Constitution and Law as Instruments for Normalising Abnormalcy: States of Exception in the Plurinational Context

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Abstract This paper argues that in plurinational contexts that are embroiled in armed conflict, the state of exception has been used to invoke national security Laws and related to manage the conflict itself and to use the force of the state to settle the friend-enemy distinction that Schmitt identified as the purpose of the state of exception. It also argues that though centralisation of power has been justified by political elites as an exception to the liberal constitutional paradigm and not as an abandoning of the same, that centralisation has become a normal and essential feature of constitutional praxis in plurinational states aimed at protecting the dominant community’s status in the state. This is in its totality shows a process whereby the constitution and laws beholden to the dominant community are instrumentalised in the normalisation of what would be otherwise considered to be abnormal.

1 Introduction

One of the biggest worries plaguing liberal constitutionalists of contemporary times is the best means of striking a balance between the question of liberty and security. The question has become particularly animated in the post 9/11 context with constitutionalists dealing with how a prolonged war against ‘terrorism’ can fit within the normal order of liberal constitutionalism. This paper however focuses on a different kind of setting in which there have been temporally long states of exception—plurinational states in conflict. By plurinational states in conflict I mean those states wherein politics is deeply divided on the basis of identity and where conflicts as to the means of conceiving and sharing state power has led to armed conflicts. The first section of this paper lays down the theoretical framework of the chapter. I draw from both Carl Schmitt and Giorgio Agamben in this chapter and with modifications to both suggest a normative means of interpreting states of exceptions in plurinational
contexts. The second and third sections deal with two case studies—Sri Lanka, in quite some detail and India as a short note.

2 A Normative Understanding of States of Exceptions in Plurinational Contexts

Carl Schmitt’s proximity to the German Nazi party and the decisionism that riddles his legal philosophy should not blind us to his work on the state of exception and his resulting take on sovereignty. 1 His argument that is of relevance for my discussion here is his argument that the true sovereign manifests himself in a state of exception. 2 Schmitt through his theorisation of the sovereignty in connection with the exception was mounting a challenge to liberal constitutionalism arguing for the primacy for the political over the legal. His argument was that the authority identifying the exception decides on its own discretion its temporal scope and substantive content and precisely of this character of being unconstrained it is the true sovereign. His disagreement with liberal constitutionalism then was that this domain of the exception was not subject to the law. For Schmitt argued that in invoking the exception the law recedes allowing the sovereign to emerge and to conduct the affairs of the state. But Schmitt does not disregard the relevance of the law altogether. His argument was chiefly that the exception was not governed by the law but that the law could return to its normal function when the sovereign had decided that the state of exception was over.

But why is a state of exception called for? According to Schmitt a political community is defined on the basis of a friend-enemy distinction. The state of exception is promulgated by the sovereign to enforce this distinction and to constrict the enemy through violence, suppression, elimination or expulsion. 3 This distinction Schmitt claims is political and not social and hence identity based considerations such as ethnicity and religion, while may contribute to the drawing of this political distinction are not the only means of distinguishing the friend and the enemy. The crucial question is as to whether the people consider a particular identity marker as important enough as defining their political existence. It is defined in contradistinction to others who do not share that identity and according to Schmitt has to be defended by going to war against the other. Schmitt while repeatedly insisting on the political nature of this distinction does concede that his friend-enemy distinction has to be a sense of shared identity that stands above legal form and that this shared identity has to be strong enough to wage war against the other.

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1 Representative works most relevant to the discussion herein include, Schmitt, Carl: The Concept of the Political. Expanded Edition (1932), trans. by G. Schwab. University of Chicago Press (2000), and Political Theology. Schmitt, Carl: Four Chapters on the Concept of Sovereignty (1922), trans. by G. Schwab, University of Chicago Press. (2005).
2 Schmitt, Political Theology 5.
3 Schmitt, Concept of the Political 46–48.
The primary problem with Schmitt of course is that he thinks that this friend-enemy distinction is desirable. In other words for the political to function on such a distinction is for Schmitt a normatively valuable proposition. He criticised liberal states for failing to distinguish properly between friends and enemies, and thus to extend rights of membership to those who do not truly belong to the political nation. For Schmitt for the survival of the state it is necessary to make sure that the boundaries of the political nation and the boundaries of citizenship coincide.

Hence in the state of exception a sovereign dictator appeals to a clear friend-enemy distinction seeking to identify the polity with a singular community. Those who do not share this monist view of political community are enemies of the state who have to be eliminated or sufficiently suppressed so that they don’t pose a threat to the state. The role of the sovereign then in the state of exception is to reinforce the dominant community’s understanding of what is normal or exceptional and as to who belongs and who doesn’t. It is by establishing such a monistic community Schmitt argues, that the proper applicability of law during normal times is rendered possible. Schmitt however is careful to clarify that his intention is not to glorify warfare but that if the community is interested in its political existence, that war may be inevitable in order to sustain itself. This conclusion about the rationale for the exception as being aimed to define the normal is very important. The exception defines the human existence that is politically relevant and that which is not. Hence it is the exception that defines the normal. In the normal, existence is not possible unless one accepts the distinction drawn by the exception. If you are the ‘enemy’ you accept the dominance of the ‘friend’ and if not there is no prospect for a normal for a member of the enemy community.

Giorgio Agamben went a step further in identifying the continuity of the normal and the exception. Agamben rightly argues that it is impossible to precisely define what determines the transition from the exception to the rule or from the abnormal to the normal. The standard explanation in constitutional law is that a state of necessity governs the temporal life of an exception. However as Agamben points out this necessity cannot be objectively defined in a legal sense. There are no such objectively identifiable finite set of situations that constitute a necessity. Hence Agamben argues states of exceptions exist in a ‘zone of indifference’. The inability of law to police necessity hence according to Agamben provides the environment in which the exception becomes the rule.

Hence according to Agamben the exception, as an exception is an illusion. Current constitutional debate on emergencies about suspending rights of due process to address a severe security threat i.e., seeking to reframe this as a matter relating

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4Concept of the Political 46–8.
5Concept of the Political 32–5.
6Agamben, Giorgio: State of Exception, trans. K. Attell, University of Chicago Press (2004), Agamben, Giorgio. Homo Sacer: Sovereign Power and Bare Life. tr. Daniel Heller-Roazen, Stanford University Press, (1998).
to strike a balance between liberty and security, and asserting the necessity of executive decision to tackle a severe crisis is fundamentally pervasive. For Agamben this is an attempt to rescue law—it creates the illusion that law can still confine law.

Agamben however argues that this illusion has an important political function. It helps sustain the idea that law can constrain politics, while in fact the contrary is true. The debate on balancing liberty and security then tries to hide the real force of political power and helps perpetuate the illusion that nothing has changed. We become in other words accustomed to understanding that exceptions are in fact exceptions while in fact they have become the normal. Hence politically there is also a need for us who do not wish to drown ourselves in the normalising of the exception to remind ourselves that we should not accept the exception as the normal. The objectives of the exception succeed when its recipients accept the exception as the normal. And the prescriptive part of Agamben’s work is dedicated to how one may then break this internalisation of exception. This is the part where he engages with the work of Walter Benjamin.7 I will not say anything about this for the lack of strict relevance to my intentions in this paper.

What does Agamben make of Schmitt’s friend-enemy distinction? Obviously Agamben disagrees with Schmitt in his normative endorsement of the definition of politics on a friend-enemy distinction. But the disagreement is also not merely normative but also descriptive. Agamben’s work invites us to go beyond the enemy-distinction and makes use of Foucauldian notions of bio-power to make the point that the state of exception in its normalised version has reduced all life into bare existence. For Agamben then the sovereign does not need the binary of friend and enemy. The situation presented is far more complex and the idea of power is far more nuanced that the sovereign need not appeal to the friend-enemy distinction to subject us to the bare life of existence that we find ourselves in.

Let me now turn to some direct comments on the relevance of this discussion to understanding the constitutional praxis and states of emergencies in plurinational contexts that are deeply divided and in conflict. By deeply divided states I refer to states that are in fundamental turmoil as to the identity and nature of the State as a result of the plural composition of its polity which is not recognised by the constituting instrument of state power—the constitution which is under the control of the dominant community. This fundamental turmoil most of the time involves armed conflict.

That the Nationalities Question is very much alive is empirically proven. Cosmopolitanism has at least not yet eroded the attachment to nationalism. While statist nationalism seeks to find new ways to assert itself in the era of globalization stateless/state-seeking nationalisms across the world be it Scotland (UK), Quebec (Canada), Catalonia (Spain), Kurdsithan (Iraq/Turkey/Syria), Kashmir (India) or Tamil Eelam (Sri Lanka) also continues to thrive. The nationalism of these stateless nations is largely in response to the fact that the state has identified itself largely with a singular nation or demos denying in essence the multinational/plurinational

7See further Moran, Brendan and Salzani, Carlo (eds.): Towards the Critique of Violence: Walter Benjamin and Giorgio Agamben, Bloomsbury (2015).
character of the state. The confounding of the state with the nation surprisingly to date remains a popular idea in the study of political science, international relations and in international law. John Stuart Mill’s well-known claim that ‘free institutions are next to impossible in a country made up of different nationalities’ dominates scholarly work on democratic theory to this day. Habermas for example asserts that while not all nation-states have not been democracies that all democracies have been indeed nation-states. His theory of constitutional patriotism which draws from civic nationalism in fact seeks to reproduce the false dichotomy between civic and ethnic nationalism.\(^8\) There is indeed a bias on favour statist nationalism willing to endorse it as civic nationalism while branding non-state nationalism as ‘ethnic’ and ‘primordial’. This also finds itself reflected in the theory and practice of liberal constitutionalism that seeks to gloss over.

The ideology of the nation-state is most of the time accompanied by rigorous nation-building exercises, which seek to coerce the non-believers into assimilating with the larger nations and their culture. These assimilatory tendencies are not only a feature of illiberal states but also of liberal states. Liberal nationalists have for some time questioned the falsehood of liberal states being culturally neutral. As Requejo argues liberal democracies have always acted as ‘nationalising agencies for specific cultural particularisms’.\(^9\) The nature of the nation-state is such that it wittingly or unwittingly converts the public sphere in favour of the dominant nation within the state. It assumes that there is only one people (\textit{demos}) within the state who share the characteristics of this dominant nation. This is what the plurinationalist theorists call the ‘monist thesis of the state’. Public law and the power structure of the state is arranged without affecting the notion of ‘democratic legitimacy’ in a way that benefits the dominant nation. Herein the stateless nation feels alienated. In worse forms not alien to even Western liberal states, the state actively pursues a policy of assimilation of the ‘others’ so as to forcibly create this monist nation-state. This provides the breeding ground for stateless nationalism to grow which is more often than not accompanied by violence and in a number of cases civil war. Hence the claim to self-determination by these stateless nations is a direct challenge to the notion of a nation-state. As Stephen Tierney neatly puts it,

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central to the challenge presented by sub-state national societies to the host state is a call for the disaggregation of the terms ‘state’ and ‘nation; those who adhere to the traditional conceptualisation of the ‘nation-state’ as one politico-constitutional territory encapsulating
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\(^8\)Rogers Brubaker has convincingly argued that there is an element of ethnic-cultural emphasis in (western) societies typically defined as civic nations and there are civic characteristics in categories defined as ethnic nations. Defining civic nationalism strictly would lead to there being very few or no civic nationalisms (even France or the US will not be able to fit into the category). Defining ethnic nationalisms narrowly produces the same result. Defining these broadly would lead to conflation of the two and hence the distinctions will fail their purpose. Roger Brubakcer Myths and Misconceptions in the Study of Nationalism, in Moore, Margaret: Secession and National Self-Determination, Oxford, (1998) p. 258 Also see: Yack, Bernard: The Myth of the Civic Nation. Critical Review, 10(2) 193–211 (1996).

\(^9\)Requejo, F.: Democratic Legitimacy and National Pluralism. In: Requejo, F (ed.), Democracy and National Pluralism pp. 157–177. Routledge, London (2001), at 167–169.
a unitary national society are charged with the task of reconceiving the plurinational state in appreciation of its essential societal plurality.\textsuperscript{10}

In the plurinational context the fault lines of the friend-enemy distinction that Schmitt alludes to as the purpose of a declaration of the state of exception is very clear. The sub-state entity seeking to question the very foundations on which the state nationalism has been built is the ‘enemy’ that needs to be eliminated or suppressed. In plurinational contexts then the state of exception is invoked more of then that not to resolve this friend-enemy distinction. The purpose of the state of exception is defeating the sub-state’s claim to sovereignty, claim to state power and the project of radical re-envisioning of the state. Schmitt it will be recalled, identifies quite explicitly the resolution of the friend-enemy problem as the purpose of the sovereign invoking the state of exception. Self-determination conflicts provide for an exemplary illustration for the uses of which Schmitt’s conception of the state of exception can be put to use. In many a context the tensions over the construction of monist societies has led to armed war, wherein the violence of the state in its project to construct a monist society and to reify the friend’s victory over the enemy has resulted in violence and counter-violence. Hence as Schmitt has argued a resort to war in these circumstances, was an attempt to resolve problems associated with this friend-enemy distinction.

But the problem with Schmitt was his pre-occupation with war as the instrument of the sovereign to enforce a monist understanding of community. The war to be clear is indeed an important instrument in the attempt to advance the interests of a monist political community. But war is not the only instrument. The state of exception as was seen earlier is only an instrument to define the normal. The normal seeks to perpetuate that which was defined by the exception and hence the normal has characteristics in it which help perpetuate the distinctions and dominations thus established by the sovereign. Outright war is used sparingly and states have learnt to use more sophisticated means of entrenching the friend-enemy distinction. The slow creeping exception into the normal is also seen in the legal domain where ordinary law has features of the exception. Hence the exception has become all pervasive as Agamben has shown us.

The problem with the Agamben however is the reductionism in arguing that the state of exception affects all citizens alike. While Agamben is right that all citizens are subject to the effects of the penetration of the exception into the normal the different and varied experiences of different communities because of the distinction that Schmitt points us to and that which continues to define the way politics is done even today, is cast aside in Agamben’s analysis. Liberalism has been rightly accused of glossing over the collective experiences of different groups of individuals and inadvertently Agamben’s reduction of all lives as being subjected to the same bare life is open to the same criticism of being reductionist.

There is one final normative argument as with regard to constitutional law of plurinational states and states of exception that needs to be made before concluding

\textsuperscript{10}Tierney Stephen: Constitutional Law and National Pluralism, Oxford University Press (2005), p. 5.
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this section one. This is with regard to the identity of the sovereign in plurinational contexts. Schmitt’s analysis of the true sovereign as being identified by the one who invokes the exception in the plurinational context reinforces the identity of the sovereign as not explained by popular sovereignty but by majoritarianism. Hence in plurinational democracies which are in effect reduced to an ethnocracies, the true sovereign is identified with the dominant community. Accordingly centralisation of powers and a unitary vision of state are strictly adhered to as the best way of protecting the unity of the state and this understanding pervades into the normal. Any alternative envisioning of the state for example on federal or confederal lines are seen as an attack on the unity of the state. Constitutional law has largely focused on the emergency powers when thinking about states of exception but in plurinational democracies governmental institutions for normal times are designed based on the rationale of the exception. Hence in plurinational democracies centralisation of powers in a particular institution (which Schmitt would conclude as the true sovereign) is not merely a characteristic of the exception but also of the normal.

I will now turn to two case studies from the Global South that I think provide practical insights to the normative arguments presented in this section.

3 Case Study: Sri Lanka

This section is organised in two parts. The first discusses the relationship between centralisation of power and the state of exception in post-colonial and Sri Lanka and the second discusses the use of national security laws in constructing a singular idea of political community in post-colonial Sri Lanka.

3.1 Centralisation of Powers and the State of Exception

Sri Lanka, formerly Ceylon, witnessed a 30 year old civil war which ended in 2009, fought on the back of a long standing protracted ethnic conflict. The antecedents of the conflict are to be found in the colonial era and the conflict continues to date despite the brutal end of the war. The National Question in Sri Lanka pertains to the nature of the state. The introduction of procedural democracy in 1931 to what then known as Ceylon, a first for any British Colony, introduced the possibilities of doing democratic party politics on ethnic lines. Political parties took on ethno-political agendas and its worst consequences manifested itself first in the form of a question over the official language of the state. The forces of ethno-national politics were unleashed less than a decade after colonial independence when Sinhala the

11For a detailed account see: Wickremesinghe, Nira: Ethnic Politics in Colonial Sri Lanka 1927–1947. Vikas (1995).
majority language was declared the official language in 1956. Policies over land redistribution, access to education and agriculture were all successively tainted by majoritarianism and soon the Tamils, the largest numerical minority asserted its claim to self-government in the form of a federal demand. The federal demand which sought a radical reorganisation of state power was sidelined and was met by systematic state sponsored violence which eventually led to the Tamils taking up violence and secession. A 30 year old war ensued which ended brutally in 2009 with the defeat of the Liberation Tigers of Tamil Eelam (LTTE).

One of the central organising principle of Sinhala Buddhist constitutional philosophy has been the need to retain a unitary state in order to, according to its own internal logic, retain a united Sri Lanka and to ensure the continuance of the Buddhist religious order in the country. The two Republican constitutions enacted in 1972 and 1978 hence despite preferring two different forms of Government (the Westminster style parliamentary system and the executive presidency) created institutions that sought to place powers quite clearly in one institution of state. The 1972 constitution created an invincible parliament stripping judiciary even of judicial review powers which it had previously enjoyed and the second republican constitution created an executive president to whom the parliament for all intents and purposes was subservient. Both constitutions also in consonance with the centralisation of powers in the centre provided pride of place to Sinhala as the official language and to Buddhism as a quasi-state religion thus clearly establishing the fault lines of the friend-enemy distinction.

The desire for centralisation of power found its initial expression in the Sinhala majority’s discontent with Section 29 of the British given dominion constitution (commonly known as the Soulbury Constitution) that outlawed any legislation that sought to discriminate one community over the other. This constitutional protection however failed to prevent legislation that disenfranchised the Up Country Tamil community in 1948 and similarly also failed to prevent the passage of the official language act in 1956. Hence the Constitution as the constituted normal law of the State, failed in the face of the dominant community’s attempts to clearly draw the

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12 Official Languages Act no 33 of 1956.
13 Peebles, Patrick: Colonization and Ethnic Conflict in the Dry Zone of Sri Lanka, Journal of Asian Studies. 49 (1) 30–55.
14 Tiruchelvam, N.: The Politics of Federalism and Diversity in Sri Lanka in Y. Ghai (Ed.): Autonomy and Ethnicity: Negotiating Competing Claims in Multiethnic States. Cambridge University Press (2000) Wilson, A.J: Sri Lankan Tamil Nationalism: Its Origins and Development in the 19th and 20th Centuries, Hurst & Co (2000).
15 For a detailed study of the 1972 and 1978 constitutions on centralising power in the Sinhala Buddhist majority see: Welikala, A (Ed.): The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice. Centre for Policy Alternatives (2012), Welikala, A. (Ed.) Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects. Centre for Policy Alternatives (2015).
16 Welikala, A.: The Failure of Jennings’ Constitutional Experiment in Ceylon: How ‘Procedural Entrenchment’ led to Constitutional Revolution, in A. Welikala (Ed.): The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice. Centre for Policy Alternatives (2012).
lines between the friends and enemies of the state and an explicit attempt at defining who belongs and who did not. The normal law then was nullified by the political which despite not being in a legal state of exception/emergency.

That the courts did not utilise Section 29 to declare the official language act ultra vires was not satisfactory to those who sought an unhindered path to Sinhala Buddhist hegemony. Section 29 thus became a nuisance to the programme to establish the identity of the state and the mere existence of the instrument of judicial review was seen as an irritant to the homogenisation project. This view was explicitly articulated in a speech delivered by an influential minister during the process of doing away with the independence constitution and establishment of the 1st Republican constitution:

> It will astonish most people in this country to hear that what has been considered the most vital law that was passed in 1956 by the Government of the late Mr. Bandaranaike is still in issue in the courts...Can you imagine a situation like that? Here is a basic law of our country, and by reason of the power given to the courts to sit in judgment on the validity of the law as distinct from the interpretation of the meaning of the law, we do not know where we are and we are rightly acting on the footing that the law is a good one until it is set aside. But, just imagine, how do you run this country in that situation?...If the courts do declare this law invalid and unconstitutional, heavens alive! The chief work done from 1956 onward will be undone. You will have to restore the egg from the omelette into which it was beaten and cooked.17

Note that the lawyer-minister is referring to the official language act as the ‘basic law of our country’ and not to the constitution. The ‘uncertainty’ brought about the liberal protection of minority rights in the constitution is interpreted herein as a destabilising factor affecting the political movement that had been set in motion in 1956 and the solution is the ridding of judicial review powers which nevertheless had proved impotent. The main complaint against judicial review then was the susceptibility of it being used as an instrument by the minorities to thwart the programme of homogenisation. Basic tenants of liberal constitutionalism were considered luxurious and expensive to this political agenda and as weakening agents in the construction of a strong state. These liberal constitutional principles were not sought to be displaced as a matter of exceptionality but rather as the normalised way in which the constitutional order was to be envisaged. The 1972 constitution’s disbanding of Section 29 hence is an excellent example of the possibility of taking forward an agenda of the exception of through the normal process of constituting a constitutional order.

The centralisation of state power thus initiated through the first republican constitution found its most brazen expression in the second republican constitution which provided for a unitary state and a parliament that explicitly unconstitutionalised any form of sharing legislative power.18 This provision was a significant obstacle to realising the quasi-devolution of powers scheme negotiated with Indian mediation.19 The scheme finally failed not able to withstand the deep rooted ideology of unitarism in

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17 Constituent Assembly Debates, 3rd July 1971: Col.2832.
18 Article 2 and 76 of the Second Republican Constitution.
19 Constitutionally provided through the 13th amendment to the Constitution which set up a provincial council system in Sri Lanka.
the constitutional political praxis of Sri Lanka. Not only did the scheme of devolution fail but a later amendment that sought to take away the unilateral appointment powers that the Executive Presidency had over public institutions also failed in the face of a political praxis that allowed the Executive President to whole sale ignore an entire chapter of the constitution. The 17th amendment was formally done away with through the 18th amendment after the end of the war in 2009. The end of the war reversed as I have elsewhere argued, the liberal consensus within the political elite to do away with the Executive Presidency, and ended up strengthening the Executive Presidency by doing away with the 17th amendment and abolishing term limits on the executive Presidency. It was argued that it was the Executive Presidency as an institution that allowed the war to be concluded and that the continuation of the Executive Presidency was necessary for continuing stability and prosperity. Centralisation of power hence in the Sri Lankan context has rebelled against the basic tenants of liberal constitutionalism such as separation of powers and asserted itself as a necessity for the continuity of the state. The rationale for centralisation of power in Sri Lanka has been mounted on the grounds of necessity but also for continuity of the State. The argument is both that it is needed for exceptional reasons but also as an organising principle of the constitutional order if Sri Lanka is to survive and prosper as a singular political community.

3.2 National Security Laws and the State of Exception

This section focuses on the sixth amendment to the Constitution in Sri Lanka, the Prevention of Terrorism Act and the war-time Emergency regulations as examples of how these laws for exceptional times are long term normalising devices used to quieten the challenge to the state structure posed by the Tamil self-determination project.

An important example of the constitution being used to enact into normal law a particular agenda of building a monist political community is the 6th amendment to the 2nd republican constitution which criminalised advocacy for a separate state including by non-violent means. The amendment was enacted in the backdrop of state sponsored pogrom leashed out against Tamils all over the island of Sri Lanka.

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20The 17th Amendment to the Constitution that provided for the setting up of a widely representative Constitutional Council to whom such appointment powers were shifted to, away from the Presidency.

21Guruparan, K.: The Irrelevancy of the 13th Amendment in finding a political solution to the National Question: A Critical note on the Post-War Constitutional Discourse in Sri Lanka. 3 Junior Bar Law Review 3, 30-42 (2013).

22The Sixth Amendment to the Second Republican Constitution of Sri Lanka provides that no person shall directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka. The consequences of criminal conviction of violating the said provision include being subjected to civic disability for seven years, forfeiture of both movable and immovable property, if he or she is a Member of Parliament, forfeiture of such membership. The same amendment provides that it would be criminal for any political party, association or organization to entertain as one of its aims
in July and August 1983. The Sixth Amendment to the Constitution certified on 08 August 1983. The violence was described by the International Commission of Jurists then as amounting to acts of genocide.²³ The immediate objective of the Sixth Amendment was to disseat the 16 Members of Parliament of the Tamil United Liberation Front who were elected on a separatist manifesto in 1976 that called for the establishment of a separate state for the Tamils in the island. The idea of the amendment was mooted by President JR. Jayawardena, in an address to the nation on 28 July 1983, his first response after the country’s largest post-independence violence, in which he made no reference to the genocidal acts perpetrated by the Sinhala Buddhist hooligans supported by his Government.

The intention of the 6th amendment went way beyond the purpose of responding to the challenge of ‘terrorism’. In fact the sole purpose of the sixth amendment is to criminalise the peaceful and political advocacy of a separate state and more broadly the Tamil advocacy for self-determination. It is submitted that the sixth amendment has this broader purpose because five years prior to the enactment of the sixth amendment, by the enactment of the ‘Proscribing of Liberation Tigers of Tamil Eelam and Other Similar Organizations Law’, No. 16 of 1978 the parliament had not only banned the Liberation Tigers of Tamil Ealam (LTTE) but also any other organization that advocated the use of violence and is either directly or indirectly concerned in or engaged in any unlawful activity. Accordingly the purpose of the 6th amendment needs to be seen in light of the state’s border purpose of criminalizing the advocacy and espousal of self-determination by the Tamil people’.

The sixth amendment was and continues to be an important stumbling block towards resolving the conflict through peaceful means. In the 2002–2006 peace process facilitated by Norway, the outlawing of the advocacy of a separate state placed the Tamils and their representatives at the talks—the Liberation Tigers of Tamil Ealam—at a structural disadvantage. The sixth amendment in fact functioned as a non-negotiable pre-condition in favour of the Sri Lankan state while the Government itself was not subjected to any pre condition. The sixth amendment and the law banning the LTTE, was also used to ban the Tamil Rehabilitation Organisation, a humanitarian organization for alleged links with the LTTE in 2007 just before the onslaught of the last phase of the war. The move was intended to prevent Tamils looking after their own rehabilitation and to discourage individual, organisational and international contribution to addressing Tamil humanitarian issues’.

The national security legislation enacted by the Sri Lankan state during the period of the war was brought into provide support to the design of a monist state so clearly laid down by the constitution. The key piece of legislation that was used in this exercise is the Prevention of Terrorism Act. The Prevention of Terrorism Act was

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²³Sieghart, Paul: Sri Lanka-A Mounting Tragedy of Errors - Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, Justice, (March 1984).
enacted in 1979 as a temporary measure, as an aspect of the then government’s military strategy in dealing with the early stages of the Tamil militant movement and more broadly as a political strategy to contain and narrow down the political space for the Tamil self-determination movement. The sun set clause— Section 29 of the original enactment expressly provided that it would be in force only for a period of three years, but this was repealed by the Prevention of Terrorism (Temporary Provisions) Amendment Act No. 10 of 1982, making the PTA a permanent measure, although incongruously, the short title of the Act continues to contain the words ‘temporary provisions.’ The Act as a whole has many problematic features. For example Section 6 (1) provides for arrest without warrant, Section 7(1) provides for detention of a person arrested initially for 72 h before producing before a magistrate, Section 9(1) provides for detention for a period of three months extendable to eighteen months and Section 16 provides for confession given to a police officer not below the rank of an Assistant Superintendent of Police as admissible evidence. Of particular concern is Section 2(1) (h) of the PTA provides that any person who by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups has committed an offence which per Section 2(2) is liable to be punished for a minimum of seven years and a maximum of seven years. In Nallaratnam Singarasa v Sri Lanka24 the Human Rights Committee noted that Section 16 was in violation of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g) of the Covenant. In Nallaratnam Singarasa v Attorney General25 the Supreme Court of Sri Lanka refused to reconsider its decision based on the observations of the HRC and further found that Sri Lanka’s accession to Optional Protocol 1 was contra the Constitution of Sri Lanka.

The Prevention of Terrorism Act similar to the sixth amendment is used to curtail and criminalise Tamil politics. The most high profile example of such usage was the one against J.S. Tissanayagam, a Tamil journalist and editor, who was arrested in 2008 and convicted under Section 2(1) (h) for writing and publishing articles critical of the Sri Lankan military’s conduct of the war in violations of principles of humanitarian law. The article in question argued that the state was depriving the Tamils in the East of access to food and water as part of the Sri Lankan Army’s strategy to take over lands which were hitherto under the control of the LTTE. The state prosecutor’s principal argument in court was that the criticism of the Sinhala-only Army would create communal disharmony between the Tamils and the Sinhala community. Tissanayagam was sentenced to 20 years imprisonment and subsequently released on a Presidential pardon following international pressure and condemnation. Another post-war example of the use of the PTA to regulate the Tamil public sphere is from November 2012, wherein four students attached to the University of Jaffna were

24Communication No. 1033/2001. Decided on 21 July 2004.
25SC Special Leave to Appeal 182/99 decided on 15.09.2006.
arrested and sent for ‘rehabilitation’ for more than four months, under the newly enacted regulations promulgated under the PTA for holding events at the university in remembrance of the dead in the war. The students were treated as “surrendees” a new category of disciplining introduced under the PTA. Clause 3. (2) of PTA Regulations no. 5 of 2011 provides that “Any person who surrenders (hereinafter referred to as the “surrenderee”) in connection with any offence under the Explosives Act, the Offensive Weapons Act, No. 18 of 1966, the Firearms Ordinance, the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or under Chaps. 6, 7 or Chap. 8 of the Penal Code or under any emergency regulation which was in force prior to August 30, 2011, or through fear of terrorist activities, to any police officer, or any member of the armed forces, or to any public officer or any other person or body of persons authorized by the President by Order, shall be required to give a written statement to the officer or person authorized to the effect that he is surrendering voluntarily”. The regulations provide that a person who has thus ‘voluntarily surrendered’ to be assigned for rehabilitation by the Defence Secretary acting through the Commissioner General for Rehabilitation. A person who voluntarily surrenders can be held for an initial period of 12 months and a maximum period of two years at the Defence Secretary’s discretion. Given that the security establishment claims that the students are being ‘rehabilitated’, it was assumed that the students are being held for rehabilitation under these regulations. This case brought into light the enormous powers under these regulations. An arrest could be converted into a surrender and the surrendee could be assigned for rehabilitation on the discretion of the Defence Secretary which could not be subjected to judicial scrutiny. The most bizarre aspect of this regulation is that the surrender need not have anything to do with an offence. An arrest could be converted into a surrender by the police applying pressure on the person arrested that if he did not consent that he could be detained for a period of 18 months under the usual provisions of the PTA. The arrested students were reluctant to take legal action fearing that their potential release after rehabilitation could be affected by way of a formal arrest under the PTA. The students were eventually released after four months in captivity. University sources argued that the arrests were intended to send a larger message to the influential students union to constrict their political activities. The design of these security regulations in the post-war context was tailored to serve as an instrument in the overall design of preventing any possible political re-appearance of the Tamil self-determination project after the defeat of its armed phase in 2009.

In the post-war context any discourse on the repeal of the Prevention of Terrorism Act continues to be a non-starter. There is resistance from the Armed Forces and Sinhala Buddhist forces to repeal the Act. The only logical explanation for retaining the act is because to keep it on the statute book helps to perpetuate the abnormalcy prevailing in the North and East parts of the country where the law is used routinely to arrest and detain Tamil activists. The Prevention of Terrorism Act which began its

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26 Amnesty International, ‘Urgent Appeal: Students at risk of torture’, http://www.amnesty.org/en/library/asset/ASA37/014/2012/en/a5fdf2a4-edf3-40a9-8d66-070decb5c3a1/asa370142012en.pdf (04 December 2012).
life as a temporary act then transformed as an ordinary law part of the general statute book during the pendency of the war continues to remain on the statute books for only one reason—to help the State retain the benefits of the war victory and to keep the Tamil Self-Determination project subjugated in a securitised environment.

The use of declarations of state of emergency and the promulgation of emergency regulations curiously sat side by side by side the Prevention of Terrorism Act providing the security apparatus the option of forum shopping—picking and choosing which law to use for arrest and prosecution. Hence even after the declaration of emergency was let to lapse in August 2011 the state of emergency practically continues. As if the PTA was not enough to handle the lack of regulations of emergency during this legally normal times new regulations were enacted under the PTA as referred to earlier. The emergency regulations on their own given their long existence (they remained in force throughout the period of the conflict) say to day lives of the people. A study conducted by the University of Colombo found that the ambit of the emergency regulations went beyond the realm of regulating the period of exception. Emergency regulations dealt with subjects as broad as edible salt, adoption of children and driving licences.  

4 The Indian Experience

The Indian experiment with federalisation on the surface might seem to provide a counter-narrative to the Sri Lankan experience but one only needs to look at the emergency powers vested in the Indian state to illustrate the enduring nature of centralisation as a feature of South Asian, post-colonial constitutions. The Indian Constitution while federal in normal times has been described as a perfect unitary state during times of emergency. The more complicated truth is that for parts of India which agreed with the dominant narrative of what constituted India, the normal federal experience has been continuously available while those parts that fundamentally question the nature of the Indian state the prolonged state of crisis has meant that the Indian constitutional experience has been one of a unitary state. This is true for most of the North-Eastern states and Kashmir. The primary instrument of control over the North-East has been the Armed Forces (Special Powers) Act first enacted for the North-East in 1958 and in operation in Kashmir since 1990. It is not a coincidence that two regions in which the Indian state has struggled to meet demands for autonomy and self-determination are the two regions in which the law is applicable. The AFSPA for the North-Eastern states was enacted soon after the Nagas organised an informal plebiscite in favour of a separate state. The Act was also

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

28 Constitutional Assembly Debates Volume VII, para 211 (04 November 1948).

29 This paper was written prior to the revocation of Article 370 by the Narendra Modi Government, which further strengthens the argument put forward in this section.
used in Punjab in the mid-1980s to contain the Khalistan movement and remained in place until 1997 when for all intents and purposes Punjab had stopped being a threat to the idea of the Indian State. As Atul Kohli frames the Punjab experience:

…[O]ver time, militants were repressed out of existence, and a tired population was relieved to accept some concessions from a more accommodating national leadership and to vote an elected provincial government back to power30

AFSPA provides wide ranging powers to the Indian Army. Once declared a “disturbed area” by either the state Government or the central government certain special powers, including the right to shoot to kill, to raid houses, and destroy any property that is likely to be used by insurgents, to arrest without warrant even on “reasonable suspicion” a person who has committed or even “about to commit a cognizable offence” are available to the Indian Armed Forces under the AFSPA. No less than an Indian Government Committee opined that the law was “a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness.”31 The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, visited India in March 2012 and concluded that “the widespread deployment of the military creates an environment in which the exception becomes the rule, and the use of lethal force is seen as the primary response to conflict.”32 The other important tool that the Indian Government has used is the British colonial given law of sedition33 that has been used to police speech over self-determination for Kashmir.34 The Indian experience thus understood confirms the Sri Lankan narrative, that of the state of exception being normalised to shape the kind of political community that will be dominant within the state structure.

30Kohli, Atul: Can Democracies Accommodate Ethnic Nationalism: Rise and Fall of Self-Determination Movements in India, Journal of Asian Studies, 56(2) (1997) 325–344.
31Ministry of Home Affairs, Government of India: Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958. (2010), p. 75.
32Heyns, Cristof: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to India. (29 May 2013). Also see most recent report by the Office of the High Commissioner for Human Rights, OHCHR, Developments in Kashmir June 2016 to April 2018 (14 June 2018) available here, https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf Accessed July 2018.
33Section 124 A of the Indian Penal Code. See for detailed discussion Narain, S: Disaffection and the Law: The Chilling Effect of Sedition Laws in India. Economic and Political Weekly. 46 (8) 33–37.
34See for example, The Guardian: Arundhati Roy faces arrest over Kashmir remark. (26 October 2010) https://www.theguardian.com/world/2010/oct/26/arundhati-roy-kashmir-india. Accessed September 2017.
5 Conclusion

The paper has argued that in plurinational contexts that are embroiled in armed conflict the state of exception has been used to invoke National Security Laws and related to manage the conflict itself and to use the force of the state to settle the friend-enemy distinction that Schmitt identified as the purpose of the state of exception. It has also argued that though centralisation of power has been justified by political elites as an exception to the liberal constitutional paradigm and not as an abandoning of the same, that centralisation has become a normal and essential feature of constitutional praxis in plurinational states aimed at protecting the dominant community’s status in the state. This is in its totality shows a process whereby the constitution and laws beholden to the dominant community are instrumentised in the normalisation of what should be otherwise considered to be abnormal. This needs further substantiation but through the Sri Lankan and more briefly the Indian case studies I have tried to illustrate these conclusions.

How does one respond to this problem in plurinational context? This paper is not devoted to answering this question but I think an important starting point to answering these questions is to start questioning the assumptions that liberal constitutionalism to its answers. For far too long the simple mantra of rule of law and good governance has been suggested as the panacea for dealing with questions that go to the heart of the character of the state, its political-social composition and states of emergencies. The answer to the illiberal national security regimes is not to understand them as exceptions but as normalised states of being that are reflective of a far deeper fracturing of the societies that make up the state. A truthful diagnosis of the problem will most often than not, help us resolve the problem.

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