

Sri Lanka, Its National Security and the Law

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My Lord the Honourable Chief Justice, the Former Chief Justice Honourable Mohan Pieris, Dr. Charika Marasinghe, President's Counsel Mr. Shavendra Fernando, the Vice Chancellor of General Sir John Kotelawala Defence University, Major General Milinda Pieris, the Dean of the Faculty of Law, distinguished participants, ladies and gentlemen.

National Security of a country means the security of the country itself and that includes the security of the State, the security of the people of the country and its property. The protection of National Security is critical for the survival of the people and the State. Maintaining national security is the foremost duty of the State. During the pre-independence era of Sri Lanka, the threats to the nation and the people, came from invading powers and colonial powers. Unlike the pre-independence era, attacks of evil forces came from within the country during the post-independence era. One such key force tried to fragment the country with the view of creating a separate sovereign state in one part of the island, and another sought to destabilize the State with the view of causing governmental and governance related structural changes while intimidating democratically elected governments through violent means. They did so, through ultra-constitutional means and in direct violation of the criminal laws of the country. These forces have unleashed violence of unimaginable magnitude and severe loss of life and damage to property were also inflicted.

Apart from the unsuccessful coup in 1967, in that overthrowing two democratically

elected governments, the more serious threats and attacks on national security took place in 1971, 1988-1990 and from the mid 1970's to 2009. During nearly thirty years of armed conflict and terrorism, at times, the intensity of the attacks was such, that territorial integrity and sovereignty of the country were seriously affected. Lawful governments were prevented from executing the writ of governments. As a direct result of the termination of the armed conflict and the perpetration of terrorism by the elimination of the organized presence of the Liberation Tigers of Tamil Eelam in the Northern and Eastern provinces, since 2009, Sri Lankans witnessed a decade of peace, ending that peace, it was most unfortunate that, on the morning of Easter Sunday of 2019, the people of Sri Lanka came under a serious terrorist attack. Unlike, previous threats and attacks on national security, which had a political undertone, this terrorist attack brought in a new dimension to the root causes of terrorism in Sri Lanka namely, religious fundamentalism coupled with lunacy like radicalism and extremism. That terrorist attack, if at all signalled to one pointer namely, that Sri Lanka needs to remain vigilant all the time, as attacks on national security can be unleashed at any point of time and can be due to multiple reasons and root causes. They can also take multiple manifestations.

It is unfortunate ladies and gentlemen, that during the post-independence era of Sri Lanka, successive governments leading the state of Sri Lanka, had to necessarily give priority attention to the protection of

national security thereby, retarding national, social and economic development and growth. Sri Lanka has remained a middle-income developing country for too longer a period. This has been mainly due to the considerable resources and time that had to be spent on the protection of national security. It was also associated with the devastation caused due to attacks on national security. Ladies and gentleman, the State has multiple instruments in its arsenal to respond to attacks on national security based on the nature of the attack, its intensity, its source, cause, methodology, previous experience and of course prudence. The State can select from multiple responses that are available. They are, the military, policy, legal, law enforcement, criminal justice, social and political responses. While some of these measures are aimed at the protection of national security through the prevention of such attacks, others are aimed at responding to attacks on national security and mitigating harm. Some mechanisms maybe used to achieve both these objectives. Social and political responses are primarily aimed at addressing the root causes and thereby, preventing the emergence and the escalation of situations that may explode into attacks on national security.

The focus this afternoon, ladies and gentlemen, of this paper, is on the law as a response to threats and attacks on national security. As you could appreciate the law, law enforcement and criminal justice are key elements of any legal system. The law itself and the processes of law enforcement and criminal justice, are founded upon a key concept namely, the Rule of Law. That is a forfeiture of our Constitution. To enforce a law enforcement and criminal justice response to threats and attacks on national security,

a prerequisite would be the prevalence of appropriate national security legislation, such legislation would have components of both substantive and procedural criminal law. When national security legislation should seek to provide it's a matter that is dependent upon the threat and the nature of attacks on national security. National security legislation, ladies and gentlemen, generally contains the following key features:

- They create offences that contain prohibitions of certain harmful conduct amounting to attacks on national security.
- They also impose legal requirements that compel persons to act in certain stipulated affirmative manners with the view to protecting national security.
- Such legislations also stipulates punishments for violation of these prohibitions including affirmative duties.
- National security laws, ladies and gentlemen, also provide a legislative framework and thereby, facilitate the conduct of investigations into conspiracies, preparation, attempts, abetment and attacks on national security.
- They also provide for the arrest and detention of persons believed to have been involved in the committing of attacks on national security.
- These laws also provide for the institution of criminal proceedings, prosecution and trial of offenders and the management of judicially imposed penal sanctions.

Among the multiple national security legislations Sri Lanka has, are the Constitution and the particular article 157, Chapter 6 of the Penal Code, the

Prevention of Terrorism Act, the Public Security Ordinance, the Convention on the Suppression of Terrorist Financing Act, the Suppression of Terrorist Bombings Act, the Prevention of Hostage Taking Act, Offences Against Aircraft Act, Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Suppression of Unlawful Acts against the Safety of Maritime Navigation Act and the Prevention and the Suppression of Crimes against Internationally Protected Persons Act. The last six of these items of laws that I read out, relate to Sri Lanka giving effect to its obligations under counter terrorism international conventions. It is pertinent to note, ladies and gentlemen, that though not typically classified as national security legislation, the Police Ordinance and the Army, Navy and Airforce Acts can also be applied to mobilize responses to protect national security. Though not typically classified as national security legislation, the Computer Crimes Act and the Financial Transactions Reporting Act can also be helpful in mounting judicial responses to attacks on national security. Of course, ladies and gentlemen, the Code of Criminal Procedure Act provides a legislative framework upon which criminal investigations into attacks on national security could be launched, criminal proceedings may be initiated and instituted and persons responsible for such attacks prosecuted. This list of laws, ladies and gentlemen, is not complete if I don't mention that in the by gone era, emergency regulations promulgated from time to time in terms of the Public Security Ordinance, the Proscription of the Liberation Tigers of Tamil Eelam Act of 1978, the Criminal Law (Special Provisions) Act of 1962, the Criminal Law Act of 1962 and the Criminal Justice Commissions Act of 1972 have also been used to respond in multiple ways to

attacks on national security. These laws are no longer in force.

National security legislation, ladies and gentlemen, deviates in multiple ways from the routine laws in this country. Therefore, some argue that they are stringent laws in comparison with the routine laws of the country and are draconian in nature. I do not necessarily subscribe to that view. Due to some of the deviations found in national security legislation it is necessary to very carefully look at the manner in which national security legislation should be enforced as well as applied and interpreted. While some of the criticisms against national security legislation may be unfounded, it is to be noted that the very nature of certain pieces of national security legislation may lend itself to be abused and misused for collateral purposes. Furthermore, it is most unfortunate that the very nature of certain features of national security legislation and the manner in which they are at times sought to be enforced facilitates illegal activities such as the perpetration of torture and other extra judicial criminal activities which necessarily infringe fundamental human rights. Unfortunately, in this country there is ample evidence in support of that contention. Therefore, in my view, ladies and gentlemen, the development of national security legislation must, on the one hand, take into account cotemporary forms and manifestations on threat and attacks on the national security of Sri Lanka and also the global theatre relating to terrorism. On the other hand, I need to underscore the fundamental importance of national security legislation being unconditionally, and I repeat unconditionally, compliant with our own Constitution and the doctrine of the Rule of Law. Restrictions, if any, on the enjoyment of fundamental rights, should necessarily conform to the

restrictions that may be imposed in terms of Article 15 of the Constitution. They should also be proportionate to the existing or imminently likely threats.

Having said so, ladies and gentlemen, I must finally emphasise that it is of paramount importance that Sri Lanka develops efficacious legislations to replace the outdated and much maligned Public Security Ordinance and the Prevention of Terrorism Act. Doing so would be necessary to efficaciously protect Sri Lanka's national security by enhancing the potency of the state to prevent attacks and also to respond to attacks through efficacious criminal justice processes. It is also necessary to ensure that such laws

that would be developed in the future is compliant with Sri Lanka's obligations under International Human Rights Law and Humanitarian Law and of course, fully compliant with the Constitution of Sri Lanka.

In that regard, ladies and gentlemen, I wish to recommend to you, for your consideration, the Counter Terrorism Bill of 2018 which was developed necessarily by a team of Sri Lankan legal, Military, Law Enforcement, Intelligence and Security Professionals and also vetted by the Supreme Court for its compliance with the Constitution.

I thank you ladies and gentlemen for your patient hearing.