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Much has been said about the recent decision of the Government to end the Emergency in Sri Lanka. Some welcomed the move and others are yet to make any pronouncements.

This short essay is an attempt to examine the implications of the decision of the Government of Sri Lanka (GOSL) together with the nature and effect of withdrawal of the emergency.

What is Emergency?

Proclamation of Emergency is made by the President under section 2 of the Public Security Ordinance (PSO). With the proclamation the President is empowered to promulgate Emergency Regulations under section 5. The proclamation is generally referred to as “Emergency in the country”. This is an exceptional situation that, among other things, permits the Executive to bypass Parliament and introduce forceful regulations having the effect of law. Those regulations, which are called Emergency Regulations, can even be contrary to laws passed by Parliament except the Constitution. However, these regulations introduced by the President are valid only so long as the Proclamation is in effect. Parliament has to approve it on a monthly basis, with a simple majority. This approval is given at the monthly 'Emergency Debate'. What is debated in Parliament in the so-called “emergency debate” is the proclamation by the President and not the regulations enacted unilaterally by the President.

With the implementation of the PSO since 1947, we have witnessed more abuses than proper implementation of the statute. In fact, when the PSO was debated as a Bill in the House on 10th June 1947, Dr. A.P. de Zoysa MP made the following prophetic words:

“... Instead of taking measures to prevent disorder, are we wise in passing a law of this nature? An unscrupulous Minister, and unscrupulous Prime Minister, could in future, make use of this very law to detain innocent people..... There may be persons with their own prejudices and hatreds. ...”

How true? With my own experience in the legal field, I have seen hundreds of such arbitrary and unlawful detentions of innocent people under almost all the governments. All what the government want is to have a state of emergency and regulations made under PSO to justify an arrest and a long detention. It is in this context we need to understand the demand from many quarters - politicians to victims, international community to civil society - to withdraw the Emergency, which has made a huge adverse impact on the rule of law of the country.

Though it is too legalistic, it is necessary to set out a summary of the legal position of the relevant legislation. Prior to the present constitution, the constitutional validity of the PSO was challenged several times but the then Supreme Court held that it was validly enacted. However, the 1978 Constitution has a separate chapter on Public Security, which also recognizes the validity of the PSO and its operation. There were also challenges on the President's declaration of emergency. In those cases the courts have held that "the existence of a state of emergency is not a justifiable matter which the Court could be called upon to determine by an objective test". Although section 8 of the PSO says the validity of the Emergency regulations cannot be questioned in any court, in many instances, the Supreme Court have quashed the Emergency Regulations that were contrary to the constitutional provisions, in particular the fundamental rights e.g. Joseph Perera v. AG. There are also cases where immunity was sought for criminal acts committed under emergency regulations but in those cases the defence of immunity was deservedly rejected. One leading case was the Kataragama beauty queen murder (Wijesuriya v. State) where a defence was taken that the execution of an order given by the Commanding Officer (denied by him) to "bump off" the prisoner came within the protection of the PSO under s. 9. This was rejected.

On 25th August 2011, the President made a seemingly innocent and laudable announcement in Parliament declaring that the emergency would lapse and will not be extended. This means that the President's promulgation of emergency made under section 2 would lapse and consequently all Emergency Regulations made thereunder would also lapse. The public was under the impression that all restrictions imposed using emergency for almost 30 years will now lapse and all parts of the country will return to normal without any emergency situation. Has it happened, despite hurried welcome statements from some?

Emergency to Emergency – A Deceptive Move?

With the so called withdrawal of the emergency, two major observations became obvious. Firstly, the President had on 6th September 2011 discretely re-introduced an Order made

under section 12 of the PSO calling out all the members of the Armed Forces for the maintenance of public order in all 25 Districts. Then a set of new Regulations made under the Prevention of Terrorism Act (PTC) dated 29th August 2011 emerged. What had taken place can only be understood only with an examination of those regulations and notifications. Let us now turn to them.

Order made by the President under section 12 of PSO comes under Part III of the PSO. This controversial provision was introduced to the PSO as an amendment to strengthen the PSO during S.W.R.D. Bandaranaike government in 1959, amidst protests. The objections were basically against the erosion of civil liberties. During the debate Dr. Colvin R de Silva was suspended and removed from the House. The speech by Dr. Bernard Soysa MP, made on 12th February 1959, was considered to be one of the all time best parliamentary speeches. He analyzed the new powers to be vested in the Governor General, and pointed out that with the new amendment, the head of the executive can act purportedly in the public interest all powers that is vested in him in the absence of an emergency. He demonstrated that after independence, our leaders were responding to public issues much worse than colonial masters. These provisions were, in fact, introduced to activate executive powers in extreme cases of emergencies such as essential services for a particular geographical area but obviously later abused.

It is this Amendment in 1959 that brought in section 12 permitting the head of the executive to call out armed forces and declare services as essential services, if there are “circumstances endangering the public security in any area have arisen or are imminent and the Governor General is of the opinion that the police are inadequate to deal with such situations in that area, he may call out armed forces for the maintenance of public order in that area.” The powers of the governor general is vested with the President and it is the President who should now call out armed forces. Any layman will understand that for the President to invoke this provision there must be an actual or imminent security threat endangering the public security and that the police must be inadequate to deal with such situations. The government by the gazette dated 8th September 2011, called out entire armed forces in terms of this act in respect of all Districts in the country. What is the situation in Hambantota, Galle, Colombo, Anuradhapura or any other part of the country? The Government tells the world that the situation is normal in the country and to the contrary the President says that there are security threats all over the country and the police cannot handle it. My recollection is that these Orders are made concurrently with the Emergency Proclamation under section 2 to enable the government to maintain law and order. Not after the Emergency proclamation is withdrawn.

With the withdrawal of the Emergency, the President’s proclamation under section 2 lapsed. For the President to impose a proclamation under section 2, there are several preconditions. The section reads as follows:

“Where in view of the existence or imminent existence of a state of public emergency, the President is of opinion that it is expedient so to do in the interest in the public security and the preservation of public order or for the maintenance of supplies of and services essential to the life of the community, the President may declare that provisions of Part II of the PSO come into operation throughout the country or in any part thereof.”

There has to be an actual or imminent state of public emergency for the President to invoke section 2 and by withdrawing the proclamation, the President admits that there is no actual or imminent public emergency. On one hand, the President says there is a status of emergency and on the other hand, he says there is no emergency and call out the military!

Inventing Unconstitutional Regulations under PTA

For almost a week since the lapse of the Emergency, the Government said that it has introduced certain regulations under the Prevention of Terrorism Act but those regulations were not to be found. Finally, they are now available in the public domain. Those regulations are dated 29th August 2011. There are several regulations made by the President under the PTA, which can be categorized as follows:

(i) Proscription of LTTE (Gazette No. 1721/2)

(ii) Detention of suspects (Gazette No. 1721/4) providing for measures to continue to detain suspects who had been previously detained under Emergency Regulations.

(iii) Keeping surrendered persons under Rehabilitation (gazette NO. 1721/5)

(iv) Extension of Applications of the Emergency Measures (Gazette NO. 1721/3), providing for continuation of several Emergency Regulations notwithstanding the lapse of Emergency.

Prior to examining the legality of these Regulations, it is necessary to understand the constitutional position of the Laws and By-laws. Laws passed by Parliament have the force of law and in fact, those laws generally authorize the Minister to make regulations in order to implement the provisions of the law. If a statute authorizes a minister to make regulations in respect of a specific matter, such matters are specifically set out in the statute. Unless the law authorizes the Minister to make regulations on a specific matter, he/she cannot introduce regulations overriding any other law. The Minister cannot make fresh legislation outside the scope of the permissible limitations of the law. The Constitution specifically states that Parliament cannot abdicate its law making power. However, the law recognizes PSO as an exception to this principle because it authorizes the President to legislate during emergencies and hence Emergency Regulations. This is the only exception where the Executive can introduce regulations contrary to the existing law but he cannot introduce regulations contrary to the Constitution. Unfortunately, this complex legal issue cannot be dealt with in detail in this paper but suffice it to say that unlike the PSO, the PTA does not authorize the President (Minister of Defense) to introduce offences or any other specific stand alone legislation.

PTA section 27(1) states: The Minister may make regulations under this Act for the purpose of carrying out or giving effect to the principles of this Act. This is the usual rule making of the Minister under most of our laws. Under the Interpretation Ordinance s.17, rules, regulations and by laws made by any authority under the powers given by a statute cannot be inconsistent with the provisions of any enactment. In short these regulations can only be introduced to give effect to the existing provisions of the enactment and not to confer additional powers!

The Regulations introduced on 29th August 2011, have an effect of new legislation altogether. President, in his capacity as the relevant Minister has usurped the power of Parliament and introduced some of the provisions, which he could only have done under the PSO. The upshot of these regulations is that some of the vital emergency measures have been unlawfully introduced by the President, even though the Emergency has lapsed!

We cannot forget how PTA was abused in this country. Retired Supreme Court Judge CV Wignaswaran, who has earned high respect for integrity, knowledge and courage, and before whom hundreds of PTA cases came up, an article on PTA, National Security and Human Rights states thus:

“I throw a stone at a hungry dog instead of giving something to it. It reacts violently. Then I take a big stick to assault it. The Big stick is the Prevention of Terrorism Act. It was used degradingly and brutally against the youth of the North and the South. In effect, the failure to offer appropriate solutions to political problems and instead have recourse to violence to stamp out

opposition to the irrational and discriminatory policies and politics of successive government, prompted the enactment of draconian PTA as a last resource.”

These regulations are a continuation of arbitrary abuse of power by the Executive; this time even without any justification to invoke the draconian PTA.

Testing Bona Fides of the GOSL

Judging from the above analysis, it is clear that the President has withdrawn the Emergency Proclamation but has made measures to keep the “emergency legal regime” going. I do not think there is evidence to establish that the government has taken any steps to remove the “emergency hang-up”, though the Emergency lapsed. Long detentions to military presence and high security zones continue. North and East continue to be under strict military control.

In that context, it is important to look at why the Government has lifted the Emergency. My reading is that the Emergency was removed mainly in response to international demand. It is necessary for the government to impress upon the international community that the country has returned to normalcy so that there will be more investments and less international shame. In fact, with the defeat of LTTE, why does the government want to keep Emergency thus far? This is a tricky political question.

Most of the International Human Rights Conventions permit limitation of human rights in time of emergencies. The parties to those Covenants are entitled to “derogate” from their commitments.

Let us see how this works under international law, when Governments derogate their human rights under the cover of emergency and national security. After a long study of 6 years by a special subcommittee and two additional years of revision by the full Committee on the Enforcement of Human Rights Law, the 61th Conference of International Law Associations held in Paris in 1984 agreed on a set of minimum standards governing the declaration and administration of state of emergency. These standards are called the Paris Minimum Standards of Human Rights Norms in a State of Emergency. This is intended to assure that even in situations of bona fide declaration of emergency, the member States will refrain from suspending those nonderogable rights under Article 4 of the ICCPR and similar provisions in the regional HR Conventions. Suffice it here to mention vital international standards applicable when Emergency situation lapses in a country. Clause 6(b) of Section (A) states thus:

“Upon the termination of an emergency, there shall be automatic restoration of all rights and freedoms which were suspended or restricted during the emergency and no emergency measures shall be maintained thereafter.”

It is clear that despite the termination of emergency, the GOSL has failed to restore all rights and freedoms and also failed to remove the emergency measures that had already been taken during emergency.

Another striking feature of the present (and questionable) PTA regulations is that they use an interesting terminology while freedoms and liberties are restricted by the very regulations themselves. Following portions of the regulations are interesting:

(a) While continuing with detentions under the guise of rehabilitation, clause 2 of the regulation No.1721/5 states that “the objective of these regulations shall be to ensure that any persons surrender (in terms of ERs of PTC), continue in terms of these regulations to enjoy the same care and protection which they were previously enjoying.” Are we to believe that the surrendeers earlier received care and protection to such an extent that the government is now required to invoke PTA to give them the same care and protection? This is an unimaginable political fairy tale!

(b) While continuing the operation of several Emergency Regulations after the lapse of the Emergency, PTA regulation No. 1721/3 states that application of the provisions of the Emergency regulations (that are being continued) “shall, in furtherance of the efforts of the Government of Sri Lanka made in good faith for the purpose of ensuring the continuance of peace within the country, be in force....”. Some of these regulations have nothing to do with terrorism. For example, the Emergency (Administration of Local Authorities) Regulations No. 6 of 2011 has nothing to do with emergency or terrorism. By those regulations several Local Authorities were declared to have ceased to be operational. The GOSL is so open about what they propose doing. Remove the emergency but invoke PTA to continue with the Emergency.

Conclusion

As the former US Senator William Proxmire once said: “Power always has to be kept in check; power exercised in secret, specially under the cloak of national security, is doubly dangerous”.

Under our constitution, like most of other similar legal instruments in the democratic world, the Executive is vested with adequate powers to deal with emergency situations. However, these powers must be exercised for the benefit of the country and the people, and not for the benefit of rulers and their political allies. What we have observed for decades is that this power of the Executive was abused, from time to time, to the detriment of the people. If there is an actual emergency, the PTA and Emergency powers may lawfully be implemented but in the absence of a genuine emergency, those provisions must not be invoked. What we now see is the restoration of some of the key emergency powers in peaceful times, contrary to basic national and international legal principles. One can argue that those advise the Executive to violate legal principles are also guilty of these breaches of national and international norms and without such authority the Executive probably would not go that far.

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