constitutional order, through measures such as the *Ermaechtigungsgesetz*, by which the *Reichstag* abdicated all its powers under the constitution to the executive. Thus, towards the end of the Weimar republic, Article 48 had become virtually the sole source of governmental power, its other parts and the ordinary legal system completely nullified.

There is a further issue of salience in the Weimar experience as Gross and Ní Aoláin point out, endorsing an observation of Rossiter's: "Finally, and perhaps most importantly, the German people lacked any real sense of constitutionalism and deep appreciation of democracy, being accustomed to, and supportive of, an authoritarian regime."¹⁶⁷ This resonates with the apposite observation Machiavelli made, in an implied indictment of his fellow Florentines, in respect of the Roman dictatorship. The lesson seems to be therefore that the ultimate guarantee of constitutional government is the disposition of society to reject the abuse of power, rather than the perfection of the paper constitution.

The Sri Lankan experience with states of emergency has not fortunately degenerated into extra-constitutional dictatorship or the suspension of the constitution, but it has been an experience of authoritarianism and human rights violations nonetheless.

¹⁶⁶ Between 1919 and 1932, Article 48 was invoked more than 250 times: Rossiter (1948), op cit., pp.37-60

¹⁶⁷ Gross and Ní Aoláin: p.85; Rossiter (1948), op cit., p.71

Parliament has generally been ineffectual in holding the executive to account for the exercise of emergency powers. The Supreme Court also has been generally deferential to the executive, although in the use of its fundamental rights and constitutional jurisdiction it has a marginally better record largely due to the efforts of some judges.

Democracy in Sri Lanka we know to be deeply flawed. A relatively long history of procedural democracy has been bedevilled by its substantive practice, its promise distorted by patronage politics and, more pertinently for this discussion, the ethnicisation of the majoritarian principle. However, because the conception of democracy of popular subscription is not based on the liberal notion of a contractarian relationship between citizen and State, but rather through the prisms of proximate relationships such as ethnicity,¹⁶⁸ standards of democratic accountability are as a matter of politics not exclusively those prescribed by liberal democracy; i.e., governmental behaviour is not always judged by reference to standards such as commitment to human rights and fidelity to the rule of law. Consequentially, public tolerance of authoritarianism is high. Of course, this has had an adverse impact on fundamental rights and the rule of law.

3.2.2 Communal Alienation: Us vs. Them

Reference was made earlier to the consensus-generating character of emergencies, that leads to greater acceptance of sweeping

¹⁶⁸ The ethnicisation of political languages of negotiation, the definition of group interests, and the articulation of political claims is aggravated by the infusion of distinctly ethnic-nationalist and antagonistic forms of political mobilisation. Political consensus on the value of liberty in the context of crisis and emergency rule is therefore difficult.

executive powers, and indeed tolerance of excess. This political or psychosocial phenomenon comes as a result of the perception that the government is fighting on behalf of 'us' against a common enemy. This dichotomisation constructs a sense of 'them' that is concerned with groups rather than individuals and thereby the creation of suspect communities, against whom can be vented the collective anger in a time of fear. The clearer the line of demarcation between 'us' and 'them', the easier it becomes for governments to expand their emergency powers without public resistance. This has been a common experience elsewhere; for example, during World War II, the internment of persons of Japanese origin in the US, and 'aliens' in the UK; and the British government's internment campaigns in Northern Ireland. Following September 11th, this has become a major problem in the West.

In the context of internal conflicts, the 'us vs. them' discourse is even more problematic in that there is no foreign element against which the dynamic works, and thereby its effects have been arguably even more pernicious. Quite apart from the tragic social costs and human suffering intra-State conflicts involve, it is also clearly demonstrable that this dichotomy is entirely counter-productive to stated aims of anti-terrorism or counter-insurgency measures, and impede the political dynamics of conflict resolution through negotiated means.

Ethnic and religious minorities have often been subject to repressive measures taken by governments in the name of combating terrorism or insurgency, usually with popular majority support, where such minorities share communal connections with the terrorists or the insurgents. This support is often accompanied by the de-humanising of the 'them', which creates the political space for human rights violations with impunity. In these

situations, it is not merely the legal transgressions of constitutional rights that result: it also debases the moral judgement of society, and devalues notions of justice and fair play that would otherwise prevail.

This in turn leads to minority alienation and with it support for anti-government forces. This entrenches the dynamics of conflict in a way that eventually de-legitimises the State. Thus, for example, as Gross and Ní Aoláin observe, "...it is widely accepted that the internment campaign initiated by the British in Northern Ireland on August 9, 1970, led to the revival of the IRA and the creation of the Provisional IRA. Similarly, there is little doubt that the repressive measures taken by the French army during the Battle of Algiers 'proved to be the most effective recruiting sergeant for the FLN which managed...to transform Algerian political life into a military situation thereby alienating the previously quiescent Muslim population against the French state.'"¹⁶⁹

All of this is all too familiar in the Sri Lankan experience, where in the context of ethno-political conflict going to the heart of the State's legitimacy, the use of emergency powers by the government has become almost completely ethnicised. Generally, even if the Sri Lankan State has failed to address the substantive anomalies at the root of the conflict and minority grievances, it has claimed to represent all Sri Lankans regardless of ethnicity in its counter-insurgency measures against the LTTE. The broader political and constitutional dimensions of the matter are beyond this discussion, but even as the military prosecution of the war has led to widespread patterns of routine violations, there has also been the occasional executive act of ethnic discrimination that has

¹⁶⁹ Gross and Ní Aoláin: p.225

so clearly and blatantly transgressed democratic sensibilities that they stand as milestones in the history of the conflict. A recent example was the order given by the Defence Secretary, under emergency powers, to evict Tamil citizens of North-eastern origin from the capital, temporarily residing in Colombo (this was subsequently stopped by an interim order of the Supreme Court on a public interest fundamental rights application of the Centre for Policy Alternatives (CPA)).¹⁷⁰

This incident exemplifies several issues raised in this paper: (a) the alienation of minorities through associating them with the terror group in conflict with the State; (b) the abuse of power through exceeding even the extraordinary and expanded limits set by a state of emergency; (c) the illegitimate violation of constitutionally guaranteed fundamental rights; (d) the subversion of rule of law principles through arbitrary, unreasonable, and disproportionate action; and (e) the official culture of convenience and contempt for constitutional and international standards in respect of human rights and the rule of law, reinforced by impunity and immunity, that is bred by the institutionalisation of emergency rule over long periods of time. This is therefore an instructive example of how the ‘us vs. them’ phenomenon produces a whole variety of misuses and abuses of emergency power.

¹⁷⁰See

http://cpalanka.org/research_papers/Press_Release_on_the_interim_order.pdf; http://news.bbc.co.uk/2/hi/south_asia/6729555.stm; <http://www.alertnet.org/thenews/newsdesk/IRIN/7f915ea1a45ece47a1199f9a7f30884d.htm>; <http://www.hrw.org/reports/2007/srilanka0807/6.htm>; <http://www.un.org/apps/news/story.asp?NewsID=22851&Cr=sri&Cr1=lanka>; http://news.bbc.co.uk/2/hi/south_asia/6732961.stm

3.2.3 The Concept of Militant Democracy and the Sixth Amendment

In the wake of the events of 'Black July' 1983, in addition to the orthodox emergency-related measures the government took, was the enactment of the Sixth Amendment to the Constitution. The aim of the amendment was to prohibit and punish the activities of persons, political parties and organisations whose activities threatened the independence, sovereignty, unity and the territorial integrity of Sri Lanka.¹⁷¹ Accordingly, the amendment provided, *inter alia*, that 'No person shall, directly or indirectly, on or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka'.¹⁷² The amendment goes on to provide for penalties in detail, including that where the Supreme Court on an application declares that a person has contravened the said prohibition, or that a body corporate has as one of its objectives the establishment of a separate state, civic disabilities are imposed or the organisation proscribed *ipso jure* (in addition to a host of other penalties such as the forfeiture of property and elected office). Apart from what was perceived to be an act of gross insensitivity and arrogance with respect to its timing, upon the heels of the severe trauma of ethnic violence against Tamils, this ban on even the peaceful advocacy of secession has been intensely criticised by liberal commentators in Sri Lanka, both on principled grounds such as free speech and on more strategic considerations of conflict resolution.

We are not concerned here with the broader constitutional and political implications of this amendment in respect of the ethnic

¹⁷¹ Preamble

¹⁷² Article 157A (1)

conflict, but the character of the Sixth Amendment as an emergency measure, designed ostensibly to combat an armed challenge to the constitutional order and the integrity of the State. Despite the opprobrium it has attracted among liberal opinion in Sri Lanka,¹⁷³ the rationale underpinning the Sixth Amendment has a remarkably liberal democratic pedigree.

Theoretically developed as a liberal response to the instrumental use of the majoritarian principle and democratic institutions by Nazis and Fascists in pre-World War II Europe by Loewenstein, the concept of militant democracy¹⁷⁴ has found expression in the post-World War II Basic Law of the Federal Republic of Germany as a fundamental constitutional principle. Loewenstein's concern was that a fundamentalist adherence to the 'exaggerated formalism of the rule of law' would be self-defeating for the democratic constitutional order in the face of the fascist challenge. Instead he advocated the concept of militant democracy, which would abandon the formalistic application of the rule of law, including constitutionally recognised fundamental rights, in the defence of the core values of liberal democracy. Loewenstein believed in the

¹⁷³ Council for Liberal Democracy (1986) '*Statement calling for the Repeal of the Sixth Amendment to the Constitution*' in Chanaka Amaratunga (Ed.) (1990) ***Liberalism in Sri Lanka 1981 – 1991: A Documentary Record*** (Colombo: Council for Liberal Democracy and Friedrich Naumann Stiftung): p.132

¹⁷⁴ On 'militant democracy' as a legal and political concept, see Gregory H. Fox & Georg Nolte (1995) '*Intolerant Democracies*' 36 ***Harvard International Law Journal*** 1; Martti Koskeniemi (1996) '*Intolerant Democracies: A Reaction*' 37 ***Harvard International Law Journal*** 231; Brad R. Roth (1996) '*Democratic Intolerance: Observations on Fox and Nolte*' 37 ***Harvard International Law Journal*** 235; Gregory H. Fox & Georg Nolte (1996) '*Fox & Nolte Response*' 37 ***Harvard International Law Journal*** 238; Dan Gordon (1987) '*Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with that of the United States and West Germany*' 10 ***Hastings International and Comparative Law Review*** 347

absolute superiority of the values of democracy, the protection of which involved, "...the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government: Human dignity and freedom."¹⁷⁵ He further argued, "Where fundamental rights are institutionalized, their temporary suspension is justified. When the ordinary channels of legislation are blocked by obstruction and sabotage, the democratic state uses the emergency powers of enabling legislation which if implicitly, if not explicitly, are involved in the very notion of government. Government is intended for governing...If democracy believes in the superiority of its superior values over the opportunistic platitudes of fascism...every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles."¹⁷⁶

After the war, the principle of militant democracy (*Streitbare Demokratie*) became one of the cornerstones of the new German Basic Law and stands for the defence of the core values of the German polity and its 'free democratic basic order.' As Kommers observes, "...the Basic Law joins the protection of the Rechtsstaat to the principle that the democracy is not helpless in defending itself against parties or political movements bent on using the Constitution to undermine or destroy it."¹⁷⁷ Thus Article 18 of the German Basic Law allows the forfeiture of rights from persons

¹⁷⁵ Karl Loewenstein (1937) '*Militant Democracy and Fundamental Rights*' 31 *American Political Science Review* 417 and 638 at p.658; see also Karl Loewenstein (1938) '*Legislative Control of Political Extremism in European Democracies*' 38 *Columbia Law Review* 591 and 725

¹⁷⁶ Loewenstein (1937), op cit., at p.432

¹⁷⁷ Donald P. Kommers (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke UP): pp.37-38; see also Currie (1994), op cit., p.213

who use them to attack or undermine the free democratic basic order, and Article 21 (2) allows the declaration as unconstitutional any political party that has similar goals. In two of its earliest cases, the German Constitutional Court used these provisions to declare unconstitutional the Socialist Reich Party and the Communist Party.¹⁷⁸ The constitution of Turkey has strong prohibitions on advocacy against its unitary and secular character, which have been the subject of litigation in the European Court of Human Rights under Article 17 of the European Convention of Human Rights, itself considered an explication of militant democracy.¹⁷⁹

Thus, was the Sri Lankan government's emergency response of the Sixth Amendment a case of entrenchment of militant democracy? It is doubtful if it can be described as such. Germany, unlike Turkey, is a highly liberal constitutional order that protects minorities through a variety of mechanisms, including the federal principle. If minority protection of that nature had been a feature of the Sri Lankan State, perhaps ethnic pluralism may not have spilled over into violent conflict. In any event, neither the sponsors of the amendment nor its subsequent defenders have attempted to justify it on these grounds, but rather as an element of the necessary legal and constitutional framework with which to, militarily, meet the threat of armed secessionism. But for the purposes of this discussion, the Sixth Amendment is an illustration of the range of measures that becomes politically available to the executive to implement, in this case, a constitutional amendment

¹⁷⁸ *The Socialist Reich Party Case* (1952) 2 BVerGE 1; *The Communist Party Case* (1956) 5 BVerGE 85

¹⁷⁹ *Refah Partisi v. Turkey* (2003) 37 EHHR 1; Paul Harvey (2004) 'Militant Democracy and the European Convention on Human Rights' 29 **European Law Review** 407

with wide and deep ramifications in a deeply divided and conflict-affected society. Admittedly, the then government enjoyed an unusual 5/6th majority in Parliament which allowed it to impose its will, at will, but in the context of a crisis, this merely eased the way for an ill thought out and reactionary measure.

3.2.4 Normalisation of the Exception

As we established at the very outset, the fundamental analytical perspective of this discussion is the liberal democratic assumption of the separation between emergency and normalcy. Without this assumption, or indeed normative principle, no critique of the 'permanence' of the Sri Lankan state of emergency makes any sense. Yet, international experience reflects the Sri Lankan experience more-or-less, in that the exception has a tendency of becoming normalised fairly easily. Extraordinary powers given to a government to meet an exceptional threat come over time to be treated as normal and part of the government's ordinary corpus of powers. If one of the purposes of the assumption of exceptionalism in respect of emergency powers is to ensure a return to 'normality' in the sense of a retraction of those powers as soon as is possible, then this phenomenon clearly counteracts that aim.

As we shall see, it is not only governments that grow accustomed to these powers and their convenience; other institutions including the judiciary also become attuned to expansive executive powers. Through a false sense of security, the public's tolerance of expansive government and incursions into individual liberty increases. Mill saw the dangers of this: "Evil for evil, a good despotism, in a country at all advanced in civilisation, is more noxious than a bad one; for it is far more relaxing and enervating

to the thoughts, feelings, and energies of the people. The despotism of Augustus prepared the Romans for Tiberius. If the whole tone of their character had not been prostrated by nearly two generations of that mild slavery, they would probably have had spirit enough left to rebel against the more odious one.”¹⁸⁰ More recently, we considered the experience of the Weimar republic in which the constitutional authority for emergency powers in Article 48 was used so frequently and extensively that both officials and public came to regard it as normal, before of course, that very provision was used by the Nazis to destroy the constitutional order.

In contemporary experience, normalisation of the exception has several characteristics. The first is that each precedent sets a higher bar for the next, which inflates the scope and nature of powers with each successive emergency. As Gross and Ní Aoláin observe, “Emergency powers and authorities that are granted to, and exercised by, government and its agents during a crisis create precedents for future exigencies as well as for ‘normalcy.’ Whereas in the ‘original’ crisis, the situation and powers of reference were those of normalcy and regularity, in any future crisis government will take as its starting point the experience of extraordinary powers and authority granted and exercised during previous emergencies. What might have been seen as sufficient ‘emergency’ measures in the past (judged against the ordinary situation) may not be deemed enough to deal with further crises as they arise. Much like the need gradually to increase the dosage of a heavily

¹⁸⁰ John Stuart Mill (1971) *Three Essays – On Liberty, Representative Government, the Subjection of Women* (1861) (Oxford: Oxford UP): p. 185

used medication in order to experience the same level of relief, so too with respect to emergency powers..."¹⁸¹

As the acceptable boundaries of emergency powers become redefined in this way, the public becomes accustomed to the expansion of government as well as measures they would ordinarily have rejected. Thus for example, in the aftermath of September 11th in the US, there was a massive upsurge in public support for ethnic or racial profiling, hitherto regarded by most as a repugnant practice.

This 'getting used to' effect, for obvious reasons, starts with government and officialdom. Gross and Ní Aoláin note the following characteristics of this dynamic: first, "...it [is] easier to pass new legislation than to examine why it is that the existing legislation, and the powers granted under it to government and its agencies, was not sufficient. The result is a piling up of legislative measures into a complex state of emergency..."; second, government and its agents grow accustomed to the convenience of emergency powers. Once they have experienced the ability to operate with fewer restraints and limitations they are unlikely to be willing to give up such freedom."; third, is "...the use of emergency and counter-terrorism legislation for purposes other than those for which it was originally promulgated."¹⁸²

A good example of this is the British Defence of the Realm Act (DORA) of 1914, which was promulgated as a temporary war measure in the context of World War I. The DORA signified the departure from Dicey's conception of the rule of the common law, altered the institutional balance between Parliament and the

¹⁸¹ Gross and Ní Aoláin: p.228

¹⁸² Gross and Ní Aoláin: p.230

executive in favour of the latter, and in the process, set the precedent for the institutionalisation of emergency powers in the UK. During its currency, this piece of legislation (aimed at the defence of the realm in a time of grave conflict), was used to regulate such matters as dog shows, supply of cocaine to actresses and the opening hours of pubs. The DORA lapsed in 1921 along with the declaration of termination of the war. Before that, however, its essence was enacted into law by the Emergency Powers Act of 1920, which in scheme, form, content and textual formulations, was the archetype for many similar statutes in the British Empire and Commonwealth, including the Sri Lankan Public Security Ordinance (PSO). The PSO as amended, validated by the republican constitutions, continues to be the statutory source of emergency power in Sri Lanka. A comprehensive study of emergency regulations in force in 1992 by the University of Colombo, found that they were used for regulating such matters as the adoption of children, edible salt and driving licenses.¹⁸³

Another feature of how the exception becomes normalised is the role of the judiciary. We have seen how judges are generally reluctant to second-guess the executive during an emergency, the time ironically that their role as guarantor of fundamental rights assumes the greatest significance. Apart from this, is the often imperceptible occurrence of transubstantiation, whereby due to the constant state of emergency, provisions of ordinary law and even the constitution come to be continuously interpreted in the light of emergency rule. A very good example of this is that a large segment of the fundamental rights jurisprudence of the Sri Lankan Supreme Court concerns violations of fundamental rights through the exercise of emergency powers. Especially in the case of

¹⁸³ Centre for the Study of Human Rights & the Nadesan Centre (1993) *Review of Emergency Regulations 3* (Colombo: University of Colombo)

infringements of critical civil liberties such as the freedom of expression, many of the Supreme Court's most important pronouncements have been concerned with resolving emergency regulations, or executive action thereunder, inconsistent with fundamental rights. Without belittling the Supreme Court or its many important determinations, the point remains that an important source of law in a common law system, in this respect the case law of the highest court in the land deciding the reach of the constitutional bill of rights, has not evolved under normalcy, but rather, under a normalisation of the exception.

CHAPTER IV

STANDARDS GOVERNING STATES OF EMERGENCY AT INTERNATIONAL LAW AND PRACTICE

4. Standards governing States of Emergency at International Law and Practice
 - 4.1. General Observations: International Human Rights Law as a Legislative and Interpretive Framework of Accommodation
 - 4.1.1. Definition of Emergency
 - 4.1.2. Derogations
 - 4.1.3. Common Themes of Treaty Body Jurisprudence
 - 4.1.4. Overview of the Derogation Jurisprudence and Commentary of the Human Rights Committee
 - 4.2. International Protection vs. National Implementation: The Enforcement Framework of the ICCPR
 - 4.2.1. The Human Rights Committee
 - 4.2.2. The Reporting Procedure
 - 4.2.3. Inter-State Communications
 - 4.2.4. Individual Communications

4.3. International Human Rights Standards in States of Emergency under the ICCPR: The Legal Regime of Derogations

4.3.1. The Principle of Exceptional Threat

4.3.2. The Principle of Proclamation

4.3.3. The Principle of Notification

4.3.4. The Principle of Non-Derogability

4.3.5. The Principle of Proportionality

4.3.6. The Principle of Non-Discrimination

4.3.7. The Principle of Consistency

The past five decades – the post World War II, United Nations era – has seen the development of international human rights law and practice, both in terms of wide codification in binding multilateral treaties and in the promotion of behavioural standards. These set out the nature and scope of positive rights and their permitted restrictions. In this chapter, we examine how international human rights norms apply within the domestic jurisdiction, especially in terms of their enforcement mechanisms, and how they seek to regulate derogations from international obligations to protect those rights during states of emergency. We do not intend to give an account of the range of rights available under international human rights law. Our concern is to see how international human rights law accommodates states of emergency by allowing, within set limits, derogations from human rights during crises.

This chapter is a general overview of the international regime of human rights with regard to its scope of application and regulation of derogations during states of emergency. The specificities of the interface between international human rights and the experience of states of emergency within the Sri Lankan domestic jurisdiction will be addressed in Part II of the book. While our primary focus is on the International Covenant on Civil and Political Rights (ICCPR), its First Optional Protocol, and its treaty body, the Human Rights Committee, as the multilateral regime that applies to Sri Lanka, for the purposes of a comparative understanding, we also refer where appropriate to the European and Inter-American regional systems. The African Charter is not discussed here, because although it does not contain a formal derogations regime, suggesting at first glance that no derogations are permitted, it is a peculiarly relativist document with many discrete limitations on the exercise of rights which are not compatible with a universalist understanding of human rights.

Moreover, human rights norms during states of emergency have also been the subject of several standard setting exercises, notably the *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (Paris Minimum Standards)¹⁸⁴ and the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles).¹⁸⁵ While these are informal and strictly speaking legally non-binding, they enjoy wide acceptance as setting the international standards on human rights during emergencies and as interpretive guides to States.

We see that international human rights law comports with the models of accommodation in Gross and Ní Aoláin's analytical typology we introduced at the outset.¹⁸⁶ That is, by the extrapolation of the rule of law ideal into international law, international human rights law seeks to legally regulate the reach and limits of substantive rights as well as derogations, the latter primarily (but not exclusively) through procedural requirements. Derogation clauses in international human rights law can thus be described as the analogue of states of emergency frameworks in constitutional models of accommodation in municipal law. Needless to say, other views exist about the theoretical basis of derogation provisions, including the view that they are an

¹⁸⁴ Richard B. Lillich (1985) '*Paris Minimum Standards of Human Rights Norms in a State of Emergency*', Vol.79, No.4 (October, 1985): pp. 1072-1081

¹⁸⁵ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (1984) '*Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*', Annex, UN Doc E/CN.4/1984/4 (1984)

¹⁸⁶ See Chapter 2, *supra*

adaptation in human rights law of the doctrine of necessity in international law.¹⁸⁷

A related and particularly significant issue is the question of enforcement of international human rights law within the domestic jurisdiction, in both the substantive and procedural dimensions. International human rights law is characterised by the assumption of separation between normalcy and emergency, as well as the attempt to legally regulate states of emergency by balancing the tension between the protection of human rights under the ordinary rule of law, and the legal provision of emergency powers (i.e., through allowing for derogations in exceptional circumstances). Accordingly, international human rights law is broadly a model of legislative accommodation. Some regional human rights instruments, specifically the European Convention on Human Rights and Fundamental Freedoms (ECHR), have assumed a character akin to a constitutional bill of rights, either through domestic legislative incorporation or through habitual official interpretive compliance, especially by domestic courts. This development has also been influenced by the distinct but closely related dynamics of the European Union legal order.¹⁸⁸ The ECHR is thus more properly a model of constitutional accommodation. In the context of international human rights instruments establishing treaty bodies for their authoritative interpretation, international human rights law is also a model of interpretive accommodation. Therefore, an important source of developing standards is the jurisprudence of these treaty bodies,

¹⁸⁷ See Jaime Oraá (1992) *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press): pp.7-10, Ch.10; hereinafter Oraá

¹⁸⁸ Patrick Birkinshaw (2003) *European Public Law* (London: Butterworths): Ch.9

such as the Human Rights Committee, the European Court of Human Rights, and the Inter-American Commission and Court.

Juxtaposed with the Sri Lankan legal framework and political experience of states of emergency, the international legal regulation of human rights and emergency powers (understood as a model of accommodation) opens up several avenues of investigation, which can be summarised as follows: (a) the applicability of international human rights law within the domestic jurisdiction in the context of the dualist tradition; (b) the dependence of international human rights law for enforcement, in spite of treaty mandated legal mechanisms, on moral suasion and political pressure, and indeed, the responsiveness of national courts in the context of competing fundamental principles such as State sovereignty; (c) the gap between law and practice in the Sri Lankan experience raises concerns about its categorisation as a model of accommodation; and as result (d) raises the possibility that the rule of law does not extend to the state of exception, which quite apart from the chilling implications for liberty and democracy, at least indicates that the Schmittian challenge to liberal constitutionalist frames of analysis has purchase in the Sri Lankan context. Many of the issues in relation to (a) and (b) above have been raised by the Supreme Court decision in the *Singarasa Case* and will be discussed in some detail later. We have made reference to the more political issues raised by (c) and (d) in the previous chapters and they will again be addressed in the discussion on the Sri Lankan experience in Part II.

With these preliminary observations, we may now proceed to provide a general overview of the issues relating to states of emergency, fundamental rights and derogations in the 'legislative' framework of international human rights law, and the general themes that emerge from the jurisprudence of treaty bodies

interpreting these provisions. Subsequently, we will take up the body of general principles that govern states of emergency under international human rights law with the main focus on the ICCPR and the jurisprudence of the Human Rights Committee, as well as a description of the ICCPR's enforcement mechanisms. It should, however, be remembered that it is not only international human rights instruments (such as the ICCPR), to which this discussion is restricted, that establish governing principles in relation to human rights in crisis contexts. In what is a growing area of human rights protection, general international and humanitarian law and the laws of war also establish such principles, extending the regulatory reach of human rights protection within the laws of external and internal armed conflict, and binding States as well as non-State actors.

4.1 General Observations: International Human Rights Law as a Legislative and Interpretive Framework of Accommodation

Despite differences of emphasis and nuance, there is wide consensus at the international level about the basic procedural issues in the treatment of human rights during states of emergency, the objective circumstances allowing a declaration, as well as the substantive limits of permissible derogations. Similarly, the treaty bodies policing both the ICCPR and the regional regimes in Europe and the Inter-American system display certain common themes in their jurisprudence that shed light on the dynamics of international protection of human rights which are violated within States' internal jurisdiction. In relation to Sri Lanka's obligations under the ICCPR, its First Optional Protocol, and the role of the Human Rights Committee, moreover, the issue of enforcement has become a matter of critical significance following the Supreme Court's decision in the *Singarasa Case*. As a prelude to the review

of that case in Part II, we discuss the ICCPR framework of enforcement in some detail later in this chapter.

4.1.1 Definition of Emergency

As we saw in relation to the experience of national jurisdictions, one of the first problems that require to be dealt with in a legal or constitutional framework for the accommodation of emergencies is that of defining generally when a crisis has reached a stage that merits the engagement of emergency powers.¹⁸⁹ Article 4 of the ICCPR, which deals with states of emergency, defines a ‘public emergency’ as one that ‘threatens the life of the nation.’ The Human Rights Committee has set a high bar for what qualifies as a threat to the life of the nation through the development of the other limitation principles of Article 4, including the duty of justification for derogations placed on States (particularly in cases of individual complaints to the Committee under the First Optional Protocol; see below). The applicable principles for the invocation of Article 4 are now set out in the Committee’s General Comment No. 29, which emphasise the temporary and exceptional nature of states of emergency.

Article 15 of the European Convention on Human Rights (ECHR) defines a state of emergency as ‘war or other public emergency threatening the life of the nation.’ In *Lawless v. Ireland*,¹⁹⁰ the majority in the European Commission of Human Rights

¹⁸⁹ See Chapter 3, section 3.1.1

¹⁹⁰ *Lawless v. Ireland* (1960-1961) 1 Eur.Ct.HR (ser. B) 56 (Commission Report) *Lawless v. Ireland* (1960-1961) 3 Eur.Ct.HR (ser. A); see also Oren Gross and Fionnuala Ní Aoláin (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge UP): p.249; hereinafter Gross and Ní Aoláin

interpreted this to mean "...a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question."¹⁹¹

Likewise in the *Greek Case*,¹⁹² the Commission again by a majority reiterated these same principles, adding that the exceptional danger must be one in which the ordinary limitations or restrictions permitted by the Convention on the exercise of fundamental rights are plainly inadequate to deal with the situation. In Haysom's summary of the principles enunciated in the Greek Case, there are four elements to what is meant by 'public emergency threatening the life of the nation': (a) the public emergency must be actual and imminent; (b) its effects must involve the whole nation; (c) continuance of the organised life of the community must be threatened; and (d) the crisis or danger must be exceptional in that the normal measures for the maintenance of public safety are plainly inadequate.¹⁹³

Both the Inter-American Commission and Court of Human Rights have restated the requirements of temporary duration and exceptional threat in relation to Article 27 of the American Convention of Human Rights (ACHR). The Commission has stated that emergency powers may be invoked only in 'extremely serious circumstances' and in its advisory opinion on *Habeas Corpus in*

¹⁹¹ *Lawless v. Ireland*, Commission Report, para.90 at p.82

¹⁹² *Denmark, Norway, Sweden and Netherlands v. Greece* (1969) 1 European Court of Human Rights, *The Greek Case*: Report of the Commission (1969): para.153

¹⁹³ See Nicholas Haysom, 'States of Emergency' in Halton Cheadle, Dennis Davis & Nicholas Haysom (2002) ***South African Constitutional Law: The Bill of Rights*** (Durban: Butterworths): Ch.31 at p.723

Emergency Situations, the Court held that Article 27 may be availed of in 'exceptional situations only'.¹⁹⁴

In one of the earliest standard setting exercises in this area, the Questiaux Report (1982) submitted to the UN Sub-commission on Prevention of Discrimination and Protection of Minorities, observed that emergency powers may only be invoked in 'exceptional circumstances', which in turn was described in the following terms:

"...temporary factors of a generally political character which in varying degrees involve extreme and imminent danger, threatening the organised existence of the nation, that is to say, the political and social system as a State, and which may be defined as follows: 'a crisis situation affecting the population of the whole and constituting a threat to the organised existence of the community which forms the basis of the State'...When such circumstances arise, then both municipal law, whatever its theoretical basis, and international law on human rights allow the suspension of the exercise of certain rights with the aim of rectifying the situation, and indeed protecting the most fundamental rights."¹⁹⁵

As noted earlier, the most widely quoted sets of principles reflecting international best practice are the Paris Minimum Standards and Siracusa Principles. The Paris Minimum Standards

¹⁹⁴ *Habeas Corpus in Emergency Situations*, Advisory Opinion, (1987) 8 Inter-Am.Ct.HR (ser. A) 33, OEA/ser.L/V/111.17.doc.13 (1987)

¹⁹⁵ Nicole Questiaux (1982) ***Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency***, UN ESCOR, 35th Sess., UN Doc.E/CN.4/Sub.2/1982/15 (1982), para.23 at p.8

were the result of an initiative by the International Law Association (ILA) to set standards on the protection of human rights during emergencies in the light of the general international law of human rights. The seventy-six Siracusa Principles on limitations and derogations were developed with specific reference to the derogations regime of the ICCPR.

Section (A), paragraph 1 (b) of the Paris Minimum Standards states that “The expression ‘public emergency’ means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed.”

Principle 39 of the Siracusa Principles states that a State may derogate from its obligations under the ICCPR by recourse to Article 4, “...only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: affects the whole of the population and either the whole of part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.” Principle 40 states that, “Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.” Principle 41 states that, “Economic difficulties *per se* cannot justify derogation measures.”¹⁹⁶

¹⁹⁶ See also Daniel O’Donnell (1985) ‘*Commentary by the Rapporteur on Derogation*’ 7 **Human Rights Quarterly** 23 at pp.23-25 (restating principles).

A broad confluence of opinion about the nature and applicable principles with regard to human rights in states of emergency are evident from these sources. As Gross and Ní Aoláin note with regard to the definitions outlined above, “These definitions point to a broad international consensus on the general contours of the term emergency, particularly with respect to its contingent and exceptional nature. Notwithstanding differences in nuance and emphasis, they accentuate the capacity for definitional agreement and the possibility for meaningful and robust oversight and accountability by law over claims of ‘public emergency’”.¹⁹⁷

4.1.2 Derogations

As we discussed above, the provision for derogating from certain treaty obligations during a state of emergency (i.e., to restrict certain rights protected by treaty) is the characteristic that makes the international regime of human rights applicable to Sri Lanka, the ICCPR (as well as of course the regional instruments elsewhere), a model of accommodation. Under the model of accommodation, furthermore, we know that legally recognising and providing for states of emergency is subject to several conceptual requirements. The three common features in this regard of the ICCPR and the regional instruments are (a) the distinction made between derogable and non-derogable rights, so that the latter set of rights cannot be restricted or suspended even in a state of emergency; (b) similar procedural requirements, namely those of declaration and notification; and (c) the principles of proportionality and consistency with the State’s other international obligations.

¹⁹⁷ Gross and Ní Aoláin: pp.251-252

All three instruments contain a list of non-derogable rights.¹⁹⁸ However, the Human Rights Committee has clearly stated that a State may not derogate from the obligation to protect a derogable right except without a high standard of justification, which will be subject to the Committee's anxious scrutiny. It has also stated that even where a right may be derogable under the ICCPR, it may not in effect be derogable if it is part of the peremptory norms of international law.¹⁹⁹

Like in the national constitutional systems we considered before, the ICCPR and the regional regimes require an explicit declaration or proclamation of a state of emergency. While some national systems also extend this procedural safeguard by requiring public notice, notification has a prominent role in the international regimes. The ICCPR, the ECHR and the ACHR require notification of derogations to the relevant treaty bodies as well as to other state parties to the treaty (except the ECHR). They also require States to provide reasons for the derogation and to notify termination. In General Comment No. 29, the Human Rights Committee has stressed the importance of these procedural safeguards to ensure that States are not permitted excessive recourse to Article 4 ICCPR, so that emergencies must be 'officially proclaimed', and that notification of derogation should "...include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law."²⁰⁰

¹⁹⁸ Article 4 (2) ICCPR; Article 15 (2) ECHR; Article 27 (2) ACHR

¹⁹⁹ UN Human Rights Committee (2001) General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (31st August 2001): para.11; hereinafter General Comment No.29

²⁰⁰ *Ibid*, para.17

But as Gross and Ní Aoláin observe, “In theory, these [procedural] mechanisms are reasonably well equipped to cope with the inception of an emergency. Their fundamental weakness revolves, however, around the willingness of states to be constrained by such procedures, and the willingness of international (and domestic) judicial and quasi-judicial bodies to enforce them robustly at the preliminary juncture.”²⁰¹ The validity of these observations are borne out by the Sri Lankan experience. The domestic judicial attitude as represented by the Supreme Court to co-operating with the treaty regime and enforcing the ICCPR, especially in relation to the First Optional Protocol has been one of outright hostility. In this context, the issue of enforcement of the ICCPR within the jurisdiction of Sri Lanka becomes an issue, which we discuss below.²⁰²

All three systems impose the principle of proportionality in respect of any derogating measure, as well as consistency with other international obligations. The purpose of proportionality is to ensure that a clear necessity for extraordinary measures restricting fundamental rights is established. In General Comment No. 29, the Human Rights Committee goes even further to state

²⁰¹ Gross and Ní Aoláin: p.261

²⁰² The issue has come to a head in the debate about the renewal of the ‘GSP Plus’ tariff benefits scheme of the European Union for Sri Lanka, which requires ‘ratification and full implementation’ by the beneficiary country of 27 international treaties including the ICCPR: see Centre for Policy Alternatives (2007) ‘*Press Release on the Draft Bill Purporting to enact the International Covenant on Civil and Political Rights (ICCPR)*’, 3rd October 2007; Rohan Edrisinha & Asanga Welikala (2008) ‘*GSP Plus’ Benefits: The Need for Constitutional Amendment*’ available at http://www.cpalanka.org/Newspaper_Articles/Article_on_ICCPR.pdf; Rohan Edrisinha & Asanga Welikala (2008) ‘*GSP Plus and Constitutional Reform: What We Did and Did Not Say*’, ***The Sunday Island***, 26th June 2008; discussion in Chapter 6, *infra*

that it would “...take a State party’s other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant.”²⁰³

4.1.3 Common Themes of Treaty Body Jurisprudence

In their survey of the jurisprudence of the judicial and quasi-judicial treaty bodies of the ICCPR, the ECHR and the ACHR, Gross and Ní Aoláin identify several ‘strategic concentrations in juridical thinking’, which are essentially commonalities of approach among these bodies to similar emergency related problems across the systems they monitor and enforce. In brief, these are as follows: (a) international courts and quasi-judicial bodies give greater leeway in derogation cases to democratic States than to non-democratic or illiberal ones; (b) they are also unable to satisfactorily deal with ‘problem’ emergencies, particularly permanent or enduring emergencies. This is because of a ‘profound conceptual lacuna’ in international human rights law which regulates an ‘ideal type emergency’ which in practice hardly ever exists. In reality, emergencies are ‘permanent, complex and *de facto*’, which the international regulatory regime cannot come to terms with jurisprudentially; (c) judicial examination of emergency powers have focussed on the substantive measures impacting on treaty guaranteed rights, but have generally not questioned the initial act of a declaration of emergency, and thereby the entire legal validity of the state of emergency and resultant derogations; (d) that regional systems are more robust than the Human Rights Committee in reviewing both the procedural and substantive aspects of a state of emergency within

²⁰³ General Comment No. 29, para.10; see for section 4.3, *infra*

a member State; (e) that derogation case law of all systems are substantially concerned with due process rights; and (f) that all systems are limited in their range of effective and genuinely responsive remedies.²⁰⁴

4.1.4 Overview of the Derogation Jurisprudence and Commentary of the Human Rights Committee

Further below, we will deal with the derogations regime under the ICCPR in some detail.²⁰⁵ However, some preliminary observations may be made here by way of explication of the general functional framework of the Committee under the ICCPR and what it can and cannot do in respect of derogations and states of emergency within the scope of Article 4 of the ICCPR. It is to be noted that the Committee's position under the ICCPR as a supervisory and enforcement mechanism is relatively weak in comparison to the European Court of Human Rights and the Inter-American Court. We discuss the strengths and weaknesses of the enforcement framework of the ICCPR in the next section.²⁰⁶ In relation to the Human Rights Committee, its role is encumbered with several problems.

The Committee does not function as an international court under the ICCPR which has the power to hand down binding decisions to States Parties. Provided a State has acceded to the First Optional Protocol, the Committee acts in an adjudicative capacity no doubt with regard to individual complaints, but the enforcement of its

²⁰⁴ Gross and Ní Aoláin: pp.264-268

²⁰⁵ Section 4.3, *infra*

²⁰⁶ Section 4.2, *infra*

'views' are dependent on the attitude to compliance of the State concerned. While many States have acceded to the ICCPR, signatories to the First Optional Protocol, arguably the most robust enforcement mechanisms contemplated by the ICCPR, are markedly less.

In respect of derogations and states of emergency, the Committee is also constrained by the framework set out in Article 4, although it has demonstrated it would hold States to high standards of compliance within that framework.

Perhaps the chief drawback of the Committee's enforcement capacity is the legal status of the Committee's 'views': in effect its judgments on the merits of individual complaints under the First Optional Protocol. Article 5 (4) of the First Optional Protocol only states that, "The Committee shall forward its views to the State Party concerned and to the individual." On the face of the text as well as in practice, this is an extremely weak provision. In Sri Lanka, various authors of communications who had obtained findings in their favour have had to institute further legal action in domestic courts in order to obtain the recommended remedies. Indeed, it was just such an attempt to have the Committee's views implemented by the State that gave rise to the *Singarasa Case*, which had the unintended and unpredictable consequences of Sri Lanka's accession to the First Optional Protocol, declared unconstitutional by the Supreme Court, in addition to a ruling that the ICCPR, without legislative enactment, created no rights at domestic law.²⁰⁷

²⁰⁷ See further discussion on this case and the Supreme Court's Advisory Opinion (2008) on the compliance of Sri Lankan law with rights recognised by the ICCPR in Chapter 6.

Within these institutional constraints, therefore, the Committee has been (a) generally reluctant to gainsay the initial political act of *declaration* of an emergency, although it has been far more robust in reviewing the *proportionality* of substantive measures.²⁰⁸ This goes to the heart of the question whether the right of derogation is the exclusive right of States guaranteed under international law (b) the Committee has also generally been unable to address the question of perpetuated emergencies, again arising out of the weaknesses of the State reporting procedure; and (c) notwithstanding (a) and (b), the Committee has demonstrated a willingness to challenge States and review excessive substantive emergency measures against the ICCPR standards as interpreted by it.²⁰⁹

Given the weakness of the supervision and enforcement framework of the ICCPR, seemingly dependent on the munificence, as it were, of domestic authorities as demonstrated in the Sri Lankan case, it is necessary to be clear about what this framework is. This is the subject of the next section.

4.2 International Protection vs. National Implementation: The Enforcement Framework of the ICCPR

A key feature of the ICCPR as one of the three instruments constituting the International Bill of Rights, is not only that it sets out a list of substantive rights in universal and mostly concrete

²⁰⁸ See *Jorge Landinelli Silva et al v. Columbia*, Communication No. R/15/64; *Consuelo Salgar de Montejo v. Colombia*, Communication no. 34/1978 in ***Selected Decisions of the Human Rights Committee under the Optional Protocol*** (1985)

²⁰⁹ See Gross and Ní Aoláin: p.298-299

terms, but also that it provides for supervision and monitoring of the observance of these rights in the form of procedural obligations for States Parties, and by the role envisaged for the treaty-body, the Human Rights Committee. This feature of the ICCPR is significant in that it brought the rule of law ideal as close to reality as seemed possible within the international legal system in the age before the special international tribunals and the International Criminal Court.²¹⁰

There are three principal mechanisms by which the Human Rights Committee is given competence to supervise States in respect of their treaty obligations: (a) the reporting procedure (Article 40); (b) Inter-State communications (Article 41 and 42); and (c) the provision in the First Optional Protocol for individual communications.

It is also to be noted that the general obligations imposed upon States Parties in Part II (Articles 2 – 5) are a significant accountability mechanism in that it requires explicit commitments to respect, protect and promote civil and political rights, including through the provision of effective remedies, and extending the protection of the ICCPR to all individuals within the territorial jurisdiction of a State Party irrespective of his or her citizenship status or rights. Moreover, the Committee is more generous than most national or supranational human rights regimes in respect of its admissibility criteria.

Finally, it is arguable that the requirement, used imaginatively by the Committee since 1981, to issue General Comments can also be

²¹⁰ Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?* in Philip Alston & James Crawford (Eds.) (2000) ***The Future of UN Human Rights Treaty Monitoring*** (Cambridge: Cambridge UP): p.15; p.27 et seq.

regarded as a positive mechanism of ensuring greater compliance. General Comments, at least notionally, are useful as interpretative guides to States Parties, promote certainty regarding the scope of substantive rights and limitations, and give guidance as to procedure.

Revolutionary as these provisions for the enforcement and supervision of the Covenant may have seemed at the time, there are significant obstacles and problems in their operation. The Human Rights Committee is not a judicial body that is empowered to execute judgments and punish defaulters, and as such, its *modus operandi* is very much in the realm of 'soft law' and the moral force of its mandate. Moreover, the broader Statist paradigm of international relations and law in which the ICCPR is obviously located, has also foreclosed certain options that could buttress a more robust human rights regime. Most notably, this relates to the role of national and international civil society and NGOs, which have a critical role in human rights monitoring, reporting and independent verification; but which under the present framework have no formal recognition.²¹¹ Likewise, it does not appear that the UN specialised agencies have any notable role within the framework of the ICCPR and its First Optional Protocol.

Correspondingly, States in which human rights protection is weakest have the most disappointing record of compliance with the Committee's views. The reporting obligations also have a disappointing record, with many States providing late and

²¹¹ *A Publication and a Printing Company v. Trinidad and Tobago*, Communication No. 361.1989; *UR v. Uruguay*, Communication No. 128/1982; see also Scott Davidson, 'Procedure under the Optional Protocol' in Alex Conte, Scott Davidson & Richard Burchill (2004) ***Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*** (Aldershot: Ashgate): Ch.1

incomplete reports. Perhaps unsurprisingly, the inter-state communication provision has never been used. In the case of individual communications, although more and more States are acceding to the Optional Protocol, it has been the case that the Committee's views have a habit of being ignored or generating hostility in States in which human rights concerns are most acute. The effect of the Committee's reports, General Comments, and Rules of Procedure also do not seem to have had a demonstrable impact on States meeting their treaty obligations. In the view of many commentators, the Committee has also been hampered by insufficient institutional support and resources.

On the other hand, the Human Rights Committee has built a solid reputation for independence, expertise, fairness and impartiality as a rules-based and adjudicative decision-making body, in contradistinction to most other international bodies which operate under the dictates and dynamics of international politics and diplomacy. Ironically, it appears that it is this very positive feature that makes it unable to exert the kind of political pressure or harness the media spotlight in the furtherance of human rights protection within States.

4.2.1 The Human Rights Committee

The rules relating to the establishment, membership requirements, composition, ensuring regional representation, quorum and enactment of internal rules of procedure, remuneration, and a detailed framework for elections to the Human Rights Committee, as well as the roles within this schema

of the Secretary General of the United Nations and of States Parties, are set out in Part IV (Articles 28 – 30) of the ICCPR.²¹²

The several competences of the Committee are to be found in Articles 40 (State Parties' reporting obligations and basic procedure), Articles 41 and 42 (Inter-State communications and the role of the Committee including conciliation) and in the First Optional Protocol (individual communications).²¹³

4.2.2 The Reporting Procedure

The reporting obligation is the main instrument of supervision in the ICCPR, and is compulsory for all States Parties. There are three kinds of reports: (a) Initial Reports; (b) Periodic Reports; and (c) Supplemental Reports.

Under Article 40 (1) and (2), a State Party's initial report must be submitted within one year of accession to the Covenant, describing the measures it has adopted to give effect to the rights established in the Covenant, and must also include reference to any constraints in giving effect to same. The Committee has decided in terms of Article 40 (1) (b) that periodic reports are to be submitted every five years by States. In exceptional cases, it may also call for special reports, and in others, supplemental reports in order clarify or seek fuller information. The Committee

²¹² See Javaid Rehman (2002) *International Human Rights Law: A Practical Approach* (London: Longman): Ch.4, pp. 83-84.

²¹³ See Steiner in Alston & Crawford (2000), op cit; Dominic McGoldrick (1991) *The Human Rights Committee* (Clarendon; Oxford): Chs.2-3; Rosalyn Higgins (1991) 'United Nations Human Rights Committee' in Robert Blackburn & John Taylor (1991) *Human Rights for the 1990s* (London: Mansell) p.67; Ineke Boerefijn (1995) 'Towards a Strong System of Supervision' 17 *Human Rights Quarterly* 766

has also issued guidelines regarding the form, content, and procedure for the submission of these reports.²¹⁴ In terms of Article 40 (4), the Committee is required to study the State report and transmit its reports along with general comments to the State Party and to ECOSOC. The Committee provides the State Party an opportunity to introduce its report and answer questions (including questions relating to follow up measures from previous reporting cycles) prior to drafting and adopting its views on the State report.²¹⁵

It has been pointed out that this approach of the Committee to the reporting procedure has engendered a more constructive relationship with State Parties. It seems to have encouraged States to not only meet their obligations in respect of timely submission, but has also enhanced the quality and completeness of their reports, as well as the importance they place in responding to the Committee's invitations to present and clarify such reports.

However, there are several criticisms of the reporting procedure that have emerged over the years.²¹⁶ Some of the more trenchant of these relate to the neutral and general nature of the Committee's annual reports (Article 45), precluding the opportunity to make State-specific recommendations and comments; the formal exclusion of NGOs and the limited role played by the specialised agencies; and, in the light of the Committee's inability to independently enforce its views where

²¹⁴ Rehman (2002), *op cit.*, p.84 et seq.

²¹⁵ McGoldrick (1991), *op cit.*, p.100

²¹⁶ *Ibid*, p.98 et seq.

necessary, the absence of any higher (political) body that can ensure compliance.²¹⁷

Most of these criticisms are valid ones. They occasion an appraisal of the reporting mechanism in the light of present circumstances. While the framework set out for reporting may have been groundbreaking at the time of drafting of the ICCPR, the subsequent consolidation of the ICCPR as evidenced by the growing body of the Committee's jurisprudence, the increasing acceptance by States of the universality of the rights set out in the Covenant, and the ever-increasing number of States wishing to accede to not only the Covenant, but also to the relatively more intrusive Optional Protocols suggest that a more robust reporting capacity for the Committee is now not only desirable, but also possible.

Likewise, there appears to be no continued justification that civil society is not given a more formal role to play in the reporting process. The international system is less State-centric now than in the 1960s, and civil society (the 'third sector') and empowered citizens play an increasingly prominent role in the participatory democratic governance paradigms on the ascendancy across the globe. In the context of the developing world, where international protection of human rights is perhaps most needed, the increasing recognition given to human rights benchmarks and civil society participation in development assistance models, would also suggest that access of NGOs to the Committee is in consonance with emerging trends.

It is also obvious that the Committee is best placed to perform an adjudicatory function within the international human rights system. However, this also means that it cannot engage in an

²¹⁷ Ibid, pp.100-102; Boerefijn (1995), op cit

advocacy role for its own views, without damaging its impartiality. In this context, it is undeniable that the political and diplomatic follow-through of the Committee's reports be undertaken by a different body (e.g., OHCHR; Human Rights Council).

4.2.3 Inter-State Communications

Articles 41 and 42 set out the rules in regard to inter-state communications in considerable detail, whereby States recognising this specific competence of the Human Rights Committee are able to communicate to each other regarding concerns they have about a State's compliance with obligations under the Covenant.²¹⁸ If the States Parties themselves cannot arrive, within set timelines, to a settlement on a communication at first instance, then the Committee provides its good offices in order to resolve the dispute. If this too fails, then there is provision for an *ad hoc* conciliation commission to attempt to resolve the matter amicably.

There are several structural as well as political limitations to this schema. Of the former, the activation of the procedure requires a declaratory acceptance of the Committee's competence in this respect (not automatic upon accession to the ICCPR), and neither the Committee nor the conciliation commission is entitled to decide the dispute. They may only suggest non-binding recommendations and good offices.

It is very hard to imagine within the political dynamics of the international legal system how such a framework could be useful,

²¹⁸ Rehman (2002), op cit, pp.88-89; see also P.R. Gandhi (1998) *The Human Rights Committee and the Right of Individual Access: Law and Practice* (Aldershot: Ashgate)

particularly one that is as convoluted and non-imperative as this. It is nonetheless remarkable for being contemplated in the bipolar international context of the 1960s.²¹⁹ It is hardly surprising that the mechanism has never been used. Perhaps with the growing importance of human rights as a principle of international law and practice, there may be a future role for this mechanism, but admittedly, even now this is a remote possibility.

4.2.4 Individual Communications

This is by far the most innovative mechanism in the ICCPR framework for human rights protection, enabling individuals to directly petition the Human Rights Committee upon exhaustion of domestic avenues of redress. This mechanism has been widely availed of by individuals, and is a significant element of the future development of the regime of international human rights protection. However, this right is only available to individuals in States that have acceded to the First Optional Protocol. The Protocol, which is in the form of a separate treaty, sets out the rules regarding who may author a communication to the Committee and under what circumstances. In brief, any individual claiming to be a victim of a violation of any right set forth in the Covenant may communicate a written complaint to the Committee, subject to having exhausted all domestic remedies. In addition to the latter, there are several other admissibility constraints including those relating to standing, although in many respects, the regime is liberal and inclusive.²²⁰

²¹⁹ Rehman (2002), *op cit.*, p.89

²²⁰ See esp. Davidson in Conte, Davidson & Burchill (2004), *op cit.*, Ch.1; Rehman (2002), *op cit.*, pp.92-101

The relevant State Party has an opportunity to respond to the allegations on both admissibility and merits. It may also inform the Committee regarding any remedial measures that have been taken subsequent to the communication. The Committee takes into account the information given by both the complainant and the State Party in arriving at its views.

Several concerns expressed by commentators²²¹ regarding the Committee's procedure in respect to expeditiousness and efficiency have now been addressed, with the result that all communications are now vetted by the Committee member serving as the Special Rapporteur on New Communications (having been screened by the Secretariat of the Office of the United Nations High Commissioner for Human Rights before). It then goes to the Working Group on New Communications where admissibility is decided by consensus. If there is no consensus at this stage, the matter is decided by the full Committee.

An increasing number of States have in the last one and half decades acceded to the Optional Protocol, indicating on surface a positive trend in human rights protection worldwide. Unfortunately, the reality is somewhat different with many States failing to take active measures to give effect to the Committee's views, routinely ignoring adverse findings, and in some cases displaying outright hostility.

The fundamental weakness, as any number of commentators point out, is that the Committee's views are legally non-binding, carrying only the force of moral suasion and some political

²²¹ McGoldrick (1991), op cit, Ch.4, esp. 202-246; J. Crawford, *The UN Human Rights Treaty System: A System in Crisis?* in Alston & Crawford (2000), op cit., Ch.1

influence.²²² The Committee has attempted to secure some follow up through the designation of a Special Rapporteur for this purpose, mandated, among other things, to conduct ongoing dialogues with States Parties on compliance as well as making on-site visits. These initiatives have, however, not produced any dramatic results, and have also been hampered by a lack of resources.

4.2.5 Conclusions

The ICCPR and the First Optional Protocol are salutary instruments of an important segment of human rights, and indeed for the establishment of some institutional arrangement for their protection and enforcement. They are important, both for their substance as well as their symbolism in terms of universal commitment to certain basic values relating to human dignity.

While substantial impediments to their implementation, and the realisation in tangible terms of the rights they espouse remain, including major structural obstacles inherent to the international legal system which continues to be dominated by the nation-state paradigm, it is to be observed that the global human rights movement is on an upward trend. The receptivity of States to these realities is reflected in the increasing number of States acceding to the Covenant and the Protocols.

²²² Rehman (2002), op cit., p.92; S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in Hurst Hannum (Ed.) (1999) **Guide to International Human Rights Practice** (3rd Ed.) (New York: Transnational Publishers): p.44 ; Steiner in Alston & Crawford (2000), op cit.

Nothing turns on the question whether such behaviour is motivated by strategic considerations or principled commitments – formal accession provides an appropriate complementarity for the adjudicative, norms-based and politically-neutral approach of the Human Rights Committee, provided that an institutional support structure for political and diplomatic follow through is developed.

4.3 International Human Rights Standards in States of Emergency: The Legal Regime of Derogations

As stated at the outset, the foregoing serves as a background to the discussion in this section on the legal regime of derogations as set out in international human rights law. Before embarking on this discussion, however, several preliminary clarifications are in order, the first of which must be the caveat that what follows is a descriptive and analytical account, and not a theoretically critical discussion. Thus, for example, the well known critiques of the theoretical assumptions of the international derogation regimes as being based on abstract ideal-types of what constitutes an emergency, and which do not accord with the reality of States' internal practices and other critical perspectives, are not discussed here. The purpose of the previous sections was to give an indication of some of these problems.

The derogation clause is a fundamental lynchpin of the three international human rights instruments (*viz.*, the ICCPR, the ECHR and the ACHR) that embody the model of legal accommodation of states of emergency. We noted that the African Charter does not contain a derogation clause and that for this and other reasons, it is not a model of accommodation. The main purpose of this section is to give an introduction to the principles underpinning and governing Article 4 of the ICCPR, the derogation clause of the

treaty-based international human rights regime applicable to Sri Lanka. Where necessary, reference will be made to the other instruments.

In this context, of fundamental significance is the proper appreciation of the difference between the concepts of 'limitation' and 'derogation' of fundamental rights. This is a pivotal consideration in the current state of the art in the design of modern constitutional bills of rights. Indeed, the particular schema of the ICCPR (and of the ECHR and ACHR) which establishes specific limitation clauses attaching to discrete rights, and a general derogation clause enumerating non-derogable rights, is now regarded as outmoded. The preferred approach is to provide for a scheme of derogation during states of emergency listing non-derogable rights, but in respect of ordinary limitations, to set out a single general limitations clause that limits permissible limits.²²³ In any event, the ICCPR uses both limitation clauses and a derogation clause, which in the ICCPR schema is differentiated by three factors:

1. *Circumstances of operation*: Limitations of rights are those that are allowed in normal times by ordinary legal measures. Derogations are only possible during a state of emergency that constitutes an exceptional threat to the life of the nation.
2. *Legal effects on rights*: Limitation clauses attach to specific rights and serve as permissible restrictions on the exercise of

²²³ See for the South African approach: Halton Cheadle & Dennis Davis, '*Structure of the Bill of Rights*', Dennis Davis, '*Rights*', Halton Cheadle, '*Limitation of Rights*' and Nicholas Haysom, '*States of Emergency*' in Halton Cheadle, Dennis Davis & Nicholas Haysom (2002) ***South African Constitutional Law: The Bill of Rights*** (Durban: Butterworths): Chs. 1,30,31

these rights. Derogation involves possible suspension of all the rights recognised by the treaty, except obviously the non-derogable rights, during a state of emergency, subject to the restraints set out in the derogation clause.

3. *International accountability*: Limitations on rights are undertaken by ordinary processes of law and are generally the domestic concern of States. Engaging the right of derogation requires notification of the proclamation of a state of emergency to the UN and other States Parties, including the specific rights being derogated from, reasons for derogation, and other circumstantial information.

Two further critical points must be mentioned. First, it has already been mentioned parenthetically in relation to General Comment No. 29 of the Human Rights Committee, that even rights that are susceptible to derogation under the ICCPR may in effect be non-derogable if they have become peremptory norms of international law. This presupposes a further and extra-textual limit on the right of derogation of States that have acceded to the ICCPR.²²⁴ Second, is the contention that some principles of the ICCPR derogation clause may have become, or are in the process of becoming, general principles of customary international law.²²⁵ The consequence of this is that even States that have not acceded to the ICCPR will have their right of derogation limited and regulated by customary international law. As Sri Lanka is a signatory to the ICCPR, (which incidentally does not allow withdrawals or denunciations once acceded to) our position is made clearer, and therefore the focus will be directly on Article 4 ICCPR, which states as follows:

²²⁴ See Section 4.3.4, *infra*

²²⁵ *Ibid*

“Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not discriminate solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

The formulation of Article 4 contains seven fundamental principles, which are of both procedural and substantive character. The key procedural principles are those relating to proclamation and notification, governing the determination of the actual existence of a state of emergency and invoking the exception of derogation. Of the principles regulating the substantive nature and limiting the scope of emergency measures, the central principle is that establishing the non-derogability of certain fundamental

rights under any circumstances, and include those of proportionality, non-discrimination, and consistency with other international obligations. The principle of exceptional threat is a mixture of procedural and substantive requirements. We may now discuss each of these in turn.

4.3.1 The Principle of Exceptional Threat

As we have seen, legally articulating what constitutes an emergency is a definitional problem in the theory relating to states of emergency, and different countries have various ways of dealing with it within their domestic legal regimes. At international law, the ICCPR defines this as a ‘public emergency which threatens the life of the nation’.²²⁶ The drafters’ intention was to formulate a definition that encapsulates the idea of an exceptional threat affecting the whole nation, and thereby to reduce, if not avoid the possibility of abuse of emergency powers by State Parties through availing themselves of the right of derogation too easily. What must be clearly understood is that what is permitted under domestic legal regimes does not necessarily allow State Parties to exercise the right of derogation under the framework of Article 4, in which the requirement of ‘exceptional threat’ must be established with evidence.

With regard to the apposite provision to Article 4 in the ECHR (Article 15), the European organs in the *Lawless Case* have defined the concept of exceptional threat as ‘a situation of exceptional and imminent danger or crisis affecting the general public, as distinct

²²⁶ Article 4 (1)

from particular groups and constituting a threat to the organised life of the community which composes the State in question.²²⁷ In the *Greek Case*, it was held that Article 15 applies to imminent threats, but the right to derogate can be exercised only when the State in question provides sufficient evidence to prove the existence of such a threat.²²⁸

In addition to the exceptional nature of the threat, the Human Rights Committee has held that derogations may only last as long as the emergency actually exists. Therefore it is clear that exceptional threats requiring derogations can only, within the meaning of Article 4, be of a temporary nature.

In the light of the textual formulation of Article 4 of 'exceptional threat' and its interpretation by the Human Rights Committee, Oraá provides the following useful summary of characteristics of the type emergency envisaged in the ICCPR:

1. The emergency must be actual or at least imminent; therefore an emergency of a 'preventive' nature is not lawful.
2. The emergency should be of such magnitude as to affect the whole of the nation, and not just part of it.
3. The threat must be to the very existence of the nation, this being understood as a threat to the physical integrity of the

²²⁷ *Lawless v. Ireland* (1960-1961) 1 Eur.Ct.HR (ser. B) 56 (Commission Report)

²²⁸ *Denmark, Norway, Sweden and Netherlands v. Greece* (1969) 1 European Court of Human Rights, *The Greek Case*: Report of the Commission (1969): para.153

population, to the territorial integrity, or to the functioning of the organs of the State.

4. The declaration of emergency must be used as a last resort once the normal measures used to deal with public order disturbances have been exhausted.
5. The declaration of emergency is a temporary measure which cannot last longer than the emergency itself; therefore, the so-called 'permanent states of emergency' are not lawful.²²⁹

In the Human Rights Committee's General Comment No. 29 of 2001 on States of Emergency (Article 4), replacing General Comment No. 5 of 1981, the Committee observed that, "Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature."²³⁰ It further stated that:

"Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary

²²⁹ Oraá: p.33

²³⁰ para.2

and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.”²³¹

4.3.2 The Principle of Proclamation

In addition to the proper determination of the existence or imminence of an exceptional threat, a further requirement of Article 4 in the invocation of the right to derogation by States is that of ‘official proclamation’.²³²

As we have seen, the requirement of official proclamation is a key feature of domestic regimes of constitutional and legislative accommodation of emergencies. One of the main rationales for requiring an official proclamation in Article 4 during its drafting was precisely the fact that most domestic regimes established this as a formal requirement. Inclusion of this requirement in Article 4 was thus a way of ensuring that States Parties complied with their own domestic procedures for the declaration of emergencies, and correspondingly to ensure against the incidence of extra-legal, *de facto* states of emergency without proper legal authority. As Oraá argues, “With this requirement, the [ICCPR] tries to prevent States which have not officially proclaimed the emergency from relying on the right of derogation.”²³³ However, it should be noted that

²³¹ para.3

²³² Article 4 (1)

²³³ Oraá: p.35

neither the ECHR nor the ACHR system requires an official proclamation.

As discussed at length before, most domestic regimes require a formal proclamation of a state of emergency due to the fact that emergencies and emergency powers usually entail restrictive consequences for the full enjoyment of fundamental rights, and also have the effect of altering the institutional balance and powers and functions between the different organs of government. Therefore, as Oraá observes, "...a formal declaration of emergency containing a clear account of all the exceptional measures taken provides an important *element of publicity* for those under the State's jurisdiction who would require to know the *exact extent of the limitations of their rights* and the *alteration in the distribution of powers among the organs of the State...*"²³⁴

If these factors constitute the rationale for the inclusion of the requirement of official proclamation, Article 4 does not specify which of the organs of the state as between the executive and legislature should be made competent to make such a declaration. This is perhaps as it should be, because each State has its own constitutional traditions within which, provided that the normative requirement of formal declaration is present and effective, each State may choose its own options. Countries such as South Africa, as we saw before, have devised sophisticated rules in this respect. By deliberately establishing procedures that require collaborative inter-relationships and checks and balances between the executive and the legislature on the matter of declaration of an emergency, the scope for unilateralist action by one or the other organ of government is reduced.

²³⁴ Ibid, emphasis added

The judicial or quasi-judicial control over the declaration of an emergency is a distinct if related matter. There are two aspects to this: (a) judicial control by domestic courts; and (b) control by international treaty bodies such as the Human Rights Committee. With regard to oversight by domestic courts there is divergence between different countries, wherein countries such as South Africa have unequivocally provided that all aspects of a state of emergency, including its declaration, are comprehensively susceptible to judicial review,²³⁵ whereas others such as Sri Lanka have expressly ousted judicial review in respect of the declaration.²³⁶

With regard to Article 4, the Human Rights Committee's oversight role over declarations, facilitated by the reporting mechanisms established by the ICCPR (discussed in general terms in the previous section), represents the international control mechanism of that treaty. For many years, the Committee was restrained from taking a more robust approach in this respect due to the dominance of principles such as State sovereignty, which were keenly defended particularly by countries belonging to the socialist bloc.²³⁷ However, the Committee seems now to be adopting a more vigorous role. In General Comment No. 29, it stated:

“Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially

²³⁵ Section 37 (3) of the South African Constitution

²³⁶ Article 154] (2) of the Sri Lankan Constitution

²³⁷ Oraá: p.49, fn.51

proclaimed a state of emergency. *The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.* When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; *it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4.* In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 *sufficient and precise information about their law and practice in the field of emergency powers.*²³⁸

4.3.3 The Principle of Notification

Article 4 (3) of the ICCPR (as well as the ECHR and the ACHR), requires States Parties availing themselves of the right of derogation to inform other States Parties ‘immediately’ through the UN Secretary General, of (a) rights from which they have derogated, (b) reasons therefor, and (c) communicate the date on which the act of derogation is terminated. This gives an indication of both the timeframe in which the requirement of notification must be met, and also the content of such notification.

With respect to the obligations of providing information that States Parties to the ICCPR undertake, an important distinction must be made at the outset between the principle of notification in

²³⁸ para.2, emphasis added

Article 4 (3), and the obligation to provide information under the reporting procedure in Article 40 and, in the case of individual communications, under Article 4 (2) of the First Optional Protocol. The fact that a State Party provides information under Article 40 or Article 4 (2) of the First Optional Protocol should never be seen as fulfilment of the obligation under Article 4 (3), because these are two different types of obligation with completely different aims. This is a salutary distinction.

The main rationale for the important procedural requirement of notification is that other State Parties are aware of the derogating State's position (and the contextual circumstances of the derogation), so as to be able to exercise their own rights under the ICCPR, specifically the inter-state complaints procedure. Notification also assists the Human Rights Committee in ascertaining the extent of their jurisdiction, and in the interpretation of Article 4, in respect of the particular factual situation within the derogating State. While this might seem sound as a theoretical proposition, as we saw before, there have been no instances in which any State has engaged the inter-state complaints procedure under the ICCPR. The experience, by contrast, under the ECHR has been markedly different, where the inter-state procedure has been the most successful mechanism of ensuring compliance with ECHR standards during times of emergency.

Nonetheless, there is a strong incentive behind the requirement of notification. Derogating States are obliged by this requirement to exercise that right publicly and with the knowledge of other States Parties and the UN. They are compelled thereby to fulfil many of the substantive requirements of Article 4, such as demonstrating that the derogating measures are 'strictly necessary' and

proportionate, in addition to conformity with domestic legal and constitutional stipulations.

There has been some debate about the legal effect of a failure by a derogating State to fulfil the requirement of notification, in regard to which there are two different aspects: (a) total failure to submit a notification, and (b) the partial failure to do so (i.e., where the notice of derogation is incomplete, contains insufficient information, or has not been sent within a reasonable time period.)

The total failure to notify a derogation raises an interesting legal problem. Does the State concerned entirely lose its right of derogation because of a failure of procedural compliance, or can the treaty body apply the derogation provisions to the State notwithstanding the failure? In principle, the right of derogation is a sovereign right of the State, not of any treaty body, and the failure to notify does not allow a treaty body to exercise a right that it does not possess. On the other hand, it is absurd that where a state of emergency in fact exists within a State, that the treaty body should apply standards applicable in a state of normalcy, merely because the State in question has failed, inadvertently or deliberately, to communicate its derogation.

The Human Rights Committee has maintained that under the reporting procedure,²³⁹ if a State has not notified a state of emergency, it is unable to take into account the difficulties faced by that State in the crisis in order to apply the leeway offered by a valid derogation. For example, in the dialogue following the significant 1983 report of Sri Lanka, Mr. Opsahl of the Committee stated that because there was a total failure of notification by Sri

²³⁹ Article 40 ICCPR

Lanka, it should be held accountable under the normal standards of the ICCPR.²⁴⁰ However, the Committee as a whole recommended that Sri Lanka duly declare and notify its state of emergency to other State Parties, which it did in 1984.²⁴¹ Unfortunately, this also was found to be too brief and without the adequate information required by Article 4 (3).²⁴²

With regard to current practice, the Human Rights Committee's General Comment No. 29 states:

“Such notification is essential not only for the discharge of the Committee’s functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that *the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in*

²⁴⁰ UN Human Rights Committee (1983), Report of Sri Lanka, CCPR/C/SR. 473 (1983)

²⁴¹ Sri Lanka (report reviewed on 3rd November 1983; notification, 21st May 1984; see also A/39/40, p.25, para.123

²⁴² UN Human Rights Committee, *Human Rights: Status of International Instruments*: notice of derogation by Sri Lanka, 21st May 1984

relation to the termination of derogation...The Committee emphasizes the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.”²⁴³

4.3.4 The Principle of Non-Derogability

Perhaps the central pillar of the entire human rights protection regime of the ICCPR, and of the other regional systems, the ECHR and the ACHR, as well as of progressive domestic constitutional bills of rights such as that of South Africa, is the principle of non-derogation from certain fundamental rights even in a state of emergency. These rights are considered so fundamental to human dignity that they cannot be suspended under any circumstances. In the ICCPR, this principle and the rights made subject to it, are set out in Article 4 (2), which states, “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” The rights thus enumerated in Article 4 (2) are: the right to life; freedom from torture and cruel, inhuman and degrading treatment; freedom from slavery and servitude; freedom from imprisonment merely due to non-fulfilment of a contractual obligation; prohibition on retroactive penal sanction; right to be recognised as a person before the law; and the freedom of thought, conscience and religion.

²⁴³ para.17, emphasis added

The point has often been made, with justification, that the list of non-derogable rights in the ICCPR betrays a quality of *ad hoc* selection. In the long drafting period of the ICCPR, this was due to the various compromises that had to be made between various States, which is true also of the ECHR and ACHR (although to a lesser extent because they are regional instruments negotiated between like-minded neighbour States, sharing *inter alia* a common regional history). In the result, Article 4 (2) of the ICCPR contains seven non-derogable rights, Article 15 (2) of the ECHR has four, and Article 27 (2) of the ACHR has eleven (including judicial safeguards to enforce the non-derogable quality of the rights so classified).

As Oraá explains, “In the drafting of the [ICCPR, the ECHR and the IACHR] there was unanimity on the necessity of including that principle in the derogation clause...Even though there was total agreement on this principle, the problem of establishing which rights should be made non-derogable was far from an easy task for the drafters [of the three treaties]. One of the striking features of the derogation clause of these treaties is that they contain a different list of non-derogable rights...The difficulty of agreeing on a concrete list non-derogable rights is well illustrated in the *travaux préparatoires* of the treaties.”²⁴⁴

By contrast, in the more ‘homogenous’ environment of national constitution-making, the example of South Africa, born out of a long and bitter experience of the abuse of emergency powers by the former apartheid State, illustrates not only the central significance given to this principle in the design of its bill of rights,

²⁴⁴ Oraá: pp.87-88

but also the deeply conceptualised basis on which the rights included in the list of non-derogable rights were selected.²⁴⁵

If there was international unanimity with regard to the inclusion of the non-derogation principle in the derogation clause of the ICCPR, what then was the rationale for the choice of the particular list of rights which were eventually included? Citing Hartman, Oraá suggests two criteria: "First, to include those rights which are absolutely fundamental and indispensable for the protection of the human being. Secondly, to include those rights the derogation of which by the State in public emergencies would never be justified because they have no direct bearing on the emergency."

²⁴⁶ While it is implicitly apparent that both criteria were at work in the ICCPR selection, it also appears that they have not been applied very consistently or coherently. Thus certain rights which are fundamental and requiring special protection have been excluded, whereas others which are not so fundamental and may not in any case be especially endangered during a state of emergency, have been included.

However, there are four non-derogable rights common to the ICCPR, the ECHR and the IACHR. These are the right to life, the freedom from torture, the freedom from slavery and servitude, and the non-application of retroactive penal laws. These rights are to be considered so important and fundamental that they are considered part of both customary international law and *jus*

²⁴⁵ Nicholas Haysom (1989) '*States of Emergency in Post-Apartheid South Africa*' ***Columbia Human Rights Law Review*** 140

²⁴⁶ Oraá: p.94; General Comment No. 29 makes direct reference to the second rationale in para.11

cogens.²⁴⁷ As Oraá observes, “These four rights constitute what has been called the ‘irreducible core’ of human rights.”²⁴⁸

In addition to this ‘irreducible core’ (as well as the other rights entrenched in Article 4 (2) as non-derogable), however, an important matter to bear in mind is that certain other rights and principles of the ICCPR are by implication also held to be non-derogable. According to Oraá, these are (a) the provisions related to the exercise of non-derogable rights (i.e., the right to an effective remedy and the prohibition on discrimination); (b) the provisions which contain general exceptions; and (c) the provisions related to the machinery of implementation (i.e., the inter-state complaints procedure, the individual complaints procedure, and the reporting procedure).²⁴⁹

In General Comment No. 29, the Human Rights Committee has added to and elaborated on those rights and principles that it would treat as non-derogable by recourse to general international law and other international human rights treaties:

“The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the

²⁴⁷ Oraá: p.96 et seq; Questiaux (1982), op cit., p.19; General Comment No. 29, para.11

²⁴⁸ Oraá: p.96

²⁴⁹ Oraá: p.102

Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”²⁵⁰

It is obvious that there is little meaning in classifying rights as fundamental and non-derogable, if provision is also not made for their enjoyment. In this respect, specifically important considerations are that they should be enforceable through the availability of an effective remedy, and that they should be enjoyed without discrimination. In the logic of the scheme of the ICCPR, therefore, during a state of emergency these two principles also become non-derogable in their application to those rights expressly entrenched as non-derogable. Thus, a State cannot deny an effective remedy against the violation of non-derogable rights, and a State cannot in fact discriminate in the enforcement or application of non-derogable rights, on the pretext that it cannot in law derogate from those rights.²⁵¹

²⁵⁰ para.11

²⁵¹ General Comment No. 29 affirms the right to an effective remedy in paras.14, 15 and 16, and the principle of non-derogation in para.8

The second type of principle established by the ICCPR, which is by implication non-derogable although not expressly set out in Article 4 (2), are those provided for in Article 5. Article 5 (1) prevents any State Party, group or person from engaging in any activity aimed at the destruction of any right recognised by the ICCPR, or limiting any right to a greater extent than is provided for in the ICCPR. Article 5 (2) also contains the prohibition on using any provision of the ICCPR as a pretext for limiting or derogating from human rights that are guaranteed, by either municipal law or other treaty, to a greater extent than the ICCPR. Implicit is also the principle that permitted restrictions cannot be used for any other purpose than the one prescribed by the ICCPR.

Thirdly, the provisions relating to the implementation machinery are also deemed to be non-derogable. As we have seen, the ICCPR implementation machinery, with their dependence on State Party co-operation, may seem weak enough. But to allow States to derogate from those provisions citing a state of emergency would be to totally defeat the checks and oversight provided by these mechanisms. Thus, it is essential to the scheme of the ICCPR that these provisions be regarded as non-derogable.

The current practice of the Human Rights Committee devotes serious attention to the principle of non-derogation, its scope, nature and application. In addition to the three areas considered above, General Comment No. 29, has now added a plethora of other principles and rights of international law that it would consider to be non-derogable. Briefly, these are (not being a conclusive list):

- Crimes against humanity (para.12, and for jurisdictional purposes the Committee would take into account the Rome

Statute of the International Criminal Court in its interpretation of ICCPR Article 4)

- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (ICCPR Articles 7 and 10)
- The prohibitions against the taking of hostages, abductions or unacknowledged detention are not subject to derogation (The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law).
- Certain elements of the international law of minority protection including the prohibition of genocide, non-discrimination and the freedom of thought, conscience and religion (the latter two of course being part of the ICCPR derogations clause)
- The prohibition on the deportation or forcible transfer of populations without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present (affirmed in the Rome Statute as a crime against humanity, and which cannot be violated under the permitted restrictions to ICCPR Article 12 relating to freedom of movement and residence).
- To engage in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence (being contrary to ICCPR Article 20).

Finally, it is clear from both the textual formulation of Article 4 (1) as well as General Comment No. 29 that there are three substantive conditions which must be adhered to by States seeking to derogate from rights during a state of emergency. These are the requirements that the derogating measures must only be 'to the extent strictly required by the exigencies of the situation' (i.e., the principle of proportionality), that such measures must 'not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' (i.e., the principle of non-discrimination), and that the measures are 'not inconsistent with...other obligations [of the State] under international law (i.e., the principle of consistency). Each of these substantive requirements, being conditions precedent to the invocation of the derogations clause, must be examined in turn.

Moreover, attention must be drawn to an important issue of legal construction raised in General Comment No. 29. Having enumerated the list of non-derogable rights in Article 4 (2), the Human Rights Committee makes the following observation:

"The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in article 4, paragraph 2, to article 18 [i.e., the freedom of thought, conscience and religion], a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of

derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party.”²⁵²

This is a salutary observation: the fact that a right is non-derogable under Article 4 (2) does not mean that during a state of emergency when there may be interference with the right in fact, that that interference will escape scrutiny by the Committee. The Committee will examine whether such interference is within the ‘four corners’ of the restrictions of the specific right allowed by the ICCPR. The legalistic response that the right is non-derogable, and therefore the State could not in law interfere with its enjoyment, will not preclude scrutiny by the Human Rights Committee.

4.3.5 The Principle of Proportionality

The principle of proportionality constitutes a general principle of international law, finding application in the customary international law of reprisals and self-defence, the humanitarian law of war, the law of non-forcible countermeasures, and in the law relating to the delimitation of the continental shelf. It is of course, a fundamental principle of the international law of human rights.

²⁵² para.7, emphasis added

In the theoretical development of the legal and political philosophy underlying human rights, one of the central problems was that of the question of how to balance the rights and freedoms of individuals with the public interest, with the principle of proportionality emerging as a device with which to determine the legality of the State's interference in the private sphere of rights. As Oraá states, "The same rationale lies behind its applicability in modern human rights law; the rights and freedoms recognised to individuals [*sic*] are not absolute or without limits; however, such limits must be proportionate to the legitimate aim pursued by the limitation. This has become a well-established principle in domestic as well as in international law."²⁵³ In the international law of human rights and the ICCPR, proportionality applies in respect of three major issues: (a) non-discrimination; (b) limitation clauses; and (c) the legal regime of derogations.

In the area of non-discrimination, international law recognises that not all types of discriminatory treatment or differentiation are bad in law; indeed, the maxim that equality demands that non-equals be treated unequally is now well-established in both international and municipal public law. The two criteria generally employed to determine whether negative discrimination has occurred are (a) whether the differentiation of treatment lacks an objective or reasonable basis, and (b) whether there is proportionality between the means used and the legitimate aim pursued.

Likewise in respect of limitation clauses, the jurisprudence of the adjudicatory organs of the ICCPR, ECHR and IACHR, suggests that limitations may be imposed on the exercise of rights only when necessary in a democratic society for reasons such as public order,

²⁵³ Oraá: pp.140-141

national security, and the protection of the rights and freedoms of others. The European regime is exemplary in this regard and the legality of a limitation is determined by (a) whether the purported limitation pursues an aim specifically allowed by the relevant limitation clause, and (b) whether the means used to so limit the exercise of a right is proportionate to the aim, i.e., whether the State's action in limitation is 'necessary in a democratic society.' Thus the principle of proportionality is inherent to the concept of necessity in a democratic society.

However, it is in respect of the legal regime governing derogations that proportionality assumes paramount importance, because, as Oraá has pointed out, it is the 'main substantive criterion' employed to assess the legality of derogating measures taken by a State in a state of emergency. Thus in ICCPR Article 4 (1), proportionality is embodied in the requirement that the derogation is only 'to the extent strictly required by the exigencies of the situation.' Oraá contends that two theoretical bases form the foundation of the principle of proportionality in the derogation clause. The first is derived from the principles set out in Article 29 (2) of the UDHR and Article 5 (1) of the ICCPR, "which embody a fundamental theory of limitation and imply that the extent of every limitation or derogation should be strictly proportionate to the need of defending the higher interest of society",²⁵⁴ and the second is found in the principle of self-defence in international law.²⁵⁵

In the application of the proportionality principle in respect of derogations, it is important to distinguish between four dimensions and sets of issues. The first is a situation in which a

²⁵⁴ Ibid, p.142

²⁵⁵ Paris Minimum Standards: para.5; Questiaux (1982), op cit, para. 60

government makes a declaration of emergency in bad faith, when there is in actual fact no emergency or crisis justifying the adoption of derogating measures. Here the issue of proportionality does not arise at all.

The second case is where a state of emergency actually exists, but where the question is whether the crisis is sufficiently grave enough to engage the principle of exceptional threat discussed earlier, or what the ICCPR has defined in Article 4 (1) as a 'public emergency threatening the life of the nation.' Thus here the question is one of degree (or proportion) of the threat. However, as Oraá observes, "this is not what can be called proportionality *stricto sensu*."²⁵⁶

The third scenario is where a crisis exists within the meaning of the concept of public emergency in Article 4 (1), and where the main question is whether the derogating measures taken by the State are proportionate to the threat. This is what Oraá identifies as proportionality *stricto sensu*.

The fourth case is a particular application of the above, in which a change of circumstances occurs during a declared state of emergency. As Oraá states, "Emergencies can have a dynamic nature, in the sense that the gravity of the circumstances can vary over a certain period of time. In these cases, the measures to deal with the emergency must also vary in accordance with the different degree of gravity of the circumstances. There must therefore be a certain proportionality in each of the phases of the emergency."²⁵⁷

²⁵⁶ Oraá: p.142

²⁵⁷ Ibid

The Human Rights Committee has repeatedly, and without challenge, affirmed its competence to review a State Party's compliance with the principle of proportionality. In this regard, it has held that the legitimacy and legality of resorting to derogating measures is justified only in cases where ordinary legislation and normal executive powers for maintaining law and order are insufficient for dealing with the emergency. Moreover, in consonance with the principle of exceptional threat discussed before, and the fundamental assumption throughout, that emergencies are exceptions to normalcy, derogating measures are justified only so long as the emergency lasts. Derogations must have a direct bearing and relation to the emergency. Thus, for example, the restriction of political rights in dealing with a natural disaster will not be regarded as valid. The Human Rights Committee has striven to assess specific measures of derogation for proportionality and necessity, although the insufficiency of detailed information has made this difficult. It has also attempted to examine not only the extent of derogating measures (in the context of the constitutional and legal frameworks of States Parties), but also how such measures operate in practice. Therefore, mere reference to abstract legal frameworks would not be sufficient; States Parties must also demonstrate the practical effect of how restrictions of rights under derogation actually operate. In this regard, the Committee would also examine the procedural and other safeguards in place to prevent abuses of human rights, even where a State has (validly) invoked the right of derogation.

In General Comment No. 29, the Committee made the following important observations with regard to the manner in which it applies the principle of proportionality: "A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are

limited to the extent strictly required by the exigencies of the situation. *This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.*²⁵⁸

Furthermore, “Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. *Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.* In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.”²⁵⁹

General Comment No. 29 also set out the Committee’s requirements for both a valid invocation of the right of derogation, as well as the specific measures taken thereunder:

“The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party’s obligations under the Covenant must be limited “to the extent strictly required by the exigencies of the situation”. This condition

²⁵⁸ para.4; emphasis added

²⁵⁹ Ibid, emphasis added

requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation."²⁶⁰

4.3.6 The Principle of Non-Discrimination

The principle of non-discrimination is the second substantive condition required by the ICCPR to be satisfied for a valid derogation to be made. While the principle itself is a value of much broader application within the framework of human rights protection envisaged by the ICCPR, it has a specific function in respect of derogations and its limits must be clearly understood.

The scope of the non-discrimination principle in the context of Article 4 (1) is limited by two factors. Firstly, it prohibits discrimination only on five grounds (i.e., race, colour, sex,

²⁶⁰ para.5

language, religion or social origin), and not on the other grounds encapsulated in the general prohibition on discrimination found in Articles 2 (1) and 26. The excluded grounds in the attenuated list in Article 4 (1) are political or other opinion, national origin, property, and birth or other status. Secondly, even in relation to the included grounds, what Article 4 (1) prohibits is discriminatory derogating measures based *solely* on those grounds. Therefore, the derogation clause allows derogating measures to discriminate even on grounds of race, colour, sex, language, religion or social origin, provided that the measures are connected to some other reasonably justifiable grounds, such as grave military exigencies which are demonstrably necessary to overcome the threat posed by the crisis.

While these limitations on the scope of application of the non-discrimination principle may be criticised, the *travaux préparatoires* of the ICCPR shows that they were based on practical policy grounds to ensure States' subscription to the treaty.²⁶¹ Moreover, as Oraá argues, "Although the extent of the non-discrimination provision is limited, its inclusion in the derogation clause is commendable because the risk of taking discriminatory measures based only on racial prejudice and hatred towards minorities is greater in situations of emergency."²⁶² However, he adds that "...derogating measures should be carefully scrutinised...in order to assess whether these measures have an objective justification, e.g. for military necessity, or are based exclusively on prejudice against minorities."²⁶³

²⁶¹ See Oraá: p.172-174

²⁶² Ibid, p.189

²⁶³ Ibid

The only occasion in which the Human Rights Committee dealt with an allegation of discrimination through emergency measures in contravention of the provisions of Article 4 (1) was in *Weinberger v. Uruguay* (1978),²⁶⁴ in which the communication alleged discrimination solely on grounds of political opinion. However, since the State Party was unable to substantiate an actual state of emergency in fact or law, and thereby the circumstances for a valid derogation, the Committee found in favour of the author of the communication on other grounds (Article 25) on the basis of normal standards used in peacetime.²⁶⁵

In General Comment No. 29, the Human Rights Committee adumbrated the following standards:

“According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. *Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provision in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.* In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the

²⁶⁴ *Weinberger v. Uruguay*, Communication No.26/1978, adoption of views, 29th October 1980, 11th Session

²⁶⁵ However, see the position under the ECHR in *Ireland v. UK*, 2 EHRR 25, and under the ACHR in the *Nicaragua – Miskitos Case*, IACHR, p.120

Covenant.”²⁶⁶

4.3.7 The Principle of Consistency

Article 4 (1) of the ICCPR provides that the right of derogation during an emergency is limited by the requirement that any such measures must not be inconsistent with the State’s other international obligations. As Oraá explains, “The operation of this legal criterion of the validity of the derogating measures can only come after all the other conditions of the derogation clause have been satisfied; in other words, after the [Human Rights Committee] has accepted that (1) there exists a public emergency threatening the life of the nation, (2) that the emergency has been officially proclaimed, (3) that there has been a valid notice of derogation, (4) that it has not affected a non-derogable right, (5) that the measure is strictly required by the exigencies of the situation, and (6) that it does not involve discrimination. Once the [Human Rights Committee] has been satisfied that these conditions have been met, it should check, in order to accept the validity of the derogating measure, that the latter does not conflict with the State’s other obligations under international law.”²⁶⁷

As the Human Rights Committee has observed in General Comment No. 29, “...article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation

²⁶⁶ para.8, emphasis added

²⁶⁷ Oraá: p.190

would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognised in other instruments on the pretext that the Covenant does not recognise such rights or that it recognises them to a lesser extent."²⁶⁸

While it would seem *ex facie* that the principle of consistency has very broad application, by enabling the Human Rights Committee to pronounce on States' compliance with other international obligations under treaty or customary international law, it should be noted that in fact, the scope of the principle is circumscribed by the requirement that a derogation under Article 4 must first be admitted for the principle to apply at all. Therefore, other international obligations cannot be implemented through the principle of consistency in Article 4. However, General Comment No. 29 contains the following advice:

“Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency. In

²⁶⁸ para.9

this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.”²⁶⁹

²⁶⁹ para.10

PART II

The Sri Lankan Experience of Emergency Powers

CHAPTER V

SRI LANKA'S CONSTITUTIONAL AND LEGAL FRAMEWORK REGARDING STATES OF EMERGENCY

5. Sri Lanka's Constitutional and Legal Framework regarding States of Emergency
 - 5.1. The Constitutional and Statutory Framework: Chapter XVIII and the PSO
 - 5.1.1. Emergency Regulations
 - 5.2. Special Anti-Terrorism Powers: The PTA
 - 5.3. Judicial Review of States of Emergency
 - 5.4. General Observations on Constitutional Framework on Emergencies
 - 5.4.1. The Definition of 'State of Public Emergency'
 - 5.4.2. Declaration, Extension and Termination
 - 5.4.3. Legal Effects
 - 5.4.4. Checks and Balances

The framers of the Second Republican Constitution of 1978 clearly perceived the declaration and the conduct of government in a state of emergency to be purely political and administrative matters; primarily the prerogative or right of the executive and to the extent oversight was contemplated, they vested Parliament with that responsibility. Whether this was driven purely on considerations of executive convenience or whether it was symptomatic of an underlying tendency to authoritarianism is a moot point.²⁷⁰ More palpable is the fact that those involved in the making of this particular constitutional scheme shared a political and legal philosophy that drew copiously from Dicey and Austin: in other words, imperial-era British legal doctrines about omnicompetence, plenary power, strong government, and command-theory positivism. This is why perhaps a recent commentator – with distinct overtones of the Diceyan conception of martial law and the common law doctrine of necessity – felt able to make the extraordinary assertion that:

“The subject of public security itself has been located within the constitution in chapter XVIII. By subjecting this area to the constitution the framers of the constitution have indicated that there is a natural aversion for the use of this subject for political and personal ends. The executive power of the land is free to declare an

²⁷⁰ See Parliamentary Series No.14 of the Second National State Assembly (1978) *Report of the Select Committee of the National State Assembly appointed to consider the revision of the Constitution*, 22nd June 1978: p. 141; Dissenting Report of the Members of the Sri Lanka Freedom Party: p. 149; Draft Article 149 on Public Security: p.602. See also A.J. Wilson (1980) *The Gaullist System in Asia: The Constitution of Sri Lanka (1978)* (London: Macmillan): pp.54-56; The ‘architect’ of the 1978 Constitution, President J.R. Jayewardene, first articulated his case for a presidential executive in December 1966, in a speech to the Ceylon Association for the Advancement of Science, cited in Wilson (1980), *op cit.*, p.1.

emergency without having to look over its shoulders to check whether there could arise a need, in the future, to answer in a court of law for declaring it. But thereafter the executive power remains answerable to the Supreme Court for the contents and for the application of the Regulations it might promulgate under such an Emergency. Such an arrangement clearly satisfies the interests of the principal parties. The state and the citizen.”²⁷¹

The central argument of this book is predicated on the belief that such an arrangement emphatically does *not* satisfy the interest of *the* principal party: the citizen. The executive power of the land must always be made to justify its measures before, during, and after an emergency. Based on the basic distinction between normality and the exception, reciprocal to the recognition that the State must be given special powers to deal with an emergency is the expectation that the operation of emergency powers is limited in time; that there are requirements of substantive justification prior to invocation of these powers; that there are effective mechanisms for approval, oversight and accountability; and that the substantive reach of emergency powers are constitutionally established and regulated, especially where fundamental rights are implicated.

This chapter describes the constitutional and statutory framework governing states of emergency in Sri Lanka, in terms of the institutional arrangements between the key organs of government and the scope of the substantive powers envisaged for the executive in dealing with crises. While the constitutional and

²⁷¹ Lakshman Marasinghe (2007) *The Evolution of Constitutional Governance in Sri Lanka* (Colombo: Vijitha Yapa): p.273

statutory framework is founded on the assumption that emergencies are the temporary exception to the norm of constitutional government, in practice what we have seen is that the fact of protracted and intractable conflict has made the exception the norm. Thus, apart from brief periods, emergency government has become institutionalised and normalised, with many of the empirical and structural consequences we discussed in detail in Chapter 3. Moreover, the special regime of anti-terrorism powers under the Prevention of Terrorism (Temporary Provisions) Act is not merely a nomenclatural misnomer; it has served to negate the fundamental analytical assumption of the legal accommodation model about the norm and the exception.²⁷²

This outline, which includes the judicial interpretation of the textual provisions, will be used to measure the Sri Lankan framework against the international and comparative standards discussed above in Part I of the book.

5.1 The Constitutional and Statutory Framework: Chapter XVIII and the PSO

The constitutional framework governing states of emergency is set out in Chapter XVIII, which primarily concerns procedural requirements and the oversight role of Parliament during their currency. The substantive powers brought into operation by a state of emergency are set out in the Public Security Ordinance No. 25 of 1947 as amended (PSO). The power to promulgate emergency regulations (i.e., the grant of legislative power to the executive) is provided under Part II of the PSO.

²⁷² See Chapter 1

A state of emergency is brought into being by Proclamation made by the President,²⁷³ which brings into operation the provisions of the Public Security Ordinance as amended.²⁷⁴ This includes the power to make emergency regulations by the President having the legal effect of overriding, amending or suspending the provisions of any law except the constitution.²⁷⁵ The same applies to statutes of Provincial Councils, which may be overridden, amended or suspended by emergency regulations.²⁷⁶

The sole discretion in issuing a Proclamation declaring a state of emergency is vested in the President, but which must be forthwith communicated to Parliament.²⁷⁷ The Proclamation is at first instance valid for a period of fourteen days and any continuation in force is subject to the approval of Parliament.²⁷⁸ If Parliament does not approve a Proclamation made under Article 155 (3), the declaration of emergency immediately ceases to be valid or of any force in law (but without prejudice to anything lawfully done thereunder).²⁷⁹

The Chapter sets out detailed rules as to how the approval of Parliament is to be obtained including provision for its immediate summoning if it stands adjourned, prorogued or dissolved. Subject

²⁷³ Article 155 (3)

²⁷⁴ Article 155 (1)

²⁷⁵ Article 155 (2)

²⁷⁶ Article 155 (3A) introduced by the Thirteenth Amendment to the Constitution (1987)

²⁷⁷ Article 155 (4)

²⁷⁸ Article 155 (6)

²⁷⁹ Article 155 (8)

to parliamentary approval, a Proclamation of a state of emergency operates for a period of one month, and may be further extended by one month at a time, although it may be revoked earlier.²⁸⁰ Before their repeal by the Tenth Amendment to the Constitution in 1986, the original paragraphs (8) and (9) of Article 155 provided that where a state of emergency has been in operation for a period of ninety consecutive days, or ninety days in aggregate within a period of six months, a resolution passed by a majority of two-thirds of members was required for a valid parliamentary approval of the continuing state of emergency. This safeguard is no longer available.

There was no provision for judicial oversight or review over the declaration or anything done in good faith under a state of emergency in Chapter XVIII, which makes Parliament the sole oversight and control mechanism of the executive during an emergency. However, Article 154J (2), which was introduced by the Thirteenth Amendment to the Constitution (1987), seeks to prohibit judicial review in respect of the making of the Proclamation. Some commentators have suggested that this was a response by the government to the Supreme Court's decision in *Joseph Perera v. Attorney General* (1992)²⁸¹ where the Court narrowed down the ouster clause in the PSO in respect of the promulgation of emergency regulations, and for the first time, struck down an emergency regulation as unconstitutional.²⁸²

²⁸⁰ Article 155 (5)

²⁸¹ *Joseph Perera v. Attorney General* (1992) 1 SLR 199 (decided in March 1987, eight months before the enactment of the Thirteenth Amendment in November 1987)

²⁸² Radhika Coomaraswamy & Charmaine de los Reyes (2004) 'Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience' I.CON, Vol.2, No.2, 272 at p.287

Chapter XVIII was predicated on the existing statutory framework governing public security set out in the PSO as amended from time to time. The Proclamation bringing Part II of the PSO into operation (i.e., the declaration of a state of emergency) is at the discretion of the President under Section 2. Under this provision, the President may issue such a Proclamation where, in view of the existence or imminence of a state of public emergency, he is of the opinion that it is expedient to do so, in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community.²⁸³

Sections 3 and 8 are the general ouster clauses, which provide respectively that 'the fact of existence or imminence...[i.e., the declaration]...of a state of public emergency shall not be called in question in any court' and 'no emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.'

Section 5 (1) is a general grant of law-making power to the President to make emergency regulations and Section 5 (2) enumerates, without prejudice to the generality of the power conferred under Section 5 (1), the various purposes for which emergency regulations may be made. These include provision for the detention of persons, commandeering and acquisition, entry and search, hearings, appeals and compensation for those affected by the regulation, and to require application, amendment or suspension of the operation of any law. Section 5 (3) is significant, especially in the light of the Chapter XVII framework and the *prima facie* ouster of judicial review in Sections 3 and 8, in that it

²⁸³ For a discussion of the meaning of the phrases 'in the interests of' and 'public order', see J.A.L. Cooray (1995) *Constitutional and Administrative Law of Sri Lanka* (Colombo: Sumathi): p.752, hereinafter Cooray (1995)

empowers Parliament to add to, alter, or revoke any emergency regulation by resolution.

In terms of Section 7, emergency regulations and any decision, order or rule made thereunder prevails over any other law. Part III of the PSO provides other rules, as special powers of the President, in matters connected with the exercise of emergency powers including calling out the armed forces in aid of the civil power, procedure for arrest, detention and executive review of detention, and the suspension of certain provisions of the Code of Criminal Procedure. As noted above, Section 8 seeks to oust judicial review of anything done under the PSO.²⁸⁴

5.1.1 Emergency Regulations

There is a large number of emergency regulations currently in force, dealing with a wide array of matters including terrorist activities, special administrative arrangements, high security zones, procurement and so on.²⁸⁵ For reasons of space, relevance and implications for the issues addressed in this book, however, the Emergency (Miscellaneous Provisions and Powers)

²⁸⁴ However, it was held in *Siriwardena v. Liyanage* (1983) 2 FRD 310, at 329 that Section 8 does not preclude the court from examining and ruling upon the validity of an order made under any impugned emergency regulation, and further, 'where an emergency regulation empowers an authority to make an order only if he is satisfied of the existence of certain facts, the Court can inquire whether it was reasonable for the authority to be satisfied of the existence of those facts. However, the evaluation of those facts is for the authority alone and the Court will not substitute its opinion for that of the authority.' See Jayampathy Wickramaratne (2006) *Fundamental Rights in Sri Lanka* (2nd Ed.) (Colombo: Stamford Lake): pp.124-126

²⁸⁵ See index of emergency regulations currently in force, *infra*

Regulations No. 1 of 2005²⁸⁶ and Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006²⁸⁷ are of particular significance, especially the latter. Both sets of regulations were promulgated in the wake of acts of terrorism: the assassination of Foreign Minister Lakshman Kadirgamar in August 2005 and the attempted assassination of Defence Secretary Gotabhaya Rajapakse in December 2006. Both sets of regulations give rise to serious concerns as to whether they represent an appropriate balance between legitimate national security and public order considerations, on the one hand, and rule of law and legality principles and fundamental human rights, on the other.

The 2005 regulations deal with powers of arrest, detention, search and seizure, trial procedure, evidence and admissibility of confession, and various other amendments to ordinary criminal procedure.²⁸⁸ The 2006 regulations seek to define 'terrorism' and 'specified terrorist activity' and to create offences in relation to terrorism and terrorist activities, in particular offences regarding 'transactions' with a terrorist group and information relating to terrorism and terrorist activities.

Regulation 6 of the 2006 regulations provides that no person or group, including an organisation, shall either individually, as a group, or through other persons engage in (a) terrorism, (b) any

²⁸⁶ *Gazette Extraordinary* No. 1405/5 of 13th August 2005

²⁸⁷ *Gazette Extraordinary* No. 1474/5 of 6th December 2006

²⁸⁸ Extensive commentary on the impact of these regulations on fundamental rights and their consistency with international standards in the International Commission of Jurists (2008) *Briefing Paper: Sri Lanka's Emergency Laws and International Standards*, June 2008 (forthcoming publication)

specified terrorist activity, or (c) any activity in furtherance of (a) or (b). Regulation 7 provides that no person shall, *inter alia*, promote, encourage, support, advise, assist or act on behalf of any person or group that is engaged in terrorism or specified terrorist activity. Regulation 8 is an unusual provision which provides that no person shall engage in any 'transaction' defined in very wide terms with a person or group acting in contravention of Regulations 6 and 7. However, in the first proviso to Regulation 8, it is provided that 'for the purposes of facilitating the development of a peaceful political solution, termination of terrorism... maintenance of supplies and services essential to the life of the community, conducting developmental activities, or for any other lawful purpose' any person including local and international NGOs could in good faith and the written approval of the Competent Authority,²⁸⁹ engage in any 'approved transaction' with persons or groups acting in contravention of Regulations 6 or 7. Moreover, Regulation 9 prohibits the provision of 'any information which is detrimental or prejudicial to national security' to any person or group.

Regulation 20 defines 'terrorism' as any unlawful conduct which (a) involves the use of violence, force, coercion, intimidation, threats, duress, or (b) threatens or endangers national security, or (c) intimidates a civilian population, or (d) disrupts or threatens public order and the maintenance of supplies and services essential to the life of the community, or (e) causes destruction or damage to property, or (f) endangering a person's life (other than

²⁸⁹ The Competent Authority is appointed by the President in terms of Regulations 15 and 16. Regulation 17 provides that any person aggrieved by a decision of the Competent Authority is entitled to appeal to the Appeals Tribunal constituted under Regulation 18, which comprises of the Secretaries to the Ministries of Defence, Finance, Nation-Building, Plan Implementation and Justice.

that of the person committing the act), or (g) creating a serious risk to public health and safety, or (h) is designed to interfere with or disrupt an electronic system; and which is aimed at (a) endangering the sovereignty and territorial integrity of Sri Lanka or any other recognised sovereign State, or (b) any other political or governmental change, or (c) compelling the government of Sri Lanka to do or abstain from doing any act, and includes any other unlawful activity which advocates or propagates such unlawful conduct. 'Specified terrorist activity' is defined as any offence specified in the PTA, the PSO, Section 3 of the Prevention of Money Laundering Act No. 5 of 2006, Section 3 of the Convention on the Suppression of Terrorist Financing Act No. 25 of 2005, and any offence under Sections 114, 115, 116, 117, 121, 122, 128, 129 of the Penal Code.

On the face of the text, the wide, overbroad language of these regulations could lend themselves to abuse, in that, in addition to dealing with activities that the State could legitimately restrain or prohibit in the interests of national security and the suppression of terrorism, they could also serve to curtail legitimate democratic activity and fundamental freedoms, dissent and the autonomy of civil society. In particular the wide range of activities prohibited by Regulation 6, 7 and 8, the definition of terrorism in Regulation 20 and the immunity clause, Regulation 19. These provisions are overbroad, drafted in very wide language, and where offences have not expressly been established, they allow for the possible criminalisation of a range of legitimate activities of civil society, and could violate constitutionally protected fundamental rights.

It is a cardinal principle of Sri Lankan criminal law²⁹⁰ and international human rights law²⁹¹ that laws creating criminal liability must be framed in clear and precise language. The principle of legality in criminal liability would be infringed if people cannot easily understand the nature of the offence, and if they cannot with sufficient certainty anticipate what conduct would lead to liability. Under international law, this requirement must be respected even in emergency law-making in a crisis context of armed conflict.²⁹² Vague, ambiguous and unclear legal definitions clearly contravene international law.²⁹³ Vague, ambiguous or overbroad language may also fall foul of the constitutional requirements upheld by the Supreme Court, where emergency regulations operate to restrict or abridge fundamental rights.²⁹⁴

The 'transaction clause', Regulation 8, is particularly repugnant to the principle of legality. It is formulated in such a way that virtually any act of, for example, journalists, civil society organisations and even private landlords, can give rise to potential criminal liability. These are strict liability offences and there is no

²⁹⁰ G.L. Peiris (1999) *General Principles of Criminal Liability in Sri Lanka* (Colombo: Stamford Lake): Ch.13

²⁹¹ See e.g. ICCPR Article 4 (2); ECHR Article 15; ACHR Article 27. See also UN Human Rights Committee, General Comment No. 29, para.7

²⁹² Ibid

²⁹³ UN Special Rapporteur on the Independence of Judges and Lawyers (1998) UN Doc. E/CN.4/1998/39/Add.1, para.129

²⁹⁴ See *Joseph Perera v. Attorney General* (1992) 1 SLR 199; *Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority, and Others* (2000) 1 SLR 314

mens rea requirement for any act of commission or omission, central to any conception of serious criminal liability. The first proviso to Regulation 8, however, provides for exemptions to engage in approved transactions in certain circumstances such as the furtherance of peace and the termination of terrorism with the written permission of the Competent Authority appointed by the President. This will give the Competent Authority, sweeping discretionary power over the activities, *inter alia*, of civil society organisations including those committed to human rights, national reconciliation and also the media. Such powers will give the government excessive control over civil society organisations which is incompatible with the freedom of expression and association and other freedoms which are necessary for the independence and autonomy of such organisations.

The dangers of these regulations are made worse by the fact that an appeal from the decision of one presidential appointee, the Competent Authority is to be made to an Appeals Tribunal consisting entirely of other presidential appointees, the Secretaries to the Ministries of Defence, Finance, Nation-Building and Justice. There are two principled objections to this arrangement. The first is that it is in breach of international law, which requires a right of appeal from an administrative decision to an independent judicial body. Secondly, conferring what amounts to at least quasi-judicial powers to persons in the executive branch of government is a violation of the principle of separation of powers and is an unconstitutional encroachment into the judicial sphere. Furthermore, it is fanciful to believe that a tribunal consisting of Secretaries to Ministries can function as an independent appeals body.

The wide immunity clause, Regulation 18, also gives rise to serious concern. It seeks to provide immunity from suit to public

servants and other authorised persons, who act in good faith in the discharge of their official duties. This sadly reflects a wholly obsolete attitude to the accountability of administrative action,²⁹⁵ especially where fundamental rights are implicated, and could be used, as so often in the past, to protect members of the police, armed forces and other persons who may infringe fundamental rights in the discharge of their duties or under colour of office. Given the wide ranging powers provided to the State and its officers under these regulations, the absence of independent review, the history of abuse of similar draconian legislation, including the Prevention of Terrorism Act, to stifle legitimate democratic activity and political dissent, and the culture of impunity that has developed in Sri Lanka in recent years in particular, such a clause could easily become one that promotes impunity rather than providing for immunity for *bona fide* actions.

5.2 Special Anti-Terrorism Powers: The PTA

Special anti-terrorism powers are provided in the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended (PTA). The sweeping powers given to the executive by the PTA are in the nature of emergency powers, but the exercise of those of those powers are independent of and not subject to even the limited oversight framework of conventional emergency powers (such as proclamation and periodic parliamentary approval) under Chapter XVIII and the PSO. The PTA's first point of departure from the liberal conception of the rule of law therefore is that it reverses the assumption of exceptional circumstances that is at the root of the conceptual justification for granting

²⁹⁵ See the majority decision in *Carltona Ltd. v. Commissioners of Works* (1943) 2 All ER 560 and Lord Atkins' dissent, and *Yasapala v. Wickremasinghe* (1983) 1 FRD 143, discussed below

extraordinary powers to the executive under the models of legal accommodation. From the perspective of international standards, this means that the regime envisaged by the PTA falls foul of the important procedural safeguards of declaration, notification, and periodic approval and oversight.²⁹⁶

The PTA was enacted in 1979 as a temporary measure,²⁹⁷ as an element of the then government's political and military strategy in dealing with the early stages of the low intensity insurgency in the North of the island. The process of its enactment through the procedure under Article 84 is also noteworthy. Article 84 is a bizarre provision which permits bills that are inconsistent with the constitution to be passed by a two-thirds majority in Parliament. Article 120 (c) precludes the pre-enactment constitutional review jurisdiction of the Supreme Court in respect of the substance of such bills falling within the scope of Article 84. Thus under these provisions of the constitution, provided the requirement of a two-thirds majority is met, it is possible to enact laws that are inconsistent with any provision of the constitution, including fundamental rights. As Mark Fernando J. observed in *Weerawansa v Attorney General* (2000): "When the PTA Bill was referred to this court, the court did not have to decide whether or not any of those provisions constituted reasonable restrictions on Articles 12 (1), 13 (1) and 13 (2) permitted by Article 15 (7) (in the interests of national security etc), because the court was informed that it had been decided to pass the Bill with two-thirds majority (SC SD No. 7/79, 17.7.79). The PTA was enacted with

²⁹⁶ See Chapter 3, section 3.1 and Chapter 4, sections 4.3.2 and 4.3.3, *supra*

²⁹⁷ Section 29 of the original enactment expressly provided that it would be in force only for a period of three years, but this was repealed by the Prevention of Terrorism (Temporary Provisions) Amendment Act No. 10 of 1982

two-thirds majority, and accordingly, in terms of Article 84, PTA became law despite many inconsistencies with the constitutional provisions.”²⁹⁸

The PTA contains a three-paragraph preamble that outlines the underlying government policy, that public order has become endangered by elements that advocate the use of force or the commission of crime as a means of accomplishing governmental change, and which have resorted to acts of terrorism including murder, armed robbery, coercion, intimidation and violence; that free institutions can only remain so when freedom is founded on the rule of law; that grievances should be redressed by constitutional methods; and (perhaps by way of legitimisation) that other democratic countries have enacted special legislation to deal with acts of terrorism.

Notwithstanding these lofty ideals, the PTA's less than admirable inspiration were apartheid South Africa and Britain's counterterrorism legislation of the same name. It flies in the face

²⁹⁸ *Weerawansa v. The Attorney General and Others* (2000) 1 SLR 387 at 394-395. In this case the court also held that a suspect arrested under Section 6 (1) of the PTA is entitled to be informed of the reasons for arrest, and under Article 13 (2) of the constitution, to be entitled to a hearing by a competent court regarding the validity of the arrest, notwithstanding Section 9 (1) of the PTA which provides for detention by ministerial order.

of almost every human rights norm²⁹⁹ pertaining to the liberty of the person, including most prominently, detention without charge for extended periods of time at irregular places of detention, the broad denial of detainees' rights, admissibility of confessions in judicial proceedings subject only to the most tenuous of safeguards,³⁰⁰ the shifting of the evidential burden of proof to the defendant, and disproportionate penalties.³⁰¹ The unchecked detention powers, special trial procedures and absence of meaningful review in the PTA facilitate arbitrary and capricious official conduct, including torture. The PTA also makes serious incursions into the freedom of expression and the media by requiring in certain circumstances governmental approval for printing, publishing and distributing publications and

²⁹⁹ For near universal international condemnation of the PTA, see: Virginia A. Leary (1981) *Ethnic Conflict and Violence in Sri Lanka*, Report of a Mission to Sri Lanka in July-August 1981 on behalf of the International Commission of Jurists: p.75; UN Human Rights Committee (2003) *Concluding Observations of the Human Rights Committee*, UN Doc. CCPR/CO/79/LKA, 1st December 2003, para.13; Patricia Hyndman (1985) *Sri Lanka: Escalating Violence and Erosions Of Democracy*, Interim Report of the Fact Finding Mission to Sri Lanka, 17th to 22nd February 1985, for LAWASIA Human Rights Standing Committee, 21st March 1985: *LAWASIA Human Rights Bulletin* (1985) Vol.3, No.2; International Commission of Jurists (2008) *Briefing Paper: Sri Lanka's Emergency Laws and International Standards*, June 2008 (forthcoming publication); Ganeshalingam, op cit., fn. 303

³⁰⁰ See, however, *Nagamani Theivendran v. The Attorney General* (2002) SCM 16th October 2002

³⁰¹ See Chapter 4, section 4.3.5, *supra*

newspapers.³⁰² For these reasons, the PTA represents an aberration of the rule of law upon which the constitutional order of Sri Lanka is ostensibly based, and has been the gateway to systematic abuse of human rights, giving rise especially to gross ethnic discrimination in its implementation.³⁰³ It has also proved to be patently an entirely unsuccessful law in terms of the purposes for which it was enacted.³⁰⁴

5.3 Judicial Review of States of Emergency

The Sri Lankan judiciary has traditionally been conservative in holding the executive to account, especially in respect of the exercise of powers under emergency law. Several of the pre-republican era cases in this regard concerned challenges on the

³⁰² Part V (Prohibition of Publications). According to media sources, a journalist has been charged for the first time under these provisions when Mr. J.S. Tissainayagam was indicted on or about 18th August 2008 in the Colombo High Court, on matters directly arising out of the practice of his profession. See the statement of the Free Media Movement (FMM) and related reports and links at <http://www.freemediasrilanka.org/English/news.php?id=1050§ion=news>. In a case that raises a number of issues in respect of the matters dealt with in this book, Mr. Tissainayagam was held in detention without charge in the custody of the Police Terrorist Investigation Department (TID) between 7th March and 20th August 2008, when he was moved to remand prison.

³⁰³ For an excellent concise introduction to the provisions of and practice under the PTA measured against the standards of human rights protection established by the ICCPR and the jurisprudence of the Human Rights Committee, see S.V. Ganeshalingam (2002) *'PTA violates International Human Rights Standards', Beyond the Wall*, June-August 2002 issue (Colombo: Home for Human Rights)

³⁰⁴ See N. Manoharan (2006) *Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy*, Policy Studies 28 (Washington DC: East-West Center)

question whether executive law-making under Section 5 of the PSO was an unconstitutional alienation of the legislative power of Parliament. Based on the doctrine of delegation, however, this issue was settled that the PSO and regulations made under it were valid and that there was nothing in the PSO to suggest that Parliament had abdicated its legislative power. In *Weerasinghe v. Samarasinghe* (1966), Sansoni C.J., held that, “One thing is essential for the validity of a delegation of [Parliament’s] law-making power, and that is that it should not abandon its legal authority to which it has delegated the power. It must not transform the executive into a parallel legislature and abdicate its function.”³⁰⁵ The two republican constitutions have expressly provided for emergency rule-making by the executive, and therefore, the more common question to be determined by the courts in respect of impugned regulations or executive and administrative action nowadays is the question of *vires*.³⁰⁶

In regard to executive and administrative action under emergency regulations, it was held in *Hirdaramani v. Ratnavale* (1971) that if an order (in this case, a detention order by a Permanent Secretary made under authority of an emergency regulation) was produced and was valid on its face, it was for the petitioner (in this case,

³⁰⁵ *Weerasinghe v. Samarasinghe* (1966) 68 NLR 361 at 363; see also H.M. Zafrullah (1981) ***Sri Lanka’s Hybrid Presidential and Parliamentary System and the Separation of Powers*** (Malaya UP): pp.59-61

³⁰⁶ Articles 16 (1), 155 (1) and 168 (1) of the 1978 Constitution; *Wickremabandu v. Herath* (1990) 2 SLR 348. On the reasoning of the Supreme Court in *Yasapala v. Wickremasinghe* (1983) 1 FRD 143, Cooray has noted that the President’s power of making emergency regulations under the 1978 constitution is ‘co-extensive’ with that of Parliament, except for the limitation as to the period during which emergency regulations are in force. The ‘limitation’ is that found in Article 155 (3) to the effect that emergency regulations override law made by Parliament. Cooray (1995), op cit, p.750, fn.3

the detainee) to establish a *prima facie* case against the good faith of the Secretary, and that the petitioner must prove the facts necessary to controvert the matter stated in the order, namely that the Secretary was of the opinion that it was necessary to make the detention order for the purpose specified in the order itself.³⁰⁷ *Hirdaramani v. Ratnavale* (1971) and similar cases followed the (now discredited) reasoning of the majority in *Liversidge v. Anderson* (1942)³⁰⁸ where it was held that the court could not enquire into the grounds for the belief that led to the making of the order under emergency powers. It was a matter for administrative discretion, although the court may examine positive evidence of *mala fide* or mistaken identity. As Cooray observes, the essence of the decision was that, “In regard to a ‘political and non-triable issue an objective test of reasonableness could not be applied but only a subjective test.”³⁰⁹ The majority in *Liversidge* relied on the *dictum* of Goddard L.J. in *Greene v. Secretary of State* (1942) that, “...where on the return an order or warrant which is valid on its face is produced, it is for the prisoner to prove the facts necessary to controvert it.”³¹⁰

It is, however, the celebrated dissent of Lord Atkin in *Liversidge* that has come to be regarded as the correct view on both the

³⁰⁷ *Hirdaramani v. Ratnavale* (1971) 75 NLR 67. See also *Gunasekera v. De Fonseka* (1972) 75 NLR 246.

³⁰⁸ *Liversidge v. Anderson* (1942) AC 206

³⁰⁹ Cooray (1995), op cit., p.575; the counterparts of UK these cases in the US are the Japanese-American internment cases during World War II: *Korematsu v. United States* (1944) 323 US 214; *Hirabayashi v. United States* (1943) 320 US 81. The issues raised by these difficult cases within the model of constitutional accommodation of states of emergency was discussed extensively in Chapter 3, section 3.2.2, *supra*

³¹⁰ *Greene v. Secretary of State* (1942) AC 284

merits as well as the statement of English legal principles,³¹¹ where he delivered the withering opinion that he viewed "...with apprehension the attitude of judges, who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive minded than the executive." Lord Atkin disagreed with the majority that the burden of disproving the good faith of the executive should lie with the petitioner: "Who could dispute the good faith of the Secretary of State or disputing it, prove the opposite?" His Lordship also stated, "In English law every imprisonment is *prima facie* unlawful and it is for a person directing imprisonment to justify his act."³¹² As Cooray notes, "Eleven years earlier in a Privy Council decision (*Eshugbayi Eleko v. Government of Nigeria*)³¹³ Lord Atkin made a similar statement: 'In accordance with British jurisprudence no member of the Executive can interfere with liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.' This statement of Lord Atkin was cited by Abrahams C.J. in the landmark case of *Bracegirdle*."³¹⁴

In keeping with this older tradition of deference (exemplified in cases such as *Hirdaramani v. Ratnavale* (1971)), judicial attitudes in respect of executive accountability during emergencies, the

³¹¹ See Cooray (1995), op cit., pp.757-758; *R v. Inland Revenue Commissioners, ex parte Rossminster Ltd* (1980) AC 952 per Lords Diplock and Scarman; *Nakkuda Ali v. Jayaratne* (1951) AC 66 (Privy Council), (1950) 51 NLR 457 (Supreme Court of Ceylon); *R v. Home Secretary, ex parte Khawaja* (1984) AC 74

³¹² *Liversidge v. Anderson* (1942) AC 206 at 245

³¹³ *Eshugbayi Eleko v. Government of Nigeria* (1931) AC 662 at 670

³¹⁴ Cooray (1995), op cit., p.758; *In re Bracegirdle* (1937) 39 NLR 193 at 212

Supreme Court was initially restrained in the engagement of its fundamental rights jurisdiction under Article 126 of the 1978 Constitution, which contemplated a more robust role for the court in the enforcement of justiciable positive rights against executive and administrative action.

Thus for example in *Yasapala v. Wickremasinghe* (1980), the Supreme Court held that the President was the sole arbiter of the circumstances necessitating a Proclamation of emergency and was not bound to state reasons for that decision. Sharvananda J. held that, "It is not competent for the Court to examine whether a Regulation was reasonable in the circumstances or likely to achieve the object of defusing the emergency. It is not the *objective fact* but the *subjective opinion of the President* that it is necessary or expedient to pass a regulation that is a condition of the regulation-making power."³¹⁵ His Lordship relied on a number of Commonwealth cases, but primarily on the opinion of Lord Greene M.R. in *Carltona Ltd. v. Commissioners of Works* (1943) to the effect that. "All that a Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspects of the transaction."³¹⁶

However, the Supreme Court soon started developing a more assertive role. In *Edirisuriya v. Navaratnam* (1985), the Court

³¹⁵ *Yasapala v. Wickremasinghe* (1980) 1 FRD 143 at 155-156, emphasis added; *Janatha Finance and Investments v. Liyanage* (1982) 2 FRD 373

³¹⁶ *Carltona Ltd. v. Commissioners of Works* (1943) 2 All ER 560 at 564; see also *Bhagat Singh v. King Emperor* (1931) AIR 111 (PC); H.W.R. Wade & C.F. Forsyth (1994) **Administrative Law** (7th Ed.) (Oxford: Clarendon Press): p.442 et seq.

struck down a detention order after an investigation into the circumstances of the impugned detention and in *Nanayakkara v. Perera* held that reasons for arrest and detention must be given to the detenu.

As mentioned before, *Joseph Perera v. Attorney General* (1992) established the test of rational or proximate nexus between the impugned emergency regulation and the harm or mischief sought to be averted. Sharvananda C.J. held that, in terms of Article 155 (2) of the constitution, "...the President's legislative power of making Emergency Regulations is not unlimited. It is not competent for the President to restrict via Emergency Regulations, the exercise and operation of the fundamental rights of the citizen beyond what is warranted by Articles 15 (1-8) of the Constitution...*The grounds of restriction specified in the limitation Article 15 are exhaustive and any other restriction is invalid.*"³¹⁷ The Chief Justice went on to hold that:

"The regulation owes its validity to the subjective satisfaction of the President that it is necessary in the interest of public security and public order. He is the sole judge of the necessity of such regulation and it is not competent for this court to inquire into the necessity for the regulations *bona fide* made by him to meet the challenge of the situation. But under Article 15 (7) of the Constitution it is not all regulations, which appear to the President to be necessary or expedient...which can impose restrictions on the exercise and operation on fundamental rights. It is only regulations which survive the test of being in the interests of national security,

³¹⁷ *Joseph Perera v. Attorney General* (1992) 1 SLR 199 at 214-215, emphasis added

public order...[sic] in terms of Article 15 (7). In a contest regarding the validity of a regulation, *the President's evaluation of the situation that the regulation appeared to him to be necessary or expedient is not sufficient to lend validity to the regulation.*

The regulation to be valid must satisfy the objective test that it is in fact in the interest of national security, public order, etc. *It is competent to the court to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental rights by the Emergency Regulation and the object sought to be achieved by the regulation...*"³¹⁸

Thus in *Karunathilaka v. Dissanayake No.1* (1991),³¹⁹ the Supreme Court employed the test of rational nexus to hold that a purported postponement of a Provincial Council election under emergency regulations (seeking thereby to circumvent the bar on postponement under ordinary law) was invalid. In *Wickramabandu v. Herath* 1990),³²⁰ the Court held that the invocation of the grounds of restriction of Article 13 under Article 15 (7) was subject to a judicially determined standard of reasonableness. This encompasses the test established in *Joseph Perera*.

Perhaps one of the most extensive judicial expositions of the law ,relating to how the restrictions of fundamental rights

³¹⁸ Ibid, p.216-217; emphasis added.

³¹⁹ *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* (No.1) (1999) 1 SLR 157

³²⁰ *Wickremabandu v. Herath and Others* (1990) 2 SLR 348

recognised in Article 15 may be validly imposed through emergency regulations, is to be found in the unanimous judgment of the Supreme Court delivered by Amerasinghe J. in *Sunila Abeysekera v. Ariya Rubesinghe* (2000).³²¹ In this decision, Amerasinghe J. considerably expanded the test of rational nexus and the general concept of reasonableness by enunciating a tripartite test of constitutionality for emergency regulations seeking to restrict fundamental rights. The court explicitly based this test on that established in the European Convention of Human Rights which involves an exploration into whether restrictions are prescribed by law, have a legitimate aim, and are necessary in a democratic society.³²²

Thus, in addition to the bare requirement of legality established by the constitution, it would appear that the courts have now added public law concepts such as necessity, rationality, reasonableness and proportionality as procedural and substantive requirements of justification expected of the executive in the exercise of emergency powers where they restrict or inhibit fundamental rights.

5.4 General Observations on the Constitutional Framework on Emergencies

The preceding description of the general constitutional and statutory framework governing states of emergencies, its judicial interpretation, as well as the special counterterrorism legislation

³²¹ *Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority, and Others* (2000) 1 SLR 314

³²² See Asanga Welikala (2000) '*The Censorship Case: An Immanent Critique*', *Moot Point*, Vol.4 (Colombo: Centre for Policy Alternatives): p.8

in force, gives rise to several issues when viewed against the conceptual requirements of the models of accommodation and international standards set out in Part I of this book. The general observations in this section are grouped under the main elements of a framework of emergency powers in the discussion in Part I: (a) the definition of emergency; (b) the legal framework for the declaration, extension and termination of an emergency; (c) the legal effects of a declaration of emergency; and (d) the framework of institutional checks and balances. These elements, or conceptual features, of the model of legal accommodation of emergencies as we saw, inform both the design of constitutional frameworks for states of democracy in liberal democracies as well as the derogation framework under the ICCPR. The following discussion should thus be treated as an exercise in recapitulative assessment of the Sri Lankan framework in the light of these conceptual, comparative, international considerations.

5.4.1 The Definition of 'State of Public Emergency'

The Sri Lankan constitution in Chapter XVIII does not provide a formal definition of what conditions precipitate and constitutes a state of emergency. Instead, the description or definition of the conditions that may give rise to the implementation of emergency powers are provided in Section 2 (1) of the PSO. The PSO is the statutory elaboration of the constitutional framework in Chapter XVIII.

The PSO has an interesting provenance (and history of amendments), in that it was passed in 1947 as an urgent bill just prior to independence with minimal legislative debate. The hurried process has given rise to inevitable political analysis about

its underlying policy and motivations.³²³ However, on the face of the text, the PSO is a fairly typical piece of legislation of its genre, which draws on similar, if quondam, British and Commonwealth legal formulations and structures of the era.

Under Section 2 (1), the President may issue such a proclamation of a state of emergency where, in view of the existence or imminence of a state of public emergency, he is of the opinion that it is expedient to do so, in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community. This is therefore (a) a general description of the conditions that would give occasion to the President to proclaim an emergency, along with (b) the aims – national security, public order and maintenance of essential services – for which such powers are to be used.

The formulation of Section 2 (1) does not seem to reflect the principle of exceptional threat that is a condition precedent to a valid declaration of a state of emergency. Terms such as ‘in the interests of public security’, ‘in the opinion of the President’, and ‘expedient’ in the provision enabling the proclamation are at odds with Article 4 (1) of the ICCPR which defines the conditions necessitating a declaration as an emergency threatening the life of the nation, or Section 37 (1) (a) of the South African constitution which allows a declaration only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency. These formulations impose a

³²³ See Coomaraswamy & de los Reyes (2004), op cit, p.274; A.J. Wilson (1979) *Politics of Sri Lanka, 1947 - 1979* (London: Macmillan): p.119; Robert N. Kearney (1971) *Trade Unions and Politics in Ceylon* (USA: California UP): p.138-140

higher threshold of justification as to the existence or imminence of the actual emergency situation than is required by the Sri Lankan law.

5.4.2 Declaration, Extension and Termination

In the manner judicially interpreted, determining the imminence or existence of the conditions described in Section 2 (1) is a subjective matter of sole presidential discretion. However, courts will review the exercise of powers that become operational consequent to such a proclamation, in respect of promulgating emergency regulations and administrative decisions, to determine whether such regulations and decisions are *intra vires*, *bona fide*, have a rational nexus with the aims allowed by statute, and are within with scope of the restrictions of fundamental rights permitted by Article 15 of the constitution.

The Sri Lankan framework for declaration is thus consistent with international standards to the extent that it requires a formal proclamation, and thereby satisfies the principle of proclamation. The principle of proclamation, by publicising the declaration of a state of emergency,³²⁴ is key to ensuring legality and the rule of law by promoting access to and foreseeability of the emergency measures to be taken. It, however, is outdated and inconsistent with international standards in several respects.

³²⁴ Section 2 (1) provides that the proclamation of a state of emergency is to be published in the government *Gazette*, and Section 2 (7) requires that notice of the approval of a proclamation by Parliament shall, as soon as may be convenient, be published in the *Gazette*. The inaccessibility of the *Gazette* to the general public is, of course, another matter.

Firstly, the problem of the definition of what constitutes a state of emergency discussed in the previous section, which facilitates rather than imposes the necessary constraints on the act of declaration.

Secondly, there is no attempt in the Sri Lankan law to ensure that the power of declaration is not abused, or availed of too easily. The principle of exceptional threat in Article 4 (1) of the ICCPR and Section 37 (1) (b) of the South African constitution require that a declaration of a state of emergency should be an act of last resort once the normal measures are exhausted or inadequate, and then only where it is necessary to restore peace and order. Indeed, in Sri Lanka the opposite is the case where the exclusive discretion in respect of proclamation is vested (with judicial approval) in the President who is entitled to exercise that discretion according to the dictates of his personal opinion, and without any statutory (or judicial) circumscription of that broad discretion. The absence of a constitutional or statutory requirement of necessity results not only in the too-frequent use of the power; it also means that there is no consideration of the proportionality of a declaration to the threat sought to be averted.

Thirdly, Section 3 of the PSO precludes judicial review of a proclamation of a state of emergency. While this may have accorded with notions of the separation of powers in the 1940s, it has now certainly become an anomalous anachronism. *Per contra*, Section 37 (3) (a) of the South African constitution expressly empowers any competent court to decide on the validity of a declaration of a state of emergency.

Article 155 (5) of the constitution provides for the extension of a state of emergency for a period of one month at a time, subject to approval of Parliament by simple majority. Given that Parliament

is the principal oversight mechanism in the emergency framework, having in addition the power under Section 5 (3) of the PSO to add, alter or revoke any emergency regulation, it may be expected that the monthly emergency debate would be an important one, involving opposition and backbench scrutiny of the government and rigorous official justification of emergency measures. In practice, however, this is not the case, due perhaps in equal measure to legislative apathy and, in the context of communal alienation and conflict, the fear of antagonising public opinion. There is also no report of Parliament exercising the power to amend or revoke emergency regulations, which is a testament to both the weakness of Parliament's committee system and the quality of parliamentarians.

As noted earlier, before their repeal by the Tenth Amendment to the Constitution in 1986, the original paragraphs (8) and (9) of Article 155 provided that where a state of emergency has been in operation for a period of ninety consecutive days, or ninety days in aggregate within a period of six months, a resolution passed by a majority of two-thirds of members was required for a valid parliamentary approval of the continuing state of emergency. This safeguard is no longer available.

The Sri Lankan framework is consistent with international standards in requiring extensions to be formally made by the executive, subject to parliamentary approval; and further, in empowering Parliament to reject any extension and to amend or revoke emergency regulations. However, the original framework prior to the Tenth Amendment requiring special majorities and limitations on the number of extensions within a stipulated period would have been more consistent international best practice. Section 37 (2) (b) of the South African reflects this important safeguard, whereby any further extension after one initial

extension requires a special majority of 60 per cent, following a public debate in the legislature.

The discretion of the President to revoke a proclamation of emergency is implicit in both Article 155 of the constitution and the PSO. Specifically, Section 2 (5) provides that upon revocation of a proclamation within a period of fourteen days of it being made, any further proclamation made within fourteen days of the original proclamation shall only come into force upon parliamentary approval. By providing for termination before expiry by operation of law, the Sri Lankan law seems to meet international standards, although an objective legal description of the conditions that would necessitate a termination notwithstanding the discretion of the executive would be an improvement of the framework, by structuring administrative discretion.

5.4.3 Legal Effects

The main questions in this regard are as follows: which elements of the normal constitutional order are affected, in whole or in part, or suspended (if at all) by an emergency declaration? What constitutionally protected fundamental rights may be limited or derogated from?³²⁵ How does the institutional balance of the constitutional order change? Do emergency powers permit constitutional amendments?

The main change in the institutional architecture under a state of emergency in Sri Lanka is the grant of extensive legislative powers

³²⁵ This is dealt with in detail in Chapter 6 and will not be discussed here

to the executive.³²⁶ These have the effect of overriding the provisions of ordinary law made by Parliament, but they cannot be inconsistent with the constitution (except to the extent the constitution itself permits restrictions to be imposed on fundamental rights under Article 15). The courts are the guarantors of ensuring that executive law-making is kept within these bounds. Under no circumstances can the constitution be suspended using emergency powers (or indeed any other means than the procedure established by the constitution itself), and Sri Lanka has been fortunate, unlike several regional neighbours, of a never having experienced a suspension the constitution through extra-constitutional means.

More ambiguous, however, has been successive governments' attitude to legality. This has perhaps not been so much as intentional illegality as a lack of understanding of constitutional propriety in the discharge of executive functions. While illustrations abound, the best recent example of where the executive's conception of its emergency and national security powers that have clearly been in excess of what is contemplated by the constitution is the eviction by executive order of Tamils of North-eastern origin from Colombo in 2007.

Another point of concern is how the assumption of emergency powers affects the constitutional principle of devolution within the framework of the Thirteenth Amendment to the Constitution (1987). Similar to the overriding effect of emergency regulations on ordinary law made by Parliament, Article 155 (3A) provides that they override statutes made by Provincial Councils. Article 154J (1) provides that once a state of emergency has been declared on the grounds of war, external aggression or armed

³²⁶ See Zafrullah (1981), *op cit.*, pp.46-50, 59-61, 114-117

rebellion, the President is empowered to give the provincial Governors directions as to the manner in which the executive power exercisable by the Governor is to be exercised. Article 154K provides that where a Governor or any Provincial Council has failed to comply with any presidential directions, the President is entitled to hold that a situation has arisen in which the administration of the Province cannot be carried on in accordance with the constitution. Article 154L provides that where the President is satisfied that the administration of a Province cannot be carried on in accordance with the constitution, he may by proclamation (a) assume to himself the powers and function vested in a Provincial Council or Governor and (b) declare that the powers of the Provincial Council shall be exercisable by Parliament. Article 154M provides that Parliament may confer the legislative power of the Provincial Council on the President.

These provisions represent very broad powers for the centre to intervene in the devolved provincial sphere in a crisis. The broader debate about devolution is beyond the scope of the present discussion, but the Thirteenth Amendment framework is further evidence as to how regional autonomy can be countervailed when in conflict with other policy of objectives that come into play during a crisis. While Sri Lanka is certainly not unique in this respect,³²⁷ the danger of providing such wide unilateral powers to a single central authority of course is that the possibility of abuse is never far away.

³²⁷ See Chapter 3, section 3.1.3, *supra*

5.4.4 Checks and Balances

The two traditional constitutional devices in this regard are judicial review and the separation of powers. It has already been noted how the provision of parliamentary oversight, while reflective of compliance with international standards, has in practice been largely ineffective. While the Sri Lankan framework is riddled with ouster clauses, we have seen above how the courts have attempted to narrow down the scope of their preclusion from reviewing the exercise of emergency powers. The courts' role in relation to the enforcement of fundamental rights is discussed more fully in the following chapter. However, it is submitted that excluding judicial review of the exercise of emergency powers is symptomatic of an approach that has now become obsolete, and that international best practice is reflected in Section 37 (3) of the South African constitution, which allows judicial review of all aspects of an emergency including declaration, extension, and legislation. Moreover, introducing comprehensive judicial review must be accompanied by the reform of the substantive legal framework relating to fundamental rights by the inclusion of features such as the enumeration of non-derogable rights and concepts of accountability such as necessity, proportionality, and consistency with international obligations; only then could the potential of judicial review be fully realised.

CHAPTER VI

FUNDAMENTAL RIGHTS

6. Fundamental Rights
 - 6.1. Chapter III: Sri Lanka's Constitutional Bill of Rights
 - 6.2. General Observations on Fundamental Rights Framework
 - 6.2.1. Structure and Content
 - 6.2.2. Judicial Protection of Fundamental Rights
 - 6.2.3. Restrictions on Fundamental Rights: Limitations and Derogations
 - 6.3. Restrictions on Fundamental Rights: International Standards
 - 6.4. Sri Lanka's International Obligations: ICCPR
 - 6.4.1. The Singarasa Case (2006) and Sri Lanka's International Obligations
 - 6.4.2. The Supreme Court Advisory Opinion on the ICCPR (2008)

Certain civil and political rights, as are guaranteed by the Sri Lankan constitution are set out in Chapter III. Sri Lanka's first post-independence constitution did not contain a bill of rights, apart from a general anti-discrimination clause in Section 29. While the First Republican Constitution of 1972 did indeed contain a bill of fundamental rights, it has generally been accepted that it was a much weaker framework than that envisaged by the 1978 Constitution. Certain socio-economic principles are enunciated in Chapter IV as 'directive principles of State policy', which neither create rights nor are justiciable. Sri Lanka acceded to the International Covenant on Civil and Political Rights in 1980 (including the Inter-State Complaints Procedure), and its First Optional Protocol (Individual Complaints Procedure) in 1997. In November 2007, Parliament enacted the International Covenant on Civil and Political Rights (ICCPR) Act No.56 of 2007. Despite its title, however, this law is not aimed at the domestic recognition of the ICCPR as a whole.

6.1 Chapter III: Sri Lanka's Constitutional Bill of Rights

Basic democratic rights declared and recognised by Chapter III of the constitution include the right of freedom from torture or cruel, inhuman or degrading punishment (Article 11); freedom of thought, conscience and religion (Articles 10 and 14 (1) (e)); rights relating to the security and liberty of the person including freedom from arbitrary arrest, detention and punishment (Article 13); freedom of speech and expression including publication (Article 14 (1) (a)); freedom of peaceful assembly and association (Articles 14 (1) (b), (c) and (d)); freedom to enjoy and promote culture and language (Article 14 (1) (f)); freedom of movement and right of return (Article 14 (1) (h)); and freedom of lawful occupation (Article 14 (1) (g)).

Permissible restrictions on these rights are set out in Article 15 for various purposes including national security, public order, protection of public health and morality, the protection of the rights and freedoms of others, the interests of racial and religious harmony or the national economy, or of meeting the just requirements of the general welfare of a democratic society. Not all rights are subject to the same restrictions and Article 15 enumerates the restrictions as may be imposed on discrete rights. All restrictions must be prescribed by law, and in respect of restrictions made in the interests of national security and public order, 'law' includes emergency regulations.

Article 10 (freedom of thought and conscience), Article 11 (prohibition of torture), Article 13 (3) (right to be heard at a fair trial by a competent court, with or without legal representation) and Article 13 (4) (right to due process and fair trial prior to imposition of punishment, but excluding pre-trial detention) are not subject to any restriction by Article 15, and are thereby to be considered absolute and non-derogable rights.

The rights that may be restricted by law in terms of Articles 15 (1) and (7) in the interests of national security and public order are as follows: presumption of innocence, criminal burden of proof and retroactive penal sanctions (Articles 13 (5) and (6)); equality before the law and non-discrimination (Article 12); ordinary procedure for arrests and judicial sanction for detention (Articles 13 (1) and (2)); rights to freedom of expression, assembly, association, movement, occupation, religion, culture and language (Article 14).

The justiciability of the fundamental rights set out in Chapter III is limited to their infringement or imminent infringement by executive and administrative action (Article 17). The remedy for

violations is provided for by way of petition to the Supreme Court in the exercise of its jurisdiction under Article 126. This is an exclusive jurisdiction of the Supreme Court and is in the nature of a discretionary public law remedy.

6.2 General Observations on the Fundamental Rights Framework

The Constitution of 1978 introduced the concept of justiciability to constitutionally declared fundamental rights for the first time in Sri Lanka's constitutional evolution. While therefore in principle a positive development, the full realisation of even the limited set of civil and political rights included in Chapter III were, and continued to be hampered by several factors. These include structural considerations of Chapter II such as the range, scope and content of the rights so recognised, the constitutional regulation of limitations and derogations, and the mechanisms of justiciability.

Consistency with international standards is also a concern, and in this regard, it must be mentioned that although the constitution contemplates socio-economic and cultural entitlements, these are expressed as aspirational goals rather than justiciable rights, and are accordingly expressed as part of directive principles of State policy (Chapter VI). The justiciability mechanism in Article 126 as well as the evolution of judicial attitudes to fundamental rights protection has also been a mixed experience.

6.2.1 Structure and Content

Viewed against international best practice in the design and structure of constitutional bills of rights aimed at guaranteeing, protecting and promoting human rights, the Sri Lankan bill of rights is incomplete and structurally incoherent. The lack of a coherently conceptualised theory underpinning the Constitution that seeks to maximise the enjoyment of human rights by Sri Lankans makes hermeneutical interpretation of the bill of rights as a whole difficult. This is reflected in the fundamental rights jurisprudence of the Supreme Court over the last three decades. This lack of theoretical coherence in the Supreme Court's fundamental rights case law is also partly due to its role as a court of first instance in respect of fundamental rights, rather than as a constitutional court that enunciates general principles in the interpretation of the bill of rights. This aspect will be discussed further below.

It is not clear from the text the basis on which the rights selected for inclusion were chosen, the order in which they appear was determined, or why certain textual formulations were adopted when more liberal options were available. The three instruments of the International Bill of Rights, *viz.*, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) had been well-established in international law by the time the constitution was drafted in 1977 - 78, as had other regional instruments such the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950). These could have provided useful guidance in designing the bill of rights, but apart from some textual evidence that the drafters drew from the UDHR and ICCPR, it seems as if the design and drafting was informed by political

considerations other than a principled pursuit of human rights protection and promotion. The result is that the bill of rights resembles a randomly cherry-picked cluster of inchoate rights that cannot at the conceptual level amount to a proper bill of rights compatible with modern expectations.³²⁸

Thus, for example, temporary policy considerations that were relevant at the time of drafting find incongruous expression in the fundamental rights chapter such as where Articles 13 (7) and 14 (2) deal with citizenship policy concerning the categories of persons falling under the Indo-Ceylon Agreement (Implementation) Act No. 14 of 1967.

The absence of a proper rationalisation of constitutional values is evident elsewhere in the fundamental rights chapter as well. Article 16 is wholly inconsistent with constitutionalism and the central object of a constitutional bill of rights when it validates all existing law, notwithstanding inconsistency with fundamental rights. This negates the purpose of a constitutional bill of rights as the principal instrument of citizens' human rights protection, which sets out human rights standards binding all executive action and legislation, and which can be only restricted to the extent and manner set out in the constitution.

6.2.2 Judicial Protection of Fundamental Rights

The jurisdiction vested in the Supreme Court under Article 126 in the enforcement of fundamental rights was advanced as a

³²⁸ See for a discussion of the South African Bill of Rights, Halton Cheadle & Dennis Davis, 'Structure of the Bill of Rights' in Halton Cheadle, Dennis Davis & Nicholas Haysom (2002) *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths): Ch.31

reflection of the high importance accorded to fundamental rights by the constitutional order introduced in 1978.³²⁹ However, case law from the early years of the constitution evinces a general attitude of diffidence in developing its fundamental rights jurisdiction, and showed extreme deference to the executive in circumstances of public emergency. This changed later when the Supreme Court demonstrated a more aggressive approach to holding the executive to account and in developing its fundamental rights jurisprudence.

Thus, the rendering of the Supreme Court as a court of first instance has resulted in a mixed experience. On the one hand, the Supreme Court has been able to assert itself against the executive in states of emergency in a way a lower court would have found difficult. This was especially true during the late 1980s and 1990s when the Supreme Court was at its apogee as the guardian of fundamental rights against a rampant executive in a particularly challenging security context. On the other hand, the theoretical clarity and the development of general principles with regard to the judicial interpretation of the bill of rights have suffered as a result of case law dominated by questions of fact.

The judicial response to review of procedural and substantive executive action in states of emergency will be discussed further below. Given, however, that during the thirty years of existence of the present constitution, the state of emergency has been the norm rather than the exception, the vast majority of fundamental

³²⁹ See Parliamentary Series No.14 of the Second National State Assembly (1978) *Report of the Select Committee of the National State Assembly appointed to consider the revision of the Constitution*, 22nd June 1978: p. 141; Draft Chapter III: p.526; See also A.J. Wilson (1980) *The Gaullist System in Asia: The Constitution of Sri Lanka (1978)* (London: Macmillan): Ch.6

rights petitions have concerned violations arising from excesses of emergency powers, and powers exercised under the PTA.

In *Visuvalingam v. Liyanage* (1984),³³⁰ an early example of judicial deference, the majority upheld the sealing of a newspaper through emergency powers on the basis that during a state of emergency the State's prerogative in respect of national security and public order could prohibit freedom of expression (Article 14 (1) (a)), and further that such exercise of prerogative could not attract judicial review.³³¹ It is interesting that in the more rights-conscious dissenting opinions of Wanasudera and Soza J.J., the judges made reference to Sri Lanka's international obligations under the ICCPR. Similarly, the court upheld a wide discretion for the State in respect of arrest and detention during emergencies on the basis of Article 15 (1) and (7) restrictions on rights protected by Article 13, in early cases such as *Yasapala v. Wickremasinghe* (1980),³³² *Kumaratunga v. Samarasinghe* (1986)³³³ and *Edirisuriya v. Navaratnam and Others* (1985).³³⁴ Even in cases concerning allegations of egregious abuses such as torture (Article 11 and which is an absolute right), the court can be found applying

³³⁰ *Visuvalingam and Others v. Liyanage and Others* (1983) 2 SLR 311; (1984) 1 SLR 305; (1984) 2 SLR 123

³³¹ *Siriwardene and Others v. Liyanage and Others* (1983) 2 SLR 164

³³² *Yasapala v. Wickramasinghe* (1980) 1 FRD 143;

³³³ *Kumaranatunge v. Samarasinghe, Additional Secretary, Ministry of Defence and Others* (1983) 2 SLR 63

³³⁴ *Edirisuriya v. Navaratnam and Others* (1985) 1 SLR 100

unduly conservative and restrictive tests for excluding its review over the executive.³³⁵

Even though there is some previous case law,³³⁶ perhaps the watershed in the Supreme Court's attitude towards a more robust role in the protection of fundamental rights is marked by the case of *Joseph Perera v. Attorney General* (1987), reported in 1992.³³⁷ The case primarily concerned freedom of expression and its permissible restriction under emergency regulations. Speaking for the majority, Sharvananda C.J., held the purported exercise of emergency powers (including the restriction of fundamental rights) was not unbounded in law. The Court interpreted the ouster clause in the PSO narrowly and asserted its competence to review the validity of emergency regulations against an objective test of necessity based on the proximity or rationality of the restrictive measure and the aim sought to be secured. What came to be known as the 'rational nexus test' (essentially a general requirement of reasonableness) in *Joseph Perera* has been later developed by the Supreme Court into an even more sophisticated test in respect of determining the procedural and substantive validity of emergency powers.³³⁸

Joseph Perera also signalled a wider space for a conception of freedom of expression based on the UDHR, establishing that

³³⁵ See for e.g., the *dicta* of Wanasundera J. in *Thadchanamoorthy v. Attorney General and Others* (1978-79-80) 1 SLR 154; and *Velmurugu v. Attorney General and Another* (1981) 1 SLR 406

³³⁶ See for e.g., *Vivienne Gunawardene v. Perera* (1983) 1 SLR 305; *Sudath Silva v. Kodituwakku* (1987) 2 SLR 119; *Edirisuriya v. Navaratnam* (1985) 1 SLR 100; *Nanayakkara v. Perera* (1985) 2 SLR 375

³³⁷ *Joseph Perera v. Attorney General* (1992) 1 SLR 19

³³⁸ See *Sunila Abeyssekera v. Ariya Rubesinghe* (2000) 1 SLR 314

restrictions based on public order or national security must demonstrate that the impugned speech would undermine the public order or was an incitement to the commission of an offence. The case established the precedent for a series of later cases in respect of freedom of expression where the Supreme Court adopted more stringent standards of scrutiny for purported restrictions.³³⁹

The establishment of a more robust standard of accountability in *Joseph Perera* has also influenced the Supreme Court's case law in respect of arrest and detention and the right of personal liberty and security set out in Article 13. The court has developed a body of rules in this respect that fill the considerable gaps in the constitutional and statutory texts in favour of fundamental rights. While the argument must surely not be overstated, this has contributed to establishing at least some basic standards of the rule of law, fundamental rights and reasonableness of executive and administrative action during states of emergency.³⁴⁰

Despite these developments, it was observed earlier that the vesting of original jurisdiction in the Supreme Court in respect of fundamental rights has inhibited the coherence of the constitutional jurisprudence on the bill of rights. For example, in

³³⁹ See for e.g., *Amaratunga v. Sirimal and Others* (1993) 1 SLR 264; *Shantha Wijeratne v. Vijitha Perera* (2002) 3 SLR 319; *Karunatileke v. Dissanayake No.1* (1999) 1 SLR 157

³⁴⁰ See *Wickramabandu v. Herath* (1990) 2 SLR 348; *Seetha Weerakoon v. Mahendra* (1991) 2 SLR 172; *Gamini Perera v. Rajaguru* (1997) 3 SLR 141; *Sunil Rodrigo v. Chandrananda de Silva* (1997) 3 SLR 265; *Vinayagamoorthy v. The Army Commander and Others* (1997) 1 SLR 113; *Jayaratne and Others v. Chandrananda de Silva* (1992) 2 SLR 129; *Abeyratne Banda v. Gajjanayake* (2002) 1 SLR 365; and under the PTA, *Weerawansa v. The Attorney General and Others* (2000) 1 SLR 387

Lilanthi de Silva v. The Attorney General and Others,³⁴¹ the only decision so far to have struck down an emergency regulation impugned solely on the right to equality, the decision in favour of the petitioner was facilitated by an implausibly weak argument on behalf of the State. In these circumstances, the value of the court's pronouncement on such an important lynchpin of constitutionalism and the rule of law as the equality clause is diminished. Similarly, in *Sunila Abeysekera v. Ariya Rubesinghe* (2000), the impugned emergency measures concerning military censorship were upheld on the facts, even though the opinion Amerasinghe J. contains an entirely progressive construction of the law.

6.2.3 Restrictions on Fundamental Rights: Limitations and Derogations

Perhaps the most serious structural weakness of the bill of rights is in relation to the way it deals with restrictions, especially in states of emergency when fundamental rights are most vulnerable and therefore require strong constitutional protection and regulation of governmental action.

Article 15 is the provision on permissible restrictions, which is not only an example of the incoherence of the Chapter of which it is a part, but from the perspective of human rights protection, it is also the weakest provision in the Chapter. An elementary safeguard in human rights instruments is the distinction made between 'limitations' and 'derogations.' This is in recognition of the fact that some human rights may legitimately be limited in their enjoyment

³⁴¹ *Lilanthi de Silva v. The Attorney General and Others* (2000) 3 SLR 155

and exercise, and that in exceptional circumstances, such as states of emergency, some rights may be required to be temporarily suspended. From the recognition of these necessities and the consequent distinction between limitations and derogations flow a set of detailed rules that govern the substantive and procedural dimensions of limitations and derogations, including the constitutional enumeration of absolutely non-derogable rights.

Moreover, the development of international best practice in respect of limitations shows that the preference now is to entrench a single limitation clause in the bill of rights which sets out the general principles to be used in determining the scope of permissible limitations themselves. In other words, the concern is to 'limit the limitations' so as to protect the essence of a right from being extinguished in the name of permitted restrictions. An instructive example of the latter approach is Section 36 of the South African Constitution.³⁴²

Similar to the ICCPR, however, the Sri Lankan bill of rights adopts the older approach which involves attaching restrictions based on different justifications to specific rights. Article 15 employs the term 'restrictions' and in its enumeration of permissible restrictions encompasses both limitations (e.g. for the protection of the rights of others) and derogations (i.e., restrictions based on national security). However, the Sri Lankan bill of rights does not follow the ICCPR in expressly setting out a list of non-derogable rights. These are identified by implication as described above.

It is to be further noted, that the rights which are not susceptible to restriction under the constitution are not as extensive as those

³⁴² See also Halton Cheadle, 'Limitation of Rights' in Cheadle, Davis & Haysom (2002), *op cit.*, Ch.30; ECHR Article 18; ACHR Articles 27, 29 and 30

provided for by the ICCPR Article 4 (2), and more significantly, are also inconsistent with ICCPR standards in terms of the content of protection. For example, whereas Article 4 (2) recognises the Article 15 prohibition of retroactive criminal liability as a non-derogable right under the ICCPR, Article 15 (1) of the constitution permits restrictions on the apposite prohibition in Article 13 in the interests of national security.

The only procedural safeguard provided by Article 15 for the imposition of restrictions on fundamental rights, is that they are required to be prescribed by law, which, however, includes executive-made emergency regulations having an overriding effect over ordinary legislation. As we have seen, even in older instruments such as the ICCPR, restrictions have to meet requirements other than prescription by law and include higher thresholds of substantive justification, such as necessity in a democratic society. While reference is made in Article 15 (7) to ‘the just requirements of the general welfare of a democratic society’, this is set out as a separate ground of restriction rather than as an inherent justificatory requirement of restrictions that are aimed at securing national security.

6.3 Restrictions on Fundamental Rights: International Standards

The Siracusa Principles on Limitations and Derogations, based on the ICCPR, are generally considered as representative of United Nations and international best practice in this area (although the Constitution of South Africa advances these basic standards into a much more robust regime in many respects).

The Siracusa Principles set out general interpretative guidelines on limitation clauses. These include requirements such as that the scope of a limitation cannot be so wide as to jeopardise the essence of the right itself and all limitation clauses are to be interpreted strictly and in favour of the rights at issue (Principles 2 and 3); that every limitation is subject to legal challenge and remedy against abusive application (Principle 8); that whenever a limitation is required as ‘necessary,’ the limitation must be (a) based on one of the grounds justifying the limitations recognised by the rights conferring instrument itself, (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim. Any assessment as to necessity is to be made on objective considerations (Principle 10); and that in applying limitations, a State is bound to use no more restrictive means than are required for the achievement of the purpose of the limitation, and the burden of justifying limitations lie with the State (Principles 11 and 12).

The Siracusa Principles also set out interpretative principles in respect of specific concepts relating to limitations, two of which, ‘prescribed by law’ and ‘national security’ are relevant to this discussion. Principles 15, 16, 17 and 18 require that restrictions prescribed by law must be made by clear and accessible law of general application consistent with ICCPR standards, that these cannot be arbitrary or unreasonable, and that adequate remedies must be provided. Principle 31 states that national security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse. Principle 32 is a salutary standard: “The systematic violation of human rights undermines true national security and may jeopardise international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at

suppressing opposition aimed at such violation or at perpetuating repressive practices against its population.”

The stipulations of the Siracusa Principles and other sources of international standards regarding states of emergency and human rights protection will be discussed further below.

6.4 Sri Lanka’s International Obligations: ICCPR

Sri Lanka acceded to the ICCPR on 11th June 1980 (entry into force 11th September 1980). At the time of accession, it made a declaration recognising the competence of the treaty body, the Human Rights Committee, under Article 41 (i.e., the Inter-State Complaints Procedure). Sri Lanka made a second declaration and acceded to the First Optional Protocol (i.e., the Individual Complaints Procedure) recognising the competence of the Committee to entertain complaints by individuals subject to its jurisdiction on 3rd October 1997 (entry into force 3rd January 1998). No other reservations or objections have been entered by Sri Lanka. The ICCPR is thus part of the international obligations of Sri Lanka, while controversy prevails as to where it stands in respect of the First Optional Protocol following the judgment of the Supreme Court in the case of *Singarasa v. Attorney General* (2006).³⁴³

In addition to the substantive rights contained in Part III of the ICCPR, States Parties are bound by the overarching provisions of the Convention, of which Part II is of significance for this discussion. Article 2, which has been described as a fundamental

³⁴³ *Singarasa v. Attorney General* (2006) S.C. Spl(LA) No. 182/99; decided on 15th September 2006

cornerstone of the Convention, sets out States' undertakings to respect, protect and promote the rights established by the Convention. Article 3 prohibits gender discrimination and Article 4 establishes the rules of derogation and the list of non-derogable rights.

Article 2 establishes a tripartite set of responsibilities in States in respect of its treaty obligations under the ICCPR. Firstly, the State undertakes the 'negative' obligation to respect human rights; that is, to refrain from actions and omissions that contravene rights. Secondly, the State must protect human rights, and involves executive, legislative and judicial action to actively protect the right of persons within its jurisdiction. Thirdly, the State is obliged as a 'positive' duty to take measures to ensure the promotion, enjoyment and fulfilment of human rights, including the creation of an atmosphere conducive to this.

Article 4 (1) sets out the objective conditions that must be met, where in exceptional circumstances a State may derogate from its obligations under the Covenant. There must be a public emergency, officially proclaimed, that threatens the life of the nation. Derogations must only be pursued to the extent strictly required by the exigencies of the situation, must not be inconsistent with the State's other obligations under international law and cannot undertake prohibited forms of discrimination. Article 4 (2) lists the non-derogable rights. Article 4 (3) establishes the significant obligation, that where a State avails itself of the right of derogation, it must through the UN Secretary General inform other States Parties to the Covenant, of the treaty provisions from which it has derogated and the reasons by which it was actuated. A similar communication must be made at the termination of the period of derogation. It will be seen below that the emergency regulations currently in force (as well as the PTA)

considerably diverge from, and in some cases vitiate, the rights and standards of restrictions established by the ICCPR. Despite this, however, Sri Lanka has made no communication of derogation as required by the procedure set out in Article 4 (3). This is a prima facie violation of a treaty obligation aimed at international monitoring of human rights within States, and thereby diminishes an important device of human rights protection in Sri Lanka.

Finally, attention needs to be drawn to the unique nature of the international legal obligations undertaken by State ratifying the ICCPR. Once States have acceded to the Covenant, they have no right of unilateral withdrawal and would continue to be bound by the treaty despite contrary intention, unless all other States Parties agreed to such withdrawal. In Fact Sheet No. 15, the Office of the High Commissioner for Human Rights provides the following explanation: "Unlike many treaties, the concluding provisions of the Covenant do not provide for denunciation of the treaty allowing a State party to withdraw from the treaty regime. In these circumstances, the [Human Rights] Committee has taken the view that in the light of the particular character of human rights treaties such as the Covenant, which extend basic rights and freedoms to persons within a State party's jurisdiction, these rights and freedoms may not be withdrawn once confirmed. Accordingly, once a State has ratified the Covenant, it is not permitted to withdraw from its obligations by denouncing the treaty."

1.4.1 The *Singarasa Case* and Sri Lanka's International Obligations

The case of *Singarasa v. Attorney General* (2006) concerned an application for revision and / or review of an earlier decision of the Supreme Court upholding the conviction of the petitioner on charges under emergency regulations and the PTA. The application was made on the basis of the views of the Human Rights Committee in respect of Communication 1033 of 2000 that had been made by the petitioner, availing himself of the right of individual communication provided by the First Optional Protocol to the ICCPR.

In the course of the judgment, Silva C.J., speaking for the court, went on to make some remarkable pronouncements that are of major significance not only for human rights protection in Sri Lanka, but which also throws into question the fulfilment of fundamental international obligations by the Sri Lankan State.

The reasoning of the court is perplexing when assessed against widespread contemporary thinking regarding the judicial role in the protection of human rights, and appears to depart from modern developments in international human rights and comparative public law in several respects. Moreover, the court adopts an attitude to the interpretation of sovereignty as laid down in the constitution that can reasonably be described as outmoded, and is inconsistent with the State's undertaking of international obligations under the ICCPR and the First Optional Protocol. In view of the relatively uncomplicated, although limited, reception of international human rights norms evidenced in the fundamental rights jurisprudence of the Supreme Court in the past, the *Singarasa* judgment represents a strident departure from previous judicial attitudes.

The court's reasoning with regard to the constitutionality of, and rights available under the ICCPR and the First Optional Protocol rest on two principal arguments, which are both founded on the court's interpretation of sovereignty and the separation of powers as laid down in Articles 3 and 4 of the constitution. These require separate analysis.

First, with regard to the ICCPR itself, the Court found that the executive power of the people as exercised by the President under Article 33 (f) read with Articles 3 and 4 (b) of the Constitution empowered the President to represent Sri Lanka abroad and under customary international law to enter into treaties, the contents of which must be consistent with the Constitution and the laws of Sri Lanka. The court found that the accession to the ICCPR was a valid exercise of executive power and found its contents consistent with the Constitution of Sri Lanka. Citing the dualist tradition of Sri Lanka with regard to international law, however, the court took the position that no enforceable rights as a matter of domestic law could automatically flow from the accession in the absence of enabling legislation enacted by Parliament to give effect to the ICCPR. The court deemed it presumable that specific legislation to give effect to the ICCPR in domestic law was not enacted because the government considered the fundamental rights declared and recognised in the Constitution as adequate fulfilment of Sri Lanka's treaty obligations.

Secondly, with regard to the declaration made by the President in 1997 acceding to the First Optional Protocol, the court found that this was unconstitutional for two reasons. Firstly, the declaration amounted to the conferment of public law rights on individuals because it recognised that rights under the Covenant were directly available to persons within the jurisdiction of Sri Lanka, and

further, conferred a right on individuals to address communications to the Human Rights Committee alleging violation of Covenant rights. In the view of the court, this was a purported legislative act by the President in excess of powers, because the creation of rights could only be done through legislation passed by Parliament. Under Article 76 read with Articles 3 and 4 (b) of the Constitution, Parliament cannot alienate its legislative power, except to make provision for the President to promulgate emergency regulations. Secondly, the court was of the view that the declaration of accession to the First Optional Protocol recognising the competence of the Human Rights Committee to receive and consider communications from individuals was a conferment a judicial power (and therefore unconstitutional alienation of sovereignty) on the Human Rights Committee, in contravention of Article 3 read Articles 4 (c) and 105 (1) of the Constitution.

The court also offered its own interpretation of Article 2 of the ICCPR, stressing the right of a State Party to give effect to the rights of the Covenant through law or other measures according to its own constitutional processes. In this way, the court adopted the traditional approach to State sovereignty vis-à-vis the province of international law and firmly subordinated the ICCPR to State jurisdiction, asserting the right of States to determine the extent and manner in which ICCPR rights were exercisable by individuals. In doing so, the court's reasoning is conspicuously at odds with the prevailing doctrine of international human rights that accords, as a general proposition, primacy to human rights in relation to State sovereignty. To the extent that this judgment is one of major constitutional significance, it is clear that the conservative and unimaginative constitutional doctrine of the Supreme Court is one based on State sovereignty and command theory positivism, rather than on rights-based constitutionalism. The refusal to

embrace judicial activism, in not only the enforcement and protection, but also the active promotion of international human rights norms capable of bringing the Constitution into modernity through adjudication and interpretation is unfortunate. This puts the Supreme Court of Sri Lanka at variance with the progressive traditions of judicial behaviour that increasingly characterise superior courts elsewhere in the world, including in Asia and Africa. More to the point, the *Singarasa* judgment is directly at odds with the Human Rights Committee's views as the authoritative interpreter of the meaning of the ICCPR.

It is beyond the scope of this discussion to critically analyse the reasoning of the Supreme Court in detail, apart from making the following observations that show the incongruence of the judgment with international developments.

The authoritative interpretation of Article 2 of the ICCPR and the nature of the general legal obligations imposed by States Parties to the Covenant is to be found in Human Rights Committee's General Comment 31. Paragraph 4 states:

“The obligations of the Covenant in general and Article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and

consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' *Although Article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty."*

There can be no clearer statement as to the applicable international law that demonstrates that the Supreme Court's reasoning is inconsistent with Sri Lanka's treaty obligations.

Thus while in States belonging to the dualist tradition domestic enactment of the Convention is desirable (for e.g. in the way the Torture Convention has been incorporated), there is nothing to preclude the Supreme Court from incorporating rights and human rights norms established in the ICCPR by way of constitutional interpretation. It is clear from General Comment No. 31 that the judicial branch of the State is expected to play a major role in the promotion and protection of Covenant rights, and even take the lead in ensuring compliance of the Covenant on the part of the executive and legislative branches. The Supreme Court's attitude in *Singarasa* is rendered all the more incomprehensible because there is precedent for this in its own case law.³⁴⁴

³⁴⁴ For e.g., *Karunathilake v. Dissanayake No. 2* per Fernando J: ICCPR; *Velmurugu per Wanasundera J*: ICCPR, *Joseph Perera per Sharvanada C.:* UDHR, *Sunila Abeysekera per Amerasinghe J*: ECHR

With regard to the finding of unconstitutionality of the accession to the First Optional Protocol, it will be recalled that the Supreme Court's reasoning rests on two bases, namely, the purported lawmaking by the executive without lawful authority, and the argument that the recognition of the Human Rights Committee's represents an unconstitutional alienation of judicial power.

It is evident from General Comment No. 31 that technical arguments focussing on strict *vires* are inappropriate and even counterproductive when the effect of the purported exercise of power is to secure a significant body of internationally recognised human rights in the domestic realm through the provision of an effective enforcement mechanism (i.e. the Individual Complaints Procedure). In any event, the Court's objection on the ground of lack of jurisdiction could have easily been cured through the enactment of necessary legislation, had the Supreme Court allowed the space for such remedial action to be taken.

The argument to the effect that the recognition of the Committee's competence is an alienation of judicial power in violation of sovereignty is totally inconsistent with the established international consensus regarding the nature of the treaty body's role and competence under the Covenant. That the Committee does not exercise powers of a judicial or even quasi-judicial nature is self-evident from the treaty provisions, and finds consensus in the view of the Committee itself as well as universal academic opinion.³⁴⁵ It is astonishing that the Deputy Solicitor General should have advanced this argument and even more so that the Court should accept it. If the Committee is not a judicial body, then there cannot be an alienation of sovereign Sri Lankan judicial

³⁴⁵ Javaid Rehman (2003) *International Human Rights Law: A Practical Approach* (London: Longman): Ch.4

power to it, whether constitutionally or otherwise, and the foundation of the Court's argument in this respect collapses.

Finally, there remains the question as to what impact the *Singarasa* judgment has on the executive with regard to the treaty obligations. The government is bound by the Supreme Court's pronouncement, the unequivocal and sweeping nature of which would require a constitutional amendment to entrenched provisions of the Constitution. This would require a majority of two-thirds in Parliament and the approval of the people at a referendum. If the government agrees with the Supreme Court, or is for other reasons disinclined to address the legal defects of the accession to the Protocol, then international law requires it to withdraw from it. Article 12 of the First Optional Protocol provides that any State Party may denounce the Protocol by written notification addressed to the UN Secretary General. Since judgment was delivered in *Singarasa* in September, there is no official information in the public domain that indicates the government's intention either way on this matter; although there have been press reports of negotiations between the Attorney General's Department and the Office of the High Commissioner for Human Rights and/or the Human Rights Committee with a view to finding an appropriate settlement to the issue. In this situation, the State of Sri Lanka remains in legal limbo and the ultimate losers are the ordinary citizens of Sri Lanka.

In its concluding remarks, the Supreme Court alluded to the response of the government of Sri Lanka to the Committee's views in *Singarasa's* Communication to the effect that the remedy recommended by the Committee was unavailable in Sri Lankan law. The court was of the opinion that this did not reflect well on the Republic of Sri Lanka. It is extremely ironic, therefore, that it seems not to have occurred to the Supreme Court as to how its

own judgment in *Singarasa* reflects on the commitment of the Sri Lankan State to human rights and its obligations at international law in respect of a multilateral treaty, that is a foundation stone of the international legal system today.

6.4.2 The Supreme Court Advisory Opinion on the ICCPR

In March 2008, the President submitted a reference under Article 129 (1) of the constitution to obtain the opinion of the Supreme Court on two questions of law:

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to civil and political rights in the International Covenant on Civil and Political Rights (ICCPR) of the United Nations adhere to the general premise of the Covenant and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitutional processes prevailing in Sri Lanka?
2. Whether the said rights recognised in the Covenant are justiciable through the medium of legal and constitutional process prevailing in Sri Lanka?

Four intervenient petitioners, including the Centre for Policy Alternatives (CPA), were permitted by court to make submissions. The opinion was published in the press (*The Nation*, 30th March 2008), albeit without the schedule of legal provisions alluded to in the opinion in the following terms: “On the basis of the submissions of the Additional Solicitor General, the observations of Court and submissions of other counsel, for purposes of clarity

a comprehensive schedule annexed hereto was prepared with two columns. The column on the left gives the particular Article of the Covenant and the column on the right gives the legislative compliance within Sri Lanka and the relevant pronouncements made by the Supreme Court and the other Courts to further strengthen the guarantee of rights recognised in the Covenant.” This has not been publicly available, and it is therefore difficult to verify its claims in respect of the compliance of Sri Lankan law with the ICCPR. The Supreme Court dismissed all of the submissions on seven specific matters made by counsel for the intervenient petitioners, mainly on the ground that many of these of submission were based on hypotheses. The court came to the conclusion that “...the legislative measures referred to in the communication of...the President dated 4.3.2008 and the provisions of the Constitution and of other law, including the decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political Rights contained in the International Covenant on Civil and Political Rights and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights contained in the Covenant” and “that the aforesaid rights recognised in the Covenant are justifiable through the medium of the legal and constitutional process prevailing in Sri Lanka.”

It is difficult to agree with the Supreme Court, given that the opinion did not contain a full and reasoned basis on which its conclusions can be defended. For example, in relation to the ICCPR Act No. 56 of 2007, the court confined itself to reiterating the claims made in the preamble – which is a total misnomer given the substance of the Act – and did not consider the fact that the ICCPR Act contains only four main substantive rights-conferring provisions in Sections 2, 4, 5 and 6 (*viz.*, the right to be recognised as a person before the law; entitlements of alleged offenders to

legal assistance, interpreter and safeguard against self-incrimination; certain rights of the child; and right of access to State benefits, respectively), and that these provisions are formulated in terms substantially and significantly different from the corresponding provisions of the ICCPR.

Given that none of the fundamental issues relating to the recognition of ICCPR rights at domestic law were given any serious judicial consideration and settlement, it is to be expected that this debate will continue.

CHAPTER VI

CONCLUSION

“...unseen, inscrutable, invisible,
As a nose on a man’s face, or a weathercock on a steeple”

William Shakespeare, *Two Gentlemen of Verona*, Act II, Sc. 1

This book began by establishing its fundamental analytical perspective that – to properly accommodate states of emergency within the rule of law, and to ensure that fundamental human rights are protected whilst granting to executive government the powers necessary to effectively deal with the crisis – the clear appreciation of a distinction between what is ‘normal’ and what is ‘exceptional’ needed to be made. It is only if this distinction is made that we can think clearly about how to strike the appropriate balance in the inherent tension between order and democracy, and make informed policy choices accordingly. More often than not however, in Sri Lanka, it is impossible to have a dispassionate conversation about such choices and alternatives, because these issues are intimately connected to emotional debates about broader matters of great political significance such as identity, ethnicity, religion, and history. In the midst of violent conflict, differences are sharpened, and it becomes increasingly difficult to achieve social consensus on such matters as essential

as respect for human dignity regardless of socially constructed identities.

In this context, to argue that crisis government is not 'normal' and that we should be thinking about (a) how we can return to 'normality', and (b), from that perspective, to rethink how we are going to rationalise the powers of the executive in the future in a more satisfactory way, runs the risk of falling from the grace of public opinion. Ultimately it becomes a contest of values and of authenticity, in which liberal democratic options would be portrayed as hopelessly foreign ideas which have no traction in the politics of real people. That is to frame the debate in its sharpest permutation: a debate between liberals and ethno-nationalists. To the latter, the agenda dictated by group political interest trumps all others. On either side of the ethnic divide, we find that the protagonists are more at home with Schmitt's concept of the political than with the liberal language of liberty and freedom from fear, and where the binary dynamic of 'us v. them' dominates political calculations.

For the vast majority of ordinary people, however, the experience of three decades of protracted conflict has meant that both conflict as well as the assumption of extraordinary powers and measures by the State have become normalised as a part of everyday life. Thus we seem to have become complacent in the belief that nothing can be done to ameliorate the many mundane miseries of crisis, because that just seems to be the way life is. This is what we discussed as the 'normalisation of the exception' and which has become invisible as the weathercock on a steeple.

The objective of this book has been to challenge these notions. Peace, order and good government is both desirable and achievable, but these public goods can only flow from making

certain commitments, and then acting on them. The commitments are with regard to positing human rights and the rule of law as non-negotiable values, and the constitutional reform debate in respect of states of emergency needs to be conducted from this standpoint.

If we make a commitment to go down this happier path, there is a vast array of options and ideas that are available to us to learn from and adapt to our own conditions. The comparative experiences of other countries as well as international law and standards, discussed at length in this book, are sources of constitutional ideas from which we can benefit greatly, if only we are open to them.

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