

Rule by emergency: Sri Lanka's postcolonial constitutional experience

Radhika Coomaraswamy* and Charmaine de los Reyes**

Sri Lanka's experience with emergency powers and the Prevention of Terrorism Act (PTA) illuminates the complex interaction between violence and repression by the state and violence and terror by nonstate actors. Many commentators maintain that the draconian measures taken by Sri Lanka have only enhanced the cycle of violence, leading to the destruction of the social and political fabric of a democratic society. The use of unbridled power by state authorities in both the north and south of the island has led to many deaths, mounting disillusionment, and violent backlash by aggrieved communities. The use of emergency powers has subverted constitutional rights, often perpetuating a climate of terror and a lack of respect for the rule of law. The use of these powers has also helped develop a culture of repression and impunity among members of the security establishment. The lack of a reasonable and effective response to terrorist activity committed by nonstate actors has led to more social unrest and the dominance of military considerations in the resolution of essentially political dilemmas. The recent peace process should give Sri Lankans an opportunity to revisit the use of emergency powers in the quest for political stability.

This article will begin with an overview of regulations declared under the state of emergency, move on to the political history behind emergency regulations, and then look at the process of enacting emergency regulations. It will then review the powers conferred on the national security forces and law enforcement officials, examine the deviations from international standards, and finally look more fully at important cases involving fundamental rights before the Sri Lankan Supreme Court.

1. Overview of emergency regulations: Is there a pattern?

Dating from when the government of Sri Lanka first declared a state of emergency in 1958 until the most recent lapse of emergency powers in 2001, Sri Lanka has experienced more years of authoritarian power, under the guise

*UN Special Rapporteur on Violence against Women. This article is dedicated to Suriya Wickremasinghe, secretary, The Civil Rights Movement of Sri Lanka, and a fearless fighter against the excesses of emergency rule.

**B.A. Hons, University of Victoria, LL.B. and B.C.L. candidate McGill University. In 2003, Charmaine de los Reyes completed a three-month internship at the International Centre for Ethnic Studies (ICES). Thanks to Ms. Suriya Wickremasinghe, Dr. Deepika Udagama and the researchers at ICES for their guidance and insight.

of emergency powers, than that of democratic governance. The longest period of emergency rule in Sri Lanka spanned the all of the years from 1983 to 2001, with the exception of a five-month suspension in 1989.

Emergency regulations were consistently renewed in order to requisition property and personal services; to control meetings, processions, publications, and firearms; to supervise, arrest, and detain individuals; and to influence investigations and trials. Whereas the motivations for resorting to emergency rule can be easily ascertained, as discussed in section 2, the issues covered by emergency regulations are enormously varied and constantly changing. Identifying a pattern is made more difficult since gazettes publishing emergency regulations have proved difficult to access.¹

1.1. Patterns of perplexity

The emergency regulations enacted since independence in 1947 have often been unfairly disproportionate to the actual situation, being used indiscriminately to regulate a limitless range of issues.²

It is useful in comprehending Sri Lanka's history of emergency regulation to distinguish between regulations that are *intra* or *ultra vires* in relation to the legal regime of the Public Security Ordinance of 1947 through which the emergency regulations are enacted and legitimized.³ The *ultra vires* regulations typically demonstrate parliamentary apathy and the desire to expedite the legislative process, permitting the executive to pass legislation despite the legal restraints on unwarranted emergency regulations.

Three categories of *intra vires* regulations may be identified. First, and least contentious, are emergency regulations that legitimately and proportionately respond to the emergency at hand. Second, there are those that seem *prima facie intra vires* but have been invalidated once their effects infringed on constitutionally guaranteed fundamental rights. Third are the emergency regulations that are *prima facie intra vires* but have proved grossly disproportionate to the actual emergency situation. Regulations in the latter two categories present the most significant threats to the protection of human rights, especially those which have conferred expansive powers to the national security forces and law enforcement agencies.

¹ Neelan Tiruchelvam, *Speech at the Emergency Debate* (Sept. 6, 1994), in *TRANSCENDING THE BITTER LEGACY: SELECTED PARLIAMENTARY SPEECHES BY NEELAN TIRUCHELVAM I* (Lisa Kois ed., ICES Publications 2000), available at <http://www.icescolombo.org/Neelan/ps060994.htm>; WILLIAM GOODHARD ET AL., *JUDICIAL INDEPENDENCE IN SRI LANKA: REPORT OF A MISSION 36* (Centre for the Independence of Judges and Lawyers Publications 1997) [hereinafter *JUDICIAL INDEPENDENCE*].

² GOODHARD, *JUDICIAL INDEPENDENCE*, *supra* note 1.

³ This methodological approach was utilized by the review committee under the auspices of the Centre for the Study of Human Rights, University of Colombo in 1993, which produced a report evaluating the entire range of emergency regulations promulgated during the period of June 1989 to May 1992. See *REVIEW OF EMERGENCY REGULATIONS 3* (Centre for the Study of Human Rights, association with the Nadesan Centre 1993) [hereinafter *REVIEW OF EMERGENCY REGULATIONS*].

A third category of regulation can be categorized as *intra vires* only if information regarding the motivation for its promulgation is available.⁴ Few regulations of this type have been identified,⁵ and information regarding the government's purpose in enacting such regulations was never disclosed, nor were the regulations legally challenged.⁶

2. The political history behind emergency regulations

The impetus for the invocation of emergency powers during this period may be attributed to three factors. First, as politically active trade unions, dominated by the Marxist parties, proliferated from the late 1940s into the 1960s, the pressure to deal with worker strikes motivated the government to enact the Public Security Act (now the Public Security Ordinance (PSO)).⁷ This regime legitimated emergency rule. From the government's perspective, public services such as food distribution, transportation, and communication services were essential to the nation's survival and protecting them justified overriding civil liberties through emergency legislation.⁸ At a subsequent point, certain government-proposed changes to legislation legitimizing emergency rule in 1959 inspired political strikes by trade unions.⁹ By 1968, many government departments were declared essential services under the Public Security Ordinance,¹⁰ which facilitated action against strikers, although emergency rule in response to trade union activity was not invoked until July 1971.¹¹ Over time, ethnic-nationalist and political activity superseded trade union activity as the principal reason for invoking emergency powers.

Second, emergency rule was implemented initially to curb the public violence instigated by the Janatha Vimukthi Peramuna (JVP), a Sinhala Marxist revolutionary party that came into existence in 1964 but did not

⁴ *Id.*

⁵ *Id.* at 7–8, 20–21. The study conducted by the review committee on emergency regulations identified the following regulations as falling within this third category. See Emergency (Appointment of Asst. Collectors of Customs) No. 574/8 (Sept. 4, 1989); Emergency (Appointment of Asst. Controllers) No. 574/9 (Sept. 4, 1989); Emergency (Miscellaneous Provisions and Powers) No. 563/7, reg. 39, 53, 57 (June 20, 1989); Amendment of Code of Criminal Procedure Act (Re Imprisonment in Default of Fine) No. 694/8 (Dec. 26, 1991).

⁶ REVIEW OF EMERGENCY REGULATIONS, *supra* note 3. Accordingly, one of the primary general recommendations of the review committee was for the government to include an explanatory preamble in a published, publicly accessible notice of the respective emergency regulation.

⁷ A. JEYARATNAM WILSON, POLITICS IN SRI LANKA, 1947–1979, at 119 (Macmillan Press Ltd. 1979).

⁸ J.C. Weliamuna, Story of National Security Law in Sri Lanka (unpublished manuscript, on file with author).

⁹ ROBERT N. KEARNEY, TRADE UNIONS AND POLITICS IN CEYLON 138–40 (Univ. of California Press 1971).

¹⁰ *Id.* at 143.

¹¹ WILSON, *supra* note 7, at 164.

become active until 1970.¹² In April 1971, the JVP launched its first armed insurrection in southern Sri Lanka in an attempt to seize state control. During a four-month period of unrest, the United Front government responded by resorting to emergency rule, enabling it to suppress the insurgents quickly and through questionable means, such as torture and extrajudicial disappearances.¹³ From 1987 to 1990, the JVP staged a second insurrection, and, amid ongoing conflict between the Liberation Tigers of Tamil Eelam (LTTE)—the extreme Tamil nationalist organization—and the Sri Lankan government, emergency rule now spread to the southern region as well. Again the government, under the United National Party (UNP), was able to suppress the JVP, but at the great cost of arbitrary arrests, detentions, and executions.

The increasingly frequent riots arising from tension between the Sinhalese and Tamil populations, which was, in turn, due to discriminatory governmental policies against the Tamil people, form the third and most common reason for the implementation of emergency rule. For instance, the peaceful protest by the moderate Tamil Federal Party to the enactment of the Official Language Act of 1956 (the “Sinhala only” bill) by the Sri Lanka Federal Party was met with violence by Sinhalese hooligans.¹⁴ Marginalization of the Tamil people soon followed. The 1972 Constitution affirmed Sinhalese domination by proclaiming Sri Lanka a unitary state, which effectively denied possible devolution of legislative powers to the Tamil population.¹⁵ In addition, legislative initiatives, such as educational policy reforms, favored acceptance of Sinhalese students over those of Tamil descent, and this encouraged the mobilization of the younger Tamil population, which began to resort to violent demonstrations against the state.¹⁶ By 1977, the Tamil secessionist movement was born. Throughout this time, intermittent periods of violence ensued to which the government responded by resorting to emergency rule.

These draconian measures, under former president J. R. Jayawardena, were further supplemented in 1979 through the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA). The PTA, enacted as a temporary measure, was intended to eliminate threats to a unified Sri Lanka. Sections 6–9 of the PTA essentially mirror the excessive police powers of arrest, detention, and seizure of property issued under emergency regulations.

¹² KEARNEY, *supra* note 9, at 151–52.

¹³ Deepika Udagama, *Taming of the Beast: Judicial Response to State Violence in Sri Lanka*, 11 HARV. HUM. RTS. J. 269, 272 (1998).

¹⁴ Amita Shastri, *Government Policy and the Ethnic Crisis in Sri Lanka*, in GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC 129, 143–44 (Michael E. Brown & Sumit Ganguly eds., MIT Press 1997).

¹⁵ SRI LANKA CONST. (1972) art. 2.

¹⁶ Shastri, *supra* note 14, at 147–48; LAKSHMANAN SABARATNAM, ETHNIC ATTACHMENTS IN SRI LANKA: SOCIAL CHANGE AND CULTURAL CONTINUITY 199–203 (Palgrave 2001).

Of particular concern, however, are the powers outlined in section 9(1), which permit a minister to issue a detention order for up to eighteen months if it is reasonably believed that the suspect is connected to unlawful activity.¹⁷ The PTA was amended to become a permanent measure in 1982. Although the proposed legislation was referred to the Supreme Court, the Court lacked jurisdiction to consider the possible dangers for constitutionally guaranteed fundamental rights. And once the PTA was enacted, the Court lost jurisdiction to review the law's constitutionality, since article 80 of the 1978 Constitution prevents judicial review of enacted legislation.¹⁸ The PTA and emergency regulations, together, achieved the counterproductive result of fueling the increasingly violent Tamil movement for an independent state.¹⁹

From 1983 to 2000, the civil war between the highly organized and ruthless LTTE and the Sri Lankan government remained a constant presence, and the severity of the emergency rule corresponded with the advances made by the LTTE, especially in 1989 and early 2000. The former period marks the violent reprise of the LTTE against Indian peacekeeping forces in northern Sri Lanka, who were established through the Indo-Sri Lanka accord to disarm the Tamil insurgents in return for greater autonomous powers in the Northeastern province. Civil libertarians urged the government to limit the excesses of the emergency regulations. Although calls were heeded, the LTTE's capture of a strategic military base in northern Sri Lanka in May 2000 led to a new set of ironhanded emergency regulations that remained in place until the final lapse of emergency rule in 2001.

3. The process of enacting emergency regulations

Sri Lanka's government has a presidential-parliamentary system, featuring proportional representation. The president may proclaim a state of emergency under part II of the Public Security Ordinance of 1947 (PSO) and issue emergency regulations under section 5 of the PSO, which bypasses the normal parliamentary processes.²⁰ Specific circumstances must exist to legitimate such an act. As stated in the PSO:

In view of the *existence or imminence* of a state of public emergency, the President [must be] of opinion that it is expedient so to do 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. . . .²¹

¹⁷ Udagama, *supra* note 13, at 275–76. See Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, § 9(1).

¹⁸ SRI LANKA CONST. (1978) art. 80, § 3.

¹⁹ Shastri, *supra* note 14, at 153.

²⁰ SURIYA WICKREMASINGHE, EMERGENCY REGULATIONS 5 (Nadesan Centre 1994).

²¹ Public Security Ordinance No. 25 of 1947, ch. 40, art. 2 (emphasis added) [hereinafter PSO].

Under the Amendment Act No. 8 of 1959 to the PSO, the president was empowered to proclaim an emergency for the whole or any part of the country, and a 1987 constitutional amendment granted legal immunity to the president for such declarations made in good faith.²²

Emergency regulations are valid for one month, but the president is empowered to renew a proclamation and to modify a regulation that is renewed.²³ If no new proclamation is made, the emergency regulations and correlated orders automatically lapse.

The PSO stipulates that emergency regulations may override any legislation that might prove inconsistent or contrary. More important, certain fundamental rights within the 1978 Constitution are subject to restriction in the interests of national security, including equal treatment before the law; freedom of association, assembly, movement, and cultural and religious expression; and procedural requirements in arrest and detention.²⁴

The primary mechanism for parliamentary review of emergency proclamations is found in article 155 of the 1978 Constitution, which subjects the president's power to parliamentary debate,²⁵ and if a proclamation is a renewal purporting to extend beyond fourteen days, the president must also obtain parliamentary approval. If the president's proclamation is made after parliament is dissolved, article 155 requires a parliamentary session to debate the issue on the tenth day after the proclamation is made. In practice, however, parliament acts as a rubber stamp to presidential powers.

Although the 1978 Constitution limits parliamentary debate to a proclamation's validity and does not enable parliament to debate the actual emergency regulations, section 5(3) of the PSO does state that parliament may revoke, alter, or amend a regulation through a parliamentary resolution.²⁶ No reports have been found where parliament has exercised this power on any emergency regulation,²⁷ including regulations that would have been better addressed through the normal legislative process, such as those regarding adoption,²⁸ the quality of edible salt,²⁹ and driving licenses.³⁰

²² Centre for International and Comparative Human Rights, Queen's University of Belfast, States of Emergency Database, Report of a Feasibility Study 6 (1992), available at <http://www.law.qub.ac.uk/humanrts/emergency/emerghome.html>.

²³ Weliamuna, *supra* note 8, at 3.

²⁴ SRI LANKA CONST. (1978) art. 15, § 1, § 7. See also PSO, *supra* note 21, § 7.

²⁵ *Id.* art. 155.

²⁶ PSO, *supra* note 21, § 5(3).

²⁷ Weliamuna, *supra* note 8, at 14.

²⁸ Amendment of Adoption of Children Ordinance (ch. 61), No. 581/22 (Apr. 4, 1990).

²⁹ Emergency (Edible Salt) No. 635/7 (Nov. 7, 1990).

³⁰ Emergency (Validation of Driving Licenses) No. 625/18 (Aug. 31, 1990); Emergency (Issue of Driving License Cards) No. 689/13 (Nov. 20, 1991).

4. Powers conferred on national security forces and law enforcement officials

4.1. Restriction orders

During a declaration of emergency, the president usually enacts a set of regulations entitled the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPPR). These regulations give special powers of search, arrest, and detention to the national security forces and law enforcement agencies³¹ and fall into three categories: preventive detention, detention pursuant to an offense, and rehabilitative detention.

Regulation 16 authorizes the defense secretary to issue an order: (1) restricting a person from being in a specified area; (2) requiring an individual to report his or her movements; (3) ordering house arrest if specified conditions are met; (4) impounding a passport; (5) restricting the use or possession of specified articles; and (6) restricting employment or business activities.³² The exercise of these broad powers is justified if the defense secretary believes that the individual was implicated in activities perceived as a general threat to national and public security, had breached regulations prohibiting sedition and incitement, had obstructed essential services, or was active in a proscribed organization.³³ The only recourse for an individual who wishes to contest such an order is to make a fundamental rights application to the Supreme Court, which must be filed within one month of the alleged infringement.³⁴

Regulation 17 authorizes the defense secretary to make a detention order. To do so, the defense secretary must be satisfied that the detention is necessary to prevent an individual from undertaking acts posing a threat to national security, endangering provisions of essential services, or committing, aiding, or abetting the commission of specified offenses.³⁵ In *Sunil Kumar Rodrigo (on behalf of B. Sirisena Cooray) v. Chandananda de Silva and Others*³⁶ (decided in July 1997), the Supreme Court stated that a detention order pursuant to regulation 17 must be based on actual, available material, and that the decision must be made independently of the recommendations of others.³⁷ The Supreme

³¹ Emergency (Miscellaneous Provisions and Powers) Regulations, No. 771/16 (June 17, 1993) [hereinafter EMPPR]; SURIYA WICKREMASINGHE, *SRI LANKA: STATE OF HUMAN RIGHTS 2001*, at 39, 50–51 (Law & Society Trust 2000).

³² WICKREMASINGHE, *supra* note 31, at 40–41.

³³ *Id.* at 40; Amnesty International, *New Emergency Regulations: Erosion of Human Rights Protections*, Index No. ASA/37/019/2000 (June 30, 2000), available at <http://www.amnestyusa.org> [hereinafter *Erosion of Human Rights Protections*].

³⁴ *Id.*

³⁵ SURIYA WICKREMASINGHE, *ARREST AND DETENTION 4* (Nadesan Centre 1999).

³⁶ [1997] 3 Sri L.R. 265.

³⁷ SURIYA WICKREMASINGHE, *SRI LANKA: STATE OF HUMAN RIGHTS 1999*, at 48 (Law and Society Trust 1999); WICKREMASINGHE, *ARREST AND DETENTION*, *supra* note 35, at 4; Amnesty International, *Erosion of Human Rights Protections*, *supra* note 33.

Court also held that the order must contain specific reasons for the detention, explaining how the detained person constitutes a threat, rather than relying on the general notion of ensuring public security.³⁸ This rule was affirmed in 1998.³⁹ In May 2000, the regulation was altered, removing the requirement to produce evidentiary material and stating that the defense secretary only had to be of the “opinion” that the detention was necessary, an apparent attempt to circumvent the Supreme Court’s decision in *Sirisena Cooray*.⁴⁰ This new rule remained in effect until the end of emergency rule in June 2001.

Detention orders pursuant to regulation 17 are valid for a period of three months but may be extended upon the defense secretary’s application to the magistrate. In 1994, the defense secretary’s power to renew the detention order was limited to one year. Thereafter, if the detainee continued to pose a documented threat to national or public security and was produced before the magistrate prior to the lapse of the detention period, the power to renew the detention passed to the magistrate, who could continually extend the order for three month periods.⁴¹ The place of detention is determined by the inspector general of police, and authorized by the defense secretary, a process that bypasses the rules of detention and rights of persons in custody as established in the Ordinance to Amend and Consolidate the Law Relating to Prisons, 1878 (Prisons Ordinance).⁴² The regulatory change implemented in May 2000 removed the requirement that the inspector general of police publish a list of authorized places of detention, creating a greater risk of secret detention.⁴³

Also common was detention under regulation 19, which is effected pursuant to an arrest under regulation 18.⁴⁴ According to regulation 18, any member of the armed forces or the police may arrest an individual without a warrant if that person has committed a crime, or is suspected of committing a crime, if there is reasonable basis for that belief.⁴⁵ Until May 2000, detainees in the north and east could be detained initially in an authorized center for up to sixty days, whereas detainees elsewhere in the country could be detained only for seven days, extendable to twenty-one days, if investigations

³⁸ WICKREMASINGHE, SRI LANKA STATE OF HUMAN RIGHTS 1999, *supra* note 37.

³⁹ *Jayaratne and Others v. Chandrananda de Silva, Secretary, Ministry of Defence and Others*, [1998] 2 Sri L.R. 129.

⁴⁰ *Sirisena Cooray*, [1997] 3 Sri L.R. 265. Amnesty International, *Erosion of Human Rights Protections*, *supra* note 33.

⁴¹ WICKREMASINGHE, ARREST AND DETENTION, *supra* note 35, at 5.

⁴² *Id.* at 6. INFORM, EMERGENCY (MISCELLANEOUS PROVISIONS AND POWERS) REGULATIONS No. 1 OF 2000: A REVIEW 9 (Inform 2000) [hereinafter EMERGENCY REGULATIONS: A REVIEW].

⁴³ Amnesty International, *Erosion of Human Rights Protections*, *supra* note 33.

⁴⁴ WICKREMASINGHE, ARREST AND DETENTION, *supra* note 35, at 3.

⁴⁵ *Id.* at 10; INFORM, EMERGENCY REGULATIONS: A REVIEW, *supra* note 42, at 10.

demonstrated the need for further detention.⁴⁶ After May 2000, all detainees, regardless of region, could be initially detained for 90 days, extendable to a maximum of 270 days. Once the maximum period lapsed, the detainee had to be released unless subsequently placed under a regulation 17 detention order or produced before a court.⁴⁷

In order for a regulation 19 detention to be valid, the arresting officer must notify the officer in charge of the nearest police station within twenty-four hours of the arrest. The defense secretary is responsible for notifying the magistrate of the area of the authorized places of detention. If the location of detention is a prison, additional safeguards through the Prisons Ordinance are available, but these safeguards can be waived or amended by the defense secretary.⁴⁸

Rehabilitation detention orders are made under regulations 20 and 21 of the EMPPR. They subject individuals detained under regulation 17 or 19 to rehabilitative confinement; by 1996, however, regulation 22 regarding surrender was modified to allow for “rehabilitative” detention of surrenderees. As stated in regulation 20(1), rehabilitative detention is reserved for those who have not been convicted of any offense but are, nevertheless, detained in “the interest of the welfare of [the] person.”⁴⁹ A presidentially appointed commissioner general of rehabilitation monitors the detention and reports to the defense secretary, who decides whether the detainee should be released. Although there is no maximum duration of rehabilitative detention imposed by the regulations, the order must indicate the time period for which the person may be held. In the reformulated regulation 22 of 1996, the extension of a detention was limited to twelve months.

4.2. Sufficient safeguards against excessive use of power?

In the early years of emergency rule, few safeguards existed outside of those articulated within the regulations themselves. Internal safeguards, such as report of the arrest (regulation 18(7)), issuance of arrest receipts (regulation 18(8)), and disclosure of the place of detention (regulation 19(8)), were in place, but they were often ignored in practice. There was also a tendency for the government to override external safeguards through the emergency regulations. For instance, the usual right of a suspect to be produced before a magistrate within twenty-four hours of arrest after an offense is committed⁵⁰ was circumscribed by the emergency regulations under regulations 19(1). This regulation was tempered in *Sirisena Cooray*, in which Justice Amerasinghe held that

⁴⁶ WICKREMASINGHE, ARREST AND DETENTION, *supra* note 35, at 14.

⁴⁷ *Id.* at 15.

⁴⁸ *Id.* at 14.

⁴⁹ EMPPR, *supra* note 31, reg. 20(1).

⁵⁰ Code of Criminal Procedure, Act. No. 15 of 1979, pt. III, ch. IV, art. 33(1) (Sri Lanka).

emergency regulations must be read with article 13(2) of the 1978 Constitution, which extends to an arrested person the right to be produced before a judge in the nearest competent court. Article 15(7) allows that right to be restricted in the interest of national security,⁵¹ but restrictions must be specified in the regulation. Although it is possible, therefore, to restrict one's fundamental rights, they cannot be denied altogether.⁵² Thus, all detainees, regardless of the express ascendancy of regulation 19 over the Criminal Procedure Act, must be produced before a magistrate within a reasonable time.⁵³

Additional legislative safeguards were introduced only in the 1990s. The first significant, independent safeguard was established with the creation of the Human Rights Task Force (HRTF), in 1991, pursuant to the Sri Lanka Foundation Law No. 31 of 1973;⁵⁴ its mandate was extended and strengthened in 1995.⁵⁵ The directives issued pursuant to this law could effectively counter the propensity for arbitrary arrest and detention fostered under regulations 17–19.⁵⁶ However, the HRTF was short lived and was officially dismantled in 1997 in favor of the new Human Rights Commission (HRC),⁵⁷ which was not fully operative by the time the HRTF lapsed and lacked the experience developed under the HRTF.⁵⁸

The presidential directions issued in July 1997, which complemented the HRC Act, recognized the need for a monitoring body to ensure the protection of fundamental rights vis-à-vis the expansive powers conferred on the security forces and law enforcement officers. The directives instruct the heads of the armed forces and police force to assist the HRC in performing its mandate to ensure the humane treatment of those arrested or detained. For instance, arresting officers are required to inform the HRC of an arrest within forty-eight hours and to give HRC members access to any detained person at any time. Yet continued reports of human rights abuses indicate that officers neither consistently complied with the directive nor faced disciplinary action for their negligence. Furthermore, the directives did not mitigate the undue harshness with which a person can be detained nor the possibility of the place of detention being kept secret.⁵⁹

⁵¹ SRI LANKA CONST. (1978) arts. 13, § 2, art. 15, § 7.

⁵² *Sirisena Cooray*, [1997] 3 Sri L.R. at 316–17.

⁵³ *Id.* at 318.

⁵⁴ Sri Lanka Foundation Law No. 31, § 19 (1976).

⁵⁵ *Id.*

⁵⁶ *Vinayagamorthy, Attorney-at-Law (on behalf of Wimalenthiran) v. The Army Commander and Others*, [1997] 1 Sri L.R. 113.

⁵⁷ Human Rights Commission of Sri Lanka Act, No. 21 of 1996 (HRC Act).

⁵⁸ SURIYA WICKREMASINGHE, SRI LANKA STATE OF HUMAN RIGHTS 1998, at 44 (Law and Society Trust 1998) [hereinafter SRI LANKA STATE OF HUMAN RIGHTS 1998].

⁵⁹ Amnesty International, *Erosion of Human Rights Protections*, *supra* note 33.

4.3. Executive review over the powers of arrest and detention

The two methods of executive review were established in the mid-1990s, primarily under EMPPR No. 4 of 1994 and the HRC Act. EMPPR created an advisory committee to hear objections from those subjected to detention orders under regulation 17. Because the provisions establishing the advisory committee are found only under this regulation, those detained under other regulations do not have recourse to this body. Moreover, the effectiveness of the advisory committee is doubtful since the committee's report of an objection must be submitted to the defense secretary, who has discretion to revoke or confirm a detention order.

More comprehensive are the powers of review conferred on the HRC. Similar to the former HRTE, the HRC was mandated to investigate breaches of fundamental rights either on its own initiative or after complaints were brought to its attention.⁶⁰ If the HRC finds that there is a breach of fundamental rights, the HRC Act states that the commission will refer the matter for conciliation or mediation. If mediation fails, the commission may (a) recommend prosecution of the infringing party, (b) refer the matter to a court having appropriate jurisdiction, or (c) make recommendations to those having authority over the infringing party. Although the government presented the HRC as an effective review mechanism supporting the "national framework for the protection of human rights,"⁶¹ the first HRC commission, which served from 1997–2000, did not initiate any litigation.⁶² However, with the appointment of new members to the HRC in 2000, recommendations were made to the government on the need to bring emergency regulations in line with international standards.⁶³

In short, the powers conferred on the national security forces and police enforcement officials were too often broadly framed, overextensive, or asymmetrical relative to the actual emergency situation. Rather than ensuring the purported goal of public and national security, the emergency powers permitted the infringement of both constitutionally entrenched fundamental rights and international standards of human rights. In turn, this practice only perpetuated public terror and instilled a culture of irreverence for the rule of law, a trend that could not be prevented by regulatory safeguards or the

⁶⁰ WICKREMASINGHE, ARREST AND DETENTION, *supra* note 35, at 9.

⁶¹ United Nations Committee on the Elimination of Racial Discrimination, Report Submitted by State Parties Under Article 9 of the Convention (United Nations International Convention on the Elimination of All Forms of Discrimination), UN Doc. CERD/C/357/Add.3 (Sept. 4, 2000), available at <http://www.hri.ca/fortherecord2001/documentation/tbodies/cerd-c357-add3.htm>.

⁶² Neil Sammonds, *Accountability of the Security Forces in Sri Lanka*, in A NEED TO KNOW: THE STRUGGLE FOR DEMOCRATIC, CIVILIAN OVERSIGHT OF THE SECURITY SECTOR IN COMMONWEALTH COUNTRIES (University of London, Commonwealth Policy Studies Unit 2000), available at <http://www.cpsu.org.uk/projects/NEED.htm>.

⁶³ *Id.*; WICKREMASINGHE, EMERGENCY REGULATIONS, *supra* note 20, at 64.

monitory bodies meant to act as review mechanisms. The abusive exercise of power also brought international involvement in Sri Lanka's long history of ethnic conflict. It is to this issue that we now turn.

5. Deviations from international standards of human rights

In practice, Sri Lanka's emergency regulations have consistently deviated from international standards, notably the International Covenant on Civil and Political Rights (ICCPR),⁶⁴ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).⁶⁵

The most obvious conflicts between the emergency regulations and international law are in relation to the ICCPR, specifically article 6, guaranteeing the inherent right to life and freedom from arbitrary deprivation of life; article 7, prohibiting torture, and inhuman and degrading treatment or punishment; article 9(1), guaranteeing the rights to liberty and security and prohibiting arbitrary arrest and detention; article 9(2), ensuring that an accused will be informed of the reasons for arrest; article 9(3), guaranteeing the right to be promptly brought before a judge; article 9(4), addressing the right to take proceedings before a court; and article 9(5), entitling the victim of a human rights violation to compensation.⁶⁶

Complementing the ICCPR provisions regarding the right to life and security is the more specific Convention Against Torture. Article 2(2) states that war, threat of war, or political instability may not justify any act of torture, which is defined as severe mental or physical pain or suffering, intentionally inflicted or condoned by an official for purposes such as obtaining a confession, punishment, intimidation, or coercion.⁶⁷ In compliance with the convention the government enacted the Convention Against Torture Act, which contains most of the commitments within the UN convention, including section 3, stating that political instability or public emergency shall not be a defense against the charge of torture.⁶⁸ However, there is no definition of torture within the act, a gap between international obligations and national

⁶⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

⁶⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, UN Doc. A/39/51 (1984) (entered into force June 26, 1987).

⁶⁶ ICCPR, *supra* note 64, arts. 6, 7, 9(1), 9(2), 9(3), 9(4), and 9(5).

⁶⁷ Convention Against Torture, *supra* note 65, art. 2(2).

⁶⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 (Convention Against Torture Act).

legislation that creates a space for acts of torture to occur with impunity. Although section 2 of the Convention Against Torture Act establishes torture as an indictable offense and makes this provision applicable during periods of public emergency, the state has rarely indicted perpetrators of torture until recently.⁶⁹

Sri Lanka has enacted excessively stringent measures regarding citizen and media censorship. The governing legislation is implemented through regulation 14, which authorizes a presidentially appointed body to prevent or restrict publications in the interests of national security, public order, and maintenance of essential services; to seize documents, film, audio and videocassettes, newsprint, or any other publications; and to prohibit a person from partaking in media activity prejudicial to national security. The ICCPR provides that citizen and media freedom of expression may be circumscribed only to the extent that is required by the emergency situation.⁷⁰ Nonetheless, this power has often been abused by Sri Lankan government authorities, most notably in the emergency regulations promulgated in May 2000, when the government extended the ban on national media to Sri Lanka-based foreign journalists. Many international monitoring bodies have issued critical reports, and, after a statement by HRC chairman, Faisz Musthapha, P.C., the government promptly lifted the ban.

Although many of the rights guaranteed in the ICCPR and the Convention Against Torture appear as safeguards in the emergency regulations or related legislation, the Sri Lankan government has achieved only formal and not substantive compliance with international standards. The overwhelming data collected from monitoring bodies, such as the UN and international and Sri Lankan nongovernmental organizations (NGOs), especially during 1983–2000, have placed Sri Lanka second to Iraq in having the worst record for the number of enforced or involuntary disappearances.⁷¹ From January to November 2000 alone, approximately 18,000 people were arrested under emergency regulations or the Prevention of Terrorism Act No. 48 of 1979 (as amended by Act No. 10 of 1982). Many were Tamils detained without trial for more than two years.⁷² Evidence against the detainees was often obtained through torture while in police custody, a practice legitimized by emergency

⁶⁹ Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture, Sri Lanka, (May 19, 1998), ¶ 254, available at <http://www.law.monash.edu.au/humanrts/cat/observations/srilanka1998.html>. The committee noted three areas that Sri Lanka's Convention Against Torture Act should review and amend to bring the legislation into compliance with the UN Convention. This includes (1) the definition of torture; (2) acts that amount to torture; (3) extradition, return, and expulsion.

⁷⁰ ICCPR, *supra* note 64, arts. 4, 9.

⁷¹ Asian Legal Resource Centre, Civil and Political Rights, Including the Question of: Disappearances and Summary Executions, (Dec. 29, 1999), ECOSOC, UN Doc. No. E/CN.4/2000/NGO/63.

⁷² HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2002, available at <http://www.hrw.org/wr2k2/asia10.html>.

regulations that override laws of evidence that bar the admissibility of statements made to persons of authority.⁷³

During Sri Lanka's ethnic conflict, independent monitors rightfully accepted the legitimacy of emergency rule. But the realities of Sri Lanka's political situation since independence, seldom warranted the excesses of the regulations and the lack of adequate judicial control to counter possible abuses.⁷⁴ The overall effect, reflecting the inadequacy of parliamentary debate and lack of political will, was tantamount to an overt defiance of legally binding international standards of fundamental rights.

A glimmer of hope appeared with the case of Krishanti Kumaraswamy, a seventeen-year-old Tamil schoolgirl, who was abducted, gang-raped, and murdered by state soldiers at the Kaithady Army checkpoint in the Jaffna peninsula because of an allegation that she was an LTTE supporter. Ms. Kumaraswamy's mother, brother, and neighbor who subsequently visited the army checkpoint to inquire after her disappearance were also murdered. Although these actions were not taken under the authority of the emergency regulations, President Chandrika Kumaratunga issued an unprecedented call for immediate action, and a case was filed so as to bypass the well-established legal impunity for state actors. The case was heard, and the verdict—finding six soldiers guilty of murder—was rendered within the record time of two years. There is no official explanation for the state's quick response. Some reports state that it demonstrates the state's commitment to its international obligations and the accountability of state organs. For instance, U.S. Department of the State Office spokesman, James P. Rubin, issued a statement on July 7, 1998, applauding the verdict in the *Kumaraswamy* case and heralding it for upholding human rights.⁷⁵ But other cases of torture and rape have not been met with the same state vigor. Only one case besides *Kumaraswamy* has successfully secured convictions of security personnel.⁷⁶ To date, no police official has been convicted for extralegal use of force.

6. Fundamental rights cases under the Sri Lanka Constitution

A study of fundamental rights cases involving the use of emergency regulations is important in two respects. First, we see the beginnings of the

⁷³ *Id.*; Prashanthi Mahindaratne, *Legal Aspects of Human Rights Issues*, in FOCUS ON SRI LANKA 8 (The Asia Foundation, Asian Perspectives Series 1998), available at <http://www.asiafoundation.org/pdf/focusonsrilanka.pdf>.

⁷⁴ GOODHARD, JUDICIAL INDEPENDENCE, *supra* note 1, at 27–28.

⁷⁵ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor (Feb. 26, 1999), available at http://www.state.gov/www/global/human_rights/1998_hrp_report/srilanka.html. See also *Embilipitiya Children's Case*, [1999] C.A. 93/99.

⁷⁶ Citations to these two cases needed from author.

judiciary's attempt to develop a space for judicial review of administrative action, despite executive attempts to circumscribe that power. Second, the authoritarian exercise of power through emergency rule has led to a new shape and meaning for fundamental rights and clarified the extent to which the government may restrict them during national emergency.

6.1. The evolution of judicial review

As noted previously, the few legislative review mechanisms to which emergency regulations are subject have not been used to restrain excessive presidential powers. On the other hand, the Supreme Court, which has sole jurisdiction over fundamental rights cases through section 126 of the 1978 Constitution,⁷⁷ has embarked on a slow but more hopeful initiative in scrutinizing executive abuse of emergency legislation.

Despite constant and grave encroachments on fundamental rights posed by emergency regulations, and the weak limitations on the presidential exercise of emergency rule imposed by article 155 of the 1978 Constitution, little hope existed for constitutional challenges in the early decades of emergency rule. At a practical level, access to the courts was prohibited by both a lack of information regarding constitutional rights as well as the nature of the legal process itself.⁷⁸ Furthermore, the costs of obtaining legal assistance and traveling to the capital city of Colombo, where the courts were located, hindered access to justice.⁷⁹ In addition, a culture of fear tended to silence victims and legal counsel. Many reports document the extrajudicial executions of human rights lawyers and the reluctance of such lawyers to start cases against security forces due to intimidation, especially during the period of 1987–1993.⁸⁰

The few fundamental rights cases to reach the Supreme Court were largely unsuccessful in invalidating emergency regulations until the late 1980s. First, justiciable fundamental rights did not exist before the 1978 Constitution.⁸¹ Nonetheless, the first case challenging the legality of the PSO legislation occurred in 1966, in *S. Weerasinghe v. G.V.P. Samarasinghe and Others*.⁸² Here, the Supreme Court held that the Public Security Ordinance was *intra vires*, and that any regulations enacted under this legislation were valid. In the 1972 case of *Hirdanaramani v. Ratnavale*,⁸³ the Court held that it could not question

⁷⁷ SRI LANKA CONST. (1978) art. 126.

⁷⁸ Udagama, *supra* note 13, at 284.

⁷⁹ *Id.*

⁸⁰ *Id.*; AMNESTY INTERNATIONAL REPORT 1993, at 267 (Amnesty International Publications 1993).

⁸¹ Udagama, *supra* note 13, at 282.

⁸² [1966] N.L.R. 361.

⁸³ 75 N.L.R. 67.

a detention order by the defense secretary if made in good faith. But it was difficult to prove that an order was made for an illegitimate reason.⁸⁴

As late as 1982, the Supreme Court affirmed that, in the absence of bad faith, the president was the sole judge in proclaiming a national emergency and was not bound to state reasons for that decision.⁸⁵ Greater space for judicial review was established in *Edirisuriya v. Navaratnam*,⁸⁶ where the Court invalidated a detention order after an investigation of the circumstances of an arrest and detention, and in *Nanayakkara v. Perera*, which held that reasons for detention under regulation 19 must be communicated to the detainee so that the person may have the opportunity to object.⁸⁷ Although all the plaintiffs in the above cases were unsuccessful in challenging the validity of the emergency regulations on the facts, the judiciary was becoming bolder.

In a paradoxical turn of events, at almost the same time that the Supreme Court decided *Joseph Perera v. Attorney General* in March 1987⁸⁸—the first time an emergency regulation was invalidated by the Court—the government sought to restrict judicial review of proclamations under the Public Security Ordinance through article 154(J) in the Thirteenth Amendment to the 1978 Constitution, certified in November 1987. Article 154(J)(2) reads:

A Proclamation under the Public Security Ordinance or the law for the time being relating to public security, shall be conclusive for all purposes and shall not be Questioned in any Court, and no Court or Tribunal shall inquire into, or pronounce on, or in any manner call into question, such Proclamation, the grounds for the making thereof, or the existence of those grounds or any direction given under this Article.⁸⁹

The Supreme Court interpreted article 154(J)(2) narrowly, which allowed it to continue invalidating regulations by means of an analysis of the nexus between the national emergency and the corresponding regulation, or on the government's failure to comply with the legal procedures set out in the regulations. With its new found authority, the Court creatively asserted judicial review over executive action limiting fundamental rights. For instance, in *Wickramabandu v. Herath and Others*,⁹⁰ the Supreme Court held that, despite the constitutionally valid restrictions that preventive detention may impose on one's personal liberty due to article 15(7) of the 1978 Constitution, the Court

⁸⁴ *Id.*

⁸⁵ *Yasapala v. Wickremasinghe*, [1982] F.R.D. (1) 143.

⁸⁶ [1985] 1 Sri L.R. 100.

⁸⁷ [1985] 2 Sri L.R. 375.

⁸⁸ [1992] 1 Sri L.R. 199.

⁸⁹ SRI LANKA CONST. (1978) art. 154, § J(2).

⁹⁰ [1990] 2 Sri L.R. 348.

could review the reasonableness of the restrictions. The concept of reasonableness as a means of scrutinizing executive action will be discussed below.

An example of both procedural and substantive judicial review is *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others Case No. 1*.⁹¹ As the terms of office for the Central, Uva, North-Central, Western, and Subaragamuwa Provincial Councils were scheduled to lapse in June 1998, the commissioner of elections scheduled the nomination period and the election date. In an attempt to circumvent the bar against postponing constitutionally entrenched procedures requiring provincial council elections,⁹² the president proclaimed a state of emergency and an emergency regulation suspending the poll date for the five councils. In an intricate opinion, the Court invalidated the regulation, stating that it did not have the character of an emergency regulation, but rather was an order not authorized in law.⁹³ Further, the Court states that even if its characterization of the regulation as an order was erroneous, the regulation was nonetheless invalid because there was no reasonable nexus between the purpose of the regulation and the national emergency given the absence of a threat to national security in the areas the regulations covered.⁹⁴

Reflecting on the judiciary's newly effective review of executive action, a report of the Centre for the Independence of Judges and Lawyers concluded that the Supreme Court was demonstrating ample independence and had balanced the interests of national security with that of individual rights successfully.⁹⁵

6.2. An emerging consciousness of fundamental rights in Sri Lanka

6.2.1. Freedom of speech and expression

In keeping with the tradition of the utmost deference to executive power, the curtailing of freedom of expression, sanctioned through emergency regulations, was upheld as late as 1984. In *Visuvalingam v. Liyanage*,⁹⁶ the plaintiffs, shareholders in the newspaper *Saturday Review*, challenged the competent authority's decision to close the newspaper under regulation 14 because it had published reports on police brutality and had expressed sympathy for the Tamil people. In dissent, Justices Wanasundara and Soza demonstrated a sophisticated understanding of the need for freedom of speech and expression in society, of the existence of such rights in the 1978 Constitution, and of Sri Lanka's

⁹¹ [1999] 1 Sri L.R. 157.

⁹² WICKREMASINGHE, SRI LANKA: STATE OF HUMAN RIGHTS 1999, *supra* note 37, at 55–56.

⁹³ *Provincial Councils Elections Case No. 1*, [1999] 1 Sri L.R. at 179–81.

⁹⁴ *Id.* at 181.

⁹⁵ GOODHARD, JUDICIAL INDEPENDENCE, *supra* note 1.

⁹⁶ [1983] 2 Sri L.R. 311.

international obligations under the ICCPR. However, a majority of the Court held that, during periods of national emergency, it was the state's prerogative to prohibit freedom of speech, a prerogative against which judicial review should not be asserted. Thus, although the competent authority had not taken any cautionary measures previous to closure, such as a warning or a censorship order, this was considered irrelevant.⁹⁷ Although the facts of the case demonstrate an asymmetry between the state's excessive response in ordering the closure and regulating the content of the newspaper publications, the Court deferred to the state solely because of a national emergency.⁹⁸

During emergency rule from 1987 to 2001, freedom of expression evolved into a much stronger enforceable right, beginning with *Joseph Perera*.⁹⁹ The plaintiffs were members of the Young Socialists of the Revolutionary Communist League who were placed under a preventive detention order after having issued a leaflet criticizing the UNP government. The latter alleged that the plaintiffs planned to create student unrest during a public meeting on college grounds. Contrary to previous judicial deference to state action, Chief Justice Sharvananda, writing for the majority, stated that restrictions on fundamental rights, including freedom of speech and expression, can be substantiated only by an intimate and rational connection to the exigencies of the state emergency.¹⁰⁰ In a more detailed analysis of article 13 than those found in past judgments, Chief Justice Sharvananda asserted that the right entails free discussion of governmental affairs, untrammelled media publication, and the ability to criticize government actions even during periods of emergency.¹⁰¹ In this light, free speech may be legally restricted only if the expression is intended to or demonstrates a clear tendency to undermine state security or public order, or to incite commission of an offense.¹⁰² This broadened view of freedom of speech and expression was affirmed in subsequent cases, such as *Amaratunga v. Sirimal and Others*¹⁰³ and *Shantha Wijeratne v. Vijitha Perera*.¹⁰⁴

Provincial Councils Elections Case No. 1 was also pioneering because it further expanded the scope of freedom of expression and led to a debate on this development. The petitioners claimed that the right to vote is a form of freedom of speech and of expression that had been infringed by cancellation of

⁹⁷ See *id.*

⁹⁸ See *Siriwardena v. Liyanage*, [1983] 2 Sri L.R. 164.

⁹⁹ [1992] 1 Sri L.R. 199.

¹⁰⁰ *Id.* at 215.

¹⁰¹ *Id.* at 223–25.

¹⁰² *Id.* at 225.

¹⁰³ [1993] 1 Sri L.R. 264.

¹⁰⁴ S.C. App. No. 379/93 (not reported).

the election. The respondents argued that the franchise is distinguished from freedom of speech and expression and thus is not a fundamental right. The Court unanimously rejected the respondents' position and asserted that article 14 must be broadly interpreted to incorporate all forms of speech and expression, silent or verbal, including the right to vote.¹⁰⁵ By exercising this right, an individual expresses an opinion about a particular candidate; it is an effective manner of expressing oneself while enjoying the protection of privacy.¹⁰⁶

The debate that ensued followed the lines taken by the petitioners and respondents. Those questioning the Court's reasoning doubted whether denoting the franchise as an aspect of freedom of expression is an appropriate reading of the fundamental rights chapter of the 1978 Constitution.¹⁰⁷ Others claimed that this view would unduly narrow the scope of free expression, and, rather than improperly expanding article 14, the judgment was merely a clarification consistent with the Court's jurisprudence on the key role of free expression in democratic governance. As a result, freedom of speech and expression experienced the most fruitful development among the fundamental rights articulated in the Constitution during the most intense period of emergency rule.

6.2.2. *The right to equality*

The right to equality is guaranteed by article 12(1) of the 1978 Constitution.¹⁰⁸ *Lilanthi de Silva v. Attorney General and Others*¹⁰⁹ is the only Supreme Court case purporting to invalidate an emergency regulation wholly because a breach of equality rights. An earlier case, *Joseph Perera*, also had addressed a violation of equality rights. In *Perera*, the Court asserted only that no regulation could endow an official with arbitrary, unguided powers allowing the official to discriminate in antithesis to the spirit of ensuring all persons equality before the law.¹¹⁰ Similarly, *Provincial Councils Elections Case No. 1* touched on equality rights because the impugned legislation had the effect of preventing only the population in the northwestern provinces from voting. The Supreme Court held that the differential treatment was tantamount to a breach of article 12(1) that could not be justified by any permitted restrictions in article 15.¹¹¹

¹⁰⁵ *Provincial Councils Elections Case No. 1*, [1999] 1 Sri L.R. at 173.

¹⁰⁶ *Id.* at 173–74.

¹⁰⁷ See, e.g., Symposium on Emergency Regulations and the Electoral Process, 9 LST REV. 34 (1999).

¹⁰⁸ SRI LANKA CONST. (1978) art. 12, § 1.

¹⁰⁹ [2000] 3 Sri L.R. 155.

¹¹⁰ *Joseph Perera*, [1992] 1 Sri L.R. at 230.

¹¹¹ *Provincial Councils Elections Case No. 1*, [1999] 1 Sri L.R. at 175.

In another important equality case, *Lilanthi de Silva*, the plaintiff alleged that regulation 6 of the Emergency (Restriction on the Use of Consumption of Electricity) Regulation No. 1 of 2000 was both *ultra vires* and an infringement of her fundamental right to equality.¹¹² Regulation 6 required all persons to reduce their average monthly electricity consumption by 20 percent and imposed a 25 percent surcharge on a noncomplying consumer. In a unanimous decision, Justice Fernando stated that electricity consumers fell into two groups: (1) those who use electricity for only essential purposes and, therefore, consume a small amount of electricity; and (2) those who are more affluent and also use electricity for nonessential purposes, consuming more electricity. The regulation therefore had the effect of treating unequals equally since the affluent would have to curtail only nonessential consumption, while those in a lower socioeconomic class would face the heavier burden of reducing consumption required for essential purposes.¹¹³ Although the respondents contended that the regulation was justified by the desirable objective of conserving electricity, Justice Fernando held that this was not sufficient and struck down the regulation as an unreasonable exercise of power conferred by the Public Security Ordinance in violation of article 12(1).¹¹⁴

Lilanthi de Silva raises questions about the meaning and scope of equality rights. On the one hand, it may be viewed as a strong statement guaranteeing the substantive nature of equal protection before the law stipulated in article 12(1), despite the existence of a national emergency. On the other hand, if the respondents had been able to present a stronger link between the regulation and the national emergency, the Court may have upheld the regulation. In the end, substantive equality remained secure in the absence of a specific, reasonable, and adequate justification offered by the government.

Viewed collectively, the above cases indicate that equality rights will be judicially defended regardless of the legislation's character; if a law appears to discriminate invidiously, an affected individual may seek legal redress.

6.2.3. Freedom from arbitrary arrest, detention, and punishment

Most of the litigation challenging emergency regulations has involved arrest and detention—hardly surprising given that these powers, as conferred on the security forces and law enforcement officials, undoubtedly have posed the greatest threat to physical security. Freedom from arbitrary arrest and detention cannot be discussed without reference to article 11, which guarantees freedom from torture and is not subject to exceptions. The absolute quality of this right, considered in light of the failure to enforce it against the many alleged instances of torture under emergency regulations, paints an ironic picture.

¹¹² [2000] 3 Sri L.R. 155.

¹¹³ *Id.* at 157.

¹¹⁴ *Id.* at 158.

The constitutional restriction on freedom from arbitrary arrest and detention under article 15(7) is understandable during a national emergency. Nevertheless, the Supreme Court has demanded vigilant observance of the safeguards protecting freedom from arbitrary arrest and detention and has required the state to have a reasonable basis for an arrest.

After the early cases that upheld state discretion,¹¹⁵ *Joseph Perera* began to reconceive the balance.¹¹⁶ The Court asserted the need for security forces and law enforcement officers to observe the safeguards described in the regulations, and, where applicable, the external safeguards not explicitly overridden by the regulations.

This approach did not come to fruition until *Vinayagamoorthy, Attorney at Law (On Behalf of Wimalenthiran) v. The Army Commander and Others*,¹¹⁷ decided in December 1996. The Court held that the government's acts violated article 13(1) because of the disregard of legal procedures for arrest as stipulated in regulation 18(1)¹¹⁸ and, if synthesized, the pertinent principles on safeguards against arbitrary arrest and detention under the Public Security Ordinance. First, the Court held that a person subject to arrest must either be engaged in committing an offense or there must be reasonable grounds to suspect that the person is connected to an offense.¹¹⁹ An arrest, therefore, is barred when the arresting officer merely believes that evidence supporting a suspicion of illegality will eventually come to light. Second, the secretary of defense must use personal judgment in assessing the validity of a detention order rather than rubberstamping decisions made by arresting officers.¹²⁰ Third, the arrestee must be informed of the material facts substantiating the arrest.¹²¹ Fourth, if the arresting officer is a member of the armed forces, the arrestee must be handed over to the police, and the Human Rights Commission must be informed of the arrest within twenty-four hours.¹²² Finally, the secretary of state must publish a list of authorized detention centers and notify magistrates of the existence and addresses of the centers within their jurisdiction.¹²³ To place a person in an unauthorized, unpublished location is therefore unlawful.

¹¹⁵ See, e.g., *Kumaratunga v. Samarasinghe, Additional Secretary, Ministry of Defense and Others*, [1983] 2 Sri L.R. 63; *Edirisuriya v. Nayaratnam and Others*, [1985] 1 Sri L.R. 100.

¹¹⁶ [1992] 1 Sri L.R. 199.

¹¹⁷ [1997] 1 Sri L.R. 113.

¹¹⁸ *Id.* at 123–24.

¹¹⁹ *Id.* at 122–24.

¹²⁰ *Id.* at 136.

¹²¹ *Id.* at 127.

¹²² *Id.* at 129, 130.

¹²³ *Id.*

Similar reasoning was applied in *Gamini Perera, Attorney-At-Law (On Behalf of Saman Srimal Bandara) v. W. B. Rajaguru Inspector General of Police and Others*,¹²⁴ where a regulation 17 detention order was invalidated under article 13(1) on the ground that the detention was based on an order that did not specify pertinent details, including the period of detention. The principles enunciated in *Wimalenthiran* concerning the substantive meaning of freedom from arbitrary arrest were thus firmly established.

As alluded to in the previous section on judicial review, article 13 gradually encouraged the Supreme Court to give greater content to the meaning of arbitrary action. In *Wickremabandu v. Herath*¹²⁵ and, later, in *Seetha Weerakoon v. Mahendra O.I.C. Police Station, Galagedera and Others*,¹²⁶ the Court asserted that an important dimension of freedom from arbitrary arrest and detention is that the state actors must have reasonable grounds for arrest and must furnish the Court with material that permitted an objective determination of reasonableness. However, in *Chandra Kalyanie Perera v. Captain Siriwardena and Others*,¹²⁷ Justice Kulatunga held that the Court could not analyze such material, and the only question for the Court to determine was whether material *existed* to substantiate the decision to arrest. But *Sirisena Cooray* established clearer guidelines for reasonableness in making a detention order¹²⁸ and overruled *Chandra Kalyanie Perera*. Borrowing from British jurisprudence, Justice Amerasinghe ruled that a reasonable decision is one that is supported by good reasons, is based on an evaluation of the facts, excludes extraneous or irrelevant considerations, and lacks caprice or absurdity.¹²⁹ Justice Amerasinghe stated that in light of the vast power to restrict personal liberty under detention orders, it is reasonable for the defense secretary to exercise that power only on the basis of “independent and impartial” information.¹³⁰ Although the defense secretary may rely on information from senior officers, the secretary cannot abdicate his personal obligation to make informed decisions that support a detention order.¹³¹

Subsequent cases have required reasonableness even when challenged by ingenious defense strategies on the part of the government. In *Jayaratne*, the state respondents were denied a “balance of convenience” defense after having arrested the eleven petitioners solely because detention was necessary to

¹²⁴ [1997] 3 Sri L.R. 141.

¹²⁵ [1990] 2 Sri L.R. 348.

¹²⁶ [1991] 2 Sri L.R. 172.

¹²⁷ [1992] 1 Sri L.R. 251.

¹²⁸ *Sirisena Cooray*, [1997] 3 Sri L.R. at 286–87.

¹²⁹ *Id.* at 286–87.

¹³⁰ *Id.* at 296.

¹³¹ *Id.* at 297.

prevent them from acting in a manner prejudicial to public order. The Court stated that to justify an arrest, arresting officials must have tangible evidence to form a reasonable suspicion of a past violation or apprehension of a future wrong.¹³² Article 13, which formerly symbolized little more than empty rhetoric, has thus evolved into an enforceable right with genuine meaning.

Despite these positive indicators and the eventual lapse of emergency rule, the PTA continues to present a substantial threat to the advances made in fundamental rights. Since the PTA essentially makes permanent the excesses of the emergency regulations, Sri Lankan citizens continually face the threat of military and police powers. Because of the restrictions on judicial review of legislation, discussed above, the Supreme Court must articulate legal principles that are in compliance with constitutional safeguards limiting the excesses of the PTA, as in *Weerawansa v. The Attorney General and Others*, decided in June 2000.¹³³ Here, the Supreme Court held that a suspect arrested under section 6(1) is entitled under article 13 to be informed of the reasons for the arrest according to the proper procedures, and, under article 13(2), to be brought before a judge of the nearest competent court for a ruling on the validity of the detention, despite section 9(1) of the PTA, which purports to validate detention by ministerial order.¹³⁴ *Weerawansa* also stands for the importance of state compliance with international treaty obligations, particularly article 9 of the ICCPR, which prohibits arbitrary arrest or detention and stipulates that a suspect shall be brought before a judge or authorized officer.¹³⁵

7. Lessons learned?

The arbitrary use of emergency power by Sri Lankan authorities has been contained, to some extent, by an increasingly active judiciary since the 1990s as well as by pressure from the international community. From the creation of the Human Rights Commission to the promulgation of new rules and regulations, Sri Lanka has shown sensitivity to international campaigns, which, in turn, compelled it to respond positively, at times, to the agitation of local civil society. Further, the Sri Lankan Supreme Court, since the 1990s, has developed standards on arrest and detention, freedom of speech, the right to vote, and the right to equality during times of emergency with which to scrutinize

¹³² See *Jayarathne*, [1998] 2 Sri L.R. at 136. This position was recently upheld in the 2002 case of *Abeyratne Banda v. Gajanayake, Director, Criminal Investigation Department and Others*, where the Court stated that the material invoked to support the arrest must corroborate the alleged offense. [2002] 1 Sri L.R. 365.

¹³³ [2000] 1 Sri L.R. 387.

¹³⁴ *Id.* at 394, 400, 407.

¹³⁵ *Id.* at 409.

what was once considered the absolute discretion of the executive in declaring and exercising emergency powers.

The history of emergency rule in Sri Lanka highlights the state's struggle to balance fundamental rights and national security. Although this discussion has often cited the state's excessive exercise of power, it must be acknowledged that Sri Lanka was undergoing a serious crisis, perpetuated by the LTTE's violent demands for a separate state. In its obsessive quest to maintain absolute sovereignty as a unitary state, the government appeared to treat fundamental rights and national security as mutually exclusive. And when, under pressure from the international community, the state sought some credibility by taking positive legislative steps to reconcile these competing interests it did not alleviate the extreme effects of emergency rule on its people by honoring its legal commitments. Juxtaposed against this state apathy was a progressively independent judiciary, which, after a slow beginning, showed an emerging sophistication in enforcing constitutionally entrenched rights.

Although the lapse of emergency rule held the promise of a new Sri Lanka that was sensitive to humanitarian concerns, the hangover of authoritarian power is ever present. The new Prevention of Organized Crimes bill incorporates many of the excesses formerly found in the emergency regulations dealing with arrest and detention. The state's propensity to abuse its power, combined with Sri Lanka's long history of ethnic tension and violence, makes this a dangerous piece of legislation. At the same time, the culture of legal impunity that was perpetuated and entrenched through emergency rule remains. Appeals from national and international monitoring bodies for the state to hold officials accountable for abusive acts have gone unheeded. Sri Lanka is, therefore, faced with the challenge of developing a new culture which respects the rule of law while remaining sensitive to basic tenets of human rights.

Sri Lanka's experiences during emergency rule are especially relevant in the post-September 11 world, where governments have taken renewed interest in stringent, repressive legislation to combat terrorist activity. Although ensuring national security and protection of its citizens is an important state interest, Sri Lanka demonstrates the dangerous potential of such legislation to achieve the opposite effect. Such legislation can lead to a cycle of extremist violence and state repression that threatens the fabric of democratic societies, eroding state legitimacy and international order.