STATES OF EMERGENCY: ISSUES FOR CONSTITUTIONAL DESIGN

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The Centre for Policy Alternatives (CPA) was formed in the firm belief that there is an urgent need to strengthen institution- and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.

1. Introduction: The Norm and Exception Distinction

Designing the constitutional framework governing states of emergency is a major task for constitution-makers, especially in post-colonial societies such as Sri Lanka, where states of emergency have been extended, the abuse of emergency powers extensive. 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 in a constitutional democracy, 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 in contemporary constitutional practice. The tension provokes questions as to which kind 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 least damage to the democratic order as possible. 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.

This Working Paper is intended to identify and discuss in comparative context the issues that ought to receive the attention of drafters as Sri Lanka undertakes reforms through the current process in the Constitutional Assembly. The discussion in this Working Paper is drawn from my 2008 book, *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka*, published by the Centre for Policy Alternatives (CPA). Those who wish to delve deeper into the issues raised in this Working Paper, especially the theoretical dimensions and applicable international standards, are advised to consult that book. At the end of the paper I will set out a checklist of questions that constitution-makers can use to determine if they have considered all the issues germane to the design of a normatively defensible, effective, and well-ordered system of emergency powers that can deal with future crises in a better way than has been our experience so far.

2. Designing the Constitutional Framework for States of Emergency: Lessons from Comparative Experience[1]

The common themes of constitutional design in 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.

2.1 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,[2] 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 indirect and then rudimentary references to this matter.[3] 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

[1] For a more detailed discussion of the various comparative models, see Asanga Welikala (2008) *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo: Centre for Policy Alternatives): Ch.2.

[2] 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

[3] Samuel Issacharoff & Richard H. Pildes, (2004) '*Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime*', I.CON, Vol.2, No.2, 296

powers of any or all branches of government during a public emergency.[4] The broad consequence has been the need to employ doctrines such as constitutional necessity to rationalise emergency powers.[5] US state constitutions are different in that many provide explicitly for states of emergency.[6] The United Kingdom, on the other hand, has no written constitution, which makes 'constitutional' accommodation difficult, 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, explicitly provide for states 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,[7] which requires a declaration of emergency, in terms of a law passed by Parliament,[8] when 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency',[9] and then only to the extent emergency powers are necessary to restore law and order.[10] Likewise, the Israeli Basic Law provides for one type of state of emergency, but unlike the South African example, neither defines a state of emergency, nor enumerates the conditions under which a declaration becomes legally available.[11]

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

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[4] 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)

[5] See esp. Gross and Ní Aoláin: pp.46-54

[6] Oren Gross (2003) '*Providing for the Unexpected: Constitutional Emergency Provisions*' 33 *Israel Yearbook on Human Rights* 13 at pp.20-21

[7] 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

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

[9] 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

[10] Section 37 (1) (b)

[11] 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

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.'[12]

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,[13] as do the constitutions of the Netherlands and Portugal. The Dutch constitution differentiates between a 'state of war' and a 'state of emergency'.[14] 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'.[15]

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 publica*), state of siege, and state of war.[16] 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 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 (*suspención de garantias*) and the vesting of extraordinary powers in the executive branch of government."[17]

Multiple structure arrangements also feature in Germany, Canada, and Spain. The German Basic Law distinguishes between an 'internal emergency' (*Innerer Notstand*), a 'state of tension' (*Spannungsfall*), and a 'state of defence' (*Verteidigungsfall*).[18] 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

[12] Section 2 (1) of the PSO
[13] See Venelin I. Ganev (1997) '*Emergency Powers and the New East European Constitutions*' 45 *American Journal of Comparative Law* 585
[14] Articles 96 and 103 respectively of the Dutch Constitution
[15] Articles 19 (2) and 19 (3) of the Portuguese Constitution
[16] Article 139 of the Guatemalan Constitution
[17] Gross and Ní Aoláin: p.42; see also Brian Loveman (1993) *The Constitution of Tyranny: Regimes of Exception in Spanish America* (Pittsburgh: Pittsburgh UP)
[18] Articles 91, 87a(4), 12a(5)-(6), 80a, 115a-l 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

'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'.[19]

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 legislation for the peace, order, and good government of Canada.[20] 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).[21] The specifically permitted initial 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*).[22] 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'.[23] Organic Law 4/1981 defines the three states of emergency and describes the circumstances under which each may be declared. Thus, a state of alarm concerns natural disasters or 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.'[24]

As with any constitutional design options, the choice of arrangements depends 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

[19] Articles 35 (2), (3) of the German Basic Law
[20] See Peter W. Hogg (1997) *Constitutional Law of Canada* (4th Ed.) (Ontario: Carswell): Vol.1, Ch.17
[21] 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
[22] Article 116 of the Spanish Constitution
[23] Article 86
[24] European Commission for Democracy through Law (1995), op cit., pp.7-8

the latter (especially in regard to constitutionally enshrined fundamental rights) strictly according to the gravity of the threat.

This classificatory approach to the structuring of emergency powers also 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."[25] Firstly, 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."[26] 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."[27] 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."[28]

2.2 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.[29] 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)[30] are South Africa,[31]

[25] Gross and Ní Aoláin: p.45
[26] Ibid
[27] Ibid, pp.45-46
[28] Ibid, p.46
[29] Clinton Rossiter (1948) *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton: Princeton UP): pp.297-306
[30] For e.g. Article 38 (c) of the Israeli Basic Law: The Government
[31] Section 34 (1) of the South African Constitution

Germany[32] and Israel,[33] which are all essentially parliamentary systems.[34] However, in the interests of a rapid response, which the executive is better placed 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,[35] 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*.[36] 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.[37] 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.[38]

In the federal parliamentary system of India, the unusual constitutional distribution of power in respect of emergencies[39] 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.[40] Sri Lanka is currently contemplating the abolition of the executive presidency, but it may be an option to vest in what would otherwise be a titular presidency some role with regard to the declaration of states of emergency and the exercise of emergency powers, especially where the state's territorial integrity is threatened. The President may on this occasion act on the advice not only of the Prime Minister but perhaps also a Council of State.[41]

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[32] Article 115a of the German Basic Law
[33] Article 38 (a) of the Israeli Basic Law: The Government
[34] 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
[35] Ganev (1997) op cit., pp.589-592
[36] Articles 16 (1), 19 of the French Constitution; see John Bell (1992) *French Constitutional Law* (Oxford: Oxford UP): p.16
[37] Ibid
[38] Article 155 of the Constitution, discussed at length in Chapter 9, *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
[39] 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
[40] Article 352 of the Indian Constitution
[41] See for the idea of a 'Council of State': Asanga Welikala and Harshan Kumarasingham, '*Soulbury Plus: Conceptual Foundations and Institutional Features of a Parliamentary-Constitutional State*', CPA Working Papers on Constitutional Reform No.4, August 2016, available at: http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-4.pdf

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.[42]

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.[43] In his model of emergency powers, Ackerman proposes the device of 'supra-majority escalation' whereby each successive extension of a state of emergency requires ever increasing legislative majorities until a small minority becomes capable of halting further extension.[44] 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.[45]

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.[46] 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. I will consider these aspects in greater detail below.

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.

[42] Articles 116 (2), (3), (4) of the Spanish Constitution
[43] Articles 80a and 115a of the German Basic Law; Article 352 (6) of the Indian Constitution
[44] Bruce Ackerman (2004) '*The Emergency Constitution*' 113 *Yale Law Journal* 1029 at p.1047-1049: "an escalating cascade of supermajorities"
[45] Section 37 (2) (b) of the South African Constitution; see for the position in Sri Lanka prior to the Tenth Amendment to the Constitution, see Welikala (2008): Ch.6
[46] 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

2.3 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?[47]

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 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."[48]

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 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 the most salient counter against abuse of such provisions is the extra-legal one of

[47] See also Cheadle, Davis & Haysom (2002) op cit., Ch.31

[48] 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 Welikala (2008): Ch.6

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, beyond the reach of ordinary 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.[49]

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.[50] Among the human rights safeguards built into the South African emergency regime are the procedural framework which gives a central role to the legislature over declaration, and comprehensive judicial review over all aspects of emergencies on the one hand, and on the other, 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.[51] 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.[52] These are highly constructive sources of both positive rights as 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*.[53]

[49] For examples of all three approaches, see Gross and Ní Aoláin: p.8
[50] Cheadle, Davis & Haysom (2002), op cit., Ch.31
[51] 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
[52] Another example is Article 23 of the Finnish Constitution
[53] See Welikala (2008): Ch.7

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."[54] 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,[55] or that the legislature may not be dissolved,[56] or that its term of office be extended during the currency of a state of emergency.[57]

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.[58]

A more pernicious problem is executive rule-making power under special anti-terrorism legislation which operate outside the constitutional framework governing states of emergency. A good example is Sri Lanka's Prevention of Terrorism Act (PTA).[59] 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.[60] 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 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 has never been far away.[61]

[54] 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

[55] Article155 (4) of the Sri Lankan Constitution

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

[57] Article115h of the German Basic Law

[58] Article 155 (2)

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

[60] See Coomaraswamy & de los Reyes (2004), op cit.

[61] Ibid

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,[62] and President Roosevelt in a time a severe economic crisis followed by global war,[63] 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 demonstrate this.[64] Other federations such as Germany, India, and Russia provide explicitly for the suspension of fundamental federal constitutional principles during times of emergency.[65]

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 on devolution,[66] 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.[67] 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 threats[68] and emergency regulations made by the President override provincial statutes.[69]

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

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

[64] 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

[65] 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

[66] 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)

[67] 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

[68] 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)

[69] Article 155 (3A). See also Welikala (2008): Ch.6

2.4 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 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.[70] Many constitutions seek to implicitly limit or explicitly prevent judicial review,[71] while many are silent on the matter.[72] The Sri Lankan constitution and the PSO oust the jurisdiction of courts to review a proclamation of emergency.[73] 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 elsewhere, 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.[74]

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."[75]
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

[70] Section 37 (3) of the South African Constitution; Cheadle, Davis & Haysom (2002), op cit., Ch.31
[71] Article 150 (8) of the Malaysian Constitution; Article 28.3.3° of the Irish Constitution
[72] 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
[73] 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.
[74] Welikala (2008): Chs.6-7
[75] 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."

substantial risk that its actions may be curbed by the judiciary."[76] 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.[77] Indeed, one of the stronger regulatory features of the Sri Lankan emergency framework is that it places Parliament in a central accountability role.[78] This promise, however, has not been fulfilled in the Sri Lankan experience in practice.[79]

In comparative experience, there are several factors that have affected the failure of legislative oversight. Primary among these are the inherent weaknesses of constitutional instruments 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'[80] 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."[81] 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",[82] 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 each department the necessary constitutional means and personal motives to resist encroachments of the others."[83]

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[76] Gross and Ní Aoláin: p.63

[77] 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

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

[79] 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

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

[81] Gross and Ní Aoláin: p.65

[82] *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

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

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.[84] 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.[85]

3. The Sri Lankan Constitutional Framework on Emergencies

Based on the general design considerations of: (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, I will now discuss the current Sri Lankan constitutional framework for states of emergency. Such an assessment, it is hoped, would assist constitution-makers – only some of whom are senior practitioners at the public law Bar who would not need such reminders – avoid the pitfalls of the past in designing the structure of emergency powers in the future constitution.

3.1 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.[86] However, on the face of the text, the PSO is a fairly typical piece of legislation of its genre, which draws on similar 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

[84] *Federalist No. 64* (John Kay) and *Federalism No. 75* (Alexander Hamilton) in Rossiter (Ed.) (1961), op cit., pp.392-393, 451-452
[85] 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."
[86] 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

the life of the community. This is therefore (a) a general description of the conditions that would give occasion to the President to proclaim and 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 higher threshold of justification as to the existence or imminence of the actual emergency situation than is required by the Sri Lankan law.

3.2 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,[87] 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. Firstly, the problem of the definition of what constitutes a state of emergency discussed in the previous section, which facilitates, rather than imposes 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.

[87] 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 practical inaccessibility of the Gazette to the general public is, of course, another matter.

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 was 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 the overwhelming weakness of parliamentary accountability over the exercise of emergency powers in the Sri Lankan experience.

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, and there is strong rationale for its reintroduction in the post-war context. 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.

3.3 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?[88] 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 to the executive.[89] 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 of 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 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.

[88] See Welikala (2008): Ch.6
[89] See Zafrullah (1981), op cit., pp.46-50, 59-61, 114-117

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 this discussion, but this 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,[90] 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. Structuring these powers in the ways discussed above – for example, through the President acting on the advice of a Council of State – is one way of ensuring that necessary emergency powers are exercised with due regard to devolution, while simultaneously ensuring the state's legitimate interest in preserving its territorial integrity.

3.4 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, although 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 elsewhere.[91] 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.

[90] See Welikala (2008): Ch.3
[91] Ibid: Ch.6

CHECKLIST OF DESIGN CONSIDERATIONS IN THE CONSTITUTIONAL ACCOMMODATION OF STATES OF EMERGENCY

1. Defining a State of Emergency

- How is a state of emergency defined in the constitution? What is the appropriate balance between generality and specificity in choosing the language of the definition(s)? How and to what extent are contentious or debatable terms like 'national security' defined?
- Is this further elaborated in ordinary legislation (e.g., the PSO), and if so, consistently with the standards established by the constitution?
- Does the constitutional definition reflect the principle of exceptional threat, i.e., that emergency powers are temporary measures to deal with an exceptional threat to the life of the community, which will be revoked as soon as objective circumstances permit?
- What is the relationship between states of emergency and the bill of fundamental rights?
- Is the definition consistent with Sri Lanka's international obligations (e.g., the ICCPR)?
- Does the definition follow recent comparative best practice (e.g., the South African constitution, the Siracusa Principles, the Paris Minimum Standards, etc.)?
- What is the relationship, if any, between the framework for emergency powers and other regimes of extraordinary powers such as permanent anti-terrorism legislation?

2. Declaration, Extension, and Termination of a State of Emergency

- Who is empowered to declare, extend, and terminate a state of emergency? (e.g., the President acting on own discretion or on advice; does Parliament and/or the courts have a role?)
- Does the constitution set down a clear procedure for the declaration, extension, and termination of a state of emergency?
- Does this procedure reflect the principles of proclamation and notification, so that any executive act is fully transparent?
- Is the declaration, extension, and termination of a state of emergency subject to effective parliamentary oversight of not control? (e.g., summoning and continuing sessions throughout the duration of an emergency, emergency debates, special scrutiny committees especially for emergency regulations, non-partisan committee reports on emergency measures, etc.)?
- Is the declaration, extension, and termination of a state of emergency subject to judicial review? Does the constitution give special guidance for heightened scrutiny to the judiciary in exercising oversight over the executive during states of emergency (e.g., the South African constitution)?

- Are extensions subject to temporal controls (e.g., that emergencies cannot be extended beyond a prescribed reasonable period of time)?
- Are extensions subject to special procedural safeguards, such as escalating parliamentary majorities?
- Is there express provision for the early termination of a state of emergency once the exceptional threat has been overcome or has receded?

3. Legal Effects of a State of Emergency

- What extraordinary powers are conferred on the executive during a state of emergency?
- What is the scope and effect of emergency law-making by the executive (e.g., may override national and provincial legislation but shall not override the constitution)? When and how are they reviewed, amended, and terminated?
- What is the effect of emergency powers on the separation of powers? How does the constitution's normal balance of institutional power change with the ascendancy of the executive during a state of emergency? To the extent that is foreseeable, is the institutional rebalancing legitimate and proportionate to the values of constitutional democracy, including the rule of law?
- What is the effect of emergency powers on fundamental rights?
- Does the bill of rights contain a list of non-derogable rights? Does it reflect a positive or negative list approach to abridgeable rights (see Section 2.3, above)? Does it set down general principles for the limitation of rights, including prescription by law (which may include emergency regulations), necessity, proportionality, non-discrimination, etc.?
- What is the role of international law within the domestic legal system during and after a state of emergency? How does the constitution require the organs of the state including the judiciary to respect Sri Lanka's international obligations and engage with the authoritative views of treaty bodies?
- What if any provision is made for *post facto* civil and criminal liability in respect of the exercise of emergency powers by officers and agents of the state?
- Does the new constitutional framework for states of emergency require a comprehensive review of exiting legislation and case law for consistency with it?

4. Checks and Balances during a State of Emergency

- What is Parliament's constitutional role during a state of emergency? What parliamentary mechanisms of scrutiny and accountability can be constitutionally required during a state of emergency (e.g., a special select committee chaired by the Leader of the Opposition; more frequent ministerial statements and questions, etc.)?
- What is the judiciary's constitutional role during a state of emergency? What additional powers of scrutiny and enforcement do the judiciary exercise in relation to emergency measures (e.g., epistolary jurisdiction)?
- Are there special institutions, or permanent institutions with a special role, during a state of emergency (e.g., a Council of State to advise the President in the exercise of emergency powers)?
- How do the independent commissions function during a state of emergency?

- Subject to reasonable restrictions, does the constitutional and statutory framework permit the activities of non-state democratic institutions such as the media to continue as much as possible?
- How and to what extent does the constitution allow individuals to access international bodies (e.g., the ICCPR Human Rights Committee) during and after a state of emergency? How does the constitution ensure respect for treaty body views?