

**EMERGENCY LAW IN THE CONTEXT OF TERRORISM  
- SRI LANKA -**

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## **1. Introduction**

Sri Lanka has undergone a continuous period of emergency for virtually four decades. This period began in 1971 when the government declared a state of emergency in response to a Marxist insurrection. Serious doubts may be cast over the assumption that 'emergency' contemplates extraordinary times, as the Sri Lankan conception of 'emergency' has now reached a state of normalcy.

On the one hand, the rule of law and the international human rights framework encourages states to provide necessary protection to citizens by establishing certain safeguards. In fact, international human rights law explicitly recognizes restrictions on certain human rights on the grounds of national security or public order. States of emergency may be conceived as part of this essential framework for ensuring national security and public order. On the other hand, periods of emergency are often exploited by states to suppress dissent and persecute opposing forces. Contrary to the very purpose of an emergency regime, such exploitative usage has led to the breakdown of the security framework.

During the past forty years of emergency in Sri Lanka, the respect for and promotion and protection of human rights has been deplorable. Hundreds, if not thousands of individuals have been 'disappeared' under the cover of emergency laws, which conferred extraordinary powers on police and the armed forces. Violations of the rights to life and liberty, including arrest and *incommunicado* detention without valid reasons and for unreasonably long periods of time, were also common during this period. Such arbitrary arrests and detention were most often accompanied by the infliction of torture and cruel, inhumane and degrading treatment or punishment. Moreover, the emergency regime has contributed to unreasonable restrictions on the freedom of speech and expression, the freedom of movement and the right to privacy.

The present emergency regime is largely a response to the advent of terrorism in Sri Lanka. Hence the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) in many ways solidified the culture of emergency within the country by framing it as part of a continuous clash between law enforcement and terrorism. This rhetorical position was further strengthened by the so-called 'global war on terror' following the 9/11 attacks.

This paper examines the emergency regime in Sri Lanka in the context of terrorism. The paper will be presented in three chapters: (1) emergency in the context of terrorism (2) the human rights cost of emergency laws; and (3) conclusions and recommendations for policy intervention. As a crosscutting theme, the paper will focus on the conceptual relationship between terrorism, emergency laws and gross human rights violations. In the final chapter, the authors analyze the response of civil society actors to the emergency regime in Sri Lanka and present certain recommendations for future intervention at the policy level.

## 2. Emergency Laws in the Context of Terrorism

This chapter discusses the evolution of emergency laws in the context of terrorism in Sri Lanka. Four distinct periods are highlighted in this regard: (1) the period between 1971 and 2002 i.e. from the Southern insurrection to the ceasefire period; (2) the ceasefire period i.e. from the commencement of the ceasefire period in 2002 up to its *de facto* abrogation following the assassination of Lakshman Kadirgamar in 2005; (3) the period in which hostilities between the government and the LTTE resumed i.e. from the promulgation of the 2005 Emergency Regulations up to the conclusion of military operations in May 2009; and (4) the post conflict period.

### 2.1 Definition of Terrorism

The question of defining ‘terrorism’ has besotted the international legal community for many years. The term has eluded definition in Sri Lanka as well, at least until the promulgation of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006 (2006 ERs). Previously, the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) referred to terrorism without defining it. In fact, the PTA itself referred to the offences it criminalized as ‘unlawful activity’ when providing for the power of the Minister to issue detention orders to those suspected of committing offences created by the Act.

Regulation 6 of the 2006 ERs prohibits ‘terrorism’ or ‘specified terrorist activity’, or any act in furtherance thereof. Regulation 20 defines ‘terrorism’ as ‘any unlawful conduct’, which, *inter alia*, ‘involves the use of violence’, ‘threatens or endangers national security’, ‘intimidates a civilian population or group thereof’, ‘disrupts or threatens public order’, ‘caus[es] destruction or damage to property’—if such conduct is ‘aimed at or is committed with the object of threatening or endangering the sovereignty or territorial integrity of the Democratic Socialist Republic of Sri Lanka or that of any other recognized sovereign State, or any other political or governmental change, or compelling the government of the Democratic Socialist Republic of Sri Lanka to do or abstain from doing any act, and includes any other unlawful activity which advocates or propagates such unlawful conduct.’

The overbroad and vague nature of this definition has been criticized by human rights organizations as being violative of the principle of legality, and of established principles of human rights law.<sup>1</sup>

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<sup>1</sup> International Commission of Jurists, *Sri Lanka: Briefing Paper: Emergency Laws and International Standards* (March 2009), at 9.

### 2.2 *The Prevention of Terrorism Act*

#### 2.2.1 *Context of enacting the PTA*

The PTA was introduced in 1979, as its title suggests, by the then government as a temporary measure to deal with what the preamble identified as ‘elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka.’<sup>2</sup> The Bill was introduced in Parliament as being ‘urgent in the national interest’ under Article 122 of the Constitution, thereby affording the Supreme Court a mere twenty-four hours within which to determine on the constitutionality of the Bill. When the PTA Bill was referred to the Supreme Court, the Court did not have to decide whether or not any of those provisions constituted reasonable restrictions on Articles 12(1), 13(1) and 13(2), permitted by Article 15(7),<sup>3</sup> because the Court was informed that the Cabinet had decided to pass the Bill with a two-thirds majority.<sup>4</sup> The PTA was enacted with a two-thirds majority, and accordingly, in terms of Article 84, the PTA became law despite any inconsistency with the Constitutional provisions. The Supreme Court determined that the Bill did not require a referendum to be passed, as it was of the view that the Bill did not repeal or amend any entrenched provision in the Constitution.<sup>5</sup>

#### 2.2.2 *Analysis of key provisions*

Section 2 of the PTA criminalizes a number of acts that already attract criminal sanction under the general criminal law of the country embodied principally in the Penal Code. Section 2 criminalizes *inter alia* acts of causing death, kidnapping, robbery, intimidation of witnesses, causing mischief to certain types of property, import, manufacture or possession of firearms and erasure, mutilation, defacement or interfering with street signs. Some of the acts that are otherwise criminal under the Penal Code are criminalized under the PTA with the additional requirement that they be committed against certain types of persons i.e., witnesses to any offences under the PTA or other specified persons, whereas others such as the criminalizing of the possession of firearms appear to be identical to the offences laid down by the general law, for example the Firearms Ordinance No. 33 of 1916 (as amended).

A significant addition to the corpus of criminal acts introduced by the PTA is the criminalization of causing or intending to cause ‘commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between

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<sup>2</sup> See Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, Preamble.

<sup>3</sup> Article 15(7) of the Constitution provides: ‘The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph “law” includes regulations made under the law for the time being relating to public security.’

<sup>4</sup> See S.C. S.D No. 7/79, decided on 17 July 1979.

<sup>5</sup> See *Weerawansa v. The Attorney General* [2000] 1 Sri.L.R. 387, at 395.

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different communities or racial or religious groups' by the use of words of visible representations. Incidentally, this was one of the charges on which journalist, J.S. Tissainayagam, whose case is discussed in detail below, was convicted.

Section 2 also criminalizes the harbouring, concealing or in any other manner preventing, hindering or interfering with the apprehension of a proclaimed person or any other person, knowing or having reason to believe that such person has committed an offence under the Act. A 'proclaimed person' is defined by section 2(3) of the Act.<sup>6</sup>

The punishments provided for some of the criminalized acts, however, go far beyond the punishments envisaged under the general law. The maximum period of imprisonment provided for all offences under section 2 is twenty years, whilst the minimum is five years. Section 22(3)(a) of the Firearms Ordinance, however, mandates a maximum of five years imprisonment for a first time offender convicted of possessing a gun.

Whilst section 2 of the PTA raises the maximum prison terms, section 4 imposes additional draconian sanctions on those convicted of a section 2 offence by deeming that all their movable and immovable property be forfeited to the Republic; and that any alienation or other disposal of such property effected by such person after the date of coming into operation of the Act shall be deemed null and void.

Section 5 criminalizes the failure to report offences under the PTA or attempts and preparations to commit offences under the PTA. It also criminalizes the failure to provide information about the location and whereabouts of offenders. The maximum punishment for these offences is imprisonment for seven years.

Section 6 vests broad powers in the state in respect of arrests, searches and seizure of documents or things without a warrant. Furthermore, section 9(1) provides for executive detention on the order of the Minister of Defence for a period of up to eighteen months. Such detention orders must be extended every three months. Section 10 purports to oust the jurisdiction of courts in respect of these detention orders, although as discussed below, to their credit, the courts have refused to give effect to the plain meaning of section 10.

Section 16 has the effect of eviscerating the salutary protections of due process accorded to suspects in the Evidence Ordinance No. 14 of 1895 by stating that statements and confessions made to a police officer of or above the rank of Assistant Superintendent are admissible in evidence against such person. Moreover, section 16 imposes the burden of demonstrating that a statement made under section 16 is not voluntary on the accused. To compound matters, the courts have gone on to rule that convictions may be based solely on such confessions.<sup>7</sup>

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<sup>6</sup> Section 2(3) provides: "proclaimed person' means any person proclaimed by the Inspector-General of Police by Proclamation published in the Gazette to be a person wanted in connection with the commission of any offence under this Act."

<sup>7</sup> See discussion *infra* on the *Singarasa* case.

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Section 31(1) of the Act defines ‘unlawful activity’ as follows:

‘Unlawful activity’ means any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provision of this Act in the commission or in connection with the commission of any offence under this Act or any act committed prior to the date of passing of this Act, which act would, if committed after such date, constitute an offence under this Act.

Some of the initial detention orders issued under the PTA described the grounds for detention as ‘terrorist activity’, which the courts found to be lacking in particularity and did not fall under the definition of ‘unlawful activity’ envisaged in section 31(1) of the PTA.<sup>8</sup> Accordingly, such detention orders have been held to be invalid *ab initio*. However, subsequent orders were issued stating that the Minister ‘had reason to believe or suspect that the detainees were connected with or concerned in unlawful activity’, which the courts have found to be a specified offence under the Act. The subsequent orders were accordingly held to be valid *ex facie*.

Consequently, the courts have held that the subsequent detention orders could cure the defects of prior orders and that the subsequent valid orders, which were in operation at the time of adjudication, may be accepted as justifying the continued detention of the persons concerned.<sup>9</sup> It has also been held that the non-naming of the custodian of the detainees in the detention orders was only a technical matter insofar as section 9 of the Act did not require the custodian to be named in the order itself.<sup>10</sup>

Construing the words ‘where the minister has reason to believe or suspect’ appearing in section 9 of the Act, the courts have opined that there must be objective grounds for the minister to authorize the arrest and the continuing acts of detention.<sup>11</sup> Yet, though affirmed in theory, the courts seldom applied this principle to the actual facts of the case, as such grounds were not stated in the detention orders under scrutiny. The same were not even revealed in the affidavits of the executive authorities concerned. In the case of *Senthilnayagam v. Seneviratne*, the question arose as to what material existed to link the detainees to the ‘unlawful activity’ contemplated by the Act in question, justifying their arrest and continued detention. In the absence of such material, there appeared to be no rational basis for the Minister to issue the said detention orders. Yet the Court of Appeal thought it fit to uphold the detention order.<sup>12</sup>

Section 10 of the PTA when read with section 22 of the Interpretation (Amendment) Act, No. 18 of 1972 decrees that the Minister’s decision in authorising an arrest and detention is beyond the pale of judicial review. Section 22 reads:

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<sup>8</sup> See for example, *Senthilnayagam v. Seneviratne* [1981] 2 Sri L.R. 187.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

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Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression ‘shall not be called in question in any court’ or any other expression of similar import whether or not accompanied by the words ‘whether by way of writ or otherwise’ in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal:

Provided, however, that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution in respect of the following matters, and the following matters only, that is to say—

(a) Where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(b) Where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

Provided further that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution to issue mandates in the nature of writs of *habeas corpus*.

However, as discussed below, there are several judgments of the Supreme Court that hold that statutory ouster clauses cannot dispense with the inherent authority of the courts to review unreasonable or *ultra vires* decisions by executive or administrative authorities.

Moreover, there is some implicit judicial authority on the non-applicability of ouster clauses to *habeas corpus* cases. In *Senthilnayagam v. Seneviratne* for instance, the Court of Appeal did not go into this particular question on account of the state conceding that the said ouster clause would not apply to the issue of a mandate in the nature of a writ of *habeas corpus*.<sup>13</sup>

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<sup>13</sup> *Senthilnayagam v. Seneviratne* [1981] 2 Sri L.R. 187, at 206.

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### *2.3 Emergency Regulations under the Public Security Ordinance*

#### *2.3.1 Historical context*

The Public Security Ordinance No. 25 of 1947 (PSO) was one of the final pieces of legislation to be passed by the British prior to independence. The PSO enabled the then Governor General to declare a state of emergency and to make emergency regulations (ERs) under section 5, as appear necessary or expedient ‘in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.’ In terms of Part I of the PSO, the President is vested with the power to issue a proclamation of emergency, which must then receive the approval of Parliament from month to month.

#### *2.3.2 Constitutional entrenchment of emergency regulations*

Article 155(1) of the Constitution states that the PSO as amended and in force immediately prior to the commencement of the Constitution ‘shall be deemed to be a law enacted by Parliament.’ Since Article 80(3) of the Constitution precludes any challenge of the validity of an enactment of Parliament, the PSO cannot be challenged for validity and compatibility with the Constitution. However, Article 155(2) of the Constitution unequivocally states that the power of the President to make ERs under the PSO does not override the provisions of the Constitution, ostensibly inclusive of the chapter on Fundamental Rights.

The Constitution also recognizes that ERs promulgated under the PSO may validly restrict the operation of certain fundamental rights. Article 15(7) declares that the exercise and operation of the fundamental rights recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of *inter alia* national security, public order and the protection of public health or morality. It then goes on to say that ‘law’ within the meaning of that paragraph ‘includes regulations made under the law for the time being relating to public security.’<sup>14</sup>

#### *2.3.3 Preventive detention*

Preventive detention in terms of ERs involves the detaining of a person with a view to preventing such person from acting in any manner prejudicial to the national security or

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<sup>14</sup> The courts have later interpreted the above provisions to specifically refer to ERs issued under the PSO and not under any other law. In the Supreme Court judgment in *Thavaneethan v. Dayananda Dissanayake, Commissioner of Elections and Others* [2003] 1 Sri L.R. 74, at 98 it was held: ‘The word “includes” in Article 15(7) does not bring in regulations under other laws. “Law” is restrictively defined in Article 170 to mean Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation. The effect of the word “includes” was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security.’



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to the maintenance of public order, or to the maintenance of essential services; or from acting in any manner contrary to any of the provisions of the ERs. For example, the Emergency (Miscellaneous Powers and Provisions) Regulations No. 4 of 1978 empowered the Secretary of Defence to issue detention orders on such a basis.

While the constitutional validity of preventive detention provisions has been called into question, the Supreme Court has consistently declared that preventive detention *per se* does not illegally infringe any constitutionally guaranteed right. In *Wickremabandu v. Herath*,<sup>15</sup> a five judge bench citing previous authorities unanimously held that preventive detention did not amount to punishment and did not violate the prohibition of an imposition of punishment except by an order of a competent court. This ruling has not been subsequently disturbed.

### 2.4 Cases during the Period 1971-2002

This section examines some of the notable judgments of the Supreme Court and the Court of Appeal in respect of the PTA and ERs in the pre-2002 period.

Following the Southern Insurrection of 1971, the government issued ERs under the PSO to facilitate the swift suppression of the insurgency. Hence a number of *habeas corpus* applications were filed in response to arrests and detentions made under the new regulations.<sup>16</sup> The Supreme Court had the authority to grant writs of *habeas corpus*, first, under the Courts Ordinance of 1889 that prevailed until 1972, and then, following the promulgation of the First Republican Constitution in 1972, under the Administration of Justice Law No. 44 of 1973. This subsequent law essentially retained the Supreme Court's authority to grant writs of *habeas corpus*.<sup>17</sup>

The system was once again overhauled in 1978. The 1978 Constitution conferred the power to issue writs of *habeas corpus* on the Court of Appeal under Article 141. As discussed above, this power was specifically protected from any legislative interference through statutory ouster clauses. In their seminal study on the writ of *habeas corpus* in Sri Lanka, Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne comment:

In the post-1978 constitutional era, while the Administration of Justice Law itself was repealed and replaced by a new statute, the writ of *habeas corpus* was elevated to a constitutional remedy. The importance of the aforesaid constitutional changes is demonstrable from the manner in which the judiciary attempted to positively respond to the writ of *habeas corpus* as a remedy to protect individual freedom and liberty.<sup>18</sup>

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<sup>15</sup> [1990] 2 Sri.L.R. 348.

<sup>16</sup> *Ibid.* at 23-24.

<sup>17</sup> See section 7 of the Administration of Justice Law of 1973. Also see Kishali Pinto-Jayawardena & Jayantha de Almeida Guneratne, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times* (Law & Society Trust, 2001), at 23.

<sup>18</sup> *Ibid.* at 31.

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The new Constitution also included a Fundamental Rights Chapter that guarantees a number of justiciable fundamental rights, including the freedom from arbitrary arrest and detention. Article 13(1) states that no person shall be arrested ‘except according to procedure established by law’ and that all persons arrested ‘shall be informed of the reason for arrest.’ Article 13(2) states that every person held in custody ‘shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.’ Article 17 provides that every person shall be entitled to apply to the Supreme Court in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of the Fundamental Rights Chapter. Thus many subsequent landmark cases dealing with ERs happen to be fundamental rights cases. Some of these decisions are discussed in greater detail below.

### 2.4.1 General overview of cases

#### 1. *Hidramani v. Ratnavale*<sup>19</sup>

In this case, the Permanent Secretary to the Ministry of Defence and External Affairs, purporting to act in good faith under Regulation 18(1)<sup>20</sup> of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971, caused a person to be taken into custody with a view to preventing him ‘from acting in any manner prejudicial to the public safety and to the maintenance of public order.’ During the *habeas corpus* proceedings instituted by the wife of the detainee in the Supreme Court, the Permanent Secretary justified his action on the grounds of a widespread armed insurrection, which commenced in 1971. The Secretary also informed the Court that he was satisfied, after considering certain material placed before him by the police, that the detainee had taken part in certain foreign exchange smuggling transactions which were under investigation and that he should be prevented in the future from engaging in similar transactions, which directly or indirectly helped to finance the insurgent movement prevalent at that time.<sup>21</sup>

The Court held that the petitioner failed to establish a *prima facie* case against the good faith of the Permanent Secretary, and therefore the onus did not shift to the Permanent Secretary to satisfy Court as to his good faith. Hence it was affirmed that a detention order issued by the Permanent Secretary in good faith was not justiciable.

Regulation 55 of the said Regulations provided that section 45 of the Courts Ordinance of 1889 would not apply with regard to any person detained or held in custody under any

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<sup>19</sup> (1971) 75 NLR 67.

<sup>20</sup> Regulation 18(1) provides: ‘Where the Permanent Secretary to the Ministry of Defence and External Affairs is of the opinion, with respect to any person, that with a view to preventing such person from acting in any manner prejudicial to the public safety...it is necessary so to do, the Permanent Secretary may make order that such person be taken into custody and detained in custody.’

<sup>21</sup> Namely the first insurrection of the *Janatha Vimukthi Peramuna*. Also see Pinto-Jayawardena & de Almeida Guneratne, at 24-25.

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ERs. In what was possibly the only positive feature of this case, the Court ruled that this Regulation was not applicable in the case of a person unlawfully detained under an invalid detention order or made in abuse of the powers conferred by Regulation 18(1). Yet the central ruling of the case vitiated this positive feature.

This case was heard during a period in which the Supreme Court ‘fell shy of reviewing decisions made in pursuance of the executive fiat.’<sup>22</sup> Hence it marked an unfortunate period where the Court was reluctant to review decisions of high ranking executive officers of the government.<sup>23</sup> Fortunately, as discussed later in this paper, the Court’s reasoning was departed from in subsequent cases.

### 2. *Gunasekera v. De Fonseka*<sup>24</sup>

In this case, an Assistant Superintendent of Police purported to arrest the detainee under Regulation 19 of the ERs of 1971, merely because he had orders to do so from his superior officer, the Superintendent of Police. Hence the Supreme Court was once again called upon to examine the ERs of 1971. It was held that although Regulation 19 empowers any officer mentioned therein to arrest, without a warrant, a person whom he has reasonable ground for suspecting to be concerned in an offence punishable under any Emergency Regulation, this power was not unfettered.<sup>25</sup> It was further held that the officer who arrests should *himself* reasonably suspect that the person arrested was concerned in some offence under the ERs. Accordingly, the Court opined that where the arresting officer was not personally aware of the actual offence for which the suspect was arrested, such arrest is liable to be declared unlawful in *habeas corpus* proceedings.

This case facilitated an important departure from the routine subservience of the judiciary to the executive will during times of emergency. However, as the subsequent case of *Gunasekera v. Ratnavale*<sup>26</sup> reveals, this principled stance was more an anomaly than the norm.

### 3. *Gunasekera v. Ratnavale*<sup>27</sup>

This case dealt with virtually the same subject matter as the previous case of *Gunasekera v. De Fonseka*.<sup>28</sup> A few hours after the detainee’s release following his successful application to the Supreme Court, he was once again taken into custody in pursuance of a fresh detention order issued by the Permanent Secretary, Ministry of Defence and External Affairs under Regulation 18(1) of the ERs of 1971. Hence a second *habeas corpus* application was filed challenging the detention order.

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<sup>22</sup> Pinto-Jayawardena & de Almeida Guneratne, at 24.

<sup>23</sup> *Ibid.* at 26.

<sup>24</sup> (1972) 75 NLR 246.

<sup>25</sup> *Ibid.* Also see Pinto-Jayawardena & de Almeida Guneratne, at 27.

<sup>26</sup> (1972) 76 NLR 316.

<sup>27</sup> *Ibid.*

<sup>28</sup> (1972) 75 NLR 246.

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In contrast to *Gunasekera v. De Fonseka*,<sup>29</sup> where the application for *habeas corpus* had been against an Assistant Superintendent of Police and was allowed by the Court, ‘greater caution was observed this time around where the application under consideration was against the Secretary of Defence.’<sup>30</sup> Accordingly, the Court held that in the absence of proof that the Permanent Secretary had an ulterior motive or acted for a collateral purpose and not for the purpose stated, the detention orders were *ex facie* valid. Moreover, overturning the single positive feature in the earlier decision of *Hidramani v. Ratnavale*,<sup>31</sup> the majority in *Gunasekera v. Ratnavale* held that Emergency Regulation 18(10), provided that an order under Regulation 18(1) should not be called in question in any Court on any ground whatsoever and that such Regulation was *intra vires* of the PSO.<sup>32</sup> Hence it was concluded that where a detention order under Regulation 18(1) is *ex facie* valid, the issue of good faith of the Permanent Secretary is not a justiciable matter.<sup>33</sup>

### 4. *Visuvalingam v. Liyanage*<sup>34</sup>

In this early case dealing with the 1978 Constitution, the Court dismissed the fundamental rights applications of readers of *The Saturday Review*—a newspaper in circulation in Jaffna—on the basis that the order of the competent authority sealing the newspaper and banning its publication was reasonable.

The Court adopted the following test:

In reviewing the exercise of discretion the Court must not substitute its own opinion for that of the Competent Authority. If his decision is within the bounds of reasonableness, it is not the function of the Court to look further into the merits. What is obnoxious during a crisis or state of emergency may not be so in normal times. The necessity for quick action for the preservation of public order which means the prevention of disorder and for the maintenance of peace and tranquility has to be recognised. As long as the Competent Authority has acted in the honest belief that his action was necessary to achieve the object set out in the Regulation the Court will not interfere.

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<sup>29</sup> *Ibid.*

<sup>30</sup> See Pinto-Jayawardena & de Almeida Guneratne, at 28. The authors comment that ‘this double standard leads us to the unenviable conclusion that the nature of the respondent dictated the nature of the judicial response.’

<sup>31</sup> (1971) 75 NLR 67.

<sup>32</sup> 76 NLR, at 330-331. Also see Pinto-Jayawardena & de Almeida Guneratne, at 29-30.

<sup>33</sup> 76 NLR, at 334. This position appears to have been contrary to the long line of authority on the separation of powers doctrine. In *Anthony Naide v. The Ceylon Plantations* (1966) 68 N.L.R. 558, a doubt was expressed as to whether Parliament had the power to interfere with the jurisdiction of the Supreme Court in connection with the issue of prerogative writs and *habeas corpus*, although it was conceded that Parliament could alter the jurisdiction of the courts even retrospectively. However, the Privy Council in the case of *Liyanage v. The Queen* (1966) 68 N.L.R. 265 (P.C.), recognised the existence of the separate power of the judiciary that cannot be usurped even by Parliament, except by way of a constitutional amendment. See Pinto-Jayawardena & de Almeida Guneratne, at 54.

<sup>34</sup> [1983] 2 Sri.L.R. 311.

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This was indeed a weak response by the Court to the highly contentious closure of a popular newspaper in the North on the grounds of national security and public order. The Court's apparent abdication of its power to review decisions patently interfering with the fundamental rights of ordinary citizens revealed a distinct judicial reluctance to intervene in matters of national security during the time. This position later evolved, as a marginally more progressive Court emerged during the 1990s and early 2000s.

### 5. *Susila de Silva v. Weerasinghe*<sup>35</sup>

This case dealt with the issue of whether a writ of *habeas corpus* could be issued in respect of an arrest without warrant under the ERs. The detainee was a journalist and translator and was taken into custody by the police without warrant under the ERs. The wife of the detainee sought a writ of *habeas corpus* complaining that she was unaware of her husband's whereabouts. It transpired that the police officer making the arrest had informed the detainee at the time of the arrest that the reason for the arrest was that he was suspected of inciting others to commit offences under the ERs. Police investigations had purportedly revealed that the detainee was the secretary of a movement affiliated to the *Janatha Vimukthi Peramuna* (JVP), a proscribed organisation at the time. Following the arrest, detention orders were issued by the Inspector General of Police (IGP) under the ERs of 1985<sup>36</sup> and thereafter by the Minister of National Security under the PTA.<sup>37</sup>

The petitioner contended that the police officer making the arrest had no firsthand knowledge of the detainee's alleged involvement in subversive activities and accordingly, that the arrest was unlawful. However, the Court of Appeal rejected the petitioner's contention, and held that there is no such requirement to have firsthand knowledge, as knowledge may be acquired from the statements of others in a way that justifies a police officer giving them credit.<sup>38</sup>

The Court, however, did not consider the question of how the authorities came by sufficient material and information to formulate an opinion against the detainee. On the one hand, it is possible to argue that insisting on public disclosure of the material on which the authorities had acted could be prejudicial to national security.<sup>39</sup> Nevertheless, on the other hand, the Court ought to have required such material to be disclosed *in camera* so that at least the Court could have convinced itself that the authorities had acted objectively and not arbitrarily.<sup>40</sup> Yet the Court chose to defer to the opinion of the authorities, thereby relinquishing its central responsibility to check unreasonable and arbitrary executive and administrative action.

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<sup>35</sup> [1987] 1 Sri L.R. 88.

<sup>36</sup> See section 19(2) of the Emergency Regulation No. 8 of 1985.

<sup>37</sup> See section 9 of PTA, as amended by Act No. 10 of 1982.

<sup>38</sup> [1987] 1 Sri L.R., at 93 citing *Nanayakkara v. Henry Perera* [1985] 2 Sri L.R. at 383. This position remains contrary to the principle later enunciated in *Sunil Rodrigo (On Behalf of B. Sirisena Cooray) v. Chandananda De Silva and Others* (1997) 3 Sri.L.R. 265, which required the Defence Secretary to place material before the Supreme Court to justify his actions in arresting and detaining a person.

<sup>39</sup> See Pinto-Jayawardena & de Almeida Guneratne, at 75.

<sup>40</sup> *Ibid.*

6. *Dhammika Siriyalatha v. Baskaralingam*<sup>41</sup>

This was a landmark decision that set an ‘admirable precedent’ in terms of the scope and availability of the writ of *habeas corpus* under the present Constitution—particularly, in the face of detention orders made in pursuance of ERs.<sup>42</sup> In this case, a 37-year-old vegetable salesman was arrested by police officers without stating reasons and thereafter detained with no charges preferred against him. The petitioner was the wife of the detainee; and she alleged that the arrest and detention had been orchestrated for a collateral purpose following her husband’s refusal to testify in a criminal case where several accused had been indicted under the PTA.

The respondents sought to justify the arrest and detention on the basis that the Defence Secretary, in pursuance of the powers vested in him under the PTA read with the current ERs, had formed an opinion that ‘he had reason to believe or suspect’ that the detainee was ‘connected with or concerned in unlawful activity.’<sup>43</sup> The petitioner contended that apart from the arrest being for a collateral purpose, there was also no material to substantiate the opinion that the detaining authorities purportedly formed against the detainee. In response, the state argued that the opinion formed in pursuance of the ERs was beyond the pale of judicial review due to the operation of section 8 of the PSO<sup>44</sup> and Regulation 8 of the applicable ERs.<sup>45</sup>

The Court of Appeal first examined the provisions of Regulation 17(1)(a). The Regulation reads:

Where the Secretary to the Ministry of Defence is of the opinion with respect to any person that; with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of essential services it is necessary to do so; the Secretary may make order that such person be taken into custody and detained in custody.

Upon examining this framework, the Court held that the opinion of the authority should be based on his satisfaction that certain action is necessary due to the existence of an objective state of facts.<sup>46</sup> The Court accordingly opined:

The objective state of facts should render it ‘necessary’ to detain the person. The required objective state of facts is revealed, if the question is posed, why is it necessary to detain this person? The answer lies in the component ‘with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of essential services’. Therefore, the objective state of facts must be such that if the person is not so prevented, he is likely to sit

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<sup>41</sup> C.A. (H.C.) 7/88, C.A. Minutes of 7 July 1988.

<sup>42</sup> See Pinto-Jayawardena & de Almeida Guneratne, at 76.

<sup>43</sup> See section 9 of the PTA.

<sup>44</sup> Section 8 of the PSO declares: ‘No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.’

<sup>45</sup> This Regulation has the same effect as section 8 of the PSO.

<sup>46</sup> C.A. (H.C.) 7/88, per Sarath. N. Silva J. (as he was then).

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in a manner prejudicial to the national security or to the maintenance of the essential service. The existence of the objective state of facts can be deduced from the conduct of the person proximate from the point of time. Conduct in the wider sense of, is referable to acts done, words spoken, behaviour and association with others of that person, as coming to the knowledge of the Secretary (*sic*).<sup>47</sup>

The respondents contended that the ouster clause contained in section 8 of the PSO and Regulation 8 of the ERs was sufficient ground to deny the application. However, this position was also rejected. It was held:

As regard to the objection based on Section 8 of the Public Security Ordinance, it was held in the case of *Siriwardene v. Liyanage* [1983 2 Sri.L.R.164] that the provision did not preclude the court from examining and ruling upon the validity of an order made under the Emergency Regulations. It is now a well-accepted proposition of law that similar clauses do not apply where the impugned order is illegal. This objection has not been urged by the state in the later cases referred to above. The same observation applies to the ouster clauses contained in Regulation 17(10). In any event, an Emergency Regulation cannot validly fetter the jurisdiction vested in this Court by Article 141 of the Constitution.<sup>48</sup>

Hence the Court upheld the claims of the petitioner and declared the arrest and detention of the detainee to be illegal.

### 7. *The Joseph Perera case*<sup>49</sup>

The Supreme Court held that while section 5 of the PSO enables the President to make regulations ‘as appears to him to be necessary or expedient in the interests of public security and preservation of public order’ and provides that he is the sole judge of the necessity of such regulation, under Article 15(7) of the Constitution ‘it is not all regulations which appear to the President to be necessary or expedient in the interests of public security and preservation of public order, made under section 5 of the Public Security Act which can impose restrictions on the exercise and operation of fundamental rights.’ The Court opined: ‘[i]t is only regulations which survive the test of being in the interests of national security [or] public order...’ that are valid. The Court ruled that under Article 15(7), ‘the Regulation must in fact be in the interest of national security, [or] public order’ and satisfy this objective test.

The Court thus ruled that the ouster clause in section 8 of the PSO, which purported to oust the jurisdiction of courts in respect of detention orders must give way to the petitioner’s constitutional rights.

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<sup>47</sup> *Ibid.*

<sup>48</sup> C.A. (H.C.) 7/88, per Sarath. N. Silva J. (as he was then).

<sup>49</sup> *Joseph Perera Alias Bruten Perera v. The Attorney General and Others* [1992] 1 Sri.L.R. 199.

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### 8. *Weerawansa v. The Attorney General*<sup>50</sup>

In this case, Justice Mark Fernando ruled that a detention order purportedly issued in terms of section 9 of the PTA was invalid because ‘[t]he Minister did not independently exercise her statutory discretion, either upon personal knowledge or credible information. She merely adopted the 2<sup>nd</sup> respondent’s opinion. That was a patent abdication of discretion.’ Justice Fernando went on to state ‘[n]ot only must the Minister of Defence subjectively have the required belief or suspicion, but there must also be objectively, ‘reason’ for such belief...’

The Supreme Court also adopted the following test laid down by Amerasinghe J. in *Farook v. Raymond*<sup>51</sup> to determine whether a magistrate’s order remanding a person constituted a ‘judicial act’ and not an ‘executive and administrative’ act, and thus beyond the jurisdiction of the Court.

If an officer appointed to perform judicial functions exercised the discretion vested in him, but did so erroneously, his order would nevertheless be “judicial”. However, an order made by such an officer would not be “judicial” if he had not exercised his discretion, for example, if he had abdicated his authority, or had acted mechanically, by simply acceding to or acquiescing in proposals made by the police—of which there was insufficient evidence in that case.<sup>52</sup>

Hence the Court concluded that a detention order might only be issued if there were grounds for the Minister to have a belief or suspicion that the person concerned was involved in unlawful activity. This holding effectively condemned the abuse of the framework under the PTA through the mechanical issuance of detention orders.

### 9. *Thavaneethan v. Dayananda Dissanayake*<sup>53</sup>

In *Thavaneethan*, the Supreme Court refused to treat detention regulations and orders made under the PTA as ‘law’ within the meaning of Article 15(7) of the Constitution. Justice Mark Fernando held that ‘the word ‘includes’ in Article 15(7) does not bring in regulations under other laws. ‘Law’ is restrictively defined in Article 170 to mean Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation.’<sup>54</sup> He further contended that ‘the effect of the word ‘includes’ was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security. While at first sight ‘public security’ may seem to cover much the same ground as ‘national security and public order’, it is clear that ‘the law relating to public security’ has been used in a narrow sense, as meaning the Public Security

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<sup>50</sup> [2000] 1 Sri.L.R. 387.

<sup>51</sup> [1996] 1 Sri.L.R. 217.

<sup>52</sup> *Weerawansa* [2000] 1 Sri.L.R., at 419.

<sup>53</sup> [2003] 1 Sri.L.R. 74

<sup>54</sup> *Ibid.* at 97-98.



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Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control set out in Chapter XVIII of the Constitution.’<sup>55</sup>

Crucially, Justice Fernando went on to explain the nature and scope of Article 15 of the Constitution. He opined:

Article 15 does not permit restrictions on fundamental rights other than by plenary legislation—which is subject to pre-enactment review for constitutionality. It does not permit restrictions by executive action (i.e. by regulations), the sole exception permitted by Article 15(1) and 15(7) being emergency regulations under the Public Security Ordinance because those are subject to constitutional controls and limitations, in particular because the power to make such regulations arises only upon a Proclamation of emergency, because such Proclamations are subject to almost immediate Parliamentary review, and because Article 42 provides that the President shall be responsible to Parliament for the due exercise of powers under the law relating to public security... Other regulations and orders which are not subject to those controls made under the PTA and other statutes, are therefore not within the extended definition of ‘law’.<sup>56</sup>

Hence, *Thavaneethan* significantly narrowed the powers of the Executive to issue regulations effectively restricting fundamental rights. This decision has proved to be instrumental in challenging a range of subsequent attempts by the executive to restrict fundamental rights through regulations issued under laws other than the PSO.<sup>57</sup>

### 2.4.2 Case study: Singarasa’s case

On 30 September 1994, Nallaratnam Singarasa was indicted on five counts under the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 and the PTA, for having allegedly attacked four army camps whilst he was a member of the LTTE.

At the trial, a purported confession was led in evidence against him. Singarasa alleged that the confession was obtained under force and produced a medical report showing evidence of beating. The High Court relied upon the author's failure to complain to anyone at any time about the beatings and accepted the confession as voluntary. It did not consider Singarasa’s testimony that he had not reported the assault to the Magistrate for fear of reprisals on his return to police custody. The Court went on to convict Singarasa solely based on the evidence of the purported confession. He was sentenced to fifty years rigorous imprisonment. Singarasa appealed his conviction to the Court of Appeal, which upheld his conviction. Subsequently, he was denied leave to appeal to the Supreme Court.

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<sup>55</sup> *Ibid.* at 98.

<sup>56</sup> *Ibid.*

<sup>57</sup> See for example, *Centre for Policy Alternatives v. Minister of Mass Media & Others*, SC (F.R.) Application No. 478/2008, Petition. The case involved the challenge of certain media regulations issued under the Sri Lanka Rupavahini Corporation Act No.6 of 1982.

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Singarasa then filed a communication with the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) that Sri Lanka had ratified. The Committee expressed the view that that by placing the burden of proof that his confession was made under duress on the accused, the State violated Article 14, paragraphs 2, and 3(g), read together with Article 2, paragraph 3, and 7 of the ICCPR.<sup>58</sup> It observed that the state was under an obligation to provide Singarasa ‘with an effective and appropriate remedy, including release or retrial and compensation.’<sup>59</sup> Moreover, it observed that Sri Lanka ‘is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.’<sup>60</sup>

Armed with these views, Singarasa made an application to the Supreme Court in 2005 seeking a revision of the conviction and sentence in 1995. The Court not only rejected the application, but also in a bizarre interpretation of the Constitution and of international law, declared that Sri Lanka’s accession to the Optional Protocol was unconstitutional because it conferred judicial power on the Human Rights Committee in Geneva without parliamentary sanction.<sup>61</sup>

The case of Nallarattnam Singarasa highlights not just the incompatibility of Sri Lankan emergency laws with international law, but also the lack of institutional structures and mechanisms whereby defaults, once identified, can be remedied. The lack of judicial review of legislation and the failure of the Supreme Court to give effect to the rights of subjects through the creative interpretation of statutory and constitutional provisions portends a bleak future for human rights protection in Sri Lanka, even in the post-war period where both the PTA and a number of ERs continue to be in operation.

### *2.5 The Ceasefire Period*

The Ceasefire Agreement (CFA) entered into between the government and the LTTE effectively suspended the application of the PTA. Clause 2.12 of the CFA stated: ‘The Parties agree that search operations and arrests under the Prevention of Terrorism Act shall not take place. Arrests shall be conducted under due process of law in accordance with the Criminal Procedure Code.’<sup>62</sup> Furthermore, most detainees under the PTA were also released during the ceasefire period.<sup>63</sup>

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<sup>58</sup> *Nallarattnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, decided on 23 August 2004, CCPR/C/81/D/1033/2001.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Nallarattnam Singarasa v. The Attorney General S.C. Spl. (LA) No. 182/99*, decided on 15 September 2006.

<sup>62</sup> See Secretariat for Coordinating the Peace Process, *Ceasefire Agreement, February 2002*, at <http://www.peaceinsrilanka.org/negotiations/cfa>

<sup>63</sup> See Shamindra Ferdinando, *Release of PTA suspects empties Kalutara prisons*, Asian Tribune, at <http://www.asiantribune.com/news/2003/04/13/release-pta-suspects-empties-kalutara-prisons>.

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### *2.6 The Post-2005 Period*

#### *2.6.1 The 2005 Emergency Regulations*

In August 2005, following the assassination of Foreign Minister Lakshman Kadirgamar, then President Chandrika Kumaratunga introduced a new set of ERs titled the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005. The Ceasefire Agreement was still in operation, meaning that these Regulations were introduced when the PTA technically remained suspended.

Regulation 8 of the 2005 ERs provides for the taking into possession or forfeiture of properties used in the course of perpetrating an offence under the ERs or the PTA. This provision had serious ramifications for right possessors and owners of property whose property was used for alleged perpetration of offences. While the Regulation provided for certain remedies for affected bystanders, any such remedy would only become applicable after a violation takes place, thereby seriously prejudicing the property rights of persons not involved in the activities proscribed by the Regulations or the Act. For example, Regulation 8(1) states that where an offence under the ERs or the PTA is alleged to have taken place, ‘the Superintendent of Police of the area shall take possession of such building or premises and shall evict any person found therein or ordinarily resident therein and secure such premises from access to any unauthorized persons.’ Critically, the Superintendent of Police is not even required to arrive at a conclusion that taking possession of the building is necessitated by the need to apprehend a suspect or prevent a recurrence of the act. Instead, the officer concerned is required by law to take possession and evict persons already resident there. Thus there appears to be no nexus between the Regulation and the preservation of national security.

Regulations 12 to 17 provide for significant control of the President and delegated ‘Competent Authorities’ over meetings, processions, publications, firearms and right of entry.

Moreover, Regulation 19(1) reintroduces preventive detention and states:

Where the Secretary to the Ministry of Defence is of the opinion with respect to any person that, with a view to preventing such person –

- (a) from acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services; or
- (b) from acting in any manner contrary to any of the provisions of sub-paragraph (a) or sub-paragraph (b) of paragraph (2) of regulation 40 or regulation 25 of these regulations,

it is necessary so to do, the Secretary may order that such person be taken into custody and detained in custody.

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Regulation 20 provides all security forces and police officers with the power to search and arrest persons without a warrant, while Regulation 21 relates to the place of detention of detainees and their production in Court.

Regulation 22 empowers the President to appoint a Commissioner General of Rehabilitation, and provides for the detention of ‘surrendees’ in rehabilitation centres. Surrendees are described as those who surrender in connection with prescribed offences and those who surrender through fear of terrorist activities. This detention could extend to up to two years.

Regulation 23 authorizes each Officer in Charge of Police (OIC) to demand householder lists, and prohibits ‘harbouring strangers’ within a household without informing the OIC in advance.

Regulations 54 to 58 lays down the procedure that must be followed with regard to the death of persons caused by the police or the army, or the death of persons while in the custody of the police or army. Provisions of the ordinary law relating to inquests<sup>64</sup> are bypassed under the Regulations, and special procedures are laid down vesting extraordinary authority in police officers, including the power to move the High Court to inquire into the death of such persons.

The above statutory framework establishes an incredibly repressive system of law enforcement. As discussed later in this paper, the excesses inherent in this system have led to the routine violation of human rights.

### 2.6.2 *The 2006 Emergency Regulations*

The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006 (2006 ERs) was introduced in December of that year coinciding with the intensification of the war between government forces and the LTTE.

As suggested above, the 2006 ERs purported to introduce a definition of terrorism into our law. Regulation 6 prohibited engaging in terrorism, specified terrorist activity—defined by the Regulations as acts prohibited by the PTA—and any act committed in furtherance of terrorism or specified terrorist activity. Regulation 7 prohibited certain types of participation in ‘persons, groups, organizations or groups of persons acting in contravention of Regulation 6’, including *inter alia* to ‘wear, display, hoist or possess the uniform, dress, symbol, emblem, or flag’ and ‘promote, encourage, support, advice, assist, act on behalf of’ such person, group or organization. Regulation 8 prohibits ‘any

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<sup>64</sup> See sections 10, 11 and 29 of the Births and Deaths Registration Act No. 14 of 1895. Also see Pinto-Jayawardena & de Almeida Guneratne, at 185. The authors comment: ‘the draconian nature of the Emergency Regulations in Sri Lanka...have been in operation for almost three decades. These Regulations permit state authorities, both police and armed forces, to dispose of dead bodies of persons in any manner that departs from the stipulations and safeguards prescribed in the ordinary law.’

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transaction in any manner whatsoever, including contributing, providing, donating, selling, buying, hiring, leasing, receiving, making available, funding, distributing or lending materially or otherwise, to any person, group or groups of persons either incorporated or unincorporated, or with a member, cadre or associate of such a person, group or groups of persons.’ Regulation 8 goes on to provide for a Competent Authority—whose decision is appealable to an Appeals Tribunal comprising designated civil servants—to exempt groups or organizations from the prohibitions of Regulation 8, on the grounds of ‘facilitating the development of a peaceful political solution, termination of terrorism or specified terrorist activity, maintenance of supplies and services essential to the life of the community, conducting developmental activities, or for any other lawful purpose.’

Finally, Regulation 19 declares: ‘No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.’

The prohibitions in these Regulations are couched in such overbroad and vague terms that a whole range of otherwise legitimate and lawful actions guaranteed by the fundamental rights provisions of the Constitution have become prohibited. For instance, it would not require a stretch of the language of the Regulations to interpret them as prohibiting the provision of legal services to a person, group of persons, group or organization acting in contravention of Regulation 6—even where such legal services are in a court of law where the provisions of Article 13 of the Constitution relating to fair trial ought to apply. Further, at the time the Regulations were promulgated, the LTTE were governing a substantial part of the North and East under a proto-state type administration. Thus any person engaging in any sort of activity that required dealing with the administration of the territory would by virtue of such connection alone be guilty of an offence. Thus a whole gamut of regular and otherwise legitimate actions was criminalized overnight. While only a fraction of these sorts of actions would ever be prosecuted—largely owing to the sheer impossibility of prosecuting all actions falling within the extremely wide net cast by the Regulations—the danger of these provisions was that they provided the state with the tool to selectively target individuals for prosecution. When the net of criminality is cast so wide as to include almost the entirety of the population of an area, the vulnerability of individuals is heightened, permitting abuse and arbitrary action.

Further, the immunity granted under Regulation 19 is so broad that it could potentially be read to cover acts committed in pursuance of powers other than the powers under these Regulations. Thus Regulation 19 effectively forecloses the right of individuals to a remedy. As the Centre for Policy Alternatives notes:

Given the wide ranging powers provided to the State and its officers under these regulations, the absence of independent review, the history of abuse of similar draconian legislation, including the Prevention of Terrorism Act, to stifle legitimate democratic activity and political dissent, and the culture of impunity that has developed in Sri Lanka in recent months in particular, such a clause

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could easily become one that promotes impunity rather than providing for immunity for *bona fide* actions.<sup>65</sup>

Finally, the competent authority is granted such sweeping powers that could potentially be used arbitrarily against civil society and human rights organizations among others. These powers allow for excessive control over civil society organizations, which is incompatible with the freedom of expression and association and other freedoms, which are necessary for the independence and autonomy of such organizations.

### 2.6.3 Case study: Edward Sivalingam's case<sup>66</sup>

The petitioner in this case was a Methodist clergyman who was serving in LTTE-controlled areas. He was arrested in Vavuniya and subsequently detained in Colombo under a detention order in terms of the 2005 ERs. He alleged that he was tortured while in custody and forced to sign a confession admitting the commission of prohibited acts in Sinhala—a language he was not conversant in. The petitioner moved the Supreme Court on two questions: first, on the legality of his arrest and subsequent detention; and second, on the allegations of torture. He sought relief in the form of release from detention and compensation.

The Supreme Court held against the petitioner on both grounds, but based its decision on a peculiar set of factual bases and inferences. On the question of the validity of detention, the Court referred to the petitioner's possession of an 'LTTE identity card.' The Court opined that the petitioner's possession of the said card indicated that he was 'favoured' by the LTTE and that this gave rise to a reasonable suspicion, which in turn justified the arrest. The Court reached this conclusion notwithstanding the petitioner's claim that in fact the alleged 'LTTE identity card' was a travel pass issued by the LTTE for purposes of entry and exit from the territory controlled by them. The card itself bears the words 'travel pass' on its face.

On the question of torture, the Court ruled that the petitioner's failure to complain about incidents of alleged torture immediately after they occurred rendered his version of events doubtful. These sentiments were strangely familiar to the previously discussed case of *Singarasa*. Once again, the Court rejected the petitioner's claim that he did not allege torture before the Magistrate due to fear of reprisals when he returned to the custody of the police. Alarming, one of two medical reports submitted by the petitioner revealed injuries that were consistent with beatings and torture.

The Court's rejection of the evidence that evinces the possibility of torture and its imposition of an obligation on the detainee to allege torture even at his own risk is a patent contravention of the duty in international law to investigate credible allegations of crimes such as torture.

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<sup>65</sup> Centre for Policy Alternatives, *Statement on Emergency (Prevention of Terrorism and Specified Terrorist Activities) Regulations of December 2006*, at <http://www.nation.lk/2006/12/24/opini.htm>.

<sup>66</sup> *Edward Sivalingam v. Jayasekara S.C.* (F.R.) Application No. 326/2008, decided on 10 November 2010.

### 2.6.4 Case study: Tissainayagam's case

J.S. Tissainayagam, Editor of the North-Eastern Monthly magazine was arrested in March 2008 by the Terrorism Investigation Division (TID) of the Sri Lanka Police. The journalist was charged *inter alia* with inciting the commission of acts of violence or racial or communal disharmony by publishing certain articles in the North-Eastern Monthly in 2006 and 2007.<sup>67</sup> During his trial, Tissainayagam claimed that he had made an involuntary statement to the police following harassment and threats while in detention.<sup>68</sup>

Tissainayagam's case does not merely highlight the lack of media freedom in Sri Lanka; it also reveals a much deeper systemic problem. The three charges against Tissainayagam under the PTA were: (1) that he intended to cause the commission of acts of violence or racial or communal disharmony through the printing or distribution of the magazine 'North Eastern Monthly'; (2) that he intended to cause the commission of acts of violence or racial or communal disharmony through the publishing of particular content in the said magazine; and (3) that he collected funds from non-governmental organizations for the publishing of the said Magazine.

One of the editorials relied on in the indictment was headlined: 'Providing Security to Tamils now will define northeastern politics of the future.' The excerpt specifically cited in the indictment reads: 'It is fairly obvious that the government is not going to offer [Tamil Civilians] any protection. In fact it is the state security forces that are the main perpetrator of the killings.' By analyzing the three charges and the excerpt in the indictment, it becomes fairly obvious that the conviction of Tissainayagam on the first and third charges was contingent on his conviction on the second charge, which was the only charge that was 'content based'. The entire case was therefore predicated on proving that the article, and more specifically the excerpt, was published with the intention of 'causing the commission of acts of violence or racial or communal disharmony.'<sup>69</sup>

The scandal of the Tissainayagam case and the fundamental contention of the prosecution was that an article written by a Tamil journalist accusing a predominantly Sinhalese Army is likely to incite the commission of acts of violence by Sinhalese readers against Tamils, or lead to racial or communal disharmony. This proposition is facially absurd and, at the very least, imposes an enormous evidentiary burden on the prosecution. The government for its part successfully manipulated the controversy into one revolving around Tissainayagam's links to the LTTE. It achieved this through the relentless use of propaganda on official governmental websites during the pendency of the case—an act which clearly violated Tissainayagam's right to a fair and impartial trial.<sup>70</sup> Even those in

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<sup>67</sup> See CNN, *Jail Sentence for Dissident Sri Lankan Reporter Condemned*, available at <http://edition.cnn.com/2009/WORLD/asiapcf/09/01/sri.lanka.journalist> (last accessed on 14 January 2011).

<sup>68</sup> See Law & Society Trust (LST), *Briefing Note on Tissainayagam Case: 17 September 2009 - Case of J.S. Tissainayagam*, at [www.lawandsocietytrust.org/web/images/PDF/briefing%20note.doc](http://www.lawandsocietytrust.org/web/images/PDF/briefing%20note.doc).

<sup>69</sup> See Section 2(1)(h) of the Prevention of Terrorism Act No. 30 of 1981.

<sup>70</sup> See Ministry of Defence Sri Lanka, *Background: Thissanayagam Case and Others*, at [http://www.defence.lk/new.asp?fname=20081222\\_01](http://www.defence.lk/new.asp?fname=20081222_01); *Tissanayagam found guilty on terrorism: sentenced 20 years imprisonment*, at [http://www.defence.lk/new.asp?fname=20090831\\_07](http://www.defence.lk/new.asp?fname=20090831_07).

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the civil society who campaigned for Tissainayagam's release focused on the issue of journalistic freedom, while being divided on whether he actually had links to the LTTE. It was rarely emphasized that Tissainayagam's alleged links to the LTTE had little to do with his indictment. In the courtroom, however, there was simply no link that could be drawn between the accused's liaisons with the LTTE and the actual indictment.

In August 2009, the High Court sentenced Tissainayagam to a total of 20 years rigorous imprisonment, for arousing 'communal feelings' by writing and publishing articles that criticized the government's treatment of Sri Lankan Tamil civilians affected by the war, and for raising funds for a magazine in which the articles were published in furtherance of terrorism.<sup>71</sup> The High Court judgment—including the judge's acceptance of the confession into evidence—was delivered despite a host of contradictions and discrepancies in the prosecution's case. Moreover, the Court translator who perused the Tamil script of the purported confession submitted in open court that the confession appeared to have been tampered with. The judge also disregarded the fact that no prosecution witnesses were summoned to prove that the articles could incite ethnic disharmony, but instead relied on her own judgment and on a defense witness's concession during cross-examination that the articles were factually incorrect. Tellingly, the judge dismissed the evidence of four other witnesses on the basis that they held the same political beliefs as the accused.

Tissainayagam thereafter appealed the ruling, and was granted bail in January 2010 pending the outcome of his appeal.<sup>72</sup> Eventually, in May 2010, the government announced that Tissainayagam would be pardoned by President Mahinda Rajapaksa to mark the 2010 World Press Freedom Day. While Tissainayagam was never officially pardoned, he appears to have been permitted by the authorities—presumably under intense international pressure—to leave the country.

### ***2.7 The Post-war Period***

#### *2.7.1 The 2010 Amendments to the Emergency Regulations*

In May of 2010, soon after Prof. G.L. Peiris assumed office as Minister of External Affairs, the government announced the repeal of and scaling down of certain ERs. The President duly amended the 2005 ERs, whilst notably leaving the 2006 ERs in place.

Regulations 8, 12, 13, 14, 15 and 16 were repealed together with a number of other Regulations that dealt with internal investigations into police practices and custodial death. However, this scaling down of ERs was largely cosmetic because the 2006 ERs remain in force, together with some of the most draconian and intrusive of the 2005 ERs including the provision for preventive detention without charge. In fact, the Regulations that were repealed were hardly ever used. Moreover, the PTA remains on the statute

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<sup>71</sup> See The Sunday Leader, *Convicted*, at <http://www.thesundayleader.lk/archive/20090906/convicted.htm>.

<sup>72</sup> See BBC, *Sri Lankan Editor JS Tissainayagam Gets Bail*, at [http://news.bbc.co.uk/2/hi/south\\_asia/8451413.stm](http://news.bbc.co.uk/2/hi/south_asia/8451413.stm).



book, with the result that there has been no substantial diminution from the powers available to the police and the military.

### 3. The Human Rights Cost of Emergency Laws

In this chapter, the authors examine the impact of the emergency law framework and judicial interpretation thereof on the respect, protection and promotion of human rights in Sri Lanka. The chapter is organized according to distinct human rights issues, though it is conceded that there is some overlap between issues.

#### 3.1 Killings and Disappearances

The PTA and ERs have directly result in extra-judicial executions and disappearances. The usual safeguards designed to protect against abuse—such as the right to be produced before a judicial officer within twenty-four hours of arrest—have been systematically eroded. Furthermore, empowering military personnel to exercise policing functions undermines the security of individuals and renders them vulnerable by placing them in the custody and at the mercy of personnel not trained in policing functions. It is reiterated that Regulations 19 and 20 of the 2005 ERs give the armed forces powers of search, seizure, arrest and detention without warrant; police powers in dealing with prisoners; and the power to question a person in detention. Furthermore, section 12(1) of the PSO also gives the President the power to call out the armed forces to maintain public order where he believes circumstances endangering public security have arisen in any area, or is imminent, and he believes the police are inadequate to deal with the situation. Upon the making of such an order, the armed forces are vested with the same powers of the police including the powers of search and detention.

Most critically though, Regulations 56 and 58 of the 2005 ERs grant the IGP and the Secretary of Defence wide powers over the burial or cremation of the body of a person who died due to action taken by a police officer or military personnel during the course of carrying out their duties, or where a person dies in police or military custody. While such powers are to be exercised in the interests of national security, the scope for abuse and the covering up of extra judicial executions and disappearances is significant.

The ground reality, particularly in 2009 during the height of military operations, is revealing. According to a study conducted by Amnesty International many enforced disappearances in the North and East took place inside High Security Zones (HSZs) and during curfew hours,<sup>73</sup> raising strong presumptions in terms of the involvement of security personnel. A U.S. State Department Report released in 2010, estimates that the number of enforced disappearances during 2009 ranged from 300 to 400, with the

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<sup>73</sup> See Amnesty International, *Sri Lanka: Human Rights in Democratic Socialist Republic of Sri Lanka - 2009*, at <http://www.amnesty.org/en/region/sri-lanka/report-2009>.

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majority occurring in the North and East.<sup>74</sup>

### 3.2 Arrest, Detention and Torture

The last few years witnessed a sharp rise in the number of arrests and detentions taking place both under ERs and the PTA.<sup>75</sup> The preventive detention provisions of the ERs and PTA have effectively nullified the freedom from arbitrary arrest and detention. The balancing act between permitting preventive detention and ensuring civil liberties is a very fine one and requires searching and diligent judicial review of arrests and detentions in order to prevent abuse. Unfortunately, the Supreme Court and the Court of Appeal have fallen woefully short of subjecting the grounds cited for detention to strict review. As a consequence, there has yet to be a single final determination of the Supreme Court within the last three years known to the authors holding that an arrest and detention of a Tamil petitioner from the Northern and Eastern Provinces was violative of the fundamental rights of the petitioner. This is notwithstanding the fact that the Supreme Court is inundated with petitions alleging illegal arrest and detention, and that young males from the North and East are particularly vulnerable to arrest.

In June of 2009, the Centre for Policy Alternatives filed a public interest petition alleging that the government's holding of civilians within military run internment camps violated *inter alia* the freedom from arbitrary arrest and detention guaranteed by Articles 13(1) and 13(2) of the Constitution.<sup>76</sup> The petitioner pointed out that the holding of 300,000 persons without permitting them to leave the camps amounted to an arrest, for which there was no provision in law. The official position of the government was that the detention of the *entire* IDP group was necessary on the grounds of national security, since remaining separatist elements were alleged to have infiltrated this group.<sup>77</sup> The petitioner also pointed out that no detention orders were issued in respect of any of the detainees. The matter was supported for 'leave to proceed'—a preliminary threshold where the petitioner is asked to demonstrate a *prima facie* case—and order was reserved. Shockingly, however, the Supreme Court has yet to deliver its decision on leave to proceed close to two years after the case was filed. In the normal course, decisions on leave to proceed are made as bench orders on the day assigned for support immediately after the hearing. This case demonstrates the complete breakdown of the integrity of the system of justice and the total failure of the Court qua organ of state to protect, fulfil and ensure the rights of individuals coming before it. The case also highlights the normalisation of impunity. The UN Secretary General's Panel of Experts found that the mass internment of civilians gave rise to credible allegations of crimes against

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<sup>74</sup> US Dept. of State – Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka*, Country Reports on Human Rights Practices, March 11, 2010, at <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm>.

<sup>75</sup> See Human Rights Watch, *Sri Lanka: Country Summary – January 2009*, at <http://www.hrw.org/en/node/79245>.

<sup>76</sup> See S.C. (F.R) 457/2009.

<sup>77</sup> Official Website of the Government of Sri Lanka, *LTTE Cadres Infiltrate Northern IDP ranks – Minister*, 28 August 2009, at [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca200908/20090828ltte\\_cadres\\_infiltrate\\_northern\\_idp\\_rank\\_s.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca200908/20090828ltte_cadres_infiltrate_northern_idp_rank_s.htm).

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humanity.<sup>78</sup> Nevertheless, the Court has refused to intervene, and for reasons best known to it, has refused to make a decision on the matter.

It is difficult to directly attribute torture in custody to the emergency regime, as the pervasive use of torture in Sri Lanka is not limited to arrests and detentions made under emergency law. Yet there is little doubt that the framework for arrest and detention established under the PTA and ERs facilitates a culture of impunity. This culture of impunity is best reflected in the dismal conviction rate in respect of torture cases in Sri Lanka.<sup>79</sup> Such impunity necessarily creates the perfect conditions for an increase in acts of torture.

Moreover, as discussed below, specific provisions contained in the PTA and ERs relating to the admissibility of confessions certainly encourage the use of torture to extract confessions from persons accused of unlawful activities. This phenomenon is evident in a number of cases relating to the ERs and the PTA. For example, in both *Singarasa's case* and *Sivalingam's case*, the accused alleged that their so-called 'confessions' were obtained under duress and through the infliction of torture.

### 3.3 Fair Trial and Due Process

Both section 16 of the PTA and Regulation 41(4) of the 2005 ERs permit confessions made by suspects to police officers to be used as evidence against them. Under the general law, codified by section 25(1) of the Evidence Ordinance No. 14 of 1895, confessions made to a police officer are inadmissible. As noted above in the discussion on the *Singarasa* case, the use of this evidence against accused persons violates the ICCPR. This problem is compounded by the practice of certain judges—not prohibited by law—to base convictions on the strength of a confession alone. Moreover, the burden of proving that a confession was not made voluntarily is placed on the accused, thereby undermining the fundamental requirement that a person be presumed innocent until proven guilty.

Furthermore, the stripping of the jurisdiction of courts vested with appellate jurisdiction to make interlocutory orders by Regulation 41(5) also constitutes a violation of the very checks and balances necessary to ensure the protection of fair trial rights of the accused in a trial.

Two provisions in 2005 ERs also reverse the burden of proof that should properly be on the prosecution. Regulation 48 provides that any documents found in the possession, custody or control of a person 'shall be submitted in evidence against such person

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<sup>78</sup> See *Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, at [www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf), at 44-45.

<sup>79</sup> See Statement by Manfred Nowak Special Rapporteur on Torture at the 62<sup>nd</sup> Session of the General Assembly Third Committee Item # 70(b) (29 October 2007), at 7. Nowak comments: 'the 1994 Torture Act criminalizes torture and the Attorney General has filed a significant number of indictments under it, though only three convictions have resulted within last 13 years.'

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without proof thereof'. Section 18(1)(b) of the PTA provides that the contents of such documents 'shall be evidence of the facts stated therein'.

Section 19(a) of the PTA provides that those convicted of an offence and pending appeal shall be kept in remand until the determination of the appeal. In its Concluding Observations on Sri Lanka in 2003, the UN Human Rights Committee criticized the PTA provisions on bail as incompatible with the ICCPR.<sup>80</sup> Moreover, Regulations 19(1)(a) and 62(2) of the 2005 ERs provide that persons shall not be released on bail except with the consent of the Attorney General. These provisions severely undermine the fair trial rights of those charged under the PTA or ERs. Taken together with the draconian punishments prescribed for those convicted of offences under the PTA and ERs, the violation of these fair trial rights constitute an assault on the integrity of the process.

At the empirical level, these provisions appear to have adversely impacted on a number of trials. The cases of *Singarasa* and *Tissainayagam*, as discussed above, are quintessential examples of the denial of fair trial rights owing to the draconian framework established under the existing emergency regime.

### ***3.4 Freedom of Speech and Expression including Publication***

The PTA and the ERs under the PSO have been indiscriminately used to impose censorship of the media, seize printing presses and jail journalists. The PTA, in addition, specifically prohibits the printing, publishing and distribution of a particular publication without the prior approval in writing of a Competent Authority, and prohibits publication of any matter, which may perceptibly lead to the incitement to violence.<sup>81</sup>

An early example of overt censorship is the *Sunday Leader Case*,<sup>82</sup> which involved the appointment of a 'Competent Authority' under Regulation 2 read with Regulation 14(2)<sup>83</sup> of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2000. On 22 May 2000, the 1<sup>st</sup> respondent, purporting to act in terms of Regulation 14(2)(b)(i), sent a letter to the petitioner prohibiting the petitioner from printing, publishing and distributing its newspaper *Sunday Leader* or any newspaper for a period of six months from the date of the order. Further, by an order purporting to be under regulation 14(2)(b)(ii), he directed the IGP to take possession of the petitioner's printing press and its premises. The petitioner filed a fundamental rights application in the Supreme Court complaining that the said orders violated its rights under Articles 12(1), 14(1)(a) and

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<sup>80</sup> United Nations Human Right Committee, *Concluding Observations of the Human Rights Committee: Sri Lanka*, CCPR/CO/79/LKA, 1 December 2003, at para.13.

<sup>81</sup> Kishali Pinto Jayawardena, *Freedom of Expression and Media Freedom* in E. Nissan, (Ed.), *Sri Lanka, State of Human Rights 2003*, Law & Society Trust (2003), at 4.

<sup>82</sup> *Leader Publications (Pvt.) Ltd. v. Ariya Rubasinghe, Director of Information and Competent Authority and Others* [2000] 1 Sri. L. R. 265.

<sup>83</sup> Regulation 14(2) provides *inter alia*: "'Competent Authority' in relation to any emergency regulation means, unless otherwise provided for in such regulation, any person appointed, by name, or by office, by the President to be a Competent Authority for the purpose of such regulation.'

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14(1)(g) of the Constitution. At the hearing, the validity of the 1<sup>st</sup> respondent's appointment as 'Competent Authority' was considered as a preliminary matter.

The Supreme Court held that the '1<sup>st</sup> respondent was not entitled to make the orders he did, for he was not empowered by the regulations to do so within the meaning of section 6 of the Public Security Ordinance.'<sup>84</sup> It was further held that the means chosen for the appointment of the Competent Authority, namely by a notification published in the Official Gazette, was 'not an effective exercise of the delegated power conferred by Parliament by section 6 of the Public Security Ordinance.'<sup>85</sup> Thus it was concluded that the 1<sup>st</sup> respondent had no power or authority to act under Regulation 14 and the document dated 22 May 2000 addressed to the petitioner was a nullity and was of no force or avail in law.<sup>86</sup>

Though many welcomed this rare ruling in favour of the petitioner, the narrow technical scope of the judgment was instantaneously revealed. By relying on a legal technicality rather than on a substantive legal principle, 'the Supreme Court left the door open for the government to re-impose media censorship...'<sup>87</sup> The government immediately promulgated a set of ERs under which it became mandatory for all media organizations to submit their reports to the 'Competent Authority' prior to publication or broadcast.<sup>88</sup> Amidst protests by both domestic and international journalists, the government subsequently lifted the requirement of pre-publication vetting. However, the Competent Authority still possessed broad sweeping powers to ban material on a wide range of grounds including the interests of national security and the preservation of public order.<sup>89</sup>

Explicit media censorship under the emergency laws has decreased in recent times. However, owing to a culture of intimidation and the perennial threat of arrest and detention under the PTA and the ERs, the Sri Lankan media is now afflicted by self-censorship.<sup>90</sup> Journalist and media rights commentator, Sundanda Deshapriya observes: 'legally we have achieved some progress. But otherwise, there is no editorial freedom in Sri Lanka at all...That is the responsibility of editors and owners.'<sup>91</sup> The issue of self-

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<sup>84</sup> [2000] 1 Sri. L. R. 265, at 278.

<sup>85</sup> Section 6 of the PSO declares: 'Emergency regulations may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorized by this Ordinance to be made, and may contain such incidental and supplementary provisions as appear to the President to be necessary or expedient for the purposes of the regulations.' Accordingly, the Court held that such authorities and persons must be appointed through a substantive enactment.

<sup>86</sup> *Ibid.* at 282.

<sup>87</sup> Dianne Sturgess, *Court Decision Expresses Rifts in Ruling Circles: Media Censorship in Sri Lanka Ruled Invalid then Reimposed*, at <http://www.wsws.org/articles/2000/jul2000/sri-j18.shtml>.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* The author cites the new Regulations as banning 'any material which would in the opinion of the Competent Authority be prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or inciting or encouraging persons to mutiny, riot or civil commotion or to commit the breach of any law for the time being in force.'

<sup>90</sup> See *10<sup>th</sup> Anniversary of the Colombo Declaration on Media Freedom and Social Responsibility—International Symposium: Speeches and Interactive Sessions* (October 2008), Session on Press Freedom in Sri Lanka: What's Happening? at 32 (Speech by Sunanda Deshapriya).

<sup>91</sup> *Ibid.*

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editorship is hence very real, as continued interference in the newsroom by owners has severely hampered the space for free, accurate and balanced reporting. Thus ascribing responsibility for the erosion of media freedom through censorship is a complex task. Though the government is largely responsible for creating an atmosphere of fear and paranoia, the media industry itself is also responsible for becoming easily malleable and resorting to self-censorship.

The UN Human Rights Committee has observed that states must appreciate the importance of a pluralistic media in the nation-building process. Restricting media freedom to advance facially noble goals such as ‘national unity’ ultimately violates the freedom of speech and expression. The Committee observes:

The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democratic tenets and human rights.<sup>92</sup>

Such observations remain largely unheeded in the Sri Lankan context. At the end of 2006—perhaps during a period where preparations for a full-blown military confrontation between the government and the LTTE were set in motion—Reporters sans Frontiers (RSF) referred to Sri Lanka as one of the world’s most dangerous countries for journalists.<sup>93</sup> This predicament continued to prevail throughout the rest of the decade, with only small improvements following the end of military operations in May 2009. Although Sri Lanka’s Constitution provides for freedom of expression, the comprehensive legal framework ‘leaves wide discretion for the government to impose restrictions.’<sup>94</sup> This wide discretion is invariably provided for under the present regime of emergency law.

### 3.5 Freedom of Movement

A number of ERs have established ‘Prohibited Zones’, ‘Restricted Zones’ and ‘High Security Zones’ prohibiting people, vehicles and vessels from entering particular areas of land or coast line seas without written authority from the Competent Authority.<sup>95</sup> Vast areas of land in the North and East have been appropriated through the use of these Regulations, preventing resettlement and raising suspicions over the motives of the

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<sup>92</sup> See *Mukong v. Cameroon*, Communication No. 458/1991, at para.9.7.

<sup>93</sup> The Centre for Policy Alternatives, *Background Note Prepared for International Press Freedom and Freedom of Expression Mission to Sri Lanka* (2007), at 7.

<sup>94</sup> Amnesty International, *Silencing Dissent* (2008), at 8.

<sup>95</sup> See Emergency (Establishment of a Prohibited Zone) Regulations No. 1 of 2006 (creates prohibited zones); Emergency (Colombo High Security Zone) Regulations, No. 3 of 2006 (allows special security arrangements in Colombo); Emergency (Port of Colombo) Regulations, No. 5 of 2006 (applies to ports of Colombo); Emergency (Restricted Zone) Regulations, No. 6 of 2006 (restricts movements on eastern seaboard); Emergency (Restricted use of Outboard Motors) Regulations, No. 8 of 2006 (prohibits motors exceeding 10 horsepower); and Emergency (Muttur (East)/Sampoor High Security Zone) Regulations No. 2 of 2007.

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government in continuing to maintain them more than two years after the conclusion of the war.

In July 2007, the Centre for Policy Alternatives challenged the establishment of a HSZ in Sampur on grounds of discrimination and the violation of the freedom of movement.<sup>96</sup> The organization contended that the establishment of the HSZ and prohibition of access by the landowners situated within the Zone, violated Articles 12 and 14 of the Constitution and international humanitarian law. The Supreme Court, however, dismissed the fundamental rights applications filed by CPA.

Moreover, section 11 of the PTA and Regulation 18(1)(iv) of the 2005 ERs enable the Secretary of Defence to prevent a Sri Lankan citizen from traveling outside of Sri Lanka. In the context of threats to members of civil society and journalists who end up seeking exile outside the country, the power to prevent a citizen from leaving the country not only violates the individual's right to freedom of movement, it also potentially and palpably augments the threat to the physical safety of certain individuals.

## 4. Conclusion

On a purely legal analysis, the draconian PTA and the many ERs promulgated in the apparent pursuit of national security have severely curtailed the fundamental rights of Sri Lankans and have restricted human security, notably by undermining the freedom from arbitrary arrest, detention and torture. In addition, they have also granted state and legal cover to the use of detention and torture as a weapon against vulnerable communities and have introduced a culture of disrespect within the police, armed forces and even the judiciary for the security of individuals and for individual liberty. Further, the legal framework on which they are based undermine democracy. They empower an already powerful executive while severely limiting the scope and efficacy of judicial remedies.

The restrictions on free speech have stifled the press and have had a chilling effect on dissenting voices. This has led to a breakdown in the fourth estate of government and has assisted in the further entrenchment of impunity in the country. Finally, the existence of ERs and the non-repealing of the PTA even though two years have lapsed since the termination of hostilities demonstrate the danger of emergency legal regimes. In the circumstances, nothing short of complete repeal and overhaul of Sri Lanka's security laws will address concerns about the use and abuse of laws that were never designed to apply during times of peace.

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<sup>96</sup> See Bhavani Fonseka and Mirak Raheem, *A Brief Profile of the Trincomalee High Security Zone and Other Land Issues in Trincomalee District*, Centre for Policy Alternatives (May 2008).