# PERSONAL LIBERTY AND THE LAW IN THE NEW COMMONWEALTH: A COMPARATIVE SURVEY

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A Thesis submitted for the Degree of
Ph.D (Law) to the University of London

August 1978

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# PERSONAL LIBERTY AND THE LAW IN THE NEW COMMONWEALTH: A COMPARATIVE SURVEY

Thir Narayan Singh

## ABSTRACT

The structural scheme of this study may be briefly explained as follows:

Part I: Foundations of Personal Liberty:

This part contains the Introduction and Chapter 1. The special features of the methodology of this study - the introduction of what we have called "Value jurisprudence" - has been explained with necessary particulars in the Introduction to lay the "foundations" of personal liberty. In Chapter 1 are revealed the several aspects of the "foundations" - the social and political aims and attitudes, ancient and modern, Western, Asian and African, and the embryonic, as well as the fully developed forms of Human Rights jurisprudence manifested respectively in some important constitutional landmarks of the Western political system and in the International Legal System.

Part II: Invasions of Personal Liberty: "Social-Security":

Chapter 2 covers this part and it deals with the norms of "restraints" and "protections" associated with the concept of "Social Security", namely the protection of society. Section I deals with the "Power of Arrest" (Common Law as well as Statutory): Section II with "Preventive Justice", which includes powers to bind over and anti-recidivist measures.

Part III: Invasions of Personal Liberty: "State-Security":

This Part embraces Chapters 3 to 8, all dealing with "emergency provisions" - the norms of "restraints" and "protections" associated with the concept of "State Security". Chapter 3 deals with the Common Law provisions for "Necessity" and "Martial Law". In Chapter 4 are discussed the emergency legislation relating to the "Defence of the Realm" in the United Kingdom and also the relevant legislation dealing with the "Northern Ireland problem". In Chapters 5 to 8 the treatment of the topic is extended to important areas of New Commonwealth. In all cases relevant case-law is discussed in separate sections and in

the New Commonwealth context, the relevant constitutional provisions are also discussed in addition to statutory provisions.

Part IV: Prospects for Personal Liberty: Conclusions:

In Chapter 9 which forms this Part the prospects for personal liberty are assessed with reference to the twin aspects of the concepts - "value" and "legal" - to emphasize the operation of the "Value jurisprudence", and a plea is made for the introduction in all national legal systems of an element of "humanitarianism" to link the twin concepts to improve the prospects for personal liberty.

ACKNOWLEDGEMENT

In the course of this research and preparation of this dissertation I had the privilege of receiving the valuable guidance of Professor James S. Read, Professor in the Department of Law at the School of Oriental and African Studies, whose careful scrutiny of my draft notes and constant encouragement made my task a lot easier. Indeed, I am able to say that it took the sting out of what is conventionally described as the "pains-taking" process of research and I enjoyed my work as a "labour of love", or, using the professional jargon, I may say that it gave me a real "job-satisfaction". To him, therefore, I owe a deep debt of gratitude.

I have had also the good fortune of receiving assistance from different sources in the collection of material for this dissertation. I consider it my pleasant duty to mention their respective contributions and to express to them my sincere thanks:

Mr. Niall McDermott, Secretary-General, International Commission of Jurists, Geneva, was kind enough to allow me to consult the original material available in the archives of the Commission in Geneva. Mr. L.S. Zimba of the University of Zambia (at present working for the Ph.D. (Laws) degree in London) very generously allowed me to consult some material on Zambia that he had collected for his own dissertation. Miss E.A.C. McAllister, Lecturer in Law in the School of Oriental and African Studies, was good enough to introduce me to some important sources. Mr. Bart Milner of the National Council of Civil Liberties, London, very kindly allowed me access to the archives of the Council. From Miss Angela Wright and Miss Judith Tucker of Amnesty International, London, I have received some helpful material. Mr. M.J.A. Cooray of Sri Lanka (at present working for the Ph.D. (Laws) degree in London) was good enough to make time to give me helpful

leads in connection with material relating to Sri Lanka. Mr. N. Hogue of Bangladesh (at present doing Ll.M. at S.O.A.S. in London) helped me to trace certain important decisions of the Pakistan courts.

I also take this opportunity to extend my thanks to the staff of the under-mentioned Libraries in London, where I had to work for many long hours, for the co-operation received from them:

The Institute of Advanced Legal Studies, School of Oriental and African Studies, Institute of Commonwealth Studies, University of London Library at Senate House, The British Library, the India Office Library of the Foreign and Commonwealth Office, and the Library at the Foreign Office of the United Kingdom Government, Royal Commonwealth Society Library, Indian High Commission Library and the Camden Public Libraries. At Geneva, the staff of the United Nations' Library at the Palais des Nations was indeed very helpful.

I acknowledge gratefully the financial grants which I found to be of immense help: The School of Oriental and African Studies helped me to pay the enhanced tuition fees for one session. In connection with my trip to Geneva I received financial assistance from the Central Research Fund of the University of London. From the Convocation Trust Fund of the London University I was given a grant to meet a part of the typing cost of this dissertation.

Mrs Joyce Maxwell spared no pains to type this dissertation with speed, combined with care and caution, correcting many accidental slips in the draft notes. I thank her for her generous effort.

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# PART I

# INTRODUCTION

## I. General

I.1 The ever growing contemporary concern for protection of personal liberty is undoubtedly a global phenomenon. But it is also true that the incidence of "invasions" of personal liberty is the highest in the "Third World" (the developing countries) and that it is the form or nature of the "invasion" rather than its extent or expanse which has accentuated and internationalised the concern. Today "prisoners of conscience" are held in great number in different parts of the "Third World" but in the New Commonwealth the disease has appeared in many states in an endemic form. This phenomenon has inspired this research or, in legal terms, has provided its "justification".

## II. Methodology: "Value jurisprudence"

I.2 The departure in this study from the conventional terms of a legal thesis, by introducing the concept of "Value jurisprudence", needs some explanation. It is the result of adopting an empirical approach normally associated with disciplines other than law, more particularly with work carried out in laboratories. We gradually realised in the course of research that it is not only unrewarding to think of personal liberty in terms solely of norms of positive law but that such norms in fact operate in terms of "values", albeit imperceptibly. We found that it is necessary to give recognition to this process. We realised that it is necessary to emphasize the fact that, if the human mind does not work in a vacuum, it also does not work merely through the institutions that it has created such as "law" in its various manifestations and their ramifications: "law" is founded on "reason" but "values" can claim a transcendental character. Indeed, the new "Human Rights jurisprudence", evolved under the international system of the new world order, is based on "values" concerned

with the fundamental issue of the very existence of mankind. We have merely articulated this premise by introducing the concept of "Value jurisprudence".

I.3 It is true that the main body of the study conforms to what may be described as a conventional treatment of the subject, namely, the examination of the institutions of positive law concerned directly with the "invasions" of personal liberty. But the detailed analysis of the "legal" norms of "restraints" and "protections" has in fact been undertaken with a view to revealing the truth - the truth that the "legal" institutions are in fact value-actuated - the truth that the various agencies associated with the making, the enforcement and the administration of law, the legislature, the executive and the judiciary, in fact operate through a "value-process".

I.4 It is also true that in this study the "socio-political" institutions, unlike the "legal" and "legal-political", have not received a similar exhaustive treatment. It is because this is a legal thesis. We accept the position that there is little doubt that the "foundations" of personal liberty lie mainly in the ideas and institutions of political thought emanating from such concepts as "society" and "polity"; "law" (positive law) a priori mainly regulates personal liberty by prescribing the norms of "restraints" and "protections", which is manifested in the process of "invasion" of personal liberty. The basic framework or the infra-structure of this study is thus based upon certain concepts and, to link up the "legal" and the "value" concepts, certain expressions have been used in a technical sense which will first be defined.

## III. Definitions

### (1) The New Commonwealth

I.5 Sir Ivor Jennings used the term "New Commonwealth" in 1958 in relation to those countries which we have, in this study, referred to compendiously as Commonwealth Asia, namely the states of the Indian sub-

continent (India, Pakistan and Sri Lanka) and of South-east Asia (then only the "Federation of Malaya" had come into being).[1] On the other hand it is commonly used nowadays in relation to all states of the Commonwealth other than the United Kingdom and three "Dominions" of Canada, Australia and New Zealand.[2] Notwithstanding these facts we have adapted the term "New Commonwealth" for the purpose of this study for definite reasons. We reiterate that the basic difference between the "old" and the "new" Commonwealth lies in their different indigenous "traditions", although they have come to share many common "aspirations". The traditions of the former are undoubtedly Anglo-Saxon/Norman in origin while the dominant strands of "indigenous" traditions of the latter are the traditions of Asia and Africa which prevail even in areas lying outside the territorial compass of these two continents: for example, in the Caribbean (which is not included in this study) the large part of the population consists of persons of African and "Indian" origin; in small islands like Fiji and Mauritius also, people of "Indian" origin form a major part of the population. Pakistan, although it has left the Commonwealth, is included in this study for the same reason, namely, to articulate the "value" aspect and not the territorial aspect in the consideration of "legal" norms. Indeed, in Pakistan the operation of the "value-process" has assumed such a significant and, at the judicial level, wholesome aspect, that its omission would have required a more laboured effort to support the theory of "Value jurisprudence".

(2) Personal liberty

I.6 In this study we have examined the concept of personal liberty in its twin aspects - as a "legal" concept and as a "value" concept. In the pure Anglo-Saxon system (which prevails in the "old" Commonwealth) the distinction is at best manifested in the recognition of the difference between "moral" and "positive" or "legal" rights: it is contended that a "right" not only means "lawful entitlement" but also "just entitlement".[3]

Under the international system, personal liberty is a "human right" and according to the "legal" norms of the system, the "fundamental human rights" spring from the reaffirmation of the "worth of the human person".[4] Indeed, Judge Kotaro Tanaka has said that "the value of a person is a juridical concept of an absolute character" and that "it is not only a technical term".[5] And he rightly asserts that human rights have always existed with human beings "independently of, and before, the State."[6] Under the national legal systems of the New Commonwealth the right to personal liberty is a "fundamental right" but the content of the right, or the purport of the expression, has been examined at some length only by the Indian judiciary:[7] through a bizarre operation of the "value-process" it has given the "legal" concept of personal liberty a meaning which violates the norms of the "value jurisprudence". Thus, a case is made out in this study for a proper appraisal of the twin aspect of personal liberty and for a proper integration of the two concepts through the "value-process".

(3) "Law" and "Value jurisprudence"

(A) The Nexus

I.7 In Anglo-Saxon jurisprudence, "law" is regarded generally as an institution of control: it plays a "regulatory" role and only positive law is "law" whether it is common law or statute-law. In this study we have also dealt with other manifestations of "law", such as "Natural Law" and "Humanitarian Law". Indeed they do not have the same "regulatory" role under the national legal systems of the common law jurisdiction. But it is necessary to remember that "Natural Law" has been absorbed into the common law in England (in America, in the constitutional Bill of Rights), having first undergone transformation into principles of Christian piety. Many principles of administrative law in both England and America are, however, directly traceable to "Natural Law", namely, the "Rule of Law" in its special aspect and the so-called "principles of natural justice", particularly such principles as the rule of audi alterem partem. Indeed,

as Schwartz and Wade observe, principles of administrative law have proliferated as it has to deal with "problems of keeping the powers of government under proper legal control".[8] And it is difficult to conceive of a wider umbrella than the concept of "Natural Law" under which can shelter new juridical concepts. No doubt the same principles of Christian piety gave birth to the "Humanitarian Law" under the international system, to embrace in its ambit the Civil Law tradition.

I.8 But whence came this metamorphosis ? It is to be attributed to "value jurisprudence". In Asia and Africa, in the traditional jurisprudence, "duty" was regarded as an institution of control, but traditional "values" were swamped by Anglo-Saxon institutions. The "Value jurisprudence" thus assumes an important role in tracing the development of new attitudes and new institutions in the emergent States.

(B) The key elements of "Value jurisprudence"

(a) Value and Value-concept

I.9 "Value" at common parlance is the measure of importance attached to a particular idea or a thing. In this study the term "value" is used to denote the inarticulated idea of a concept which determines the content of the concept, not merely with reference to the norms of positive law obtaining at any particular time in any particular territory but with reference to innate human understanding and human culture. At different times and under different climes human understanding and human culture change, from these changes emerge different "value-concepts"; they cannot be directly relatable to changes in "legal norms", they are independent of them. They operate through the "value-process" regulating the content of the parallel "legal" concepts. Thus, in this study we contend that not only is "personal liberty" a "legal" as well as a "value" concept, but there are other concepts as well that need similar treatment, namely, "liberty", "security", "state", "society" and "[human] person"; even the more legalistic concept of "Rule of Law" embraces an element of dualism. On this premise we have

used expressions such as "social security" and "state security" for which there does not exist any universal terminological parallel.[9] These two concepts, in this study, are meant to denote the legal norms concerned with the protection of "society" in the first case and the "state" in the second case, to form the value-triangle of personal liberty.

(b) "Value-process" and "public opinion"

I.10 The process by which the inarticulate idea of a "value concept" is activated and is used to "regulate" the content of the "legal" concept is described in this study as the "value-process". The process operates at different levels through different means or agencies and it is constituted with different ingredients, chiefly "public opinion". In a modern polity the process operates through the different organs of the state such as the executive, the legislature, the judiciary and the bureaucracy and also through different social agencies such as the individual, the family, the group and organisations variously constituted (such as "Pressure groups"). The aims and attitudes of the several organs and agencies of the state and the society respectively are influenced and moulded by "public opinion". The last-mentioned term is meant not only to include the activities of the various "media" but also to embrace all kinds of public, private, parliamentary and juristic (including judicial) debates. The scale and the scope of the debate and the extent of human involvement in it determines its capacity to mobilise "public opinion". Such debates evidently form an essential element of the vitality of "public opinion". It cannot however be ignored that although the "value process" operates through "public opinion" there is a "constant factor" which forms the keynote of the "value-process" in so far as its operation in the field of personal liberty is concerned. The keynote is the triangle which is formed by the "value-concepts" of "human rights", "social security" and "state security". This will be revealed in the course of examination of the "foundations" and "invasions" of personal liberty in the succeeding pages of this study.[10]

Chapter 1

# THE FOUNDATIONS OF PERSONAL LIBERTY

## I. Western political thought and some important constitutional landmarks

### (1) A General View

1.1 Law and politics find a common meeting ground in the search for the origin of the concept of liberty. According to Dean Roscoe Pound the Common Law, even in its beginnings, saw the problem of, "on the one hand, effective ordering of conduct in a civilised society, and, on the other hand, such limitations of and checks upon those to whom that ordering is committed as to preserve due balance between the general security and the individual life."[1] Sir Isaiah Berlin has written about "two concepts of liberty" and has observed that there is an "open war that is being fought between two systems of ideas which return different and conflicting answers to what has long been the central question of politics - the question of obedience and coercion."[2] However, Professor Maurice Cranston observes that the western political philosophers had one thing in common in that they all shared "a deep concern with freedom as a concept and a value" although they had different ideas about the meaning and content of the concept.[3] Hobbes, Locke and Mill, observes Cranston, were interested in preserving the freedom of each individual from interference by his neighbours or his rulers while Aristotle, Rousseau and Hegel were more interested in the "quality" of a man's freedom.[4]

1.2 A summary of this great issue, which has been a preoccupation of Western philosophy for many centuries, is inevitably inadequate. The distinctions, on the one hand, between the two schools of thought and, on the other hand, between the formulations of the different philosophers were subtle and complex. Indeed the spectrum is so broad that in each case the formulations have been variously branded as "absolutism", "collectivism", "positivism" in one case and "liberalism", "naturalism"

and "individualism" in the other case, to name but a few of them. We have deliberately omitted the important and distinct concept of "communism" from the first group. The modern "western world" does not own it as a "western" political philosophy apparently for the reason that it is considered to be an antithesis of the western concept of "liberal democracy". We propose to discuss Marx, Communism and the Russian Revolution separately as part of the new world order.

1.3 In this section it is necessary to discern the influence only of the "liberal" currents of western political philosophy[5] on the making of such important constitutional documents as Magna Carta and the Bill of Rights in England and also of the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen. However we have to look back to the ancient Greeks and their "Natural Law" as it is asserted that the continuity of western political thought is reflected in the traditional concepts of "natural rights" and the "rights of man" and the modern concept of "human rights".[6] Evidently, ideas took concrete shape with the march of civilisation. Indeed, we do not hear the ancient sages speaking in terms of "personal liberty" or "freedom of movement"; they spoke of "liberty" in general terms and more of "law", its content and nature. Gradually the terms "state" and "sovereignty" and the concepts of "rights" and"power" came to be discussed. For the first time in Magna Carta, in chapter 39, the concept of "due process of law" came to be embodied through which personal liberty was protected although, as we shall see, the contemporary political thought did not engender personal liberty as a specific and distinct concept.[7]

(2) The Greeks and "Natural Law"

1.4 The civilisation of the polis - the ancient Greek city-states of the fifth century B.C. - with its stratified social setting of aristocrats, citizens and slaves and the rule of oligarchy could not obviously be expected to generate what we consider today as "liberal" views. However, the concept of "natural law" appears to have been born out of the distinction made by a group of philosophers known as the Sophists between physis ("nature") and logos ("divine law") on the one hand and nomos ("law") as applied to the human life of the polis on the other.[8] One was eternal and wise; the other, being man-made, was arbitrary. It is true that Socrates and Plato do not explicitly refer to "natural law" but in Plato's Republic there is an inquiry into the nature of justice. Plato sees the polis as "man writ large" but the idea is open to divers interpretations;[8a] Socrates, on the other hand, points out that the powerful frequently rule in their own interest and are corrupted by power itself.[8b] One thing is, however, certain. The two philosophers were obviously concerned with what has been called "the harmonious balance or principle of justice" in the city-state (which is not to be understood in the modern sense of the enforcement of public law) and the supreme end of the state was conceived in attaining the moral perfection of its citizens.[9]

1.5 With the gradual change in the social setting taking place during the transition from polis to cosmopolis, in the Laws, Plato becomes more categorical. He subordinates law to community interest rather than to any absolute or abstract higher morality.[10] Even Aristotle, in his Politics, does not carry the concept of "the laws" any nearer to "natural law". Although he asserts that laws ought to be rational and accord with politeia, unjust and inequitable laws cannot be invalidated for there are no sanctions against bad laws as "the law" is not "sovereign";[11] the

opposition party had to overthrow the constitution rather than the government.[12] It was, in fact, the stoic school of philosophy which became active towards the end of the fourth century B.C., that came out openly in support of the "Law of Nature".

1.6 The Stoics were interested in the cosmos which led them to believe in the universal brotherhood of man and they came to relate what they considered to be the "innate reason" of man to the cosmic order.[13] A new era had begun - the transition from polis to cosmopolis was complete. Man was required to live "in accord with nature"; nature was full of laws.[14] In other words primacy came to be attached to "natural reason" or "universal reason" through which, as has been said, the concept of conscience entered into the history of political thought. Whether it was a case of resistance or of obedience, to authority, appeal was made to "conscience".[15]

(3) The Romans and "jus gentium" and "jus naturale"

1.7 The Roman mind, it has been observed, was not speculative but "practical, military and legalistic".[16] Cicero has been credited with translating Stoic philosophical ideas into Latin legal terms. The Hellenistic idea of "Law of Nature" was linked up with the "Law of the people" and as a result "jus naturale" became more practical and "jus gentium" more general.[17] The Roman Commonwealth had become a big world and "jus gentium" which was devised for foreigners and was, as such, in great need of extended application, found justification for such a course in "jus naturale". In De Republica, Cicero defined Natural law in the following terms:[18]

> There is in fact a true law, right reason, in accordance with nature; it applies to all men, is unalterable and eternal. . . There will not be one law in Rome, another in Athens, one now, another later on, but one law for all people at all times; one master and ruler over us all, the inventor, promulgator and enforcing judge. [emphasis added]

Thus, the tribal "jus civile" as well as the "jus naturale" are equally subordinated by the new norms of "jus naturale" although, in practice, the

later Roman lawyers, as has been pointed out, did not always allow jus naturale to prevail against jus civile but the relation between the three systems was not clearly defined.[19] Nevertheless, it is possible to assert that jus naturale probably modified not only the application but also the content of jus civile even if it could not supersede the latter;[20] the influence of Natural Law was also to be seen in the proliferation of new concepts.

1.8 Cicero could insist that the state must preserve jus, namely, right and law, and that one could expect from the state justitia, namely, due process of law. But, as monarchy had come to stay, the concern for liberty and rule of law lost its primacy although Seneca could still insist that monarchs should not be tyrants.[21] The influence of Natural Law was also to be found in the Institutes of Emperor Justinian. Justice is defined as "the constant and perpetual desire of giving to every man what is due to him" and jurisprudence as "the knowledge of things divine and human, and the exact discernment of what is just and unjust."[22]

(4) The Church, Natural Law and Mediaeval ideas

1.9 The period between the collapse of the Roman Empire and the rise of mediaeval civilisation has been called the "Dark Ages".[23] With the disintegration of the Graeco-Roman society, the Christian Church alone, it has been pointed out, had the vitality and the organization to take over the bankrupt society.[24] By the fifth century, St. Augustine, in De Civitate Dei, formulated a theory of society which, it is asserted, paved the way for the theocratic claims of the mediaeval church.[25] In Book XIX he argues that "true justice" cannot exist in a pagan State.[26] However, he also observes that peace and order rather than justice are the essentials of an "efficacious government" and that government was a "necessity" despite its "impurity".[27] It has been pointed out that "the formulation of abstract norms of justice based on a natural law accessible to the reason of all men by means of logical demonstration did not interest Augustine" and it has

also been suggested that his replacement of justitia with concordia parallels the modern distinction between legal and moral rights.[28]

1.10 It was left to the thirteenth century Christian philosopher, St. Thomas Aquinas, to state his political thoughts in terms of Natural Law with greater certainty. Unlike Augustine he does not see Natural Law simply as God's Law. To him, it is "both descriptive and normative, both biological and moral".[29] He does not say that a Christian is obliged only to obey the edicts of a truly Christian, or just government, but he says that an edict which manifestly contravenes Natural Law can be disobeyed for "unjust laws have no moral validity"; any edict which was contrary to the basic principles of "justice" was not "law" according to him.[30] It has been suggested that he might have been willing to concede to some extent the right of revolt against tyranny[31] and that although he did not enumerate the "natural rights of man", he believed in the right to life by which he meant both the duty to live and the right to a decent living.[32] He regarded liberty rather as a feature of a justly ordered society than as an inalienable right of the individual.[33]

1.11 We must not forget the feudal character of mediaeval European society. In fact the Church itself gave recognition to the feudal conception of ownership. The right of inheritance of the individual was to depend on baptism and "rebirth" in that the "universal dominium" vested itself in the Church.[34] Even kingship was held in trust: the King was under God and Natural Law.[35] Aquinas referred to the "common good" as providing the test for the validity of modification of any law.[36] In a sense it might have been an appeal to Natural Law. Before the individual finally emerged as a fully-fledged citizen in the late thirteenth century, the affairs of society were actually managed in England by the "commonwealth" of the village government.[37] Under the feudal system even the King was subject to the "feudal contract" which promoted the concept of law as a vehicle of government by "counsel and consent" to counteract the unfettered powers of the King envisaged by his theocratic role.[38]

1,12 The double role of the King - as a feudal lord and as a theocratic monarch - had an important bearing, it is pointed out, in the making of Magna Carta. The grievances which led to its making were the result of "overuse" of the monarchical powers.[39] The Charter was not, therefore, a revolutionary document. It merely restored the balance although, in the process, legal protection for the first time came to be accorded to the rights of the individual in the renowned chapter 39 of the Charter.[40] Indeed, as has been suggested, the feudal law and the feudal practice had brought forth the "awareness" of certain "fundamental rights" of the individual.[41] The common law, it has been asserted, was an offspring of the feudal law and the Charter reiterated the primacy of common law by referring repeatedly to the "unwritten ancient liberties".

(5) New Interpretations: From Renaissance to French Revolution

1.13 Machiavelli's The Prince (written in 1513 after his banishment from the service of the Florentine state) is still considered to be a work of considerable merit. He extolled the virtues of a republican form of government whose chief characteristic, according to him, was liberty but he said that it was dangerous to give liberty suddenly to those people who were not used to it.[42] Nevertheless he was not opposed to revolutionary methods. Indeed, he believed that the State rested on violence.[43] He is, however, renowned particularly for his theory of duality in morality - political and private. This has been seen as a radical break with the Christian and Hellenistic tradition.[44] However, as we shall see, his theory was anticipated by the great Indo-Aryan political philosopher, Kautilya, who was a contemporary of the ancient Greek philosophers.

1.14 The sixteenth and seventeenth century produced such other eminent political thinkers as Jean Bodin in France, Hugo Grotius in Holland, and Hooker, Hobbes and Locke in England. It may be usefully noted in this connection that in the beginning of the sixteenth century the French, Dutch and English were yet to commence their "intrusive voyages", while the Portuguese had already made journeys to the east, to

India, and the Spaniards to the west, to Mexico and Peru. In the succeeding century, however, each of the nations had set up plantations and colonies and were engaged in the growing overseas trade. These developments gave rise to many legal and political problems, such as ownership, sovereignty, jurisdiction and international relations.[45] It has also to be noted that the feudal aristocracy was facing gradual decay, with the rise of a capitalist middle class, and that there were such events taking place as the establishment of nation-states, the growth of strong monarchies and the repudiation of the "cosmopolitan authority" of both Pope and Emperor, which had been the basis of the concept of the single society of mediaeval Christendom. It was against such a background that the political thinkers expounded their views.

1.15 The political thought of Bodin is reflected in his theory of sovereignty but, as has been suggested, it was perhaps considered by him as "the only radical remedy for the disorders of his own France."[46] According to him in a democracy there is always a chronic disorder and therefore there is less real liberty, which he calls "true popular liberty".[47] However, he asserted the existence in all "republics" of an unlimited legal authority to which all owe obedience as a duty.[48] According to him, sovereignty was man's creation and it arose from the nature of man and from human need and aspiration.[49] He also spoke of leges imperii as fundamental laws which limited sovereignty,[50] but except for his "conscience", there was no legal obligation on the sovereign to obey Natural Law.[51] Even so, he appears to suggest that a Magistrate ought to disregard the sovereign's order which was violative of Natural Law even if he had to face the consequences thereafter.[52] Undoubtedly Bodin raised many interesting and important questions but he left them unanswered and possibly it is for this reason that his theory has been described as being built upon "disjointed foundations."[53]

1.16 Hooker, whose philosophy is described as "par excellence a philosophy of law", also advocates that positive laws which are

demonstrably contrary to Divine or Natural Law may be disobeyed.[54] Society, government and law, all rest on and imply consent.[55] Hooker was essentially a man of God but he said that reason supplemented direct revelation and that Natural Law, found out by reason, supplemented Divine Law.[56] He was against the blind acceptance of authority.[57] The power of making laws he reserves for the people and conceded to the sovereign the right of veto on the ground that the sovereign has to enforce the law.[58] It is observed that as Hooker was conscious of the need to support his own Queen's government, he combined sovereignty with the rule of law.[59] He attributes divine right to the laws rather than to rulers.[60]

1.17 The Dutch jurist Grotius and the English philosopher Hobbes were almost contemporary. Grotius, however, concerned himself more with international law. Even so, his conception of "the state" and "law" constitute a distinct contribution to the political thought of his time. It is observed that his concept of state involves a perception of utility and also an element of consent and that it is nearer to the Social Contract of Hobbes and Rousseau than the Governmental Contract of Hooker and Locke.[61] Like Hobbes, he also denied people the right to rebel but following Bodin he distinguished between a King and a tyrant; the latter could even be slain. Although sovereignty was some sort of "dominion" it was to be held under Law, especially Law of Nature.[62] He regards jus naturale as the dictate of right reason and said that it was so immutable that it could not be changed by God Himself.[63] He is categorical that positive law is subordinate to Natural Law.[64]

1.18 Hobbes, in writing the Leviathan, it is claimed, provided a "wondrous confirmation" of the circumstances of the English civil war.[65] It can be said that his renowned social contract theory was epitomised in his statement - "Liberty and Necessity are Consistent".[66] It has been pointed out that he distinguished between the Right of Nature and the Law of Nature, between jus and lex;[67] Laws of Nature are "those restraints by which we agree mutually to abridge one another's liberty."[68] The

"SOVERAIGN", the "great LEVIATHAN", the "mortal God", was to be instituted by the common consent of all men for their "peace and defence".[69] Men choose the sovereign "for fear of one another, and not of him whom they institute".[70] In Leviathan he propounds the theory of obedience to "Civill Power" under which the surrender of men to certain constraints is contemplated but, as obedience is grounded on the right to personal protection, the right of self-defence is expressly reserved.[71] Hobbes believed in what has been called a "single, unlimited" sovereign authority. The conflicting voices of the King and Parliament led to the English civil war, according to Hobbes.[72] It has been suggested that although the central idea of his theory was that the state was "all-powerful and beyond moral criticism" it was subject to a few important qualifications; the sovereign was to satisfy the needs of his subjects and he was to confine his attention to their outward behaviour and not to try to judge their private thoughts. Thus, he ruled out "inquisitions and extracted confessions".[73] His outlook has been rightly described as "utilitarian", anticipating one aspect of "Benthamism" and his interpretation of the Law of Nature as "an instinct for self-preservation".[74]

1.19 Indeed, in political theory the continuity was never broken.[75] After the "Glorious Revolution" England with its widening influence in the world turned to the Whig interpretation of the tradition of mediaeval freedom - disciplined power and rule of law.[76] It is therefore not difficult to see that some of the old values which found expression in Magna Carta were reassessed and reiterated in the Bill of Rights, which declared "the Rights and Liberties of the Subject" after deploring the fact that King James II had endeavoured to "extirpate" the "laws and liberties" of the kingdom by his various acts which the statute itself listed.

1.20 Of the two great promoters of the Whig tradition we have already briefly referred to Hooker and his ideas. Locke's interpretations have been described as "more businesslike and even more influential."[77] It has also been asserted that "It was from the political speculation of Locke and the

actual working out in England of the principles of toleration and limited monarchy that the French thinkers of the Enlightenment drew their inspiration".[78] In Two Treatises of Government, Locke writes in the preface of the Restoration as having been founded upon the "consent of the people" and of the resolution of the people to preserve their "just and natural rights". His concept of the "Law of Nature" differs from that of Hobbes in that he relates it to "declared and reasoned laws" although he is prepared to concede that the concept is founded on the instinct of self-preservation which drives men into society.[79]

1.21 Indeed, as has been observed, Hobbes and Locke both conducted their theorising from a common base, that of the state of nature and the social contract, but they arrive at two radically different conclusions.[80] Hobbes, who lived through the uncertain ties of the Civil War, was more concerned with "security" while Locke was determined to safeguard liberty as he considered loss of liberty to be the worst of evils - "to be subject to the inconstant, uncertain, unknown, arbitrary will of another man".[81] It is suggested that it was in the context of the tax on ship-money and of the arbitrary arrests of the Stuart regime that Locke demanded that "certain spheres of private interest should not only be regarded as inviolable but also that the law should safeguard the subject's rights in these spheres."[82] The right of a man to life, liberty and property, he asserted, were "natural rights" and that these were "self-evidently true like axioms of geometry". He stood for separation of powers and categorically insisted that legislative authority ought not to be delegated so as to make laws "conformable to the law of nature".[83] According to Cranston, Locke's main thesis that "morality, as a system of rules" was superior to both customary and enacted law is of enduring importance despite the fact that his conceptual scheme of "natural rights" and "natural laws" was not free from infirmity.[84] Similarly, his concept of "consent" was central to the theme of "legitimacy" of a government but

it has been pointed out that except for the right to resist (revolution), there was no indication of any other sanction and the concept merely attempted to "moralise the relationship between the individual and government".[85]

1.22 It has been claimed that Locke's views were "developed and broadened out" in France and America.[86] Indeed, as we shall see, in the two important constitutional documents resulting respectively from the American War of Independence and the French Revolution there is to be found a distinct impress of the concepts evolved by him. But it is also necessary to refer briefly to the views of three great French philosophers who flourished after him and who were nearer in point of time to these two great political events. It is observed that Montesquieu's analysis of the British Constitution in the eleventh book of Esprit des Lois deeply affected the thoughts of the American and French revolutionaries.[87] Indeed, the doctrine of separation of powers advocated by him forms the cornerstone of the American Constitution. He detested the despotism of the French Government and saw real hope for liberty in the solution of the problem of "control of powers".[88] He passionately believed in what is called "the validity of Natural Reason or the Universal Law of Reason".[89] Voltaire, on the other hand, it is said, was powerful because as a propagandist he was not committed to specific political doctrines but, like Montesquieu, he was also a great admirer of English constitutionalism.[90]

1.23 Rousseau, it is stated, "formulated the middle-class revolt against the intellectual arrogance of the age of reason."[91] He is credited with the conception of "popular sovereignty".[92] In Du Contrat Social (Bk.I, viii) he asserts that men are naturally unequal but as a result of the social contract they are made "equal by convention and legal right". He posits sovereignty in the legislative power which, according to him, is reserved to the people and cannot be delegated.[93] In other words, "the individuals who are citizens exercise their

sovereignty collectively when they meet in the general assembly" and it is the general assembly which can only enact laws.[94] Locke's ideas had immense influence on Rousseau's formulations. Rousseau did not live long enough to see the actual revolution, although he was an unsparing critic of the existing regime and provided, it must be said, the immediate inspiration for it.

1.24 However, it was the great British parliamentarian Edmund Burke who reacted strongly to the contemporary events in France and brought out his "Reflections on the Revolution in France". Burke thought that the revolution was "sacrilegous" in that it snapped the link that existed between the state, the world of nature and God.[95] As has been suggested, in the Reflections, he distinguished between "root-and-branch" change as happened in France and the "piecemeal" change of the "Glorious Revolution" of England and of the American War of Independence which he had defended.[96] Indeed, Burke has been described as the "greatest prophet of English conservative tradition" who had all his life attacked the "nakedness and solitude of metaphysical abstraction" in which Rousseau revelled.[97] His own concept of "Natural Reason" implied the "social instinct of the whole man" and not the "old-fashioned abstract rationality".[98] There was "one great immutable pre-existent law" and there could be no arbitrary powers for, that would be, according to Burke, against the "Rights of Humanity".[99]

1.25 However, the political philosophy of Burke, as well as that of Rousseau, has been termed a "romantic reaction" to the political concepts formulated in the "Age of Reason".[100] The British philosopher Hume, who was a contemporary of both Rousseau and Burke, had challenged the traditions of "natural reason" of pagan antiquity,[101] although he accepted "natural law" as the law of self-preservation and also the concept of rule of law based on the "consent of the governed".[102] The German philosopher, Kant, who was also a contemporary of Burke, attempted,

however, to give a new interpretation to Hume's ideas. He asserted the freedom of "goodwill" to reaffirm the "moral liberty" of man.[103] While Burke laid emphasis on "duty" to oppose the arbitrary exercise of power, Kant distinguished between "juridical" and "moral" duties. According to Kant, reason demands that in order to assure the freedom of others each individual has to impose certain restraints upon his own freedom and as a result there will then be a system of laws under which the "will" of all is brought into a harmony. He was convinced that there could be no "ideally perfect" Constitution although he had "sympathy" with the Constitution of the United States of America.[104]

(6) The American and French "Declarations"

(A) The American Declaration of Independence, 1776

1.26 Relevant extracts from the Declaration are quoted below:

> When in the course of human events it becomes necessary for one people to dissolve the political bonds. . . and to assume among the Powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God entitle them. . . they should declare the causes which impel them to the separation. . . . .
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . [emphasis added]

Among the various "causes" listed, the following are noteworthy:

(i) Suspending of operation of laws, even when they were enacted as of "immediate and pressing importance" till the Royal Assent was obtained;

(ii) refusing Assent to "Laws, the most wholesome and necessary for the public good" and to "Laws for establishing Judiciary Powers";

(iii) making the judges "dependent on his will alone" for tenure of office and payment of salaries;

(iv) keeping "in time of peace, Standing Armies without the consent" of the legislatures of the colonies;

(v) rendering "the Military independent of and superior to the Civil Power";

(vi) depriving in many cases "the benefit of Trial by Jury";

(vii) transporting "beyond the Seas to be tried for pretended offences".

1.27 The political philosophy of Locke is amply reflected in the text of the Declaration quoted above, but at the same time it is also easy to see why Burke also defended the American War of Independence which he did not see in terms of a "revolution". The tie had to be "dissolved" as of "necessity" which was recited in the document itself as so many "causes" and each of the causes which we have listed above, as we shall see, was, in some manner similar to the causes of the "Glorious Revolution", and amounted to the denial of the Common Law rights and Rule of Law. The Declaration was possibly meant to be read as a preamble to the Federal Constitution that came to be enacted after a decade and contained a very short preamble which stated the objects of the Constitution to be, inter alia to establish "justice" and to secure "liberty". In defining the legislative power, prohibition against the enactment of a Bill of Attainder and ex post facto laws and against suspension of habeas corpus was expressly stated in the Constitution in Art.I (ss.9 & 10). The Bill of Rights, however, came to be enacted later, in 1791, and was contained in the first ten amendments but it could be enforced only against the Federal Government. The situation was remedied when the 14th Amendment was passed in 1868, after the Civil War. Both the 5th and 14th Amendment, however, prohibited deprivation of "life, liberty and property" of any person "without due process of law"; the 4th Amendment, however, in terms provided for protection against "unreasonable" arrests, searches and seizures.

(B) The French Declaration of the Rights of Man and of the Citizen, 1789

1.28 The Declaration was affirmed in the French Constitutions of 1946 and 1958. Extracts from the relevant articles of the Declaration are quoted below:

> Men are born free and remain free and equal in respect of rights. . ." (art 1)
>
> The purpose of all civil associations is the preservation of natural and imprescriptible rights of man. . . liberty, property and resistance to oppression (art 2)

> The nation is essentially the source of sovereignty. . . (art 3)
>
> Liberty consists in the power of doing whatever does not injure another. . . [these] limits are determinable only by the law (art 4)
>
> The law is an expression of the common will. . . (art 6)
>
> No one shall be accused, arrested or imprisoned save in the cases determined by law and according to the forms it has prescribed. . . All who solicit. . . or cause to be executed, arbitrary orders ought to be punished. . . (art 7)
>
> [emphasis added]

1.29 The French Declaration did not set out the "causes" or justification for the revolt. On the other hand it uses the phraseology of the "popular" political philosophy of Rousseau in abundant measure; the definition of the terms "law" and "liberty" are noteworthy. Such vague definitions can only be accepted as manifestation of high ideals. Even in the important article 7 the sanction against exercise of arbitrary powers is signified by the term "ought" although it can be said that the very mention of the specific words "arrest" and "imprisonment" are referable to the influence of English Constitutionalism on both Voltaire and Montesquieu. The other important point to be noted in the article is that it stresses the importance of procedure by using the word "forms". However, the origin of the importance attached to "procedure" which is also reflected in the modern European Convention of Human Rights (art.5), is also traceable to the "English Experience" which we now proceed to examine in greater detail.

(7) The English Experience: Due Process of Law

(A) A General View

1.30 It is commonplace knowledge that the English Common Law is judge-made law: it has grown up in courts through the procedures and the interpretations of the courts. When a statute was involved in any cause the role of interpretation was indeed vital but generally the courts regulated their procedure in such a way that they came to be acclaimed as champions of personal liberty. In the "unwritten" British Constitution the right to personal liberty is protected, even without "written guarantees"

through such provisions of great antiquity as a well-defined power of arrest, the right to bail, the right to a fair trial (which included the right to jury) and protection against "unlawful" detention by the right to the writ of habeas corpus. We propose to deal in this study with some of these provisions which are of a fundamental character and of general importance in the context of the laws of the New Commonwealth. The provisions of Magna Carta, the Bill of Rights and habeas corpus along with those of the Petition of Rights and the Act of Settlement constitute the basic structure of the British Constitution but in this study we propose to confine our detailed examination to the first group of provisions.

(B) The "Due Process" and the Right to Bail

(a) Magna Carta

(i) The Charter and Common Law

1.31 Magna Carta was not a revolutionary document: it merely recognised pre-existing usages and customs.[105] But the manner in which this was done, and the process by which it was procured in 1215, were indeed revolutionary; they gave it its perennial constitutional importance. As observed by Viscount Bryce, it declared the supremacy of 'lex terrae', on which "the fabric of British freedom was solidly set before a representative Parliament had come into existence."[106] The following passage from the confirmation of the Charter by Edward I in 1279 throws into relief the importance of the process:

> Know ye that we. . . to the profit of all our realm have granted for us. . . that Great Charter of Liberties and . . . made by the common assent of all the realm. . . shall allow the said charter(s) in pleas before them and judgment in all their points; that is to say the Great Charter of Liberties as common law. . . [emphasis added]

In the above passage the supremacy of the common law was apparently attributed to the common assent of all the realm and the charter's greatness was founded upon it and not on royal assent.

1.32 The traditionalists led by Bishop Stubb hold the view that the

Charter and its immediate ancestor, the Coronation Charter of Henry I, were confirmation of the essential principles of the old laws of Alfred and of Edward.[107] Holdsworth endorses this view and observes that it could be connected with Cnut's Charter of Liberties and the Anglo-Saxon writs.[108] The important point to be noted is that the Charter symbolised a charismatic event: it rehearsed, in a conflict situation of an unusual type, the fact that the ancient customs of the realm were of supreme binding force, binding equally the King and his subjects. The King, John, had changed the normal course of the political life of the nation. It was the power of the Barons against which the Crown and the people had been united "in the name of law and order" but now the King had become the law-breaker.[109] The clergy and the merchants joined the Barons and made common cause against the King for their several grievances arising out of royal misadventures, such as the war with France that he had lost. The document, as has been said, marked the beginnings of a constitutional government.[110] Also, it may be said, it underlined one of the basic concepts of common law jurisprudence - the negation of arbitrary power - embraced by the modern rubrics of Rule of Law. Thus, in a rudimentary way it laid the foundations of a new form of government and also defined the powers of the executive organ using common law norms. This revolutionary process and manner of treatment of common law secured it the status of a constitutional document.

1.33 It is true that by 1645 most of its provisions had become obsolete but the core provisions have stood the test of time, few though they may be.[111] We have quoted above from the confirmation by Edward I, which found for it a place on the statute book and conferred on it the honorific title, "Great Charter". Before that it had been confirmed many times, 38 times according to some scholars while others put it as high as 55 times.[112] The process is important for it conferred on the Charter the

character of fundamental law as we understand it today. No doubt, this practice of confirmation has been traced to earlier proclamations of the King's peace at the beginning of each reign but the fact that its fundamental character was asserted from time to time to test the validity of both executive and legislative acts is noteworthy.[113] In 1320 the "award" of the Baronry against Hugh and Hugh le Despencer were grounded inter alia on violations of certain provisions of the Charter, although eventually it was set aside, but also on the ground that it was violative of the Charter's provisions in chapter 39.[114] In 1330 the impeachment of Roger Mortimer was likewise grounded.[115] In 1368 a statute of Edward III declared that "if there be any statute to the contrary, it shall be holden for none".[116] In 1535 Sir Thomas More grounded on the Charter his challenge to the statute on which the Crown had based his indictment.[117] Many instances abound: we have quoted a few examples only.

1.34 However, notice has also been taken of the phase during which the authority of the Charter was on the wane and a Bill was introduced in 1606[118] which echoed the language of the statute of 1368 of Edward III, mentioned above. This phase, we might recall, coincided with the Stuart regime when the entire body of common law was eclipsed by a pronounced emphasis on prerogatives, as we shall have occasion to see.[119] But the concept of parliamentary sovereignty not having evolved at that time, the fundamental character of the Charter was not only restored but found further exposition first in the Petition of Right of 1628 and then in the Habeas Corpus Acts of 1640 and 1679, and the Bill of Rights of 1689, as we shall see in the following pages of this study.[120] With the great constitutional settlement of 1688-89 the concept of parliamentary sovereignty started gaining ground at the cost of the theory which propounded that common law was immutable. As Lord Scarman observed in his Hamlyn Lectures, "the common law is no longer the strong and independent ally, but the servant of Parliament."[121] This notwithstanding, the Charter,

with its Common Law origin, retains its appeal albeit on a subdued note; although the challenge grounded on the Charter to the emergency laws enacted during the first world war did not succeed, some common law rules nevertheless prevailed against the Northern Ireland Emergency laws.[122]

(ii) The Charter and the Rule of Law

1.35 Its provisions, which we may now examine, justify the comment that it was a lawyer's document: although it dealt with specific grievances and followed mediaeval class distinctions, treating each class separately, notice may be taken of the use of the word "grant" in respect of "liberties" in relation to "freeman" in chapter 1. There are some provisions, those dealing with the administration of law and justice, which touched the rights of all citizens alike. They deserve greater attention although they profess to deal with procedural and not substantive rights. The venue of the court which followed the King was fixed to cut down delay and cost, vide chapter 17. In the next two chapters we find reiteration of a similar principle that local issues should be tried locally. In chapter 20 an injunction against excessive fines (amercements) was underwritten by laying down the twin criteria of "means" and "measure". It has been suggested that chapter 24, as also chapters 38, 39, 45 and 61, embodied the basic idea of the Rule of Law:[123] this perhaps projects a narrow view of the concept. The provisions of chapter 20, as also 40, which we quote below, with those of 24, 38 and 45, should be included under the same rubric.

> 24. No sheriff, constable, coroners, or our other bailiffs, shall hold the pleas of the crown.
>
> 38. No bailiff shall in future put anyone to trial, upon his bare word, without credible witness to support it.
>
> 40. To none will we sell, to none will we deny, or delay, right or justice.
>
> 45. We will not appoint justices, constables, sheriffs, or bailiffs, except of such as know the law of the kingdom and are of a mind to keep it well.

It is true that in the contemporary context the emphasis was on the word "sell" in chapter 40, which purported to abolish the prevalent practice, but we are trying to see if the provisions indicated above carried a common ethos which corresponded to that of the modern concept of Rule of Law. We submit that the answer ought to be in the affirmative.

1.36 We now quote below the original Latin version of the renowned chapter 39:

> Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicum parium suorum vel per legem terrae. [emphasis added]

The English version runs thus - "No freeman shall be taken, or imprisoned, or dissesised, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send against him, except by the lawful judgment of his peers or by the law of the land." It will be possible to understand now the emphasis supplied in the Latin version. The true import of the expressions marked out has been intensely debated which we propose to discuss in brief.

1.37 It has been established that the term "liber homo" included the villein.[124] Sir Paul Vinogradoff observes that in criminal and police matters the villein was on the same level as the freeman and a common law judge would have found it difficult to reconcile free birth and unfree tenure. The word "vel" was the subject matter of another controversy. Sir Paul categorically asserts that the second "vel" was used in the conjunctive sense. The normal meaning in Latin of the term was "or" as Dr McKechnie points out while referring to the first "vel".[125] However, he concedes that sometimes it also meant "et", namely "and". Does this show that even at that distant period the common law judges had evolved sophisticated rules of interpretation that have come down to this day as part of common law ? The debate has definitely revealed this interesting aspect of common law and also supports the proposition that the Charter was a lawyers' document.

1.38 Professor McKechnie also observes that there was no peerage until long after King John's time and that judgment by the accused's equals was an old English custom applicable equally to high and low. The term "judicum parium" should not therefore be understood as conferring a special benefit on the barons.[126] Professor F.M. Powick on the other hand contends that by chapter 39 the Barons intended to lay stress not so much on any particular form of trial (judgment of peers) as on the necessity for protection against the arbitrary acts of imprisonment, disseism and outlawry in which John had indulged.[127] However, he concedes that it met the desire of the freeman for prevention against administrative proceedings at the King's command, such as imprisonment without prospect of a trial in the local court.[128] If that was the purpose, one must say that it was not fulfilled as we shall see when we discuss the writ of habeas corpus.[129] Sir Paul reads the two expressions together - judicum parium and legem terrae. He concludes that emphasis was on "legality all round, both substantive and procedural" and adds that "the formulation was elastic enough to stand carrying over from the class justice of the feudal lords to the common law."[130]

1.39 Professor McKechnie discusses the import of the term "legem terrae" in greater detail and observes that the statutes affirming, expanding and explaining the Charter show that the expression was read in the 14th century as equivalent to "due process of law". He refers to an enactment of 1352 which, after reciting chapter 39, insisted on "indictment on presentment of good and lawful people of the same neighbourhood." The interpretation placed on this chapter aimed at prohibiting the trial of men for their lives and limbs before the King's Council on mere informal and irresponsible suggestions.[131] But it could also be said that chapter 39 did in fact reiterate the common law rule that the royal prerogative was a part of common law and that, so far as personal liberty was concerned, the common law did not recognise any

prerogative right to tamper with it. Glanvill and Bracton had applied the term "leges" to all unwritten laws of England.[132] The term "legem terrae" therefore included prerogative and if we read the two expressions, judicum parium and legem terrae, conjunctively, following Sir Paul, we can clearly see the limits of prerogative defined. It is therefore not difficult to appreciate the abiding appeal of chapter 39 in the modern context as it denies to the Executive the power to act arbitrarily in matters concerning the personal liberty of citizens. It anticipated the notion of "ordinary law" inherent in Dicey's modern theory of the Rule of Law.[133]

1.40 It remains now to say something about chapter 61. It was deleted in the later confirmations so it is now of historic importance only. Dr McKechnie underrates its importance, saying that it only conferred a right of "legalised rebellion" on the Barons and did not provide a real sanction. The King re-affirmed his pledge to abide by the Charter and to redress grievances should there be any violation and in default, chapter 61 provided ". . . the twenty-five barons, who with the commonalty of the whole land shall destrain and grieve us in whatsoever way they can. . . saving our person and that of our queen and children." We have added emphasis to show that the criticism is not fully justified. On the other hand we submit that the important right affirmed in chapter 39, without a corresponding remedy, made it easier for the Crown to violate it. This defect, as we shall see, was finally removed by the Habeas Corpus Acts of 1640, 1679 and 1816 in an effective manner.[134] No doubt, chapter 36 stated that the "writ of inquisition of life or limb" shall be "freely granted" but, as has been pointed out,[135] it has been erroneously confused with the writ of habeas corpus which, in its present form, had not been evolved till then.[136]

(iii) The third dimension: the Export

1.41 On the whole, it must be said that the true importance of the Charter lies in promoting constitutionalism in the Commonwealth or, to

be more precise, in the proliferation of British constitutionalism and its export to colonies and dependencies. As Sir Ivor Jennings points out, many concepts not originally there have been read into it, such as trial in open court, independence of judges, trial by jury and the writ of habeas corpus.[137] The "Due Process" doctrine evolved in the American jurisdiction also owed a great deal to the Charter as we find that in a statute of 1354 (28 Edw III, c.3), which professed to reaffirm the principles of the Charter, an explicit reference was made to the phrase in these terms:

> No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law. [emphasis added]

Although the Supreme Court in the U.S.A. developed in due course a comprehensive doctrine, the same was to be found in the provisions of the 4th, 5th and the 14th Amendments of the Federal Constitution which contained in them, as we have seen, the pith and substance of the provision quoted above.[138]

1.42 However, it is to be noted that, subject to the operation of the doctrine that an Englishman carried his law with him,[139] the Charter had a limited application in the territories comprising the bulk of the New Commonwealth. Even so, the "apparatus of law" in Asia and Africa was erected on the concepts emanating from the Charter with such meticulous care that the courts there could claim to be, as Sir Ivor Jennings has observed, "heirs of the courts in Westminster, acting freely and fairly and applying common law remedies even when the wrongs are not common law wrongs."[140]

1.43 We may now turn to examine how the Charter promoted the development of the writ of habeas corpus and the latter's role in protecting personal liberty, but it is worthwhile to refer to the weak and subtle influence of the Charter in the dependencies. It has been observed that Blackstone's theory of allegiance was based on the

Charter.[141] During the colonial rule, a prisoner in India tried unsuccessfully to press this theory in support of his application for habeas corpus after he was confronted with the contention of the Crown that the protection of the Charter was not extended to the native population.[142]

(b) The Right to Bail and the Bill of Rights

1.44 The Bill of Rights, as we have already seen, was a product of the "Glorious Revolution". Its constitutional importance lay as much in the fact that it placed succession to the throne on a statutory basis, as is commonly asserted,[143] as we submit, in the fact that the document listed the grievances against the deposed King before enumerating what were described as the "true, ancient and indubitable rights and liberties of the people", which, the document stated, "shall be firmly and strictly holden and observed". This drafting technique, as we have seen, provided an immediate precedent to the American revolutionaries who listed in the Independence Declaration "causes" similar to what in its predecessor were called "laws and liberties" which the King "did endeavour to subvert". Indeed, the Bill of Rights was, like its illustrious predecessor, Magna Carta, a lawyers' document.[144] Unlike the "Declaration", it was not based on an appeal to "Natural Law" which, as Professor de Smith points out, despite the fact that in 1765 Blackstone was paying it "lip-service" had long since ceased to have legal significance.[145]

The Right to Bail

(i) Its basic character at Common Law and under old Statutes

1.45 However, the important point in connection with "due process of law" to be noticed in the Bill of Rights is that it complained among others against "excessive bail" and against "excessive fines" and "illegal and cruel punishments" and also against "fines and forfeitures before any conviction and judgment", which, among others, were described as "utterly and directly contrary to the known laws and statutes and freedoms" of the

realm. It therefore guaranteed that - "excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted".

1.46 We have to see therefore what were the "known laws and statutes and freedoms" concerning bail. According to Stephen, "In early times the formal accusation was often, perhaps usually, the first step in procedure and the prisoner was not arrested until after he had been indicted".[146] He also asserts that "Right to be bailed in certain cases is as old as the law of England itself".[147] [emphasis added] The origin of the right could possibly be traced to the ancient Common Law writs - De Homine Replegiando which was rooted in the ancient process of replevin and the writ of Mainprize.[148] But, as Stephen observes, "the main foundation of the Bail Law" was to be found in the Statutes of Westminster, the First of 1275 (3 Edw I c.15), which specifically dealt with "which prisoners be mainpernable and which not" and with "the penalty for unlawful bailment".[149]

1.47 The object of the statute was to guard against the corrupt practices of the Sheriffs and others who, it was stated "have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not repleviable, and have kept in prison such as were replevisable because they would gain of the one party and grieve the other". Imprisonment for three years was provided as penalty for "unlawful bailment" and on the other hand "amerciaments to the King" was provided as penalty for "unjust or corrupt" detention. As we shall see, provisions in respect of bail were also to be found in the Habeas Corpus Act 1679 and even in that Act a sanction against "unduly delaying the writ" was provided.[150] As Stephen observes, although the statute defined the bailable and non-bailable offences, it did not distinctly indicate whether "persons arrested on suspicion (e.g. by hue and cry) were to be bailed or not."[151] Indeed, the statute did not codify the law relating to bail and

this position still prevails despite the fact that a large number of enactments have since been passed in respect of bail including the latest Bail Act 1976. The various old statutes generally dealt with the powers and procedure in relation to bail of the subordinate courts and, as Stephen observes, "the power of superior courts to bail in all cases, even high treason, has no history" and that it has existed unaltered from earliest times.[152] In cases of treason, in 1848 statute (11 & 12 Vic. c.42) provided that no bail may be taken except by order of the Secretary of State or the High Court.

1.48 Thus, the right to bail existed and still exists at common law but it is an "entrenched right" and it is therefore not an ordinary right available under both statute and common law. The statutes have from time to time qualified the right, by defining the extent of the right exercisable under different circumstances through the process of regulating the powers and procedure of the courts where the right was eventually exercised. The sanctions enacted against refusal of bail, and the fact that the Bill of Rights recognised that "excessive" bail made the right illusory and prohibited such exercise, made it incumbent on the judiciary to exercise its powers in relation to bail judicially. It may be mentioned in this connection that, apart from the statutory sanctions, at common law, on proof of malice or improper motive, for refusal of bail the judge could be sued in damages.[153] This position, as we shall presently see, has been fortified in the latest enactment.

(ii) The Modern Law - The Bail Act 1976

1.49 The object of the enactment was elaborately spelled out in the long title which makes it clear that it is not a complete code. However, by virtue of s.1(2) the common law provisions in respect of bail were superseded to the extent provided in the Act. Similarly, the existing statutory provision relating to bail was amended and repealed to the extent provided for in schedules 2-4 by virtue of s.12. The important provisions of the Act are to be found in ss.3 to 5 and schedule 1

which we may briefly examine to see the new cast of the right.

1.50 The Act regulated the procedure of all criminal courts in England and Wales in bail matters. s.4 dealt with the "general right to bail of accused persons and others". It dealt with the procedure when an accused person applied to "a court for bail" and also when he appeared or was brought before "a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offence"; it did not apply to proceedings "on or after a person's conviction" or to proceedings against a fugitive offender. By sub-s.(5) read with schedule 1 the "conditions of bail" were defined. The schedule described "persons entitled to bail" and was in two parts. Part I dealt with cases of "defendants accused or convicted of imprisonable offences" and Part II with those concerned with "non-imprisonable offences". In both cases "exceptions to right to bail" were set out separately in detail [emphasis added]. These must therefore be considered as controlling the exercise of discretion of the courts in the matter of granting bail and therefore containing the core provisions of the Act.

1.51 It is apparent that the Act did not disturb the main elements of the existing criteria. Paragraph 2 of Part I of the schedule is quoted below:

> The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to condition or not) would -
> (a) fail to surrender to custody, or
> (b) commit an offence while on bail, or
> (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

We have supplied emphasis in the extract to indicate the greater measure of control sought to be exercised on the exercise of discretion of the court, possibly in view of the need to preserve the "entrenched" character of the right. However, it may be pointed out that the concept of "protective custody" installed in both parts of the Schedule (in para.3 in each case)

does not receive similar treatment: the requirement of "substantial ground" has been omitted and the twin criteria also - "protection", and in the case of a child or young person, "welfare" - appear to confer a wide discretion on the court.

1.52 However, the last-mentioned flaw was, to some extent, removed by sub-ss 1(a), (3) and (4) of s.5 which required the decisions on bail to be recorded by the court and provided that when a Magistrates' court or the Crown Court withholds bail it had not only to give reasons therefor but also to give a copy of the "note" thereof to the person in relation to whom the decision was taken. It is conceded that this position can only obtain if the two paragraphs 3 of Parts I and II of Schedule I were read in conjunction or subject to the provisions of s.5 and there was no reason why it should not be done in view of the fact that Schedule 1 and s.5 carried the common caption "supplementary provisions" although in s.5, unlike s.4, the application of the schedule to its provisions was not explicitly contemplated. Notice may also be taken of the fact that, in so far as decisions under paragraph 2 of Part I were concerned, paragraph 9 thereof itself provided for additional guidance to the courts which was, significantly stated in a mandatory form - "the court shall have regard to such of the following considerations".

1.53 Of the "general provisions" dealt with in s.3 notice may be taken of the fact that the old system of taking recognizances from persons granted bail was abolished and a "duty" was placed on the person bailed to surrender to custody: breach of this duty was made punishable under s.6. The section also accepted and embodied the recommendation of the Working Party that sureties should not be required as a matter of course, in that sub-ss.(3)(b) and (4) provided that before release on bail a person "<u>may</u> be required" to provide a surety but sub-s.(6) empowered the court ["only"] to require the person to comply, either before release on bail or later, with such requirements as might "appear to the court" to be necessary, among other things, to secure that he surrenders to custody. Nevertheless,

it must be said that the Act has, in many respects, added to the "entrenched" character to the right to bail and the last-mentioned provision does not detract from the inherent strength of the ancient right. Indeed, in the recent past the right has only been "suspended", in the Habeas Corpus Suspension Acts[154] and now in the Northern Ireland (Emergency Provisions) Act 1973 the right has only been "restricted" in that s.3 permits only a High Court judge to grant bail.[155]

(C) Unlawful detention and the Writ of Habeas Corpus

(a) The Writ and the Common Law

(i) The Right to the Writ - a Constitutional Right

1.54 In our search for "entrenched rights" in the unwritten British Constitution we have already found one, namely, the right to bail but the right to the writ of habeas corpus ad subjiciendum had greater importance in that it could procure peremptory anullment by the judiciary of an unlawful detention by restoring the prisoner to his full and complete liberty. However, as we shall soon discover, it was in fact a procedural right - a remedy evolved by common law courts - which was recognised and entrenched more deeply in the legal system of the state, by statutes.[156] Indeed, the remedy of habeas corpus represented another aspect of "due process of law" which had to be preserved and fortified as was done in the case of the right to bail.

1.55 As observed by Dicey, the statutes which are popularly called Habeas Corpus Suspension Acts hardly correspond with the name they have received; they do not even mention the words "habeas corpus".[157] In a statute enacted on February 28, 1800 (39 & 40 Geo.3, c.20) it was recited as follows:

> Whereas it is necessary for the public safety. . . that any person who shall be in prison within the United Kingdom of Great Britain or at any time thereafter by warrant. . . signed by any of His Majesty's Principal Secretaries of State. . . for high treason, suspicion of treason or treasonable practices, may be detained in safe custody without Bail or Mainprize, until February 1, 1801; and that no Judge or Justice of the Peace shall bail or try any person so committed. . . any law or statute to the contrary notwithstanding. [emphasis added]

As we shall see, although the Parliament later adopted a different device to achieve the same result, the position did not alter materially; the courts, recognising the changed circumstances, reoriented their approach but did not rule that under no circumstances could they entertain and allow any application for the writ of habeas corpus.[158]

1.56 The fundamental character of the right is therefore attributable to its immutability but its constitutional importance finds expression in the fact that it had nurtured and protected for several centuries citizens' "civil and political rights" as they are now called, namely, the right to liberty and security of person and the right to be protected against arbitrary arrest or detention.[159] But these rights, as we have seen, were existing at common law and were recognised as such in Magna Carta which, in turn, has to a great extent contributed to the evolution of the writ in its present form. Holdsworth categorically asserts that the judges were influenced by chapter 39 of Magna Carta in developing writs to safeguard personal liberty and that in this process they were assisted by legislature.[160] He refers to the mediaeval writs of De Homine Replegiando, Mainprize and De Odio et Atia (mentioned as the Writ of Inquisition in chapter 36 of Magna Carta) which, he points out, proved inadequate in due course, in protecting personal liberty.[161]

1.57 There is however no dispute on the point that it was not an "original" writ; it was a part of the "mesne process" of common law. Instances have been cited of the use of the process dating back to 1199 and 1214. In the latter case, an order in the Coram Rege Rolls in the TYREL case has been quoted as the authority.[162] It is established therefore that the common law courts could direct any person to produce before them any person they named. (Literally, "habeas corpus" meant - to have the body. So when writs in ancient times were issued in Latin, the term appears to have been used in the literal sense.) However, the practice of giving direction to a person having the custody of another

commanding him to produce the latter and to furnish the cause or authority of such custody, which is the gist of the modern habeas corpus could, as has been suggested, be attributed to the writ of "corpus cum causa".[163] It has been observed that evidence exists of such writs being issued by Chancery in 1341 and that in the fifteenth century it had a widespread use in enforcing "privilege".[164]

1.58 Maitland observes that the prisoner who had not been bailed or replevied by the Sheriff or the Justice of the Peace could bring his case by a writ of habeas corpus before the common law courts, as the First Statute of Westminster (3 Edw 1, c.15) in 1275 had defined the cases in which "pledges" were not allowed. The judges of the King's Bench did not consider that the statute had limited their power and in the exercise of their discretion they bailed persons accused of treason, murder and also those committed under the special command of the King or the Council although according to the statute "pledges" were not allowed in such cases.[165] There were precedents, he says, of such persons having been bailed by the King's Bench in 1344 and also subsequently during the reign of the Tudors and James I as had been committed by the King or the Council.[166] Both writs, the ancient habeas corpus and corpus cum causa, were judicial writs and it is possible that there was a period when both forms were used. A judicial writ did not require to be stamped with the Great Seal out of Chancery and could be issued by any judge under his personal authority, perhaps by "word of mouth" if the gaoler were present to hear the command.[167]

1.59 Indeed, as has been suggested, the "quality" of the writ was dependent entirely upon the "command" of the court which was a manifestation of the "independent existence of Royal authority through the administration of royal court." It has been said - "The stronger the King's judges became in a relatively decentralised and anarchic society, the more could they seek to impose their will. And what was more natural than

that the exercise of that will should take the form of personal commands from those same judges."[168] To this we may add Maitland's observations that during mediaeval times England was full of "private prisons of Lords". On the prayer of the imprisoned subject the King sent his writ to the keeper of the gaol bidding him to have the prisoner's body brought before the King's court - this prerogative of the King, in due course, came to be regarded as the right of the subject.[169] The following passage from Blackstone explains more fully the "prerogative" nature of the writ:[170]

> . . . [it is] directed to the persons detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention. . . to do, submit to and receive whatsoever the judge or court awarding the writ shall consider in that behalf. This is a high prerogative writ and therefore by common law [issues] out of King's Bench . . . for the King is at all times entitled to have an account why liberty of any of his subjects is restrained. . . [emphasis added]

The foregoing discussion has an important bearing on the extent of the hotly debated right at common law of making successive applications to each of the several judges of the different courts.

1.60 Upon a writ being issued, observes Coke, "the gaoler must retourne, by whom he was committed, and the cause of imprisonment" and that if the court found that the imprisonment was contra legem terrae, the prisoner had to be discharged; if "doubtful and under consideration", he had to be bailed; and if "just and lawful", he had to be remanded.[171] According to Blackstone, the English law defined the "times, the causes and the extent, when, wherefor and to what degree the imprisonment of the subject may be lawful". This was manifested by the rule that upon every commitment the reason for which it is made has to be expressed so that the court could, upon an habeas corpus, examine into its validity and according to the circumstances of the case either discharge or bail or remand the prisoner.[172]

1.61 Thus, we see that it was natural for the judiciary to encounter mainly two problems in establishing the writ as a quick and efficacious

remedy, namely, the interpretation of the term "legem terrae" and the scope of inquiry into the "gaoler's retourne". In solving these problems the judges were confronted with challenges from the executive which they could meet effectively only by taking their stand on the primacy of common law, which invested them with the right to state the law. At the same time it is difficult to lose sight of the nature of their office. How secure was their own tenure to ensure their independence ? We find that it is only after the Revolution that the judges were commissioned - quandiu se bene gesserint - to hold office during good behaviour. This was confirmed by the Act of Settlement in 1700. Earlier the judges have been holding office - durante beneplacito - during the King's good pleasure.[173] Much depended therefore on the attitude of the executive.

1.62 It has been observed that the conduct of the judges in the 1630s undermined the public prestige they had enjoyed during the era of Coke.[174] It has also been observed that the judges of Elizabeth's reign had returned a very obscure, "perhaps designedly obscure answer" to the question, whether commitment by the special command of the King was a sufficient return.[175] Reasons are not far to seek. It is a well established fact of history that the royal power started gaining ascendancy during the reign of the later Tudor monarchs and reached its zenith in Stuart times. King James I, in The Trew Law of Free Monarchies, pronounced that the Kings were "God's vice-regent on earth" and that there were no legal limits to their powers.[176] Still, he did not deny the primacy of common law[177] and we have noticed earlier that during his reign the judges had in fact bailed persons committed by the King.[178] His successors however started interfering with the independence of the judiciary by resorting to arbitrary dismissal of the judges and therefore they had become, as has been suggested, "servile creatures".[179]

1.63 It will not be wrong to suggest that the people had begun to consider the writ of habeas corpus a constitutional right before the

"unconstitutional" phase in history had begun and that statutes were passed to recognise the constitutional character of the right. Both Jenks[180] and Holdsworth[181] refer to the cases of SEARCH[182] and HOWELL[183] decided in 1588 and to the "Resolution in Anderson" by the Judges and Barons in 1591 and assert that these events had established habeas corpus as a remedy which was "substantive" according to Jenks and "best" according to Holdsworth. Jenks categorically asserts that the Habeas Corpus Act of 1679 had merely set at rest the "doubts" as to "competent tribunal" and about the writ's nature, namely, "as of right".[184]

1.64 It is also necessary to take notice of the fact that in both the Extradition Act 1870 (vide s.11) and The Fugitive Offenders Act 1967 (vide s.8(1)) it is provided that the magistrate committing under those Acts must inform the person committed that he has a right to apply for the writ of habeas corpus. The fact that persons other than British subjects are committed under these Acts show that the right to the writ is a part of the immutable law of the land which is administered alike to all persons. In fact persons detained under the provisions of the Immigration Act, as we shall see, have successfully pursued the remedy of habeas corpus.

(ii) Some landmark cases of constitutional importance

1.65 We may now examine generally some of the important decisions which provide the legislative history of the relevant statutes and also show how the judicial approach was responsible for securing the writ the status of "constitutional right". We take up first the DARNEL case,[185] which is supposed to have precipitated the first constitutional crisis in English legal history. King Charles I having dissolved Parliament appointed a Commission to raise "loan money" for the prosecution of war. The Commissioners were privately instructed as to their function and duties. Several defaulters were imprisoned but only five Knights, including Sir Thomas Darnel, applied for habeas corpus. Sir Nicholas Hyde, C.J., speaking

for the court, held as follows:

(a) The court was "not bound" to examine the truth of the return but the sufficiency of it.

(b) The precedents cited do not bear out the prisoner's contention that when a man was committed by the King's command and no just cause was shown, upon a general return the party was "ipso facto" delivered if the return was not amended.

(c) There were precedents to show that a person detained "per speciale manadatum domini regis" was either remanded or delivered by the King's command. The Resolution by the Judges (in Anderson) also endorsed this, saying "we know not the cause of the commitment".

(d) If no cause of commitment be expressed, it was to be "presumed to be for matter of state" of which the court could not "take notice".

The Report carried the following footnote:[186]

> Sir Randolf Crew shewing no zeal for the advancement of the loan was then removed from his place of Lord Chief Justice, and Sir Nicholas Hyde succeeded in his room: a person who, for his parts and abilities, was thought worthy of that preferment: yet nevertheless came to the same with a prejudice, coming in place of so well-beloved and so-suddenly removed.

We are also told on the authority of Lord Campbell that Sir Nicholas Hyde was elevated to the Bench to ensure that the prisoner was remanded.[187]

1.66 The effect of the decision in the DARNEL case was annulled by the Petition of Right but the controversy did not end. Nine members of the House of Commons, including Seldon, were committed under the King's command for seditious words spoken during the "great debate" following the DARNEL case. This provided the occasion for another habeas corpus proceeding. In this case the cause was given and, as Maitland observes, the Judges ought to have bailed the prisoners.[188] Instead, they ordered that the prisoners should also find sureties for good behaviour.[189] Therefore, after the Long Parliament met, in 1640, the first Habeas Corpus Act was passed. This action, it is apparent, was called for by the unusual approach of the judges of the Stuart period which underlined the subservience of the judiciary.[190]

1.67 In BUSHELL's case,[191] in the return to the writ of habeas corpus it was stated that:

> the prisoner, being a juryman, among others charged at the Sessions Court. . . to try the issue between the King, and Penn and Mead, upon an indictment, for assaulting unlawfully and tumultuously, did contra plenem et manifestem evidentiem openly given in court, acquit the prisoners indicted, in contempt of the King etc. . .

The jurors had, in fact, been fined but the applicant did not pay and was imprisoned. The court held that the jury could not be fined for that would be "an attaint upon an attaint". Because it was an act of the court of Sessions it could not be accepted that the commitment was for a cause "particular and sufficient". As to its own jurisdiction, the court cited precedents to show that the Court of Common Pleas had discharged persons imprisoned by other courts upon insufficiency of return and not merely for "privilege". For a false verdict a juror could be punished by attaint only and therefore the cause returned being insufficient, the prisoner was entitled to be discharged.

1.68 The JENKES case[192] is supposed to be the immediate cause for the 1679 Act. The occasion for the detention of Francis Jenkes was a speech made by him at the Guildhall in London suggesting a petition to be submitted to the King for summoning a new Parliament. He was called to the Council Chamber and there he was interrogated by the King, the Lord Chancellor and others and then upon a warrant of the Council he was committed to prison. In the warrant the fact of his interrogation was stated and he was charged for behaving in a "seditious and mutinous manner". The Lord Chief Justice was moved for the writ which was denied on the ground of vacation. The Lord Chancellor was then moved, also without success, although it was conceded that the Court of Chancery is ever open. Eventually the Lord Chief Justice had to approach the King for advice and it is stated that, "As soon as His Majesty understood that what was demanded was the subject's right, he immediately commanded that the laws should have their due course, which their Lordships had stopped; and accordingly he was bailed."

1.69 Whether or not the courts dealt with criminal matters in a

different way from the beginning in dealing with applications for habeas corpus, the judges of the King's Bench, as we have seen,[193] used to bail prisoners notwithstanding the Statutes of Westminster the First of 1275 (3 Edw 1, c.15). This jurisdiction, which they have been exercising as a long established tradition, the judges refused to exercise in each of the three cases of DARNEL, SELDON and JENKES. In the BUSHELL case, on the other hand, the court did in fact, inquire into the truth of the return. It is therefore not surprising to find that the 1679 Act laid pronounced emphasis on the provision for bail, as in s.2, and attached no importance to the latter point. The Statute merely buttressed the existing rights by sanctions.

1.70 The classic example of the use of the writ in a non-criminal matter is to be found in the famous SOMMERSETT case.[194] The master of a deserted negro slave apprehended him and put him on board a ship to be taken to Jamaica and sold there. In the return to the writ it was pleaded that there was a right to detain and sell him according to the laws of Jamaica from where he was brought to England. The celebrated dictum of Lord Mansfield is quoted below at some length:

> The only question is whether the cause of the return is sufficient. . . the power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . . it is so odious nothing can be suffered to support it, but the positive law. . . I cannot say that this case is allowed or approved by the law of England; and therefore the black must be discharged.

1.71 In the HOBHOUSE case,[195] the prisoner's commitment was under the warrant of the Speaker of the House of Commons. In the application for habeas corpus it was held that because it was a "writ of right" it did not mean that it should be issued without a probable cause. The writ ought not to issue as of course but on a probable cause verified by affidavit. The writ was, in this case, granted on the submission that proper time for pointing out the defect of the warrant would be upon the return.

1.72 In Ex p. BESSET[196] it was held, on an application by a French national, that a habeas corpus was claimable at common law. It was found that the warrant of commitment was not in accordance with the provisions of the enactment which was of the nature of an Extradition Act. Subsequently, the 1870 Act, as we have seen, did, in fact, recognise this right.[197]

(iii) The case-law on the ancillary rights at Common Law

1.73 We propose to examine some decisions now to show how the "constitutional" character of the writ was buttressed by the ancillary rights that came to be recognised at Common Law. In COX v HAKES, Lord Halsbury observed as follows:[198]

> If release was refused, a person detained might. . . make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. [emphasis added]

Where did the common law judges find justification for evolving such a procedure ? This question is also answered by Lord Halsbury: "The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom." [emphasis added] It is apparent that the theory was rooted in the common law ethos of liberty although, as we shall see, the correctness of two of the several dicta of his Lordship has been challenged. The three ancillary rights indicated by his lordship are generally referred to, in short, as - (1) the right of successive applications; (2) the right of appeal; and (3) the right of precedence over other business of the court. In the instant case the court held that there was no right of appeal at Common Law against an order of discharge. In a subsequent decision, as we shall presently see, the same court followed the decision in the instant case and went further to recognise the positive right of appeal up to the highest tribunal in the case of refusal of discharge.

1.74. In SECRETARY OF STATE FOR HOME AFFAIRS v O'BRIEN[199] the House of Lords was called to pronounce upon the "legality of discharge" of a prisoner detained under an order passed under the Defence of the Realm Regulations, as applied to Ireland in accordance with the provisions of the Restoration of Order in Ireland Act 1920. The prisoner was arrested and deported under the order to Dublin where he was detained by the Government of the Irish Free State. The Court of Appeal having allowed the application for habeas corpus holding the detention to be illegal, the Home Secretary had come up in appeal. It was held that the order was to be justified by the Minister responsible and that he had no power to order a person to be interned in the Irish Free State. Their Lordships dismissed the appeal as incompetent. The Earl of Birkenhead observed:[200]

> [the writ] is of immemorial antiquity. . . It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege. . . In the course of time certain rules and principles have been evolved. . . if the writ is once directed to issue and discharge is ordered by a competent court, no appeal lies. Correlative with this rule, and markedly indicative of the spirit of law is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from court to court until he reaches the highest tribunal in the land.

It may be profitably recalled here that in the COX case the Court of Appeal had reversed the decision of the Divisional Court which had, unlike this case, granted the writ and the question whether an appeal lay against the refusal of the writ was expressly left open.[201] Viscount Finlay in this case referred to old practice and said that the matter was then disposed of at once on exparte application.[202] Lord Dunedin expressly approved Lord Halsbury's dictum which has now become controversial.[203]

1.75 A few years later the Privy Council also, in the ELEKO case (infra),[204] followed the decision in the COX case and upheld the right of successive applications. The decision in the ELEKO case was examined by Lord Parker, C.J. in, In re HASTINGS (No.2).[205] His Lordship observed that the decision has remained unquestioned, except by an Irish case[206]

and that there were also parallel decisions of the Canadian and Australian courts. The correctness of the decision was, therefore, left open for future consideration. On the facts of the case, his Lordship held that the second application before another Divisional Court of the Queen's Bench Division was incompetent. We must confess that it is not easy to follow the reasons given in the decision but the legislature was quick to see the difficulty experienced by his Lordship and, as we shall see, the law was amended to terminate the right of successive applications.[207] Nevertheless, the question is res integra in so far as other jurisdictions of the Commonwealth are concerned. It is necessary, therefore, to examine, even in brief, the controversy surrounding the decision in the COX case about the right of successive application.

1.76 The main plank of the argument which has termed Lord Halsbury's opinion as an "inadvertent dictum"[208] appears to be based on the suggestion that his Lordship might have overlooked the fact that the common law courts, in olden times, sat in banco.[209] The fact that some of the other judges in their separate opinions in the COX case did not use the word "judge" but "court" and in Ex p. PARTINGTON[210] there was a similar difference between Park B. and Pollock C.B., does not, we submit, suggest that Lord Halsbury had used the word "judge" inadvertently, oblivious of the ancient procedure. It must be remembered that in the COX case the main point for decision was concerned with procedure, namely, whether the provision of appeal in a criminal matter introduced by the Judicature Act 1873 was also applicable to habeas corpus proceedings. His Lordship dealt with the point with meticulous care, as follows:[211]

> I have insisted at some length upon the peculiarities of the procedure. . . one cannot suppose that the Legislature intended to alter all the procedure by mere general words, without any specific provision as to the practice under the writ of habeas corpus, or the statutes which from time to time have regulated both its issue and consequences.

The decision, we submit, stated the law correctly and was rightly followed in later cases.

1.77 Lord Goddard does not dispute that the right to successive applications and the negative right prohibiting an appeal against discharge did in fact grow up but unlike Lord Halsbury who speaks of ancient procedure he traces the origin of the right to the period following the enactment of the 1679 Act.[212] On the other hand, Heuston, relying mainly on an Irish decision, STATE (Dowling) v KINGSTON (no.2) appears to suggest that the right of successive applications was limited to different courts and did not extend to several judges. Apparently agreeing with Lord Goddard he tends to suggest that the ratio in the ELEKO case was based not on the COX case but on the right accruing from the 1679 Act.[213] He observes that the effect of the Judicature Act weighed heavily with the Privy Council but this was precisely the reason, as we have seen, which also weighed with the Court in the COX case and as such we submit that it is not correct to say that the decision in the ELEKO case was not based on the COX case. Professor de Smith, relying on the three decisions in, In re HASTINGS,[214] suggested that "possibly successive applications to individual judges could be made in vacation" [emphasis added].[215] But it is to be noted that Lord Parker, in delivering the unanimous judgment of the court in the second of the three decisions, had made it clear the decision should be read as limited to the facts of the case. Without examining the divergent views in detail we might at once suggest that sufficient importance ought to be attached to the fact that being a "high prerogative writ" dependent on the "personal command" of the judge, there was, a priori, co-ordinate jurisdiction in each judge to issue the writ. This aspect of the matter appears to have been overlooked by the protagonists of the different views.

(b) The Writ and the Statutes

(i) The Habeas Corpus Acts

1.78 We propose to examine briefly some of the statutes enacted between the years 1640 and 1816, each one with the common title "Habeas Corpus Act". The first enactment of 1640 (16 Car. 1 c.10) expressly

referred to the "Great Charter" (Magna Carta) and to the various statutes affirming the Charter, and also to the "common law of the land" by way of asserting their primacy. It abolished the Court of Star Chamber and regulated the power of the Privy Council, having branded both these institutions as a "means to introduce an arbitrary power and government". By s.7 it was provided that the Act was to extend only to the Court of Star Chamber and "courts of like jurisdiction hereafter erected and to commitments, restraints and imprisonments of person or persons commanded or awarded by the King. . . or the Privie Councell." The important provision was contained in s.6 which, in material parts, ran as follows:

> Every person committed contrary to this Act shall have an habeas corpus for the ordinary fees. . . unto the court of the King's Bench or the Common Pleas in <u>open court</u> shall <u>without delay upon any pretence</u>. . . have forthwith granted to him a writ of habeas corpus. . . upon return made the court shall examine and determine whether the cause of commitment be just or legal and shall thereupon. . . either delivering, bailing or remanding. . . [emphasis added]

1.79 In the preamble of the 1679 Act (31 Car. c.2) it was stated that "great delays" had been made in making return to the writ "contrary to the known law of the land" in the cases of persons committed to custody for "criminal or supposed criminal matters" and in s.s.2 and 6 the Act laid down provisions as regards bail. Originally s.1 excepted the cases of both treason and felony but in 1967 the word "felony" was deleted by the Criminal Law Act. It fixed a time limit for the return, three days in a usual case. Other sanctions are to be found in ss.4, 5, 8, 9 and 11. To "neglect" either to make the return or to produce the body was made an offence. To re-arrest a person enlarged on <u>habeas corpus</u> was also an offence. Transfer of custody of the prisoner could only be effected by <u>habeas corpus</u> or other legal writ. Perhaps s.9 embodied a sanction of an extreme nature: it was directed against the judiciary itself; it contemplated a penalty for "unduly denying the writ". Sending prisoners beyond the seas was prohibited by s.11, perhaps as a result of the <u>CLARENDON</u> case.[216] In s.9 the "competent tribunals" were mentioned - the courts of Chancery, Exchequer,

King's Bench and Common Pleas. Contrary to the contention referred to earlier[217] it contained no indication of any right of successive application to these courts; nor was it indicated that the jurisdiction was "conferred" on these courts for the first time.

1.80 The two enactments that followed in 1803 (43 Geo 3 c.140) and 1804 (44 Geo 3 c.102) made more effective the writs of habeas corpus ad testificandum, by which a prisoner could be brought to give evidence. But we are not concerned in this study with this writ or with the other forms of the writ of habeas corpus except that of habeas corpus ad subjiciendum.

1.81 Next came the 1816 Act (56 Geo 3 c.100). By s.6 the general provisions of the Act were extended to the 1679 Act. In s.1 it was provided that a Judge could issue the writ in vacation and in cases other than for criminal matter, or for debt, or on civil process. These two provisions had to be read with the preamble which contained a recital to the effect that the writ having proved to be "an expeditious and effectual method of restoring any person to his liberty" it would be conducive to "public advantage" to extend the remedy of such writ, to enforce obedience thereunto and to prevent delays in the execution thereof. It was also noted in the recital that the 1679 Act had a limited scope as it extended to only "criminal or supposed criminal" matter. By s.2 non-obedience to the writ was made contempt of court. The common law power of the judges was supposed to be enlarged by s.3 which is set out below, in material parts:

> . . . in all cases provided by this Act, although the return . . . shall be good and sufficient in law, it shall be lawful for the Justice or Baron. . . to proceed to examine into the truth of the facts set forth in such return. . . and if. . . it shall appear doubtful to him. . . whether the material facts set forth in the said return or any of them be true or not. . . to let to bail the said person. . . [emphasis added]

The section further contemplated examination of the truth of the facts to be continued "by affidavit or affirmation" and empowered the judge "to order and determine touching the discharging, bailing or remanding the party." This was supplemented by s.4 which expressly provided that the truth of the return could be controverted. In both the 1679 and 1816 Acts the long title described them as Acts for "better securing", in one case, and "effectively securing" in the other case, "the liberty of the subject". The description thus maintained the "high prerogative" nature of the writ and indicated their Common Law parentage.

1.82 Mention may now be made of the recent statute which has tampered with some of the important ancillary rights available at common law. We refer in this connection to the relevant provisions of the Administration of Justice Act 1960 (8 & 9 Eliz.2, c.65). s.14 dealt with procedure on "application for habeas corpus" which s.17(2) defined to mean an application for the writ whether it was a "civil or criminal" application. Sub-s.(2) debarred successive applications by providing the twin criteria of the limitation - "same grounds" and "unless fresh evidence is adduced". s.15(2) provided for appeal in civil as well as criminal cases "against order for release as well as against order of refusal". [emphasis added] The right of making successive applications has been branded by a contemporary observer as "an indefensible survival of archaic ideas that seems to have been based on a misapprehension from the first."[218] We find ourselves unable to agree with the suggestion that the right served no useful purpose in the past but we can safely concede that it has outlived its utility as the right to the writ of habeas corpus has now been firmly established. The change in the law brought about by the 1960 Act does not therefore detract from the efficacy of the remedy by forbidding merely successive applications in a limited way (vide s.14(2)), but by providing appeals generally against all orders passed in habeas corpus proceedings (vide s.15) the statute is perhaps affecting the nature of the right in a serious manner. However, the court is still trying to preserve the important character of the right

by adhering to certain salutary rules. An application for habeas corpus still takes precedence over all other business of the court.

(ii) Some important cases under wartime legislation

1.83 The important wartime cases have been examined in detail in an appropriate context[219] but it may be useful to state the position briefly. In all the three cases[220] - HALLIDAY, LIVERSIDGE and GREENE - the prisoners were detained under wartime regulations which authorised the Home Secretary during the two world wars to pass the orders contemplated thereunder. The regulations were framed under statutes and in the HALLIDAY case it was the vires of the relevant regulation that was challenged. It was inter alia contended by the prisoner that the provision of detention without trial was tantamount to an implied repeal of the provision of habeas corpus. The court construed the regulation against the backdrop of the wartime situation and held that the prisoner had failed to establish that it was ultra vires; the remedy was not lost but it was for the prisoner to establish that he was unlawfully detained.[221] Normally, as we have seen, by requiring the cause of "caption and detention" to be returned in a habeas corpus proceeding, the burden was placed on the person who held or authorised the detention. Apparently, the court had changed its approach but found justification for it in the object of the statutes.

1.84 The LIVERSIDGE case arose out of an action for false imprisonment and as such it does not have much relevance to our present discussions but in the GREENE case the court dealt with the scope of habeas corpus proceedings at some length. Viscount Maugham held that the case came under ss. 3 and 4 of the Habeas Corpus Act 1816 but the only fact of which the court could examine the truth, under the regulation, was whether the Secretary of State had reasonable cause to believe the prisoner to be a person of hostile association and that by reason thereof it was necessary to exercise control over him. Affidavits were filed on both sides and the Divisional Court had accepted the statement of the

Secretary of State.[222] But his Lordship proceeded further to hold that it was not necessary for the Secretary of State to file an affidavit in view of the provisions of the regulation.[223] The burden, again, was shifted to the prisoner and the reason for this was attributed to the law. The position was explained more lucidly by Lord Wright, who observed:[224]

> It may be objected that the discretionary powers thus vested in the Secretary of State are just those which were upheld in DARNEL's case and condemned in the Petition of Right. But the answer is that they are here lawful under this regulation because they are conferred by the supreme authority of Parliament and are thus the law of the land . . .

In one case at least, as we shall see, the court attempted to observe the normal rule as to burden.[225] This indicated that the new approach dictated by the changed circumstances was not firmly established.[226] This is also supported by the fact that in both cases, HALLIDAY and LIVERSIDGE, there were forceful dissents which, as we shall see, have come to be accepted as corresponding to the modern approach of the judiciary in England and even elsewhere in the Commonwealth.[227]

1.85 In R v GOVERNOR OF BRIXTON PRISON ex p. SARNO,[228] another wartime case, the usual wartime approach prevailed although the detention was under a different regulation. A Russian national was ordered to be deported and he was held in interim custody authorised by the Aliens Restriction (Consolidation) Order 1914, made under the Aliens Restriction Act 1914. The application failed on the ground that the prisoner had not established that he was a political refugee from Russia, as contended. Low, J., however made a significant remark that if the Executive had said that the writ was to be refused because the custody at the moment was technically legal, that would not have availed if the court found that "what was really in contemplation was the exercise of an abuse of power".

(iii) Some important cases under the immigration and extradition law

1.86 We have considered it proper to club together for the purpose of our study the statutes belonging to two different species to examine the

judicial response for the reason that both had common between them the "foreign" element - the state protecting its national interest against a foreigner in one case and in the other case it was the right of a foreign government to try an offender on which the state adjudicated.

1.87 In R v GOVERNOR OF BRIXTON PRISON ex p. AHSAN[229] the application for writ was by eleven Pakistani citizens, who claimed right to the writ as British subjects by virtue of their being Commonwealth citizens. It was alleged that they had landed clandestinely and were detained in prison. They were examined by an Immigration Officer who had issued to each of them a "notice to refusal of admission" as contemplated by the Commonwealth Immigration Act 1962. The prisoners contended that the notices were bad as they were examined after 24 hours of their landing and as such the Officer had no jurisdiction to detain them. The Crown contended, relying on the wartime cases[230] - HALLIDAY, LIVERSIDGE and GREENE, that the notices were "good on their face" and the return was sufficient. Relying on the 1816 Act Lord Parker, C.J., held that the validity of the return could be challenged. His Lordship also held that the Executive had not discharged its onus to negative the challenge and prove beyond reasonable doubt that the conditions-precedent for the issue of the notices had been satisfied. Reliance was placed on O'BRIEN and ELEKO cases (supra). Referring to the GREENE case, his Lordship said, "The court was not dealing with the question that arises here as to the position 'at the end of the day'".

1.88 Ex p. SCHTRAKS[231] was a case in respect of commitment under the Extradition Act 1870. It was a second application on fresh evidence as contemplated under s.14(2) of the Administration of Justice Act 1960. Lord Parker, C.J., observed that the provision was meant to give "legislative authority" to the three decisions, In re HASTINGS (supra). It was held that the proceedings in habeas corpus were not to be equated with appeal. The court could only see if the prisoner was properly detained. No evidence could be admitted except to show lack of jurisdiction

in one way or another - either because the crime was not within the Act or there was no evidence on which the Magistrate could exercise his jurisdiction. Both these grounds, we submit, could also be taken in appeal. Therefore, it appears that where appeal was not provided legality of a decision, whether judicial, as in this case or executive, as in the AHSAN case (supra), could be tested by habeas corpus.

1.89 In a later decision, in ARMAH v GOVERNMENT OF GHANA,[232] this position was explained and reference was made to Bacon's Abridgement to say that the courts used to issue the writ of certiorari along with that of habeas corpus to bring the record to see the sufficiency of the return. Courts have thus held themselves entitled to correct the error in law of the Magistrate. The court could consider, it was held, whether there was sufficient evidence to satisfy the "relevant test" prescribed by the law under which the order was passed. The court could see whether there was evidence before the Magistrate, in this case, which raised a "strong and probable presumption" against the prisoner, who had been committed under the Fugitive Offenders Act 1881, that he had committed the alleged offence.

(c) The Writ and the dependencies

1.90 We may now examine the position of the writ in relation to the dependencies. Before we examine the relevant case-law we may refer to the relevant statute. In s.1 of the Habeas Corpus Act 1862 (25 & 26 Vict. c.20) it was provided as follows:

> No writ of habeas corpus shall issue out of England, by the authority of any judge or court of justice therein, into any colony or foreign dominion of the crown where Her Majesty has a lawfully established court or court of justice having authority to grant and issue the writ, and to ensure the due execution thereof throughout such colony or dominion. [emphasis added]

Commenting on the Act, Sir Kenneth Roberts-Wray observes that "it applies to a colony where there is a court having authority to issue writ and not to a case in which a colonial court has that authority."[233] [author's emphasis]

He discusses certain decisions and appears to conclude that the common law link has not been snapped by the Act. He rightly posits the jurisdiction of the English court in the "high prerogative" nature of the writ (the common law link) and observes that, "The writ can issue from an English court to a territory under Her Majesty's protection, irrespective of the local basic law, provided that the Crown has sufficient jurisdiction".[234] We may now examine some of the decisions discussed by him.

1.91 In Ex p. ANDERSON[235] a writ to Canada was issued by the court, rather reluctantly, in view of the "higher degree of colonial independence". That common law mandate left them with no choice is expressed in the following passage of the judgment of Cockburn C.J.:

> . . . in establishing a local judicature in Canada, our legislature has not gone so far as expressly to abrogate the right of superior courts at Westminster to issue the writ of habeas corpus to that province. . . Lord Coke, Lord Mansfield, Blackstone and Bacon's Abridgment all agree that writs of habeas corpus have been and may be issued into all parts of the dominions of the crown of England, where a subject of the Crown is illegally imprisoned. . . nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject. [emphasis added]

As we have seen, the 1862 Act sought to provide the answer by trying to fill up the void complained of by their Lordships.

1.92 In R v Crewe, ex p. SEKGOME,[236] the applicant, whose claim to a tribal chieftainship in the Bechuanaland Protectorate had aroused a heated controversy, was detained on the authority of a proclamation issued by the High Commissioner for South Africa stating that it was necessary for the preservation of public peace. The High Commissioner had been empowered by an Order in Council made under the Foreign Jurisdiction Act to exercise in the Protectorate the powers of Her Majesty to do all such things "as are lawful" and by proclamation to provide for, among other things, the prohibition and punishment of all acts tending to disturb the public peace. Vaughan Williams, L.J., referred to the ANDERSON case (supra) and observed that the 1862 Act applied only to the "territorial dominion"

of the Crown and it had no effect in the Protectorate. The word "foreign dominion" used in the 1862 Act did not mean any country out of Her Majesty's dominion which was the sense in which the word "foreign" was used in the Foreign Judicature Act. By the word "dominion" the legislature did not mean "power" but "territorial dominion".[237] His Lordship however held that the proclamation being valid and the detention being lawful it was not necessary to decide the point. Kennedy, L.J. was however more categorical and held that Her Majesty exercised "power and jurisdiction as a protecting and not as a ruling sovereign" in a Protectorate and as such the writ could not be issued.[238]

1.93 The Court of Appeal, in a case from another Protectorate, Northern Rhodesia, however, held that the jurisdiction of an English court depended upon the extent to which the Crown exercised general jurisdiction in that country. In Ex p. MWENYA,[239] reversing the decision of the Divisional Court, it was held that it would be "in conformity with the nature of the writ" if the internal Government of Northern Rhodesia was, in legal effect, indistinguishable from that in a Colony. In the Divisional Court, Lord Parker, C.J. had held that "while the writ will issue to any part of the territorial dominion of the Crown, it will not issue to foreign territories even if such territories belong to a Prince who succeeds to the throne of England".[240] Reference was made to the opinion of Kennedy, L.J. and the following dictum of Lord Mansfield in R v COWLE[241] was accepted as the "authority" for the decision:

> To foreign dominions which belong to a Prince who succeeds to the throne of England this court has no power to send any writ of any kind.

1.94 Thus, we see that the common law link maintained through the high prerogative nature of the writ allowed the English courts to exercise jurisdiction in certain cases notwithstanding the 1862 Act. But after 3 years, in 1865, came the Colonial Laws Validity Act. How this enactment affected the right of the subject also merits consideration. We know that

none of the English Habeas Corpus Acts applied proprio vigore to any "possession abroad". Therefore, s.2 of the 1865 Act could not operate to invalidate any colonial law enacted to abrogate any right conferred by the English Habeas Corpus Acts. Even so, the effect of s.3 was doubtful. Although it provided that the repugnancy provision (s.2) was operative in respect of the enacted law only, could it be said that the implied exclusion of common law also implied that the right to the writ at common law could be taken away by a colonial law ? Roberts-Wray observes, perhaps rightly, that the colonial law could abrogate the right in so far as the jurisdiction of the colonial courts was concerned and not of the English courts, because of the high prerogative nature of the writ.[242]

1.95 In ESHUGBAYI ELEKO v OFFICER ADMINISTERING GOVERNMENT OF NIGERIA,[243] the Privy Council applied the principles enunciated by Lord Halsbury to the judges of the Supreme Court of Nigeria, as to the right of successive applications. Lord Hailsham held that although by the Judicature Acts the courts were combined, still each judge had jurisdiction to hear the application in term time and also in vacation.[244] The appellant was a deposed native Chief who had applied to the Supreme Court for the writ against an order directing his "deportation" to another area. The first application having failed on a technical ground, the applicant made another application. The Nigerian Supreme Court held that although the earlier application was heard and disposed of by a single judge it was nevertheless a decision of the court and a second application by the court could not be entertained. In the Privy Council, the contention of the Nigerian Government was that the right of successive application at common law was from court to court and therefore a second application in the same Supreme Court was incompetent which was, as indicated above, rejected. On merit, the Privy Council held that the deportation order was bad as the condition-precedent prescribed by law had not been satisfied.

1.96 The decision suggests that in the dependencies the common law right

to the writ was exported in full measure, with all ancillary rights. From this we may deduce an answer to the question which the Indian courts had left unanswered.[245] Possibly, the right of a British subject to apply to the English court, in the right of successive application, was not affected by the 1862 Act. The Administration of Justice Act 1960 did not apparently alter this position. In the modern context this question has lost its importance except perhaps in those cases where the Queen is the head of State. But as we have seen, in certain situations, the right to apply to English courts of citizens of such states of the Commonwealth where the Queen does not enjoy a similar status, has been recognised.[246]

1.97 How and when the colonial courts of the New Commonwealth started exercising jurisdiction to issue the writ is another aspect of the matter that needs investigation. This question can, however, be answered only generally in this survey, for English law was introduced variously in the different territories. We can however point with some certainty to the establishment of Supreme Courts in 1774, 1801 and 1823, at Calcutta, Madras and Bombay respectively, when the British subjects residing in those Presidency Towns secured the right to apply for the writ to those courts. The effect of the 1862 Act was considered by Norman, J. of the Calcutta High Court in the AMEER KHAN case,[247] in a limited way. It was held that the English common law was introduced there long before the establishment of the Supreme Court but it was not decided if a British subject resident there could apply to the English court either by passing the Supreme Court or having failed there to obtain the writ.

1.98 The position in Africa and South-east Asia was not much different. The superior courts everywhere in the dependencies, whether called "Supreme Courts" or "High Courts" were modelled after, and invested with powers similar to those possessed by, the High Court of Justice of England. That apart, as we shall see, the Common Law as well as the English statutes were made applicable in the dependencies. However, in India, South-east

Asia and in most of the African territories as well (except West Africa) additional provision was made in the respective Criminal Procedure Codes. This position will be examined in the appropriate context.[248] It will be sufficient, in the present context, to emphasise the fact that the right to the writ of habeas corpus has not only firmly established itself as an immutable part of the law of the land in England but, as we shall see, everywhere in the New Commonwealth, even in One Party States and also states which are or have been, under military rule.[249]

## II. A short study of the polity and society of the New Commonwealth: traditional ideas and institutions vis-a-vis modern aims and attitudes

### (1) The Indian sub-continent

#### (A) The Indo-Aryan civilisation

1.99 The noted Indian historian, K. M. Panikkar, insists that the evolution and development of social and cultural forces in India ought to be related to the movements in Central and South-east Asia in view of the fact that Indo-Aryan civilisation had spread far and wide and had covered those regions.[1] In this study however, we are primarily interested in identifying the common ideas and institutions that still survive or at least retain their appeal in the modern states of India, Pakistan, Bangladesh and Sri Lanka, bearing in mind the fact that the Indo-Aryan influence, which had spread to Malaysia and Singapore also, was more effectively supplanted there (particularly in Malaysia) by the Islamic influence and discussion in this part of the study should therefore be confined to the Indian sub-continent. Indeed, Islamic influence tried to assert itself in Northern India as early as the eleventh century A.D. when some Turkish and Afghan chiefs invaded the region and later when the Delhi Sultanate founded itself firmly in the thirteenth century. But it has been rightly pointed out that the potentates of the Delhi Sultanate as well as of its successor, the Mughal Empire, ruled as Indians and not as foreign sovereigns.[2] Modern Pakistan and Bangladesh have predominantly Muslim populations. Similarly,

over seventy per cent of the people of modern Sri Lanka are Buddhists but Prince Vijaya of the Lion race, after whom the island is named, came from India in 483 B.C.[3] and immigrants from India settled there as early as the third century B.C.[4] Still, in all these states the Indo-Aryan institution of village assembly retains its appeal in some form or other. In India and Bangladesh the panchayat has its popular appeal. In Pakistan the institution of jirgahs possibly inspired President Ayub Khan to promote what he called "basic democracies".[5] In Sri Lanka, the ancient institution of gamsachavas flourished until recently.[6]

1.100 It is to be noted that the Aryan settlement in India dates back about 5,000 years.[7] According to Sir Paul Vinogradoff,[8] who places the Indo-European union of the Aryan family between 3000 and 2000 B.C., before their dispersal the Aryans possessed a fairly high standard of pastoral pursuits and the beginnings of agriculture.[8] He aptly points out that on account of differences in conquests, mixture of races, climate, geography and other conditions, development among the Indians, Teutons, Celts etc. was bound to proceed on divergent lines but he notes that a "traditional and dialectic" affinity continued to exist between them.[9] However, Professor Stuart Piggot observes that, "The Aryan advent in India was, in fact, the arrival of barbarians into a region highly organised into an empire based on a long-established tradition of literate urban culture,"[10] referring to the Harappan civilisation that flourished in the North-west region of India (now in Pakistan) in 2500 B.C.; it was, according to him, "largely self-sufficient and essentially Indian in origin."[11] It was however the Indo-Aryan civilisation which, according to Panikkar, became "one of the major factors of world history at least from the sixth century B.C. and was recognised as such by her sister civilisations of Greece, Persia and China".[12] And fortunately, historical records of this "collateral branch" of the great Aryan family, as Professor Max Muller asserts, "have been preserved to us in such perfect and legible

documents that we can learn from them lessons" to supply what he calls "the missing link" in the "intellectual ancestry" of the Anglo-Saxon race.[13]

(B) The Foundations of the Indo-Aryan Polity and Society

(a) The Village Assembly and the ancient society

1.101 There is copious and unimpeachable evidence to support the proposition that the role of the village community in the succeeding constitutional set-up over the centuries as an important vehicle of continuity has been recognised and maintained by the successive rulers of India. Professor Max Muller tells us that "the political unit or the social cell in India has always been, and in spite of repeated conquests, is still the village community."[14] Indeed, Sir Charles Metcalfe, member of the Indian Governor General's Executive Council had also observed:[15]

> Dynasty after dynasty tumble down. Revolution succeeds to revolution. Hindoo, Pathan, Mogul, Maharatha, Sikh, English are all masters in turn but the village communities remain the same.

Sir Henry Maine also spoke in the same vein:[16]

> The truth is that all immigration into India after the original Aryan immigration, all conquests before the English conquest, including not only that of Alexander, but those of the Mussulman, affected the people most superficially than is assumed in current opinion.

1.102 E.B. Havell, also writing during the golden period of British imperialism, makes an important attempt to find an English parallel institution when he says that, "The description of old English village communities in Sleswick and Jutland given by well-known historians and the characteristics ascribed to the ancestors of the Anglo-Saxon race, correspond closely with what is known of the Aryan settlements in India from their literary records and traditional evidence."[17] He ventures to trace the development of the Aryan system as follows:[18]

> The freedom and general happiness attained by the people of Great Britain with the help of Parliamentary institutions and the richest revenues of the world can hardly be compared with that which the Indians within the Aryan pale enjoyed before and after the fifth century

> A.D. . . . The Indo-Aryan Constitution, built up by the highest intelligence of the people upon the basis of their village communities, and not wrung from unwilling war-lords and landlords by century-long struggles and civil wars, secured to the Indian peasant-proprietor not only the ownership of the land, but very considerable powers of self-government. The powers of the central government, though they might often be abused, were at least delegated to it by the people themselves, and limited by unwritten laws which by common consent were given a religious character.

1.103 This view is endorsed by the first Law Commission of republican India who reiterates that the village as a territorial unit "enjoyed a considerable measure of autonomy" during the early period and that most of the later Hindu and Muslim rulers were mainly interested in the collection of revenue and that they favoured retention of these institutions which facilitated this purpose.[19]

(b) The Institutional Structure of the State and the Law

(i) A General View

1.104 Although the constitution of the State in the Vedic period (c.1500-800 B.C.) was monarchical, corporate life was not unknown to the Aryan and we can say on a high authority (Jayaswal) that the village as a collective unit was well-known and in fact formed the basis of the Constitution of the Samiti, an institution which had a life of over 1000 years.[20] "Going back to the oldest literature of the race," observes Professor Jayaswal, "we find from the Vedas that the national life in the earliest times on record was expressed through popular assemblies and institutions." The Samiti, he adds, was the national assembly of the whole people and election of the King was one of its chief functions.[21] The other institution, the Sabha, which was a standing body of selected persons and acted under the authority of the Samiti as the national judicature, outlived the Samiti.[22] Sir Srinivasa Varadachariar's allusion to the double parentage of Sabha, in the context of his effort to find its parallel in the English Curia Regis,[23] is, perhaps, to be read with reference to the later influence of strong central government, and

the fact remains that while the Saxon Witenagemot was not the source of power of the Curia Regis which was a creature of the Norman Kings, the Sabha had its origin in the popular assembly.

1.105 Professor U.N. Ghoshal is more explicit in saying that the power of the Vedic King was limited by the will of the people as expressed in the Samiti and the Sabha.[24] Dr. R.C. Majumdar endorses this view and adds that, ". . . they [the people] took politics seriously. . . the Samiti in Vedic India was characterised by a keen sense of public life and an animated public activity. . ."[25]

1.106 Professor A.S. Altekar, relying on Vedic evidence, tells us that the village communities enjoyed a practical unlimited autonomy and that "the State was usually co-terminus with the village."[26] Dr. R.K. Mookerji looks at the relation between State and society from another angle and says that the two were distinct, separate and independent of each other, guided by a policy of non-interference; that the King was the head of the State but not of society.[27] Very rightly he draws the conclusion that "this character of local government in ancient India explains the rise of few empires" and a fortiori, we submit, absence of a strong central government also.

1.107 Next in importance to the village community is the institution of the village headman, the Gramani or Gramyevedin of Vedic literature who, according to Varadachariar, had the power to punish criminals except in serious cases. He cites the authority of Professors MacDonnell and Keith and also the Jataka stories (fifth/sixth century B.C.) in support of his contention. It is said that the power may have been exercised by him either personally or in conjunction with the village council and that the office was probably an elective one in the beginning.[28] It is submitted that these probabilities, read against the backdrop of the spirit of the Vedic age, make it probable that the democratic element was retained and nurtured in the institution of the Gramani, and not killed.

This conjecture can be ventured without fear of contradiction as the Cambridge History of India also speaks in similar vague terms about the Gramani: "an officer who appears in Ṛgveda and who was probably invested with both military and civil functions though we have no details of his duties or powers."[29]

(ii) The village assemblies, law and administration of justice

1.108 On this aspect Jayaswal quotes Manu and Arthaśāstra and categorically asserts that the King was under the law. "Apart from the operation of coronation oath and checks and limitation imposed by Paura-Janapada and the council, there was the all-powerful law, the canon law of the Hindus, which is declared again and again above the King and as King of Kings," says Jayaswal and adds that there was separation of executive and judiciary; lawyers were appointed judges.[30] (Varadachariar disputes this).[31] Other relevant information collected from Jayaswal may be summarised thus:[32]

> The King could hear a case only when he was sitting in Council.
>
> The law court was called Sabha which was made up of the community who helped the judge in the administration of justice acting as the jury of the court. They were called "the examiners of the cause" and were concerned with "finding the truth".
>
> The judge was called the "President" or the "Speaker".
>
> Punishment imposed by the Court was carried out by the King.

1.109 According to Altekar, even during the Mauryan period (fourth century B.C.), when the power of the central government reached its zenith, though the village assembly lost its power de jure, the position did not alter de facto.[33] He quotes Brhaspati (c.600 A.D.) who asserted that the King is to abide by and enforce the decision of the pūga, śreni etc.[34] and contests the claim of Sir Henry Maine that the sanction behind the decision of village assemblies was mere approbation. Central power

was used to enforce the decision by physical force of the State at its command, says Altekar.[35]

1.110 Referring to the residuary powers and responsibilities of the King, Varadachariar discards the extreme view that punishment was the prerogative of the ruler.[36] Historic evidence is quoted by him to show that the King could inflict punishment only if seven successive tribunals found a person guilty. However attractive the argument might sound, it is submitted that the evidence appears to have been misquoted. The evidence relates to the republican era when the important functionaries of the State were called the "upa-raja" and the "raja", literally the Viceroy and the King respectively. The similitude in the expressions might have caused the confusion. Another point to be noted in this connection is that the prerogative pleaded did not possess a wide sweep, for, as Dr. N.C. Sengupta observes, "The King's judicial functions include maintenance of peace and security, the prevention of sahasa or violent crimes and infliction of punishment. . ."[3] It thus appears that the King's jurisdiction was limited to a specified category so that the power and functions of the popular court were not totally eclipsed despite the fact that the institution of Kingship was at its zenith of influence. There was at the most a corresponding dimunition in the power of the village courts with the ascendancy of royal power.

1.111 The Vedic period was followed by the republican era which, according to Jayaswal, began sometime in 1000 B.C. and continued up to 600 A.D.[38] It is referred to by Megesthanes (fourth century B.C.) and also in the Buddhist literature of the fifth and sixth centuries B.C. In Aitareya-Brahmana (c.1000 B.C.) it is stated that the greater portion of Aryan India was under republican constitutions.[39] Maximum safeguards for the liberty of the citizen were provided in the Constitution of the Lichchavi Republic (c. fifth-fourth century B.C.). An accused was adjudged guilty only if he was separately so held by the Senapati, Raja, Upa-raja etc.,

the various functionaries of the State. Similar provision for multiple enquiry also figured in the Criminal Procedure Codes of the other Ganas (Republics).[40]

1.112 Before we proceed to examine certain special features of the ancient criminal law, the role of the village assemblies in the administration of justice may be summarised in the words of Professor Sidney Webb, whose views proceed from a close and comparative study of some of the ancient institutions of the Indian and English against the background of jurisprudential developments in England and thus adds a new angle to the perspective:[41]

> The Indian village offers us, like the Quaker meeting, a possibly higher alternative, if we believe in government by consent, in the decision by the general sense of the community. In England our lawyers and statesmen are still encumbered with the Austinian pedantry of a century ago, which taught them that obligations are but the obverse of rights, and that nothing is a right which is not enforceable by judicial proceedings - the inference being that there can be no binding obligation to the public at large. . . the Indian village, like the early English manor, emphasizes obligation rather than rights; and far from confining itself to rights on which some particular person could take action for his own benefit, devotes itself largely to the obligations to the public.

These observations, it is submitted, explain to a great extent the reason why a law of civil injuries did not gain importance in Hindu Common Law and also tend to suggest that in ancient Indian polity the "higher alternative" of community-consensus ensured the dispensation of even-handed justice and protected the liberty of the person without compromising the interest of the community.[42]

(iii) Special features of ancient criminal law and police system

1.113 In the Tagore Law Lectures delivered in 1909, Dr. P.N. Sen has said that in Hindu Law punishment of crime occupies a more prominent place than compensation for wrong.[43] In the case of injury to person, however, the victim could also recover solatium for the pain inflicted in addition to expenses to which he might be put to as a result of the violence done to him.

"The law-givers condemned a crime not so much because it involved an infringement of private right but because it imperilled society and the tranquillity of the people at large," says Dr. Sen.

1.114 Dr. R.B. Pal tells us in his Tagore Law Lectures of 1930 (on Hindu Law of the early period) that, "There is no clear indication of an organized criminal justice either in the King or in the people. There still seems to have prevailed the system of wergeld (vaira) which indicate that criminal justice remained in the hands of those who were wronged. In the later literature however the King's peace is clearly recognised."[44]

1.115 Still, it must be admitted that the early position of this branch of law is obscure. Dr. R.C. Majumdar introduces a third element of uncertainty by postulating that the two systems of justice were contemporaneous.[45] He speaks of justice being administered by the King with the help of Purohita (priests) and probably also advisers and of the common punishment which was to tie the criminal to a stake. Then he says: "The system of wergeld (vairadaya) was in force and we come across the epithet satadaya, that is, one, the price of whose blood was one hundred [cows or coins]."

1.116 That a positive development in this branch of law took place in India in the early stages appears from the observations of Dr. P.K. Sen[46] in his Tagore Law Lectures which Varadachariar had briefly summarised thus:

> The predominant feature of crime according to Hindu Law is its quality of causing alarm to the people [p.124; punishment for wrong-doing for preservation of social order was conceived in ancient times [p.89]; there was no theory of retribution or vengeance in the Hindu penal system [p.110].

1.117 Whatever might be the earlier stage of the law on this point, one conclusion can be safely drawn. While law in India was developed progressively by the Aryans here so that it could outgrow its primitive and tribal origin, in England the idea of compensation associated with the origin was frozen. This phenomenon is reflected in the primacy attained by the law of tort in England. The Indian process is reflected in the

early beginnings of the classification of disputes which did not correspond to civil and criminal divisions according to modern notions of justice. Varadachariar refers to the classification of Gautama (c.600 B.C.) based on covetousness (Dhanamula) in one case and in the other case on desire and anger (Himsamula) and profers the opinion that this reflects the Hindu outlook which lays more stress on duty aspect of each situation.[48] A priori we may conclude that the basic issue in all types of litigation, generally, in ancient times, must have been - whether a person has failed to perform his duty and is to be compelled to do so and not whether a person's right has been infringed and he is to have a remedy. It is trite to say that the general concept of justice in England is founded on the oft-quoted maxim - ubi ius ibi remediem. Vinogradoff was therefore not wrong in saying that development in the different branches of Aryan society was bound to proceed on divergent lines.[49]

1.118 Dealing with the concept of criminal justice in ancient India, Lingat points out that the subject belonged not to the science of Dharma but to Artha.[50] He relies on the authority of Yājñavalkya (c.100 A.D.) who calls it raja-dharma (also called prakīrnaka in other dharma sastras) to signify the distinct aspect of the royal authority which was concerned with the police functions of the State, He also refers to Manu who enjoins the King to "root out the thorns" (kaṇṭaka-śodhana) of his realm. Manu is quoted as saying - "The King should take care to render himself harmless of those subjects who are liable to compromise public order by their action. . ." [emphasis added] Lingat also quotes Kātāyana to suggest that the class of crimes grouped under prakīrnaka consisted of the King employing spies for the purpose of taking preventive measures."[51] [emphasis added]

1.119 Book IV in Kauṭilya's Arthaśāstra (c.300 B.C.) is wholly devoted to the topic of kaṇṭaka-śodhana. Professor P.V. Kane observed that Kauṭilya

deals with such a large number of offences that "his treatment compares favourably with such modern criminal codes as the Indian Penal Code."[52] The fact that offenders were brought up for punishment by the King's officers, says Kane, shows that "offences [were] not viewed as mere private matters but a matter in which the State was concerned for the eradication of crime in general."

1.120 It will be useful to note some of the salient features of the account given in the Arthaśâstra. Varadachariar says that, "Some of the provisions resemble the security sections of the Indian Code of Criminal Procedure though the procedure contemplated is not the same."[53] Examining the text we find that in Chapter IV of Book IV, it is stated that:

> There are thirteen kinds of criminals who secretly attempting to live by foul means destroy the peace of the country. They shall be either banished or made to pay an adequate compensation, according as the guilt is light or serious.[54]

It may be noted that in early English laws on vagrancy, which had some elements in common with Indian law, banishment was also one of the prescribed punishments. Other provisions of the chapter indicate that they were applied to state officials also and their honesty was tested by employing spies and other methods.

1.121 Another salutary provision directs that three days after the commission of a crime no suspected person shall be arrested unless there is strong evidence to bring home the charge.[55] No doubt, this is apparently meant to counterpoise the provision of torture to which end some other provisions are also directed: thus "false prosecution" is made an offence and production of conclusive evidence is insisted upon "to exclude cases of accidental presence at the scene of theft, accidental resemblance to the thief, accidental presence near the stolen article";[56] it was considered that such circumstantial evidence may lead to torture which in turn may lead to confession.

1.122 In Medhatithi's commentary on Manu cited by Professor U.N. Ghoshal we find a glimmer of approval of the right of private defence extending to preservation of one's own property and also the "interest of others":

> The King cannot stretch his arms to reach every individual. There are some wicked persons who obstruct even the royal officers [who are] very valorous and intent upon [the discharge of] their duties. But one always fears a person wearing weapons. Hence using weapons on all occasions is justified.[57]

1.123 What kind of law-enforcement machinery existed in ancient India ? We may now examine this briefly to complete the picture of the administration of criminal justice. According to Varadachariar only a stray reference here and there is found in the Dharmaśāstras about the police system.[58] A text of Apastamba (c.450 B.C.) requires a ruler to appoint "pure and truthful" men of three castes for protection of the people in the villages and towns. In Book II, chapter I of the work, it is provided that "the interior of the kingdom shall be watched by trap-keepers, archers, hunters, chandala and wild tribes." At the end of Chapter VI of Book IV it is stated that "a Commissioner with his retinue of Gopas[59] and Sthanikas[60] shall take steps to find out the external thieves and the officer in charge of a city shall try to detect internal thieves inside fortified towns." More ancient and hallowed authority, the Atharva Veda (c.1000 B.C.) is quoted by Dr. R.B. Pal to show that offenders were (most probably) brought under arrest by police officers before a magistrate where trial took place by ordeal.[61]

1.124 On the other hand Altekar states that the village headman (Gramin) was in charge of the local police duty which comprised watch and ward attended to by watchmen; between 300 B.C. and 1300 A.D. there was also a central police organization. During the time of the Maurayan, and also of the other and later Kings, police and detective officers were employed to arrest and chastise robbers and desperate characters.[62]

1.125 Dr. S.K. Aiyangar gives an account which is at once composite, compact and concise: "The village assembly had the responsibility of tracking down crime. They had their own village officers whose special duty it was; when criminals were traced they were brought before the assembly for punishment. . ."[63] Although this account professedly relates to southern India we know that Aryan penetration into the south took place as early as 600 B.C.

1.126 Dr. John Matthai, in giving a picture of the system of watch and ward of the seventeenth and eighteenth centuries, says that: "There is evidence that this practice of employing men privately for police purpose goes back to ancient times - the Arthaśāstra mentions wild tribes [aranyacharas] among those who may be used to protect the interior of the kingdom."[64]

(c) The ancient Indian theories of State and the Law

1.127 We have so far dealt with merely the institutional structure but not the ancient Indo-Aryan theories of State and the law. Indeed, a detailed discussion of the complex theories is beyond the scope of this study. We have had, however, occasion to refer earlier to the celebrated ancient political thinkers such as Manu, Brhaspati and Kautilya. But, as Dr. B.A. Saltore points out, between Manu, the lawgiver, whom he places between circa 1900-1800 B.C., and Kautilya, the celebrated Mauryan Prime Minister, who is said to have lived in the fourth century B.C., a number of other eminent political philosophers flourished.[65] According to Professor U.N. Ghoshal the Hindu political theories developed in the Dharmasutras are usually assigned to the period from the sixth or seventh to the third or fourth centuries B.C.[66] In his Arthaśāstra Kautilya refers to his predecessors[67] but it must be remembered that the great masters were exponents of different schools of political thought. However, in these discussions we propose to indicate in brief outline only the dominant ideas of the ancient Indian political thought. It is important however to take

notice of the fact that, as Professor Ghoshal points out, while the Dharmasutras are the product of the "Vedic theological schools and are inspired by the canonical tradition", in the Arthasastra we find the "Art of Government in the widest sense of the term" dealt with in a manner which is marked by a "fearless freedom of thought".[68] Indeed, Kauṭilya was, in a sense, the true precursor of the Western philosopher Machiavelli: both believed in violence and were equally critical of this aspect of the Aristotelean concept of State.[69]

1.128 The most popular Hindu concept of State is founded on matsya nyaya - the rule of the fish (the big ones eating up the smaller) - to be found in the Manusmṛti.[70] The State is, as Panikkar explains, the rule, the outcome of the desire of man for security, for a social order in which he can live and enjoy the fruits of his own labour, which postulated, a priori, natural equality of man.[71] Proceeding further he observes that State represented force both externally and internally and that the Hindu thinkers relied on the dualism between dharma (law or duty) and artha (means of subsistence) to evolve a purely secular theory of State of which the sole basis is power.[72] According to Pannikkar, "the conception of the state in India was not one based on laissez faire or the mere maintenance of law and order, but one of direct activity to further progress."[73]

1.129 According to Dr. Saltore, "The ancient Indian State, even as described by Kauṭilya, did not dare to transgress the limits imposed upon it by the dharmaśāstras and the nitiśāstras." He proceeds to add that, "State action in ancient India was circumscribed by ancient usage of the land" and tries to distinguish it from the modern state which, he rightly points out, "imposes its will" on both the Common Law and the individual.[74] Another pertinent observation made by Saltore on another comparative aspect deserves to be quoted:[75]

> If we consider the totality of ancient political thought, Eastern and Western, in the fourth century, we may say that Kautilya began where Aristotle ended, and completed the history of ancient governments by adding the description of the imperial state. . .

It may be remembered that although the two philosophers were contemporaries Kauţilya was the Prime Minister of the great Mauryan Empire whereas Aristotle's concept was limited by his experience of life in the European city states.[76]

1.130 The broad concept of law in the early Aryan society can be gathered from Dr. N.C. Sengupta's observation that, "Law was invariably looked upon as founded on the twin roots of religion and agreement of men learned in sacred lore". This vesting of authority in the "assembly", according to Dr. Sengupta, distinguishes the polity of the Aryans from those of the Semites but in the Aryan parishad he finds the parallel of the Witans of the Saxons, the Druids of Britain and the Pontiffs of Rome.[77]

1.131 However, it must be admitted that it was the overriding concept of dharma that embraced law but the term dharma has defied many attempts at a satisfactory definition. Indeed, a reputed Western Indologist, Professor F. Kielhorn, has observed: "I find no English word by which I can fully express all the meanings of the Sanskrit dharma." This view, as has been pointed out by Saletore, is shared by the reputed Indian scholar, Dr. Kane.[78] Nevertheless, Saletore quotes another Indian scholar, Professor Aiyangar, to explain the significance of the term. According to Professor Aiyangar "dharma may connote such different things as law proper, virtue, religion, duty, piety, justice, innate property and quality and that it was in this general sense that it was used in the ancient times when it was maintained by the lawgivers that the State had to maintain dharma."[79] This definition of the term dharma offers a plausible explanation of the well-known fact that it was the concept of "duty" rather than of "rights" that formed the basis of Indian jurisprudence.

1.132 It is necessary however, to refer to an equally important concept of daṇḍa of Indo-Aryan political philosophy. Although the literal meaning of the term was a staff or a weapon, in course of time, as Saletore observes, it came to be identified with the science of government as signified more particularly by the term daṇḍanīti.[80] Scholars disagree on the relative importance of dharmaśāstra and daṇḍanīti; Saletore notes this but he also deals with the inconclusive debate on the question of whether the latter evolved from the former.[81] He quotes the statement in Manusmṛti that "the wise declare punishment to be identical with law" to say that the two were co-existent.[82] We support this view and add that the two were complementary in the sense that daṇḍa implied sanctions as understood in modern jurisprudence and Manu considered sanctions as an important ingredient of positive law.

### (C) The Indian society and administration of justice under Mughal rule

1.133 It is true that the Indo-Aryan political thoughts had no place in Islamic jurisprudence yet it must be remembered that the Mughal rulers considered India as their home and ruled the country as Indian sovereigns. Indeed, Akbar the Great had made a serious attempt to synthesize Hindu and Islamic cultures. However, we have already brought sufficient evidence to light to show that the people were affected most superficially by the successive conquests. Dr. R.K. Mookerji categorically states that the alien rulers took possession of the political capitals only and that even during the Mohammedan rule "the social life remained untouched."[83] Altekar quotes Sir Jadunath Sarkar to tell us that village communities during this period enjoyed parochial self-government rather than local autonomy and that although the village council disappeared from western India, the headman continued to be a man of the people and not an officer of the central government and that he continued to manage the affairs of the

village by holding informal consultations with the village elders.[84]

1.134 We may now refer to the comprehensive account of Sir Jadunath Sarkar himself.[85] He tells us that there were Qazis (judges) only in the provincial capitals, large towns and seats of Foujdars (district heads). At other places disputes were settled locally by the panchayat and salis, which, according to him, were the caste courts and local juries in the former case and impartial umpire, in the latter case. We are also told that the Qazi's part was that of a jury, to give the verdict; the Mufti expounded the law. But we ought to know that by his terms of appointment the Qazi was formally the judge. Sarkar quotes Bernier, saying that the local Governor was jealous of the Qazi's power and did not sufficiently support him.[86]

1.135 Emperor Aurangzeb introduced the most comprehensive reforms in the administration of justice. He caused a digested code of Islamic case-law to be compiled which came to be known as Futwa-i-Alamgiri. It was meant to check the capricious and arbitrary dispensation of justice by the Qazis. Later in 1672, he issued a farman (royal writ) containing his Penal Code in a nutshell. It provides, inter alia, in clause 32, for "inquiry with all diligence" by the Subahdar (Provincial Head) into the cases of captives sent up by the Foujdar, "immediately on arrival." It also enjoins him to inquire into the cases of the prisoners in "kachari and police chabutra" (Court and Police Station), to release the innocent and to arrange quick trial of others.[87] Sarkar also quotes Mirat-i-Ahmadi, which contains the following salutary provision:[88]

> When a man is brought to the Chabutra of Kotwal under arrest by the Kotwal's man or revenue collector on an accusation by a private complainant, the Kotwal should personally investigate the charges against him. . . If a Qazi sends a man for detention take Qazi's order for your authority. . . If the Qazi fixes a date for his trial, send the prisoner to the adalat on that date; otherwise send him there every day so that his case may be decided quickly.

1.136 The above picture captures the contemporary view of the administration of the central government which had mostly peripheral authority. Dr. A.B. Pandey in his Society and Government in Mediaeval India focuses light on the heart of the country to show us that "Government officers usually did not come in any close contact with village folk" and that "they only realised the tax and left the people free to manage their affairs through panchayats."[89] M.B. Ahmad in Administration of Justice in Mediaeval India also lists the panchayat as the only court at the village level (presided over by headman of the village) among the different grades of courts that functioned at different levels under Mughal rule.[90] He asserts that, "The administration of justice in the villages was, as was the tradition from ancient times, left in the hands of the village councils (panchayats)."[91] The police outposts established as a preventive measure against theft, dacoity and murder at convenient centres were instructed to mobilise local support in apprehending and rounding up thieves and dacoits. According to Ahmad every Muslim could arrest a person who had committed a "cognizable crime" (Hadd, Ta'zir) in his sight and that bail or security was discouraged.[92] It is easy therefore to surmise that such outposts were few and far between and not properly equipped either. Dr. Pandey however, credits the Mughal rulers of India with "keeping before themselves the ideal of making due provision for justice" and especially commends the efforts of Akbar and Aurangzeb for taking special care "to keep the judiciary honest, efficient, just and industrious." The Mughal emperors, he adds, did not permit the judges to impose the death penalty without their concurrence.[93]

1.137 Sir James Fitzjames Stephen, in giving a general account of administration of criminal justice during the Mughal period, describes the Nawab Nazim and his deputy as magistrates, the Foujdar as the officer of the police and judge of minor crimes, and the Kotwal was the peace officer of the night.[94] These officers, according to him, formed the pivot of

the machinery of justice in the capital. In the rest of the country, he adds, the administration of justice, both civil and criminal, was in the hands of the Zamindar who, it is said, inflicted all sorts of punishments but chiefly fines for his own benefit. This account, it is submitted, is too general and is perhaps more typical of Bengal subah than any other place and that too of a late period, when the Mughal rule was in its decadence and the Subah had become virtually independent of the Empire in 1713.

1.138 It is submitted that Stephen appears to minimise the role of the village courts to the point of total extinction, for which there is no justification. Besides the authorities cited above, the intrinsic evidence also supports the conclusion that a majority of the people were compelled to resort to "caste panchayat" for the important and obvious reasons that Mohammedan Law did not admit the evidence of "infidels" against "believers" and also placed great reliance on confessions.

1.139 "The role of Zemindar," says Dr. N. Majumder, "has been the subject of some controversy."[95] She quotes Warren Hastings who says "I venture to pronounce with confidence that by the constitution of Bengal the Zemindar neither presided in the criminal court of his district nor executed sentences. . ."[96] Her own conclusion however is that, "Whatever might have been the definite position of the Zemindar . . . [they were] de facto dispensers of civil and criminal justice on the disruption of the Mughal Government."[97]

1.140 Both Dr. Majumdar and Dr. B.N. Pandey use the same language to say emphatically that "justice and the police were two weak points in the Mughal system."[98] The statement, we submit, is not accurate in so far as administration of justice is concerned. For, although there was an element of arbitrariness in the administration of criminal justice, it was mainly due to the peculiar theories of penology (such as emphasis

on deterrent measures, e.g. mutilation of limbs) and of the rule of evidence (such as emphasis on confession and on exclusion of evidence of non-Muslims) of the Islamic Jurisprudence.[99] On the other hand, the comment on the police system is indeed justified as Ahmad also shares the same view.[100] However, he adds that sometimes "dangerous persons" were either sent to prison or were called upon to execute "bonds".[101]

(D) The aims and attitudes of modern Indian political leaders

1.141 The majority of the front rank Indian political leaders who formed the vanguard of the struggle for independence received higher education in England and were lawyers by training, like Gandhi, Nehru and Patel, to name only a few.[102] But there was a great difference in their aims and attitudes. Gandhi was a traditionalist while Nehru had a modern Western outlook. Gandhi observed as follows:[103]

> My idea of village swaraj is that it is a complete republic, independent of its neighbours for its vital wants, and yet inter-dependent for many others in which dependence is a necessity. . . The village will maintain a village theatre, school and public hall. It will have its own waterworks. . . Education will be compulsory up to the final basic course. As far as possible every activity will be conducted on a co-operative basis. There will be no castes such as we have today with their graded untouchability. Non-violence with its technique of satyagraha and non-cooperation will be the sanction of the village community. There will be a compulsory service of village guards who will be selected by rotation from the register maintained by the village. The government of the village will be conducted by the Panchayat of five persons, annually elected by the adult villagers, male and female, possessing minimum prescribed qualifications. These will have all authority and jurisdiction required. Since there will be no system of punishments in the accepted sense, this Panchayat will be the legislature, judiciary and executive combined. . .

Indeed, the technique of non-violent non-cooperation movement was tried with some success by Gandhi first in South Africa(against apartheid)where he had started his legal practice. Later, when he came to India and became the leading figure in Indian politics the Indian National Congress, which spearheaded the freedom movement, adopted Gandhi's technique which had earned him worldwide acclaim. The African leaders like Nyerere and Kaunda

were also greatly influenced by Gandhi.[104] But we find that Gandhi contemplated a system of government which conformed solely to the traditional pattern. His denouncement of the caste system and untouchability was, however, singularly modern in approach.

1.142 Nehru, on the other hand, was an internationalist. He did not subscribe to Gandhi's view that immobility was a virtue. Gandhi deplored the fall of successive Western civilisations and observed that "India remains immovable and that is her glory."[105] Nehru, on the other hand, deplored the "contradictions in British rule" but extolled the virtues of Western dynamism. Nehru said:[106]

> The impact of western culture on India was the impact of a dynamic society, of a 'modern' consciousness, on a static society wedded to medieval habits of thought which, however sophisticated and advanced in its own way, could not progress because of its inherent limitations. And yet, curiously enough, the agents of this historic process were not only wholly unconscious of their mission in India but, as a class, represented no such process. . . If change came it was in spite of them or as an incidental or unexpected consequence of their other activities. . . They succeeded in slowing down the pace of that change to such an extent that even today the transition is very far from complete.

Nehru was critical of the traditional approach and of the tendency of Indian society to "cling" to what it considered as its superior "philosophical background". He realised that the "impact and influence of the West were on the practical side of life which was obviously superior to the Eastern" and wanted these to stay.[107] He analysed the Marxian philosophy and declared that he "accepted the fundamentals of the socialist theory" although he did not like to trouble himself "about its numerous inner controversies.[108] He was moved by the "scientific spirit that has been at the back of Western civilisation for the past 150 years or so."[109] Indeed, President Radhakrishnan rightly described Nehru as "a maker of modern India, who tried to put India on a progressive, scientific, dynamic and non-communal basis".[110] Nehru spoke particularly of "socialist patterns of society" for India with a "democratic apparatus"

of parliamentary democracy and an independent self-developing economy with a strong public sector" for heavy industries.[111]

1.143 Eventually, when free India's republican Constitution was framed Nehru's views prevailed. Gandhi was dead but his views were forcefully projected by Rajendra Prasad who advocated (albeit unsuccessfully) the idea that "village republics" ought to form the basis of the new Constitution.[112] Indeed, the "constitution-making" process preceded Independence and at each earlier stage the panchayat had retained a strong appeal. In the"Commonwealth of India Bill" which was drafted in 1925 by a convention of members and ex-members of the Indian legislatures (which was presided over by Sir Tej Bahadur Sapru, a former Law Member of the Government of India), clause 37 provided that the village should be one of the units of government and that each village should have a panchayat with powers to "administer all village affairs". The Bill was introduced in the House of Commons in December 1925 and was ordered to be published but with the fall of the Labour Government its fate was sealed.[113] Earlier, in Gokhale's "Political Testament" issued in 1914 a demand was voiced for extension of local self-government with the "village panchayat" as its epi-centre.[114] Before that, Bal Gangadhar Tilak's "Constitution of India Bill" of 1895 provided for "village groups" as one of the four units of the Provinces.[115]

1.144 In the Republican Constitution enacted in 1949 a provision was eventually made without compromising with the idea of a modern framework.[116] In Art. 40 of Part IV, which provides for the "Directive Principles of State Policy" (an idea borrowed from Ireland's Republican Constitution), it is stated that:

> The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Pursuant to this provision the State legislatures have enacted laws in

each state to set up village panchayats. But the generally accepted view about these new institutions has been most appropriately expressed by a learned commentator who observes that, "Under the new Panchayat Raj legislation, new Panchayats are a statutory creation, but their form and structure are not very different from the traditional village councils and they exist only in name but not in use."[117] Apparently the approach of the new rulers of free India to the traditional institution is not much different from that of the colonial masters, despite the difference in the respective motivation. The Chairman of the Drafting Committee of the Constituent Assembly had rightly observed that the traditional institution survived on a "low and selfish level"[118] but no effort appears to have been made to rid them of caste prejudice and other similar vices as a result of which the new institutions have failed to fulfil their role.[119]

1.145 In 1907 the Royal Commission on Decentralisation had recommended constitution and development of village panchayats by conferring jurisdiction on them in petty civil and criminal cases.[120] This was endorsed by the Civil Justice Committee of 1924-25[121] but long before that Governor Elphinstone had established panchayats in Bombay in 1818[122] and in 1824 the Madras Governor Munro had expressed the view that criminal trials could be better conducted at such courts as facts could be ascertained there in a better way.[123] Indeed, such courts did function under the Madras Village Courts Act 1888 and the U.P. Village Courts Act 1892. Generally, these village courts had jurisdiction to try minor offences such as theft, assault etc. with power to inflict punishment by fine, the maximum limit being Rs 50. The courts could only summon the accused; they had no power to issue warrants for their arrest. The British experiment obviously aimed at using these institutions as law-enforcing machinery and not as a measure for "rural democratisation" which the new rulers hoped but failed to achieve on account of the apathetic attitude.

(2) Commonwealth Africa

(A) Sources of ancient African history

1.146 Belated but intensive and painstaking research has indeed dispelled much of the darkness that surrounded the "dark continent" in past centuries. It has been found that 2000 centuries ago the "ape man" appeared in Southern and Eastern Africa.[1] Still, the story of the rise and fall of the ancient African civilisations, particularly of the sub-Saharan region, has not been told beyond a general outline.[2] Claims are laid of contacts with China dating back four thousand years[3] and, with a little more precision, of trade connections between India and Eastern and Central Africa which has been traced back to the eighth century.[4]

1.147 The historian's dilemma is perhaps best expressed by Crowder. He has observed that the story of Nigeria goes back two thousand years but much of the earlier history is contained in myths and legends and that written records before the nineteenth century being scanty, botanical and archaeological evidence and oral tradition has to be resorted to; the northern region, which had contacts with the Arabs was an exception.[5] His view is endorsed by Kiwanuka who rightly adds that the research in Africa started gathering momentum only fifty years back when the anthropologists, sociologists and linguists stepped into the field.[6]

1.148 It appears that trade connections with Europe had begun when the French traders established a fort on the western coast in 1383[7] but it was not until 1530 that a regular trans-Atlantic slave trade had begun when the Spanish government employed Portuguese merchants to transport slaves to work in the plantations and mines in the Spanish possessions in the Caribbean and South America.[8] However, it was only in the "scramble for Africa" which was reflected in the international conference in Berlin in 1884-85 that we first find the European nations thinking in terms of "conquest and partition"[9] and of the "dual mandate" - "to make the trade and resources of Africa available to the rest of the world" (perhaps for

the benefit of their own nations in particular); and "to replace the slave trade by the moral and material benefits of the European civilisation."[10] This partly explained the belated research.

1.149 In our study we are primarily concerned with such ideas and institutions as are relevant to the theme of personal liberty in the ancient societies and polities of anglophone Africa, with the object of tracing its role in the traditional jurisprudence and legal system. In the case of India, as in England, the social, political and legal history of the ancient period could be gathered from the extant records of the antiquarian legal texts and institutions, but in the case of Africa we have to follow mainly the anthropological reconstruction, accepting perforce Basil Davidson's thesis that "the history of the Africans was the handing of the torch from generation to generation."[11] Whatever may be the source, evidence or authority that we shall rely on, such an inquiry is impelled by the necessity of examining the impact of some of the colonial laws and also of the "indirect rule" on the traditional legal system and institutions.

(B) The structure of the traditional African societies and polities

(a) A General View

1.150 The picture, unlike that of ancient India of the Aryan civilisation, was not the same everywhere. In Africa there were societies and civilisations, races and cultures, of different forms and varieties. It has however been rightly asserted that there was "the special quality of Africa" transcending such diversity exhibited in the existence of 850 societies[12] and 800 languages which were, till recently, mostly unwritten.[13] We propose, therefore, to examine those social and political institutions which bear the strong imprint of this quality, bearing in mind the fact that the societies are classified in broad and general terms as "chiefly" (centralised) and "chiefless" (decentralised or acephalous).

1.151 Typical acephalous societies found in West Africa were the Ibo and Tiv of eastern Nigeria and the Tallensi of the 'northern territories'

of Ghana; in East Africa, such tribes as Nandi, Masai, Kikuyu, Logoli and Arusha inhabiting different parts of Kenya and Tanganyika were acephalous. Similarly it may be said that among certain tribes inhabiting different parts of Nigeria and Ghana and some parts of East and Central Africa, there was a predominance of "chiefly" societies. "Indirect rule", as we shall see, effaced the distinction and in course of time "official" (in Kenya) or "warrant" (in Eastern Nigeria) Chiefs came to be appointed even in those territories where the traditional system did not recognise such functionaries. Indeed, the "scramble" had already produced artificial political boundaries.

(b) Age-sets, lineages and the political systems of acephalous societies

1.152 Perhaps the only common institution of the societies of this class is the age-sets or age-grades which comprise individuals who occupy a particular set or grade at a particular time and perform social, political and judicial functions.[14] Even so, the racial characteristic of each tribe found expression in the local variation mainly in respect of the number of sets and their functions. Seligman discusses the age-sets of the Nilo-Hamitic race (Nandi, Masai etc.) and observes that the ordinary functional divisions of boys, warriors and elders not only served as a system of peacetime administration but also as an instrument of military operation. The "medicine man" is said to be both the spiritual as well as temporal head of the tribe, but neither the extent of his authority nor his functions are precisely stated, except that they are required for rain-making.[15] Lucy Mair speaks of another office (poiyot), while asserting that there is no ranking of class or lineage among Nandis. When the elders who have moved out of the warrior grade collect under a shade tree for deciding any matter they recognise one of them as their leader. He is the poiyot. He lays before the elders the matter to be discussed and then after taking the sense of the meeting he gives a

decision in its name.[16]

1.153 In an official study of the social and political structures of a number of minor tribes of East Africa, it is shown that the authority of decision-making and dispute-settlement was generally vested in the elder members of the tribe.[17] Among the Arusha, it has been stated, the authority was not confined to any group with limited numbers but was diffused among the whole according to a general view of the capacities of men at different ages.[18] About the Masai it has been observed that the "centre of political gravity" was not with elders, but with a republic of young men.[19] Hailey points out an important basic distinction that marked the Kikuyu age-sets in that the age was not the sole criterion, for "admission into a desired grade" could well be a matter of personal prestige and wealth.[20] Kenyatta describes the Kikuyu organs of government with precision and speaks of a hierarchy of councils of elders at the village, district and national levels, having vested in them the authority of decision making.[21] For dispute settlement the "normal forum" appeared to be the "kinship court"[22] over which the elders presided.[23]

1.154 The Ibo of East Nigeria, according to Hailey, presented "the most outstanding example in the British African colonies" of an indigenous structure, as he found it difficult to trace "any definite seat of executive authority" in the Ibo political system.[24] He quotes Perham who had identified the institutions which catered for the basic needs of Ibo society, such as collective family responsibility and the age-grades which served as the "potential policemen" and of the councils which settled feuds between local groups.[25] The chairmen of the "Council of Elders", according to Elias, were sometimes religious functionaries.[26] Carlston attributes to the middle age group the role of "regulatory, advisory and judicial body of the village" and to the junior age-grades, executive functions which included the duties of policemen.[27] Among the Tiv of Northern Nigeria the focal point of social and political

organization was the concept of "Tar" which referred to both lineage group and the land it occupied and meant in social terms a good working relationship between the two, according to Carlston.[28] The only person who could possess "legitimate authority" among the Tiv was the compound head. It has also been observed that "elders and men of affluence, prestige and power" performed, in fact, "political and legal action" within and on behalf of the lineage group.[29]

1.155 In the case of the Tallensi and the Logoli it can be said that the centre of political gravity is to be found not in the age-sets or age-grades but in the concept of lineage or kinship. Each lineage group has a certain post designated in kinship terms. Such functions among others as of a political and conflict-solving character are performed by social structures defined by kinship ties.[30] It has been asserted that the Logoli have "no political structure as distinct from the kinship and social structure"[31] and that "there is no tribal judicial authority but justice is administered by those affected by the offence in question."[32] Whether the dispute is inter-clan or intra-clan the individual's interest in the dispute is not accorded primacy; his role in the process of settlement is insignificant. It is the group in the former and the clan in the latter case that takes "judicial action" and that too for a negotiated settlement.[33] Needless to say, the absence of an adverserial context is a typical feature of almost all forms of African societies in general.

1.156 The position among the Tallensi does not appear to be much different. It has been stated thus:[34]

> Segments bitterly opposed over divergent interests unite vigorously on matters of common interest. Co-members of any unit have a common interest in one another's welfare and in safeguarding one another's right.

Disputes give rise to tension in the society and what is sought is the restoration of harmony, peace and order through de jure recognition of conflicting claims. And, as has been observed, intra-clan disputes having

arisen mostly out of rival claims to priority in the exercise of a politico-ritual right, the diviner plays the role of decision-maker in the absence of a judicial system.[35] Mention is made of two other offices - the chief's and that of the custodian of the earth; in some cases they are merged. No political power, however, is attached to these offices. Indeed, as has been said, they merely carried the status of "primus inter pares in the native system"; and the contest for the office was a contest of segments and not of individuals.[36]

(c) Political system of "chiefly" societies

(i) A General View

1.157 It has been observed, perhaps rightly, that in its primitive form, African society was typically decentralised and that the process of "political centralisation" took place when cultural, religious and occupational homogeneity was broken with the gradual infusion of immigrants holding a diversity of ideas.[37] Not only was there an intra-continental movement of the indigenous races, but the influence of the Arabs in particular, appear to have contributed a great deal to this process. The various forms of political centralisation that came to flourish at different periods in different parts of the continent has been fitted into a common rubric of "African despotism" and some of the similarities of the basic pattern have been stated thus: monarchical absolutism, divine kingship, electoral succession, territorial bureaucracy, dual role of the ministers etc.[38]

1.158 West Africa saw the rise and fall of a number of major states with centralised authority between 300 and 1897 A.D. In the territory now known as Nigeria the Hausas, Yorubas, Fulanis, Binis and other minor tribes had centralised political systems.[39] The Hausa-Fulani states flourished between 900 and 1837 A.D. and the Yoruba states between 1000 and 1893 A.D. while the kingdom of Benin, which was founded in 900 A.D.,

was last to fall to the British in 1897.[40] In the middle region of modern Ghana the Akan states appeared in 1200 A.D. from which first emerged the Asante Union in 1699[41] and then the short-lived Fanti Confederacy of 1867-71; the former has been described as a "well-organised military and democratic political system."[42] In Central Africa the establishment of the Luba and Lunda kingdoms in 1500 and 1600 A.D. respectively, and of the Lozi kingdom in 1650, is noteworthy.[43] In East Africa a large number of coastal city states had sprung up, the first in 750 A.D., leading to the emergence of the "Swahili" civilisation in 1300 A.D. based on Arab, Persian and Bantu cultures and to the founding of Mombasa in 1505 A.D.[44] In the area of modern Uganda, the two major kingdoms of Buganda and Bunyoro arose almost contemporaneously in 1500 A.D.;[45] these, with the neighbouring kingdoms of Ankole and Toro, survived throughout the colonial period and formed the "Federal States" in the federal independence Constitution of 1962.

(ii) East and Central Africa

1.159 The Ugandan kingdoms, it is said, were ruled by "divine kings" who governed through an elaborate hierarchy of court officials and provincial chiefs.[46] It has also been observed that the territorial units of government of these states, which were of a feudal character, were comparable to those of feudal Europe.[47] In all such states the judicial system was based on a hierarchy of courts held by the subordinate chiefs and the saza (county) chiefs as well as the Katikiro, in Buganda, who were all appointed and were also liable to be deposed by the King. The office of the Prime Minister and Chief Justice was combined in the Katikiro who heard the final appeals, subject to the final verdict of the King.[48] There was a body called the Lukiko, which was an assembly of the King, the Katikiro and another ten chiefs who held charge of the administration of the different districts and had to render accounts for the management to the King through the Katikiro.[49] The king (known as

Kabaka) has been described as a despot and it appears that the Lukiko met at his pleasure.[50] It is, however, interesting to note that the chiefs held meetings in their respective districts, in connection with their administrative work, which could be attended by any man, even a resident alien who did not, of course, have the voting right.[51]

1.160 It must, however, be remembered that in Uganda, besides Buganda and other kingdoms with hereditary monarchs, there were "multiple kingdom tribes" and also tribes with acephalous societies.[52] Political systems were, therefore, diverse in character. A distinction has been made between the tribes of northern and southern Uganda respectively on the basis of the absence of a "sense of community between the chief and the people".[53] Chiefs at all levels were not traditional institutions in the same sense throughout East Africa as a whole; however, the pattern of the centralised political systems of Tanganyika was almost similar to that of Uganda.[54] In some cases their authority was rooted either in hereditary rights, particularly at higher levels, or in royal appointments;[55] in other cases, as we have seen, it depended solely on royal patronage. However, at the lowest level, even in Buganda, it has been noted that clan leaders acted as village headmen and possessed judicial power.[56]

1.161 The position in Northern Rhodesia (now Zambia) does not appear to be different. In the kingdom of Bemba, all district chiefs were princes and the clan leaders were politically unimportant.[57] The Bemba in effect formed a union of chiefdoms while the Lozi, also in Northern Rhodesia, had become a kingdom in the fullest sense, as a unitary state. It is said that the Lozi king was more powerful than the First Chief of the Bemba who merely had a "certain pre-eminence" over the other chiefs. In the Lozi kingdom the administration was carried on through the district officials.[58] However, we are told that the political organizations of the Bantu peoples of east and central Africa had certain common features such as

emphasis on kinship, descent and concentration of executive, ritual and judicial power in the paramount chief; difference existed in the details of the machinery of government.[59]

1.162 There have been continuous migrations of the Bantus from the north towards the south and into east and central Africa and beyond, into parts of southern Africa as well, during the course of the last 1500 years, and they occupy today almost one-third of the continent.[60] We are told that the Bantu in the south-eastern area are culturally not much different from those of the south-central and also those of farther north and west.[61] We may accordingly, albeit with a note of caution, gather some important information from Schapera's learned study of certain tribes, including those of the Bantu stock, of the southern region. It is, however, necessary to bear in mind that he is dealing with Bantu societies in which centralisation has not been accentuated to such a high degree as in the "kingdoms".

1.163 We are told that the Chief is the "symbol of his tribe" and one of the principles of political association in such cases is described as a "personal attachment" to him; it is not always based on kinship ties.[62] Disputing the Chief's authority is considered a serious crime and "banishment" is one of the sanctions applied in such cases. It is, however, based on the principle that only those acknowledged as members of the community have the right to live in its land;[63] the political community not only has its own territory but also has the right to occupy that to the exclusion of others.[64] Chieftainship is normally hereditary from father to son but there can also be cases of "usurpation", "secession" and "creation" of a new tribe.[65] However, succession is not automatic; the senior relatives and important advisers of the deceased chief can pass over an heir apparent if he is "unsuitable".[66]

1.164 According to Schapera's account, there are also "sub-chiefs" in districts and "headmen" in charge of smaller units such as villages, but the Chief's powers both as a legislator and a judge are plenary.[67]

He can make laws[68] as well as inflict the death penalty.[69] In his executive capacity he can organize "age-regiments" which can be used as policemen.[70] There is, however, provision for consultation between the chief and some form of popular assembly as a part of the machinery of government which also provides for two grades of advisory personnel at higher levels, a well-defined hierarchy of courts as well as central and regional executive officers besides the sub-chiefs and the headmen[71] with a duplication almost in all respects at the level of the local rulers.[72] It appears that besides the natural check to which the unlimited powers of the Chief are subjected by the mechanics of administrative decentralisation, his potentially autocratic rule is regulated by some other means as well. The tribal conceptions of "good government" and "ideal chief" are possibly the most important ones. The Chief is publicly exhorted to be just and judicious and to consult his councils.[73] Such advise is normally given at some point in his installation ceremony[74] and his tacit acceptance might well have the effect of a coronation oath. Some of the extreme sanctions used against an autocratic chief are "assassination",[75] "expulsion and replacement" of the chief and "secession" from the tribe.[76]

(iii) West Africa

1.165 West Africa has been called the home of the "true negro".[77] The Bantu and the Nilo-Hamitic tribes of the East and Central part of the continent with which we have dealt with so far, are said to have been "Hamiticized to a varying extent".[78] Of the Hausa and the Fulani of Northern Nigeria it is said that the former are essentially negro, though they speak a Hamitic language, and that the Fulani are of Hamitic origin and culture though they have also, except perhaps the "pastorals", gradually absorbed negro blood.[79] However, both tribes are no longer pagan but are adherents of Islam.[80] The Fulani consolidated their conquest of the Hausa states in 1810 by extending their empire over an area which covered one-third

of the population of Northern Nigeria.[81]

1.166 In the Fulani empire eleven "emirates" or chiefdoms owed allegiance to the Sultan of Sokoto. Chieftainship in the area has been described as "a nexus of relations of clientage". The chiefs of the vassal states were clients as well as vassals and they attained office and secured its tenure only by demonstrating their allegiance to their immediate superior whose clients they were. In the same way, within the community the officials and "title-holders" were his clients.[82] The administrative set-up has been described as "highly centralised" and the chiefs as "autocratic" and operating in a "feudal type" of social and political organisation.[83] The capture and exploitation of slaves, and waging wars for that purpose, were significant aspects of the exercise by the Hausa-Fulani states of their political power in the nineteenth century.[84] There was, therefore, a regular army and, as parts of civil administration, there were also the police and prisons as well as courts of justice.[85] It appears that the impact of Islam on Hausa social life, though slow and gradual, was almost total, unlike India, where the Moghul rule could not break down completely the social structure so as to bring about a total effacement of the indigenous village assemblies, the panchayats.[86] In Northern Nigeria (Hausaland) many important tribal institutions, such as lineage, clan and extended family, became extinct.[87] On the other hand, it has been observed that the Fulanis found in Hausaland a well-organized system of government which they retained.[88] As the courts came to administer the Maliki school of Mohammedan Law, the indigenous legal system appears to have been superseded.

1.167 Another people who were not originally of Negro blood were the Yorubas of the south-western region of Nigeria. Arriving between the seventh and tenth century A.D., they are said to have founded the first settlement at Ife and the Oni of Ife became the religious head. The political capital was removed to Oyo and the Alafin of Oyo became first

in practice, and later nominally the suzerain, of all the Yoruba chiefs. Each clan was virtually independent and was governed by a king whose powers were controlled by a council of elders which had the right of "electing" the King and advising him in all routine matters.[89] In Lagos, the king was called Oba; in Ibadan, Alake, where the four divisional kings under him were called Obas. The Alafin was assisted by a council of the paramount chiefs (the kings). It has been observed that the hierarchy of advisers was based upon the principle of representation and of mandate.[90] The Alafin must belong to a royal family although he was "selected" by the council ("cabinet") and it is also said that there was a leader like the Prime Minister who headed the council.[91]

1.168 Although the Oba appeared in the role of a divine king, with ritual as well as temporal authority, the Yoruba did not tolerate the arbitrary exercise of power by any authority at any level. He, as well as the Alafin, could be denounced and had then either to leave the country or to commit suicide, otherwise he was killed.[92] This did not perhaps apply to the head of a lineage who wielded considerable power among its members by adjudging their offences and arbitrating in their disputes;[93] he was not deposed but de facto authority passed to another.[94] There was one type of "secret society", the Ogboni, and the age-sets also played important roles in the political set-up.[95]

1.169 The Obas of the Edo, to their east, were, however, more powerful and could not be removed, although in rank they equalled the Alafins of the Yoruba. They could appoint chiefs, ignoring lineage claims. The Benin Kingdom of the Edo has been described as a powerful and organised empire.[96] The kingdom was divided into tribute units or fiefs and the fief-holders were responsible for day-to-day administration. The King, who was assisted by seven hereditary nobles is said to have had "exclusive right over life and death of his subjects".[97] Slave-trade and slave-wars appears to be a common feature of West Africa and their effect was reflected

in the economic, social and political structure of the Yoruba and the Edo in perhaps the same measure as in the case of Hausa-Fulani.[98]

1.170 In Ghana, it was mainly the Akan people who are said to have the "archaic state system" in which the state was a social as well as a political entity. Here also lineage, kinship and age played an important role and "selection" of chiefs was confined to one or more royal lineages. The selection was made by the "Queen Mother", the blood relatives and the "elders" on behalf of the people.[99] The "elders" were heads of important lineages and were chief's councillors. They held a hereditary office, the symbol of which was a "stool". When an "elder" died his successor was selected by the grown-up men and senior women of the lineage, subject to the chief's acceptance. There were oaths of allegiance by the members of the lineage to the elder-designate and by the latter to the Chief. The Chief's selection itself, we are told, had to be approved at a meeting of village headmen, elders, commoners and the spokesman of the young men. The latter's position was politically important in that public opinion and criticism of the government was expressed through him.[100]

1,171 The Chief was bound by oath to consult the elders and to obey their advice. He could be de-stooled by the elders if he habitually rejected their advice, broke a taboo, committed a sacrilege or became physically unfit. The tribe or the division was administered on a policy of decentralisation and for passing laws the divisional councils had to be summoned where the representatives of the whole people met. The council had to approve also major executive and administrative proposals.[101] The chiefship was essentially a sacred office. The Chief had to perform various rites for the welfare of his people as respects food, health and fecundity.[102] Osai Tutu, who was the chief of a tribal division at Kumasi, succeeded in uniting the other chiefs into a confederacy and came to be known as the Asante Hene (the King of Ashanti) and the renowned "golden stool" became the symbol of unity. However, decentralisation remained the dominant feature

of the new Ashanti constitution and the old family, clan and tribal organization survived under the new regime.[103] There was no separate judiciary. The distinction between civil and criminal liability was not sharp: emphasis was on "arbitration" and the only recognised forms of punishment were death and fine.[104] Although slavery appears to have been institutionalised the slaves were, it is said, for all practical purposes, members of the family.[105]

1.172 The Fanti who formed another branch of the Akan people had a similar political system[106] but their attempt to confederate like the Ashanti was a failure, as has been indicated in the beginning. All Akans were matrilineal but there were non-Akan tribes also in Ghana who had chiefly political systems which have been termed as "less democratic" although there was a difference inter se of degrees. These other tribes are said to be patriarchal, patrilocal and patrilineal and though they had their own stools, their conception of them did not carry the same mythical significance.[107]

(iv) The "special quality" of African chiefship

1.173 A short comment on the institution of chiefship is called for in that the institution truly displayed what has been described as the "special quality" of Africa.[108] This special quality is manifested in a pronounced form in the fact that the Chiefs almost everywhere were hierarchically graded and in most cases the office was either hereditary or otherwise linked up with lineage which gave prominence to his ritual functions and made him a traditional institution in the true sense. Besides, we have also seen that the so-called "African despotism" did not figure prominently in most cases in that the Chief's powers were regulated in varying degrees through various means of checks which, possibly, may not have proved to be equally efficacious in all cases. It is also necessary to take note of the impact of Islam and Christianity on these ancient African societies. In the second ELEKO case[109] the Privy Council observed that "the barbarous customs of the earlier days may under the influence of civilisation become milder without losing

their essential character of custom" when it was suggested that the ancient custom of killing a deposed Chief was moderated into the milder custom of banishing him. How the indigenous societies generally reacted to the superimposition of the civilisations of the east and west does not appear, however, to have received the attention it deserves although it is admitted that social structure was a "condition of equilibrium" which, when disturbed, undergoes a modification and that there was a need to study African political systems from this perspective.[110] How the institution of chiefship was modified by "indirect rule" we shall be examining soon.

(d) Some traditional ideas and institutions

(i) The "secret society", oracles and diviners

1.174 Some of the West African societies, despite their distinctive political systems, shared certain common institutions of political significance besides slavery and the slave trade as means of "associated control": among the Yoruba the Ogboni stood between the Oba and his people.[111] A "secret society" has been described as "an embodiment of, and a means of canalizing, supernatural power".[112] The Ogboni, it has been observed, was an "earth cult" and it performed political and judicial functions, including the power of life and death over the Oba; its principal organ was the "council of state" (Oyo Misi).[113] Among the Ashanti also it is said that a similar earth cult was prevalent but whether or not it was institutionalised in a similar manner it is not stated.[114] Among the chiefless societies, in Ghana, the Tallensi also practised the "earth cult" which appears to have been institutionalised in the office of the "custodian of the earth" and in the "Cycle of the Great Festivals". The two institutions appear to act as integrating forces to harmonise relations and relieve any tension that might develop between the different clans.[115]

1.175 It is stated that the "secret society" among the Ibo and the Tiv of Nigeria was a "typically judicial body deciding the more intractable intra-village disputes."[116] The Ibo society was known as Mmo. Its

members acted as maskers and were regarded as ancestral spirits. It could administer oaths of various types, such as compelling non-members to obey the members, to speak the truth, and could also impose and enforce sanctions against persons accused of certain offences.[117] Among the Eastern Ibo, according to Basil Davidson, the Ekpe had legislative as well as judicial functions and it also acted as an enforcement agency.[118] Oracles and diviners also had important roles. Not only were they consulted in detecting witchcraft offences but it is said that some of them also functioned in courts which decided certain types of disputes between individuals and also between villages.[119] Among the Tiv, the Nyambua appears to act as a sort of constitutional device in that it promoted the Tiv political philosophy which denied acquisition of legitimate institutionalized power by any person.[120]

1.176 Seligman has rightly observed that the secret societies of the West African tribes were a type of mutual benefit club and that they functioned variously as a ritual of initiation, a symbolism, a particular ceremony, etc.[121] but they also had a constitutional significance of some importance as indicated above. The dominant role of such cognate ideas as kinship and ancestor-worship and its wider connotation, the belief in spirit, which permeated through the entire fabric of the traditional African society, possibly contributed a great deal in involving and sustaining the institutions we have discussed. What relevance they have in the political set-up of the modern age is, however, a different matter more appropriate for sociological research.

(ii) The Extended Family system

1.177 It is possible to relate the system to the concepts of clan, kinship and lineage which, as we have seen, formed the basic social and political structures of African societies generally.[122] Indeed, Basil Davidson calls it a "working organization for political action" outside purely family affairs.[123] It was this aspect which gave it its "special

African quality". On the other hand, its economic function as a "nuclear group" which usually consisted of a family unit of three or four generations and which provided "ultimate security" to its members, had an Indian parallel in the institution of the Mitakshara (Hindu) joint family system. On the other hand, in the ancient Indian village assembly or the village republic, we did not find any political role being attributed to the joint family.[124] However, it has been observed that the village, in Africa, was generally regarded as a "social" (and not "political") unit[125] and that the "village community" was an "essential economic unit" and that authority in the village was vested in the heads of families, council of elders and the chiefs.[126] Indeed, the apparent absence of a well-defined and clear distinction between social and political ideas and institutions could only be understood in terms of what we may call African philosophy.

1.178 The composition of an extended family differed according to the rule of residence prevailing in any clan or lineage,[127] but such families had certain common 'basic characteristics' such as sharing the same compound or homestead and accepting the leadership of the senior male member in the dominant line of descent.[128] How such a "residence group" functioned and how it was motivated has been stated succinctly thus:[129]

> the people have ordered their affairs inside a 'jural community' composed of a varying number of nuclear groups inside, that is, the widest grouping within which there was a moral obligation and a means ultimately to settle disputes peacably.

However, the African social life has been influenced not only by Islam and Christianity but also by challenges of the modern age as the system suited a time when, as has been said, "activities were performed in common and the economy was self-sufficient and based on subsistence agriculture."[130] Nevertheless, it has been found that the system has retained its appeal for the modern town-dweller.[131]

1.179 We have to look, however, in another direction to appreciate the importance of the concept of extended family in the context of the

post-independence political development in some of the African states. It has apparently provided a strong argument to ridicule the criticism that the One-party State was a negation of the concepts of democracy and socialism. A small quotation from President Nyerere's writing aptly demonstrates this:[132]

> We in Africa have no more need of being 'converted' to socialism than we have of being 'taught' democracy. Both are rooted in our past. . . Modern African socialism can draw from its traditional heritage the recognition of 'society' as an extension of the basic family unit. But it can no longer confine the idea of the social family within the limits of the tribe,(nor indeed the nation. . . beyond . . . even the continent. . . to mankind.)
>
> [emphasis added]

Although tribalism was not a problem of any acuteness in Tanzania as it was in Zambia or even in Nigeria and Ghana, President Nyerere's warning against dangers inherent in limiting the extension of the idea to tribe was indeed prophetic. Zambia saved herself by adopting a one-party state Constitution but both Ghana and Nigeria, particularly the latter, succumbed to tribalism and lost a democratic government. It has no doubt, been rightly asserted that the traditional African state based on kinship was a prototype of an extended family but it has also to be remembered that the boundaries of the modern states no longer corresponded with the tribal boundaries.[133]

(iii) Law, justice and the traditional legal system

1.180 Any study of traditional African jurisprudence must take note of certain classic studies - e.g. of the Lozi of Zambia by Gluckman,[134] of the Tiv of Northern Nigeria by Bohannan[135] and of the Ashanti of Ghana by Rattray,[136] as being typical. However, as we have already seen, and as Hailey observes of the baraza of East Africa and palaver of West Africa, emphasis in decision-making and dispute-settlement everywhere appears to be placed on discussion and consensus,[137] even when there was an identifiable judicial organ such as the "courts" of the chiefs, with the apparent exception of the Islamic Hausa-Fulani states and perhaps of a

few other "chiefly" states having an institutionalized judicial organisation encouraging some sort of adverserial form of litigation, such as Buganda[138] and Ashanti,[139] where there was even a requirement of court fees. The African traditional process of dispute-settlement was not accusatorial either, even when the dispute was of a "criminal" character, as Lucy Mair appears to suggest in discussing the process in vogue among the Arusha of Tanganyika.[140] The general African pattern possibly reflected the central idea of traditional jurisprudence which, as has been pointed out, postulated litigation based on duties and not rights.[141]

1.181 What Gluckman writes of the Lozi was true of almost every African society, namely, irremediable breaking-up of relationships was disapproved. The "court" played a conciliatory role and the "judges" considered the total history of relations between the parties and in the "public interest" a civil suit was sometimes converted into a criminal case. The central figure in the judicial process is that of a "reasonable man" - a standard by which the conduct of the parties is adjudged and it is said that the judges are reluctant to support the party who is right in "law" but wrong in "justice".[142] It is stated that they import equity, social welfare and public policy into their application of law and the judicial process is seen as "an attempt to specify the legal concepts within ethical implications" according to the structure of society" and thus developing the law to cope with social change.[143]

1.182 Certain rules of substance as well as procedure present a close parallel to Anglo-Saxon jurisprudence. A ruler could "mulct or punish" a person only after trial in court and he himself was not above law although he was not tried in his own court.[144] Penalties which a court could impose were death, throttling and flogging; imprisonment was unknown.[145] The presumption of innocence was adopted in criminal trials[146] and the rule audi alterem partem was normally observed as also certain rules

of evidence bearing a striking resemblance to English rules, such as the necessity of testing evidence by cross examination which, however, the judges themselves undertook.[147] Indeed, cross examination was one of the three stages in which "judicial logic" operated, the other two being the taking of a decision on the evidence and the exposition of law in support of the decision.[148] Needless to say the first and the last-mentioned features certainly bore a distinctive characteristic.

1.183 The jurisprudence of the Tiv provides a study in contrast as, unlike the Lozi, their society was "chiefless". The Tiv, Bohannan observes, do not distinguish between a sin and a crime and breach of the norm which has to be counteracted either by self-help or by ritual was called ifer.[149] A few other concepts are also noteworthy: jir, which means a court and also a case;[150] kweghbo, which indicates the dangerous and anti-social element in any human activity and the kwaghdang which indicates a thing, person or act which is morally reprehensible.[151] Incest, homicide and sometimes adultery are said to require ritual reparation. However, homicide, as also rape and slave-dealing, cannot now be tried by the moots which are not recognised by government as courts but are called "jir at home" or "jir of the lineage", and which still handle the ifer of witchcraft. Theft and assault are other numerically important ifer. Penalty for stealing was either revenge or ridicule and also return of the object or its equivalent.[152]

1.184 A jir can be arbitrated by any one before whom the parties are willing to discuss, usually at a market which is in the charge of either a headman or a group of three or four elders.[153] Among the Tiv the emphasis is on self-help. The parties may be allowed to carry out the decision of the jir. One may protect one's own right even using violence and a reprisal by way of revenge may also be resorted to.[154] It is stated that the key concept, the jir, embodied the concept of law among the Tiv[155] and, as Carlston suggests, this was related to the concept of 'tar' as well[156]

so that eventually it became a question of restoring social harmony as in the case of the Lozi. The same principle has been noticed in the case of another Zambian tribe, the Ngoni. It has been observed that the judges who were also councillors and village headmen had an interest not only in good administration but also in social development, in 'order' and also 'law'.[157] This was possibly the result of the primacy accorded in the traditional African polity and society to social rather than political norms as the state was generally co-terminus with society.

1.185 A departure from the truly traditional ideas and institutions was, however, to be noticed in the chiefdoms and kingdoms evincing a strong centripetal tendency in terms of political power and institutions. As Rattray observes, among the Ashanti also, before the rise of a powerful aristocracy, the chief aim of the authorities was to see that the possible causes of the dispute were avoided and a conciliation was brought about between parties temporarily estranged by litigation.[158] Later, it became the rule that the offences committed within the kindred group had to be referred to the central authority for decision. Even the Ashantis, it appears, made little distinction between a sin and a crime; the central authority was bound to punish only when "an act hated by the tribe" was committed.[159] For such acts as a theft there was no direct redress, not even self-help. The injured party deliberately committed a sin to attract the jurisdiction of the central authority when the matter was indirectly investigated. The death penalty was probably unknown but a person could be "expelled" or sold as a slave to avoid a likely blood feud on account of corporate responsibility of the kindred group if an offence was committed within a clan.[160]

1.186 It is stated that for certain acts considered "hateful to the tribe" (Oman Akýiwadie) an Ashanti was liable to summary arrest and trial without further legal formality and to suffer capital punishment.[161] A murder was also considered such an act but it is observed that it was

because of the dread of supernatural reprisal and that one could not "buy one's head" if he had committed a murder.[162] Among other acts punishable with death were attempted suicide, certain kinds of sexual offences, certain forms of abuses and assaults, invocation of a curse upon a chief and witchcraft etc.[163] Among the Baganda of East Africa who had a powerful kingdom sanctions as well as procedure were equally arbitrary. Suspected persons were forced to submit to a poison ordeal. For accidental homicide the sentence was a fine but for petty theft, mutilation. There were no prisons and men were put into stocks. But even there it was the dread of the supernatural rather than the fear of penal sanction enforced by the central authority that appeared to act as a deterrent.[164]

1.187 The range of sanctions in the traditional legal system of Africa was indeed a wide one and could be classified, as has been suggested, into transitory and permanent. In addition to compensation, fines and corporal punishment, a temporary banishment could also be included in the first group but not imprisonment which was almost unknown.[165] Death and permanent banishment, it is said, appertained to the group of permanent sanctions but how slavery could be classified has not been stated although mention has been made of its use against habitual offenders.[166] Both banishment and sale of a person into slavery probably produced almost similar results in view of the importance attached to the concepts of kinship and extended family in African societies generally; banishment also served as an alternative sanction against habitual offenders like witches and witch doctors.[167] It thus appears that banishment, which later reappeared as "deportation" in the colonial legal system, was a powerful sanction in the traditional legal system and was used for serious offences. Another distinctive feature of the traditional legal system of Africa, demands special emphasis: norms of social behaviour generally constituted the law and the breach of any norm was looked upon as disturbing the social

equilibrium which called for measures to restore it through discussion, conciliation, compromise and settlement.

(C) A short study of select areas of impact of colonial rule on traditional ideas and institutions

(a) Witchcraft and the law in Africa

1.188 It has been observed by Professor J.S. Read that the African legislatures as well as the judiciary adopted an ambivalent attitude in dealing with witchcraft but the remark applies more appropriately to the institutions of the colonial era.[168] There is no doubt that the British realised early the importance of anthropological study of social and political institutions of African societies after the great Ashanti uprising that took place in the Gold Coast following demand for surrender of the "golden stool". Such studies unfortunately did not achieve the desired result. Perhaps colonial legislators and judges alike considered it to be their divine duty to discharge conscientiously such responsibilities as appeared to them to be vital to their "civilizing" mission in the "dark" continent.

1.189 However, there can be no doubt that relevance of the African concept of witchcraft in the field of enactment, enforcement and in the administration of law as well as of justice has a double edge. On one side stands the urgent necessity for putting an early end to the practice and belief in witchcraft. On the other side stands the equally pressing problem of protecting rights recognised under the traditional legal system. Admittedly the latter does not conform to Western notions of law and justice. A choice has therefore to be made and it appears that the leaders of free Africa have made this choice. The traditional ideas and institutions do not appeal to modern African aims and attitudes and the colonial witchcraft laws therefore hold the field under the new set-up also, despite the difference in motivation.

1.190 Of the Azande people of Central Africa, Professor Seligman observes

that: ". . . witchcraft is a normal event of everyday life through which he may suffer at any hour of day or night."[169] In writing of the Kikuyu of Kenya, Kenyatta describes witchcraft as one type of "magical practice" and states that such practices, "like religion are inspired by the daily economic and social activities of the people. . . they run through and fertilise these activities and refer them to the mysterious forces which surround human life."[170] Rattray, in writing of the Ashantis of Ghana, observes that witchcraft was considered as a "sin" all over Africa and that "it was regarded by the community with particular dread and abhorrence." [emphasis added][171] The customary law in Nigeria, another observer points out, visited the practice of witchcraft with serious punishment as "a witch was not only a disturbing element in the community but also a threat to its supernatural governance."[172] Nadel speaks of the institution of the "anti-witchcraft society" (ndako 'gboya) and of the office of Lelu (later, Saqi) whom he describes as the "Controller of Witchcraft" under the traditional political system of the Chiefs of the Nupe tribe of Northern Nigeria and adds that the institution retained its appeal even under the Mohammedan Fulani Emirs.[173]

1.191 It is therefore necessary to see how the belief of witchcraft worked in traditional African societies, the rationale of these beliefs and the sanctions against such practices in a little more detail. Accusations of witchcraft, says Professor Gluckman, arose out of competition between kinsfolk. Such accusations maintain the egalitarian basis of society.[174] In a way, witchcraft acts as a means of social control. Even when there is acute shortage of foodstuff and famine conditions prevail, prices do not rise.[175] Emotions such as anger, hatred and jealousy are also connected with such beliefs and as such witchcraft also acts as a general code of morality. Lest he provokes another to bewitch him, such feelings have to be controlled.[176] He also tells us that such beliefs do not

operate in all social relationship: a commoner does not accuse a noble; a man usually accuses his neighbour.[177] As a theory of causation also such beliefs have their due importance. When an Azande suffers a misfortune he consults oracles and witch-doctors to identify the particular witch which has caused it.[178]

1.192 In a detailed study of the belief of witchcraft among the Azande, Professor Evans-Pritchard has presented us with certain valuable information. It is believed that certain persons possess witchcraft-substance in their body which grows with the body. Older persons are therefore considered to be more potent witches.[179] Witchcraft is, however, not merely a physical trait but is also inherited.[180] Witches are to be found among both men and women but women are bewitched only by their own sex while men are by either sex.[181] Evans-Pritchard points out the difference between what he calls "good magic" and sorcery and also between a sorcerer and a witch. Witchcraft, oracles and magic, he says, are three sides of a triangle.[182] We might say from what he suggests, action of the oracle is at once diagnostic and preventive while that of magic is positive, in combating witchcraft. A sorcerer uses the technique of magic and derives his power from medicine while a witch acts without rites and spells, instead using hereditary psycho-psychical powers to attain his or her ends.[183]

1.193 However, good magic even, says Evans-Pritchard, may be lethal but it strikes at that person only who had committed the crime; good medicines cannot be used for evil purposes. Bad magic is used out of spite against men who have not broken any law or moral convention. Good magic is open; sorcery is a secret rite. Sometimes it is difficult to distinguish between the two: magic of vengeance is most destructive but at the same time it is also considered as "most honourable". It is regarded as the judge who seeks out the person who is responsible for any death occasioned by magic and acting as an executioner, slays him.[184] He also observes that most magic is male prerogative[185] and that old and

middle-aged men are usually owners of medicines.[186] Sanctions also differed: compensation in olden times could be paid for death caused by witchcraft but a sorcerer in identical circumstances was invariably put to death.[187]

1.194 It is not unnatural that there should be some measure of difference in so far as the sanctions are concerned. Despite the fact that in almost all African societies distinction between crimes and civil injuries was less recognised, the offence of witchcraft was considered as a public wrong, which Professor Alan Milner categorises as an offence against supernatural power.[188] He considers ordeal itself acting as a self-executing sanction; its function was both penal and evidentiary. Kenyatta gives a graphic description of the proceeding according to customary law taken against a witch from accusation until his public execution by burning him to death. In spite of such steps as arrest and trial with which the community as a whole is associated, the final judgment says Kenyatta, is passed by the kinsmen of the witch himself: it is some of his own near relations who have to set fire to his body after all his kinsmen formally denounce and disown him.[189] Read also tells us of a "suspected" witch being "tried" at a large public gathering and sentenced to death.[190] Another observer speaks of "secret trial" in the forest before execution by the relatives of the witch. At such trials presumption of guilt loomed large, he points out.[191] Read correctly points out that in small, homogenous, integrated societies in Africa greater emphasis was laid on such sanctions as self-help, restitution and compensation. Milner also speaks of the wide range of sanctions prevalent under customary law for different offences. It is not therefore difficult to conceive of cases in some societies where the sanction of self-help even in such offences as witchcraft gained recognition in view of the concept of presumption of guilt that prevailed when "trials" took place.

1.195 It is clearly not possible to examine in detail in this study the

witchcraft laws of East and Central Africa and the provisions of the Criminal Codes of Ghana and Nigeria relating to witchcraft and allied offences. Even so, we may identify the problem area which lay around the defence in homicide cases when pleas such as provocation, self-defence, mistaken fact, were put forward on behalf of the defendant. The defence was based on the belief in witchcraft, and justification for the culpable act was evidently sought in the traditional sanctions, such as of self-help. In trying to grapple with the difficult problem which was loaded with a great deal of sociological and anthropological bias, Courts tried to evolve certain tests. It was held that the belief ought to be genuine and reasonable.[192] How far the tests were satisfactory was another matter, for they followed from Western notions of law and justice. What concerns us most is the application of these tests and with due respect it is submitted that they were not correctly applied.[193] Courts considered what was genuine and reasonable from the viewpoint of an Englishman of the twentieth century. It will be apposite to recall in this context that belief in witchcraft once prevailed in England too, and that it faded out gradually with the advent of the industrial revolution. However, it may also be pointed out that although the colonial rulers sought to tackle the problem in Africa through legal means the law enacted in Nigeria and Ghana lacked the force, vitality and concern that is to be found in the comprehensive enactments of the five countries of East and Central Africa.[194]

1.196 Professor A.N. Allott refers to some decided cases, such as those of FABINO[195] and GALIKUWA[196], observing that the application of English law in criminal matters may be "varied" to take account of African beliefs and patterns of behaviour.[197] Indeed, in FABINO the court accepted the plea of provocation and altered the conviction from murder to manslaughter but in the other cases the plea failed. As already submitted the courts did not act in a uniform manner in applying the tests they had evolved. The colonial legislature did not feel inclined to create a new category of

defence in homicide cases in the context of pervasive belief in witchcraft but the matter deserves the attention of independent legislatures. Whether or not such a measure is necessary under the altered conditions of the independence era can only be answered after intensive sociological studies with emphasis on "socialisation", "culture patterns", "value systems" which, as A.I. Richard points out, British anthropologists have so far neglected.[198] Nadel's observation, made in his study of the Nupe of Northern Nigeria, that modern law courts have failed to afford protection to the so-called victims of witchcraft, also deserves attention.[199]

(b) "Indirect Rule"

(i) A General View

1.197 In 1618 the "Company of Adventurers of London trading into parts of Africa" was granted a Royal Charter which established forts in Gambia and also in the Gold Coast between 1618 and 1631. In a subsequent Charter granted by King Charles II in 1660 there appeared a power to use martial law almost similar to that conferred upon the East India Company.[200] The relevant recital in the Charter (Patent Rolls, 12 Car II, part xxi), was as follows:

> . . . grant unto them full power, license and authority to name and appoint Governor from time to time in the said plantation. . . who shall have full power and authority. . . to execute and issue within the said plantation the law called the martial law for the defence of the said plantation against any foreign invasion or domestic insurrection or rebellion. . .

Similarly, as happened in Bombay,[202] when a "court of judicature" was established for "forts", "plantations" and "factories" on the Gold Coast, by a subsequent Charter (Patent Rolls, 24 Car II, part iii) it was constituted with "one person learned in civil law and two merchants" but it was to deal with maritime cases only.[203]

1.198 However, it cannot be said that the two early Charters referred to above in any way established the sovereignty of the British Crown in Africa. The island of Lagos was ceded to the British by the native Chief

in 1861 but even before that we find the "usurpation" of judicial as well as legislative authority in the celebrated "Fanti Bond" of 1844. The Chiefs acknowledged in the Bond that "power and jurisdiction" were being exercised in places not only within, but also "adjacent to", the forts and settlements, "for and on behalf of" the British Crown. In an important clause, quoted below, the germ of indirect rule, we submit, could be traced:[204]

> . . . murder, robberies and other crimes and offences will be tried and inquired of before the Queen's judicial officers and the Chiefs of the district moulding the custom of the country to the general principles of British law.
>
> [emphasis added]

Until independence everywhere in British Africa the machinery of government continued to function along two parallel lines with two sets of executive, legislative and judicial organs, as we shall see.

1.199 It has been observed that the principle of indirect rule aimed at using Africans as "agents" as they were cheaper and they also acted as "shock-absorbers" and that both the colonial powers and the chiefs, needed and reinforced each other.[205] It is true that the hard core of the policy which came to prevail in all territories bore a single central theme but we cannot agree that it was first drawn up by Lord Lugard in the Northern Nigeria Protectorate in sharing power with the Emirs who were given Letters Patent, it is stated, to confirm their position, subject to the British government's right to impose taxation and control allocation of land.[206] However, it is to be noted that the political authority throughout the whole of Northern Nigeria did not vest in the Emirs and, as has been stated, there were as many as 500 treaties which the Royal Niger Company had made in the "Niger territories" and which were recognised by three Anglo-German agreements between 1885 and 1898 which secured control of jurisdiction over the entire territory for the British.[207] On the other hand, in several parts of Southern Nigeria police and armed forces were used in "punitive expeditions"

between the years 1900 and 1913 in the process of establishing, expanding and consolidating the protectorate[208] although some of the Yoruba states appear to have "surrendered power and authority" over certain civil and criminal matters by the "judicial agreements" of 1904-08.[209]

1.200 The above process illustrates how power, authority and jurisdiction were acquired in different territories in Africa by divers means.[210] Besides, the political culture of the people of the different territories hardly conformed to a single uniform pattern. Hailey, therefore, rightly observes that "flexibility of application is the outstanding requirement in the technique of the native authority policy".[211] Another observer appears to describe this technique as "progressive adaptation of native institutions to modern conditions."[212] Allott has suggested four reasons that impelled the British rulers to retain the customary or traditional legal system - economy, also perhaps, administrative expediency, e.g. to meet the insufficiency (in the rank and cadre) of trained personnel, ready acceptance of British over-rule, compliance with the agreements and treaties under which jurisdiction was assumed and the nature of British law, which was considered too sophisticated for a primitive population.[213]

1.201 These reasons could equally apply to the system of "indirect rule" as a whole but it has also been stated by another observer that the share of European officials in the administration was limited to "persuasion" to allow sufficient "freedom of action" to the native rulers to preserve the "reality" of their authority among his people.[214] There could, however, be another possible reason, or rather a motivating factor. Could it be that "indirect rule" was an indirect way to abridge the breach of legality ? Admittedly, the treaty-making process of acquiring territorial sovereignty was of doubtful validity as had later been judicially noticed.[215] The Chiefs could not give more than what they possessed and, as we have seen, in most cases the traditional concept of the Chief's authority was a combination of ritual as well as temporal

powers without any positive aspect of territorial sovereignty. However, the temporal powers manifested themselves in the judicial and executive functions combined in the person of the Chief. Whether or not the "Indirect rule" attempted to infuse the doctrine of separation of powers into the remodelled political authority of the Chiefs by dealing separately and also in separate legislations what may be called their"non-judicial" or "political" status and functions as distinguished from "judicial", the Chiefs definitely lost their paramountcy through this metamorphosis. Thus, the "reality" of their new authority was, in fact, less real than it seemed to be. On the other hand, by creating "Chiefs" where none existed, the "indirect rule" engendered a Pan-African appeal for the institution.

(ii) The "political" status of the "New Chiefs"

1.202 Lucy Mair has rightly observed that two opposite trends are discernible in the policy underlying the system - to improve what was found and to make all new.[216] In Hailey's words two types of "native authorities" were created - agencies deriving their authority entirely from statutory enactments for their appointment and those which, though so appointed, derived authority from their traditional status.[217] Although the observations of both Lucy Mair and Hailey were made in the context of East and Central Africa, the general position was hardly much different. Lucy Mair, however, makes a significant general comment when she says that the African chiefs traditionally represented a smaller political unit and had different functions and, as area and functions both changed, the link with tradition was snapped.[218] According to Hailey, his second type was conceived as "a means of endeavouring to graft our higher civilisation upon the soundly-rooted native stock. . . moulding it and establishing it into lines consistent with modern ideas and higher standards."[219]

1.203 After four years of formal assumption of sovereignty in the Gold Coast with the constitution of the "colony", law for "indirect rule" was enacted there in the Native Jurisdiction Ordinance, No. 8 of 1878

which envisaged a kind of "dual rule", as relations between the Akan and Fanti states and the government were regulated by agreements. This position continued until the Native Administration (Colony) Ordinance (No. 18 of 1927) introduced a larger measure of administrative control.[220] For Ashanti, the Native Authority Ordinance, No. 1 of 1935, was enacted and similarly, for the Northern Territories, Ordinance No. 2 of 1932 was separately enacted. The tribes inhabiting these two areas, as we have seen, had widely divergent types of institutions, with the predominance of "chiefly" societies in one case and of the "chiefless" in the other. We also noted that the Fanti Bond of 1844 for the first time empowered the British and the Chiefs to act conjointly in the exercise of "judicial" and "legislative" powers as the Ashanti Treaty of 1831 merely recognized the position of the British Governor at Cape Coast as a mediator in case of acts of aggression against Ashanti or the states inter se.[221]

1.204 The link with the 1844 "Bond" was maintained in the Native Jurisdiction Ordinance of 1878, as it purported to deal with "certain powers and jurisdictions" and not the functions severally and separately. Even so, the attempt to split up, and scale down, the traditional personality and authority of the Chief was successfully made. The terms, "Head Chief" and "Chief" were defined; the latter included the former and also certain named traditional Chiefs. The application of the Ordinance was however, subject to a proclamation by the Governor made with the advice of the Executive Council (s.3). This provision was eventually modified after the legislation was re-enacted as Ordinance No. 5 of 1883;[222] the other material provisions remained substantially in the original form. In its modified form, as it stood in 1920, s.3 provided that "powers and jurisdiction" of all "native authorities" (not defined), shall be exercised according to the provisions of the Ordinance "and not otherwise". The traditional hierarchy of subordinate Chiefs was also tampered with by s.4 (cap. 82) which vested in the Governor the

power to subdivide the Head Chief's division and appoint Chiefs for these units. Both in the original 1878 Ordinance and its 1883 re-enactment (cap. 82), s.29 vested in the Governor in Council the power to "suspend" and "dismiss" any Chief who shall "appear to him to have abused his power or be unworthy or incapable of exercising the same unjustly or for other sufficient reasons" subject, of course, to the rule of audi alterem partem.

1.205 The provision just quoted clearly made a mockery of the Chief's traditional authority in that the ultimate authority of the Chief to his tribe, clan or lineage was now subordinated to a new supreme authority. This position was further strengthened by the Chiefs Ordinance, No. 4 of 1904,[223] and later buttressed by the 1927 Ordinance,[224] which repealed and replaced both 1883 (cap. 82) and 1904 (cap. 80) Ordinances. The deposition of any Chief, as also his election and installation made in accordance with native custom, was subjected to the requirement (in 1883), of "confirmation" by the Governor. In 1927 there appeared not only new classes of native authorities, such as "Paramount Chiefs", "Divisional Chiefs", "Chiefs" and "Headmen", but also new institutions, such as "State Councils", "Provincial Councils" and "Judicial Committees", which were entrusted with such matters as the election and deposition, as well as deportation following deposition, of the new classes of native authorities (ss. 2 to 14). Deportation could be from the "former place of abode to another place within the state" (s.10). This provision (albeit in a modified form) was incorporated in the enactments of 1932 and 1935 relating respectively to the Northern Territories and Ashanti, although the "Native Authority" envisaged there was of a different form in that it carried substantially the same status in so far as such matters as election, appointment, installation and deposition was concerned.[225]

1.206 In Nigeria, Lord Lugard's policy, it has been observed, first found expression in the Native Authority Proclamation No. 2 of 1907 in the Northern Protectorate and in Proclamation No. 25 of 1901 in the

Southern Protectorate.[226] In the Eastern Provinces the native members of the "Native Councils" established under the Proclamations were given "warrants" to exercise authority for the "conservation of peace" in their respective areas for they had no customary or hereditary status, and came to be known as "Warrant Chiefs".[227] It is also necessary to refer to two other Proclamations of 1901 appertaining to Southern Nigeria of which No. 15 did not apply to the Central and Eastern Provinces to which No. 26 exclusively applied. While the former set up "Councils" at different levels, the latter provided for a "Head of a House". In 1914 the two Protectorates were amalgamated and Native Authority Ordinance No. 14 of 1916 was enacted.[228] In 1943 the law on the subject in the Protectorate and the Colony was embodied in a single enactment. The central theme of the law of Nigeria was the same as that of the Gold Coast - the power of appointment (also contemplating plurality of Chiefs) and punishment by the Chiefs, and also of specifying their functions and scope of authority came to be vested in the government, destroying completely the traditional link.[229] Indeed, in 1943, the "modernisation" was carried a step further by enabling the "native authorities" to become "corporate bodies" (s 45). The same central theme also informed the law enacted in East and Central Africa.[230]

1.207 West Africa, as we know, had a preponderance of "chiefly" societies and later came to be known as the traditional home of "indirect rule". But the traditional Chiefs even when in other territories, wherever they existed, met the same fate. Their political status was completely blacked out and they became not only "agents" but virtually servants of the colonial rulers. It is apparent that there was a deliberate attempt to discard everywhere the traditional structure. The paramountcy of the Chief was now replaced by a derived authority which was sought to be supported by such provision as making it an offence to "intrigue" against his authority, which obviously carried a hollow ring of sanctity for the

office.[231] Such provision could not supply the traditional authority which was completely effaced by tampering in various manners with the customary method of election and deposition of the imcumbent and most materially perhaps, by contemplating plurality in the office of the Chief. Lucy Mair rightly observes that the new Chief became a symbol of alien rule to some subjects;[232] another observer points out that the Chief was driven out of politics with the advent of independence.[233] Both however overlook the fact that the ritual functions of the office of the traditional Chief possibly retained for the office a great measure of respect and appeal, as reflected in the Independence Constitution of Ghana as well as in the position in Central Africa.[234] It may also be interesting to note that in the few cases that came before the courts during the colonial era, the judiciary adopted a cautious approach in matters concerning "election" and "deposition" of the Chiefs considering possibly the political aspect of the matter.[235]

(iii) The "non-judicial" functions of the "New Chief"

1.208 Under "indirect rule" the "New Chiefs" (the Native Authorities) were entrusted with "non-judicial" functions which were generally similar in all cases everywhere, namely executive and legislative. It was only in detail and emphasis that the provisions differed. It appears that the legislative function was developed gradually and found prominence where the "native authority" was contemplated in a plural form. Emphasis all along, from the beginning, in all these enactments, was on the necessity of maintaining "law and order" in the community. The political status of the Chief having been reduced, as we have seen, his executive functions also took the form of an agency for law enforcement. The phraseology is also common in almost all enactments. He was required to "interpose" to prevent crime and arrest offenders. Similarly, he could "issue orders" for the purpose, inter alia, of prohibiting any conduct which might cause a riot or breach of the peace. In the early enactments of Gold Coast and Nigeria, he was

even described as "the conservator of peace"[236] and, of course, in all cases and at all times disobedience of his "lawful" orders was made an offence. If he failed to act in any situation he could be ordered to do so by the appropriate official of the general administration, who could even act himself.

1.209 The legislative power in Nigeria in the beginning appears to have been vested in the "Native Councils" as in Southern Nigeria it was provided in s.2 of The Native House Rule Ordinance that any "regulation" passed by the Council under the provision of the Native Courts Ordinance, with the consent of the Governor, was to be considered as "Native Law and custom". In the Gold Coast, s.5 of the Native Jurisdiction Ordinance 1883 provided that the Head Chief of a Division, with the concurrence of the Chiefs, captains, headmen and others who were councillors of his stool, according to native custom, could make "byelaws consistent with the laws of the Colony" for "promoting the peace, good order and welfare of the people of his division". The byelaws required approval and were subject to disallowance. In the 1927 Ordinance the "Paramount Chief" replaced the Head Chief but there was another significant provision in s.130 which empowered the "State Council" to record its opinion on "any subject" of customary law. If the Governor in Council was satisfied that it was agreeable to the majority of other native functionaries, it could be "proclaimed" as the law on the subject. In the consolidated Nigerian Ordinance of 1943 the scheme followed was almost similar: s.25 dealt with power to make 'rules' and s.30 with the 'declaration and modification of native law and custom'.

1.210 However, as has been observed, "legislation was not a primary issue" in the traditional African society.[237] The innovation, we submit, was motivated by a twin objective. In the first place the power to make 'rules' and 'byelaws' was not truly a legislative power but an 'incidental power' that was given usually to a body corporate as a measure of administrative convenience to enable it to carry out its function more effectively

and orderly. The other power was indeed of a radical nature which aimed at using law as a means of social change as was suggested by the condition attached to it, namely, such "declared" law was not to be "repugnant to justice, equity and good conscience" or incompatible to the enacted law. Obviously, the aim was to mould the native law according to British notions of justice, as was expressed in 1844 in the Fanti Bond.

(iv) The "Judicial" status and functions: the "Native Tribunals"

1.211 We have already seen that in most traditional African societies Chieftainship, where it existed, carried with it also judicial power, as in only a few societies was there a separate institution of a judiciary, for the obvious reason, as already indicated, that there was emphasis on discussion, compromise and settlement, due again to the importance attached to social norms rather than legal norms, in all societies generally. The British rulers, on the other hand, made specific provision for dispensing "native justice", as Hailey prefers to call the system. In Kenya, the Chiefs were not associated with a "Tribunal" and members of the "Tribunal" were chosen for their personal qualifications who, although required to administer customary law primarily, also administered the statutory law of a wide range.[238] However, it was not a case of altering the traditional structure, as "chiefless" societies predominated in Kenya but what was significant was that Art.52 of the East Africa Order in Council 1897 empowered the Governor to make "Queens Regulations" by which he could not only make rules for the administration of justice in "native courts" but also "alter or modify" the operation of any native law or custom "in the interest of humanity or justice". Later, Ordinance No. 29 of 1930 provided that "Native Tribunals" should be constituted "in accordance with native law and custom" and, as has been stated, it was towards the end of the colonial period that a gradual policy of integration of the dual court system came to be adopted.[239]

1.212 In Uganda, as we have seen, a hierarchy of courts with "appointed"

personnel existed in the "kingdoms". This tradition appears to have been continued.[240] Native courts were first constituted with only the "official Chiefs" but later re-organised with half "officials" and half "commoners" with the "Chiefs" as Presidents.[241] In Tanganyika also, it has been observed, no innovation was introduced by Ordinance No. 5 of 1929 as it did not prescribe the constitution of the courts but by "warrants" the native authorities were appointed as native courts. If any "Chief" was the native authority in any case he presided over the "Bench" which was constituted according to native custom.[242] The same pattern was followed in Nyasaland.[243] In Northern Rhodesia also Benches were constituted according to native custom and the "Chiefs" held courts with the help of two assessors who were selected by him; in Barotseland ruled by the Lozi the hierarchy of the traditional courts such as the Paramount's court and the District court appears to have continued without any material change.[244]

1.213 In West Africa, in the Native Jurisdiction Ordinance 1883 itself provision was made (in Part III, ss.10-25) for "Native Tribunals" which had, as in every other case, a plural membership with the Head Chief and also the Chief of any subdivision or village and their respective councillors forming tribunals to try breaches of byelaws and "to exercise civil and criminal jurisdiction". The criminal jurisdiction was to include the power of punishing offenders by fine or by personal detention or "other native punishment not repugnant with natural justice or with the principle of the law" (s.13). Its successor, the 1927 Ordinance, enlarged the powers of the Native Tribunals and also provided for a Native Court of Appeal. The Native Courts Ordinance, No. 2 of 1935, made for Ashanti, also provided for plural membership with the Ashantehene or a Head Chief or a Chief, or any other person or persons or a combination thereof, and in addition enabled the District Commissioner to sit in the court as an "adviser" (s.4). The Tribunal could administer such customary law as

was "not repugnant to natural justice or morality or inconsistent with any provision of any other Ordinance" (s.8), hereinafter referred to as the "Ashanti formula".

1.214 In Nigeria a different process was followed and a separate statute, The Native Courts Ordinance, No. 8 of 1914 was enacted which was replaced later by Courts Ordinance No. 44 of 1933. In the Northern Provinces an "alkali" with or without assessors constituted the native court; elsewhere (including the Colony) the court was composed of either a Head Chief or a Chief or any other person, including a non-native, or a combination of them, with or without assessors (s.4). Courts were graded as "A" to "D" according to power conferred on them and Grade "A" court was given "full judicial power". Provision was made for a "Final Native Court of Appeal" (ss. 29 and 30) and in certain cases appeals from its decision could also lie to the Supreme Court and from there to the West African Court of Appeal (ss. 32, 34). The appellate courts also were provided with Assessors (s.39). Legal representation at the original stage was expressly barred (s.24) and the practice and procedure of the court was, subject to rules made under the Ordinance, regulated by native law and custom (s.14). The Ashanti formula (supra) in respect of customary law was reproduced and, in addition, the imposition of punishment "repugnant to natural justice and humanity" and specifically mutilation and torture was expressly forbidden (s.10).

(v) Conclusion

1.215 It is not possible to suggest the motivation behind the policy of providing everywhere courts with a plural forum under "indirect rule". No doubt, in the traditional societies, in many areas, "judicial power" was vested in the "council of elders", but even in areas where central authority was pronounced and the judiciary was institutionalised, the emphasis was, as we have seen, on discussion and compromise, and a plural membership was perhaps best suited for such purpose. The members of the

"Native Tribunals" could not possibly be legally trained in adequate measure and a decision by discussion among them could apparently obviate arbitrary decision making. However, the more important contribution of the Native Tribunals was possibly reflected in incidental unification of the substantive as well as procedural provisions of the traditional legal system. Needless to say, such unification which was carried out in accordance with the "Ashanti formula" could obviously ensure that the deleterious provisions of the traditional legal system respecting sanctions (in many cases harsh, inhumane and arbitrary) and also enforcement procedure were filtered out. In other words, personal liberty in the social context received better protection under "indirect rule" through the administration of justice by the "Native Tribunals".

1.216 On the other hand, it can be said that in the political context personal liberty was evidently better protected under the traditional social, political and legal systems. As we have seen, there were effective checks against abuse of authority by the Chiefs under the traditional systems: "African despotism" was a myth. Under colonial rule, the new attitude was projected into the stance of "legality" and "legalism" adopted by the new rulers. The "colonial constitutionalism", as we shall see, was, in fact, an antithesis of "constitutionalism"; the colonial laws themselves authorised arbitrary executive actions. Indeed, the colonial rule could claim legitimacy only by resorting to "legalism" and "legality" as the concept of government by consent was the antithesis of colonialism and the international system had not attained sufficient strength to contain colonialism. However, the indirect rule incidentally made a wholesome and strong impact on "tribalism" as colonial rule itself broke down tribal boundaries to pave the way for the creation of independent nation-states.

(D) The aims and attitudes of modern African political leaders

1.217 Ghana was the first state of Commonwealth Africa to attain independence, in 1957. Its leader, Kwame Nkrumah, spelled out succinctly the attitudes of the emerging nations in the following terms:[245]

> . . . the philosophy of the African revolution. . . is defined by three political components of our liberation movement - namely: Nationalism, Panafricanism and Socialism.

Martin Minogue, who quotes Nkrumah, observes that, "the labels selected by Nkrumah remain the most convenient catch-phrases to summarise the dominant strands in African ideology". He proceeds to add that the Western philosophy was turned to good effect by the African leaders "against embarrassed imperial governments which had customarily pretended not to notice the blatant contradictions between their own explicitly democratic values and the colonial autocracies."[246] As we have already seen, in India also, the leaders had adopted the same stance many decades earlier.[247]

1.218 The African leader strives hard to retain popular appeal for the call to national unity which had served him well in the struggle for independence. And as Minogue observes, national unity is seen as the guarantee of independence and political competition as subversive. Minogue rightly points out that this fact was central to the new African ideology and to its belief in the need to restructure the emergent political system: "Political organisation henceforth is to centre on a single political party which will act to reflect the popular will."[248] It was perhaps not difficult for the African leader to preach this doctrine as parliamentary democracy, even in its barest form, had a fragile existence in Commonwealth Africa,[249] unlike India.[250] Although the "indirect rule" in Africa was an attempt at modernisation of the traditional political system it was not meant to provide a training base for self-government. However, the erosion of traditional values caused by

the experiment possibly helped the African leader to promote the African brand of socialism which was described as "reconstructed traditionalism".[251] It made the compromise between old, traditional values and modern values readily acceptable to the populace.

1.219 Indeed the traditional "tribalism" was turned to good effect by Nkrumah in the new creed of Pan-Africanism. The idea was not new but Nkrumah became its most vocal exponent to use it not only as an instrument to hasten decolonisation but also to promote the economic salvation of Africans. He spoke of "common functional organs" to promote the idea of a Common Market for Africa.[252] In Nkrumah's view there was no difference between what he called "economic imperialism" and "political imperialism" and that it was necessary to create a "Union of African States" to ensure what he called "mutual security and prosperity of our people".[253] In another context, Nkrumah maintained that Ghana society was "by its own form and tradition fundamentally democratic in character."[254]

1.220 However, it is to President Nyerere of Tanzania that we have to look for the most lucid exposition of the African brand of socialism which found most vocal expression in his concept of ujamaa (familyhood) and the "Arusha Declaration". The following quotation projects in bold relief what may perhaps be considered as the central theme of his doctrine:[255]

> It is particularly important that we should now understand the connection between freedom, development, and discipline, because our national policy of creating socialist villages throughout the rural areas depends upon it. For we have known for a long time that development had to go on in the rural areas, and that this required co-operative activities by the people. . .

and

> The Ujamma village is a new conception, based on the post-Arusha Declaration understanding that we have to develop its people, not things, and that people can only develop themselves. . . Ujamma villages are intended to be socialist organizations created by the people, and governed by those who live and work in them. . .

Indeed, the picture which Nyerere paints is similar in many respects with the one that Mahatma Gandhi had painted in the panchayat system of government that he envisaged for free India, based on the traditional concept of village assemblies.[256]

1.221 The concept of "humanism" of President Kaunda of Zambia was also rooted in the "legacy of African tradition" which, according to him, recognised a "Man-centred" society.[257] However, he observed:[258]

> . . . care must be taken that we do not over-stress or over-emphesize the importance of preserving our past society at the expense of material development of our people. . . the crucial point [is to] preserve what is good in our tradition, and at the same time allow ourselves to benefit from the science and the technology of our friends from both the West and the East. . .

1.222 The following extract from an official publication of the Kenya Government is also relevant to our present discussion:[259]

> The system adopted in Kenya is African Socialism but the characteristics of the system and the economic mechanism it implies have never been spelled out fully in an agreed form. . . two African traditions which form an essential basis for African socialism [are] - political democracy and mutual social responsibility. . . African socialism differs politically from communism because it prevents the exercise of disproportionate political influence by economic power groups. . . Mutual social responsibility is an extension of the African family spirit to the nation as a whole. . .

1.223 However, as Basil Davidson points out, in Africa today, "public opinion could not be ignored, and public opinion wanted progress."[260] Thus, notwithstanding their dogmas and precepts the leaders are bound to adopt a flexible approach in all matters tending to be more pragmatic than dogmatic. Indeed, there was a time when the "problem of power" was one of the dominant trends of the framework within which public opinion operated but as Davidson observes, these trends have been negated by events.[261]

## III. The New World Order: Industrialised Societies and the International System

### (1) First phase: Dogmas and events

1.224 The spirit of scientific inquiry which marked the birth of the Industrial Revolution in England in the late eighteenth century, followed by what has been called the Technological Revolution, progressively permeated the different spheres of human knowledge and understanding over the decades to establish a new world order, under which we notice not only a proliferation of social and political concepts but also a harmonious co-existence of conflicting values and views, both old and new. With the growth of industrialised societies, the value of international co-operation has been accepted with increasing rapidity during the last few decades since the termination of the First World War, marking the beginning of the second phase of the development of the new world order. The fact that the world today stands divided into various "blocks" makes it all the more necessary to intensify the process of co-operation which finds expression in international standard-setting in different fields of human activity, at different levels and through different agencies. How the value of the (human) "person" is determined under the new international norms and through the various international agencies has to be considered at some length but first it is necessary to deal with the first phase of the development of the new order, in order to understand its theoretical base, which can be conveniently stated in terms of the important dogmas and events of the corresponding period.

1.225 In 1778 appeared Adam Smith's famous work, Wealth of Nations, which laid securely and firmly the foundations of the laissez-faire economy into which Smith had imported "an optimistic version of Natural Law", but the moral principles which informed his views were, as has been observed, gradually abandoned by the subsequent exponents of the theory.[1] However, the temper of the new order was reflected more clearly

in the German philosopher Hegel's Fundamentals of the Philosophy of Right, published in 1821, in which he tried to hold a "precarious balance between rationalism and authoritarianism"[2] thereby propounding what has been called "dynamic constitutionalism".[3] It has also been observed that Marx took from Hegel the idea that the prime motive force of the historical process is human labour or the practical activity of men in society.[4] In 1845 Engels published his Conditions of the Working Class in England in 1844, anticipating in form the descriptive passages of the first volume of Das Kapital of Marx, published in 1867.[5] The Marx-Engels theory of Communism had, of course, found exposition earlier in the Manifesto, published in 1848, under their joint authorship, for the German members of the Communist League in London, but their "cult" acquired prestige only through the Russian Revolution of 1917.[6]

1.226 The Manifesto opens with the statement - "A spectre is haunting Europe, the spectre of Communism", and proceeds to add that "the history of all previous society is the history of class struggle." Continuing further it states that, "Capitalism breeds its own destruction" and that, "The values which will be destroyed by a revolution which abolishes private property in the means of production will merely be the values of bourgeois life."[7] The core of the Marxist theory has been stated in these terms:[8]

(1) Utilitarian slogan blurs the conflict between classes, which is such that to realise the interest of one class is to frustrate those of another.

(2) Capitalism having progressed to the point at which the workers are concentrated in action, they become organised as a result of their experience of industrial life, having learnt the inadequacy of bourgeois liberal parliamentary democracy for remedying their conditions.

(3) No political theory can be understood out of its context in the struggle between classes - appeals to principles of morality or justice are useless as they will embody principles to express the interests of the ruling class.

The Manifesto, it is said, "attacked all concepts of the rule of Law and self-government developed in answer to the central and perennial problem of politics, the control of power."[9]

1.227 On the other hand Mill asserted that it was not the laws but the traditions, customs and conventions of society that made men less free to speak and act, starting from the assumption that the judiciary had established its independence from both executive and legislature and that nobody could be tried or condemned for "reasons of state". He agreed that self-government was a pre-requisite of freedom but at the same time he observed that the real problem of freedom began once self-government was established.[10] In Utilitarianism (1863), he modified Bentham's ideas about "utility" to include in it the pleasures of the imagination and gratification of the higher emotions.

1.228 In 1789, Bentham had defined "utility" to mean

> that property in any object whereby it tends to produce pleasure, good or happiness, or to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered.

According to Bentham, mankind was governed by two "sovereign notions" - pain and pleasure - and he observed that the object of all legislation must be to ensure "the greatest happiness of the greatest number". Since all punishment involved pain and was therefore evil, it ought to be used therefore "to exclude some greater evil".[11] Bentham is known more for his preoccupation with the codification of law, and also as a critic of law and of judicial and political institutions, rather than as a philosopher. In Anarchical Fallacies he discarded the theory of Natural Law and called natural rights "nonsense". Professor de Smith has cited his statement as an authority for the proposition that the "Anglo-Saxon attitude towards a comprehensive Bill of Rights has been uniformly negative."[12] Indeed, Dicey, a Benthamite like Mill, had stressed the paramount role of "ordinary law" in 1885.[13] But, as has been pointed out, he was careful enough to take note of the fact that what was true of the democratic system of England, need not be necessarily true of another democratic system, for democracy varied

"according to the

national temperament of each State".[14] It is true that Dicey's contemporary "Lawyers" like Maine and Stephen did not share his views and expressed distrust of democracy but, as has been observed, "the habit of mind induced by service in India", in the cases of both Maine and Stephen, has to be taken into account.[15]

1.229 However, it is to be noted that the international socialism preached by Marx and Engels did not strike deeper roots in England, where "the Fabians threw aside the older theory of value as based entirely on labour, and the older policy of class-war, for a theory of marginal values based on utility, and a policy of the gradual socialization of rent," just as "Bentham threw aside the old conception of natural rights for that of utility".[16] The English socialism took on new bearings in 1914 in The Great Society of Graham Wallas who, along with George Bernard Shaw and others, had brought out the Fabian Essays in 1889. It has been observed that Graham Wallas sought to reconcile "Fabianism with Occupationalism in much the same way, though with more clarity and logic, as the British Socialist Party in 1912 attempted to reconcile Marxism with Trade Unionism."[17] The open approach of British socialism was expressed more vocally two decades later (in 1931) by Harold Laski, in writing"The Dangers of Obedience", in which he observed as follows:[18]

> For to suppress individuality is to diminish it; and the outcome of continuous dimunition is the slave-mind. States have perished in history not because they could not conceive great ends, but because their passion for uniformity has deprived them of the instruments necessary to carry out those ends. High purposes in any community require citizens high-minded enough to appreciate them; and men who have been modelled to a pattern are incapable of intellectual stature. Men whose minds have been put in fetters cannot exert that energy of the soul which is the motive power of great achievement.

1.230 Having taken note so far of the few important dogmas that gained currency under the new Order, we may now briefly recount the important contemporary events as the obvious correlation between the two cannot be ignored. The State and society are bound to react to important

events, and the new values and new views in turn create new events. It cannot be gainsaid that the ideas of democracy and self-government acquired new meanings and contents in England after the American War of Independence. We have seen how the Utilitarians responded to the new ideas of democracy and how Mill spoke of self-government. Public opinion was bound to be influenced by the contemporary political thought and in turn to influence state policy, but it has been rightly observed that the British colonial policy has not been consistent and that it "has not run ahead of colonial nationalism, but has been a response to its demands."[19] The Indian Sepoy Mutiny of 1857 resulted in a change in the form of the Indian colonial administration, with the enactment by the British Parliament of the Government of India Act in 1858.[20] Parliament also granted "Constitutions" to the self-governing colonies of Canada and Australia in 1867 and 1900 respectively; the Colonial Laws Validity Act enacted in 1865 was in fact a response to the problem of an Australian colony. In 1907 New Zealand was also granted a "Constitution". While this process was going on and the concept of the Commonwealth was taking shape, the British surprisingly joined the "scramble for Africa", manifested in the first International Conference held in Berlin in 1884-85.[21]

1.231 But there were more important international events that preceded the Conference. In 1814, "The Treaty of Paris" provided for the universal prohibition of the slave-trade. In 1856 the Crimean War began and in 1861 the American Civil War. These events brought an immediate response from the international community in the form of the Geneva Conventions of War in 1864, which was the first international treaty to provide for the sick and wounded prisoners of war being given humanitarian treatment. In 1874 there was an International Conference in Brussels which dealt specifically with the legal status of insurgents. Later, the Hague Conventions of 1899 and 1907 dealt with the Laws of War in greater detail. Possibly the founding, first of the League of Nations

in 1920 and then of the United Nations in 1945 encouraged further development of the law in this field which found expression in the Geneva Conventions of 1925, 1929 and 1945.

1.232 It is true that the "international socialism" of Marx gained a permanent foothold in Russia in 1917 with the fall of the Czarist regime there, but it was only after the end of the First World War that the idea of a broad-based international co-operation on a larger scale captured the imagination of the world, which saw the League of Nations being founded in 1920 with headquarters at Geneva and The Permanent Court of International Justice at The Hague. It is to be noted that, although America never joined the League, it was President Wilson who first mooted the idea in 1918, stressing the need for "affording mutual guarantees of political independence and territorial integrity to great and small nations alike."[22]

(2) Second Phase: International standard-setting in the field of human rights

(A) The Role of the League of Nations

1.233 Although the League of Nations was formally dissolved in 1946, Russia had joined it as late as 1934 only to be expelled a few years later, in 1939. On the other hand, Germany and fourteen other States had withdrawn from it before the Second World War began. As we have seen, the international efforts in the field of human rights have been confined, until the formation of the League, to one aspect only, namely, violations resulting from armed conflicts, insofar as the right to personal liberty was concerned. This position remained unchanged during the era of the League except possibly in one respect. Earlier, in various bilateral and multi-lateral treaties negotiated as early as 1555, human rights problems were dealt with mainly in terms of the rights of religious minorities.[23] This aspect was broadened in Art. 22 of the Covenant of the League, under which certain "advanced nations" became "mandatories on

behalf of the League". They were entrusted with "a sacred trust of civilisation" in governing "people not yet able to stand by themselves under the strenuous conditions of the modern world". A Commission was set up to monitor the process and to submit annual reports on the "well-being and development" of the dependent people. Cl.(5) of the article guaranteed "freedom of conscience and religion" and prohibited trafficking in slaves, arms and liquor. It is pertinent to note that Britain became a mandatory in respect of Palestine and Tanganyika, among other dependencies.

1.234 The founding of the League of Nations did not, in view of the limited scope of Art. 22, contribute to international standard-setting in the field of human rights, although it might have resulted in, as has been suggested, "Internationalisation of the colonial problem", of which the "security aspect" might have been the prime mover in that it might have brought about a realisation of the fact that colonial rule created inter-state rivalry leading to armed conflict in many cases.[24] Indeed, Britain was a major colonial power which had neither a written Constitution nor any sympathy for a written Bill of Rights, whether at a national or international level. The Constitutions it granted to its self-governing colonies like Canada, Australia and New Zealand did not contain any Bills of Rights. The colonial interests of France possibly swamped its wider humanitarian sympathies. Although President Wilson had pleaded for the right of self-determination of peoples in 1918 in his "Fourteen Points", he could not persuade the American Senate to ratify the Convention to join the League.[25] Although Soviet Russia had had no colonial problem it adopted a Constitution in 1936 without a Bill of Rights, to conform with the orthodox Marxian doctrine under which a man is considered as a "specis being" and a man is discouraged to think of himself "in bourgeois terms as an individual with separate inalienable rights".[26] The founding of the United Nations and international standard-

setting under its aegis, however, influenced the Russian leaders to depart from the orthodox doctrine in 1965 by amending the Constitution to incorporate therein a Bill of Rights (albeit non-justiciable) in, among others, Art. 125 which "guaranteed","in order to strengthen the socialist system", freedom of speech, of the press, of assembly and of processions and demonstrations. Art. 127 "guaranteed inviolability of the person" to the citizen.

(B) The Role of the United Nations

(a) Some provisions of the Charter and the new bearings

1.235 The new bearings in the international system were evident even before the actual founding of the United Nations. For this one may look to President Roosevelt's declaration of "Four Freedoms" of January 1941 and also to the "Atlantic Charter" of the same year and to the "Moscow Declaration" of 1943. When the United Nations Charter was signed in 1945, of the twelve Afro-Asian "original members" (out of a total of 51), only India (albeit a dependency then) belonged to the New Commonwealth but the Afro-Asian membership rose rapidly to 22 in 1960 and 41 in 1970, out of a total of 127. During this period, as Chief Adebo, the Under Secretary-General of the United Nations observed, this handful of members "made it their business to see to it that their brethren who were still under the colonial yoke attained their freedom and independence as soon as possible and, in the meanwhile, that they were treated with decency and fairness by their colonial masters."[27]

1.236 In the preamble of the Charter it is stated that the object of the United Nations is, inter alia,

> to reaffirm faith in the fundamental human rights, in the dignity and worth of human persons, in the equal rights of men and women and of nations large and small.

Thus it committed itself to the task of standard-setting in the field of human rights, but notice has also to be taken of some of the other provisions of the Charter. Art. 1(2) indicates one of the "Purposes of the United

Nations" as being "to develop friendly relations among nations based on respect for the people to equal rights and self-determination of peoples". Art. 2(7) provides that the United Nations shall not "intervene in matters which are essentially within the domestic jurisdiction of any State".

1.237 Chapter XI contained "Declarations regarding non-self governing territories", which the Afro-Asian bloc used with great determination to curtail the scope of Art. 2(7).[28] Art. 73 in this Chapter, adopted some, though not all, of the concepts of Art. 22 of the Convention of the League of Nations. It also speaks of "sacred trust" and the "well being" of the inhabitants of non-self governing territories and requires the "members of the United Nations which have or assume responsibilities for the administration" of these territories to do such things as ensure "their political, economic, social, and educational advancement, their just treatment and their protection against abuses" and, in developing self-government, "take due account of the political aspirations of the people". Chapter XII provides for the "International Trusteeship System" which replaces the "Mandate" system of the League of Nations. Art. 76 in this Chapter indicates the "basic objectives of the trusteeship system", such as "to encourage respect for human rights and for fundamental freedoms for all" and "recognition of the interdependence of the peoples of the world."

1.238 Chapters IX and X are concerned with "International Economic and Social Co-operation" and contain important provisions on human rights (Arts. 55, 60, 62 and 68). Art. 55 deserves special notice in that it reiterates "respect for the principle of equal rights and self-determination of peoples" and that the United Nations shall "promote universal respect for, and observance of, human rights and fundamental freedoms for all", but it is to be noted that the underlined expressions are not defined. Art. 62 empowers the Council to prepare and submit appropriate "draft conventions" to the General Assembly and also "to make recommendations for the purpose of promoting respect for, and observance of

human rights and fundamental freedoms for all". Art. 68 specifically empowers the Council to set up "Commissions" for such purpose.

1.239 It is to be noted that the non-aligned nations prefer an approach of "effective interpretation" of the Charter, which is to be inspired by its general philosophy and underlying basis and to be directed towards the fulfilment of its fundamental purposes and stated objectives. This has replaced the fragmentary and merely prohibitive rule of international law by an integrated system of more positive standards.[29] Indeed, Fawcett points out that Art.2(7) has not afforded the protection that the drafters contemplated.[30] He observes that "it has come to be accepted that where the political right of self-determination of a people is in issue or where there is at least a systematic denial of human rights, the United Nations does not regard Art. 2(7) as a barrier."[31] There is no doubt that not only the Afro-Asian group has brought a new emphasis to bear upon the interpretation of the Charter, as both Twitchett and Goodwin observe, but that there is also much truth in Twitchett's contention that the international drama is now being played out in a new setting, which the founding fathers could not have anticipated.[32] There is also the pressure from the Communist group, besides the pressure of rapid developments that are taking place in today's world as a result of "technological revolution" and "conquest of space", with a lurking danger of destruction and pollution of natural environment. Twitchett is right in asserting that international aspects of human rights and racial questions have assumed "a new, more potent guise".[33] Goodwin is perhaps more candid when he says that the pressure from the Afro-Asian group is directed towards declaring "the interpretation of human rights almost exclusively in terms of the right to national self-determination."[34] On the other hand, Professor Felix Ermacora prefers to take an orthodox view of Art.22(7) by referring to its precursor, Art.15(8) of the Covenant of the League of Nations, despite the fact that the two "domestic jurisdiction"

clauses are differently worded. According to Ermacora both the League and the United Nations have characters similar to that of a "union" in a confederation and they both have "limited competence".[35] However, even Ermacora concedes a "concurrent jurisdiction" in matters of "gross violation" and "consistent patterns of violations" of human rights, especially in respect of protection against discrimination and of the right to self-determination.[36]

1.240 It is to be noted that discussions had taken place in the very first session of the General Assembly in 1946 on a "Declaration on the Rights and Duties of States".[37] In the draft it was proposed that the declaration should deal, inter alia, with limitations of the rights of the state, discharge of international obligations, and the national and international scope of the law of nations, but the Secretary-General observed that it was not a purely juridical question and that it was necessary to take into account "varying geographical and political conditions and to synthesize them to represent the united juridical thinking of the whole world."[38] It was resolved that the views of not only the member states but also of national and international bodies concerned with international law be invited, and that further studies be conducted into the matter by the International Law Commission.[39] Unfortunately, the latter decided in 1949 that the definition of "domestic jurisdiction" was not a topic suitable for codification. Some members expressed the view that while the Covenant of the League empowered the "Council" to do so, the United Nations Charter, on the other hand, left it to the member states to define the jurisdiction.[40]

1.241 However, in a United Nations seminar in Dar-es-Salaam (Tanzania) in 1973 the subject again came up for discussion. The seminar was discussing ways and means for promoting human rights with special attention to the problems and needs of Africa.[41] There were views expressed to the effect that the principles of human rights might in some cases be "put

aside temporarily" until the majority of the African people had been educated and their conditions of living improved. It was also said that it was useless to discuss human rights except in the context of territorial integrity of a state; that the "primary aim" of any government was to promote the happiness of the people of the country and that civil and political rights were useful only if they contributed to the attainment of this goal.[42] The views apparently confirm the position, as has been observed, that "Many Afro-Asian states view international law as a group of legal norms devised by their former colonial masters to maintain and protect the status quo".[43] Similarly, the East European nations, led by Russia, were also expected to thwart any attempt to encroach on "domestic jurisdiction" as they were apt to consider international law as reflecting the values of the capitalist economic system.[44]

(b) The Universal Declaration on Human Rights

1.242 The Declaration was adopted unanimously by the General Assembly of the United Nations, in December 1948, although eight countries abstained, including Russia and five other East European countries as well as South Africa and Saudi Arabia.[45] Professor J.E.S. Fawcett prefers to regard the document as "interpreting and defining" the relevant human rights provisions of the Charter.[46] Professor L.B. Sohn, however, accords it a very high status and observes that it has become "a part of the constitutional law of the world community; and, together with the Charter of the United Nations, it has achieved the character of a world law superior to all other international instruments and to domestic laws".[47] The two views reflect the difference, respectively, in the British and American approach to the character of international instruments arising from the difference in the constitutional position in the two states. There is apparently another reason for the difference in approach in that Britain and other Western European nations obviously attach greater

importance to the European Convention on Human Rights adopted in 1950. However, it is to be noted that according to the "Montreal Statement" of the Assembly for Human Rights, the declaration has "become a part of the customary international law". In the "Proclamation of Teheran" (also of 1968) it is stated that the Declaration "constitutes an obligation for the members of the international community".[48]

1.243 In this view of the matter, and in view of the further fact that the International Covenant on Human Rights of 1966 has come into force in 1976, it can be legitimately claimed that in principle the position in respect of "legal" protection of human rights in many parts of the world has come very close to that of Western Europe and Britain. Indeed, as we shall see, Khanna, J., of the Indian Supreme Court, attached importance to the discharge of international obligations relying merely on the Declaration and the provisions of the Indian Constitution in the famous HABEAS CORPUS case.[49] Despite the difference in the constitutional provisions, courts elsewhere in the republican states of the New Commonwealth generally (more particularly the African states with somewhat similar constitutional provisions)[50] were likely to follow India's example, as they were not likely to feel burdened by the theory of prerogative followed in England in matters relating to discharge of "treaty" obligations.[51]

1.244 It is necessary to note in this connection that a change in the political order in many African states of the Commonwealth has not been accompanied by a change in the legal order; in any case none has fully accepted the Marxist ideology. But, as indicated earlier, Russia had itself amended its own Constitution in 1965. The change had, however, come much earlier in the "Eastern Bloc" in that in the 1958 Warsaw Colloquium it was first observed that it was necessary to include the concept of rights and freedoms of the citizens in the definition of "socialist legality".[52] Accordingly, in 1958 the new criminal law in

Russia gave a larger measure of protection to civil rights and, when a new bias was imparted to the 1961 "Programme of CPSU" envisaging "peaceful competition between socialism and capitalism on an international scale", it became easier for Yugoslavia and Rumania to display an emphasis on human rights in the Constitutions enacted there in 1963 and 1965 respectively.[53] It is also to be noted that despite the "cold war" continuing for a long time the present political climate is infused with a spirit of detente which found expression in the "Final Act" of Helsinki.[54] Even the military rulers in Commonwealth Africa could not fail to take notice of the new climate and noted that their claim to legitimacy could be best sustained by proclaiming their respect for and awareness of international concern for the human rights situation there.[55]

1.245 The Universal Declaration contains a formidable preamble which invokes the Charter, recalls the "pledge" of the members regarding the "promotion of universal respect for and observance of human rights and fundamental freedoms" and states that it has to serve as a "common standard of achievement for all peoples and nations", not only to "promote respect" therefor but also "to secure (inter alia) their effective observance". Art. 5 prohibits "torture", as also "cruel, inhuman or degrading treatment or punishment". Art. 9 forbids "arbitrary arrest, detention or exile". Arts. 10 and 11 reaffirm common law protection as respects criminal trials by insisting on "fair and public hearing by an independent and impartial tribunal" and on the presumption of innocence, besides reiterating the rule embodied in the maxim nulla poena sine lege. Art. 14 negatively recognises the concept of "political crime" and creates the right of asylum, while Art. 13 speaks somewhat vaguely (in terms of "everyone" and not citizens) of the "right to freedom of movement and residence". The concept of democracy is spelled out in the following terms:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(3) The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure. (Art. 21)

Art. 22 speaks of the "right to social security" (for "everyone") which is not defined but is related to his being "a member of society". On the other hand, Art. 28 speaks of "a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realised." Art. 30 is relevant to the concept of "state security" and deserves to be quoted:

> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.
>
> [emphasis added]

1.246 It is to be noted that, although the Charter as well as the Declaration fails to define the terms "human rights" and "fundamental freedoms", Art. 30 possibly fulfilled the purpose as indicated by the expressions underlined above. The provision of Art. 30 can also be so construed as to supply meaning to the term "social security" used in Art. 22. It is possible to contend that Art. 30 contemplates that as a member of society, an individual is entitled to be protected not only from the activities of the State but also from those of another individual. It is also possible to construe Art. 30 to protect the State also from such activities of an individual as would make it impossible for the State to provide an individual with "social security" (in the sense just explained), in the discharge of what may be considered as one of its important functions. However, the article has to be read in conjunction with cls. (1) and (2), of Art. 29:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for. . . meeting the just requirements of morality, public order and the general welfare in a democratic society.

The Declaration thus attempted to harmonise the conflicting rights and duties of the individual, the State and society, embodying what may be called the trilogy of concepts of human rights, social security and state security. However, it is to be noted that of late the term "social security" has acquired a technical meaning in the welfare legislation of the United Kingdom, but it must be remembered that the Declaration dates back to 1948. Indeed, Lord Denning has also defined the term as we have suggested here, but he has not invoked the Declaration as we have.[56]

(c) The International Covenant on Civil and Political Rights

1.247 The International Covenant was adopted in 1966 by the General Assembly unanimously, but it has entered into force only in 1976.[57] Matters concerning violation of human rights used to be brought before, and discussed in, the General Assembly and, among members of the New Commonwealth, India vigorously pursued its complaint in this connection against South Africa, in spite of objections grounded on the "domestic jurisdiction" clause (Art. 2 (7) of the Charter).[58] The Covenant puts into "binding legal form, and in many cases amplifies the provisions of the Declaration.[59] Art. 1 of the Covenant deals with the "right of self-determination", which is not found in the Declaration. The preamble refers not only to the obligations of the member-states under the Charter, but also to the Declaration and it amplifies in the following terms the concepts embodied in Arts. 29 and 30 thereof:

> . . . the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights. . .

The substantive provisions in Art. 5(1) reproduced almost verbatim Art. 30 of the Declaration. The provisions of Art. 29 of the Declaration is amplified in Art. 4(1), as follows:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State. . . may take measures derogating from their obligations. . . to the extent strictly required by the exigencies of the situation. . .

However, cl. (2) further circumscribed the ambit of the derogation by making the provision of Art. 4 inapplicable among others, to Arts. 6, 7, 8 (paras 1 and 2) and 15.

1.248 According to Art. 6, "Every human being has the inherent right to life." Art. 7 reproduces with embellishment Art. 5 of the Declaration. Art. 9 asserts that, "Everyone has the right to liberty and security of person" and that "No one shall be subjected to arbitrary arrest or detention." It also emphasises that there can be no deprivation of liberty "except on such grounds and in accordance with such procedure as are established by law." Clause (2) to (5) reaffirm certain common law protections: every person shall be informed, "at the time of arrest", of the reasons therefor; right of bail ("release may be subject to guarantees to appear for trial"); right of habeas corpus ("court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"); right to sue for false imprisonment ("victim of unlawful arrest or detention shall have an enforceable right to compensation"). Art 10 additionally requires such person to be treated with "humanity". Art. 8, cls. (1) and (2) deal with and prohibit "slavery", "slave-trade" and "servitude". Art. 15 embodies the rule signified by the maxim nulla poena sine lege. Thus, the remark made in respect of the Declaration - "an incipient common law of mankind" -[60] more appropriately applies to the Covenant, in that it embodies more comprehensively the safeguards provided in the English common law as respects the right to personal liberty, which find place in the legal systems of thirty-seven Commonwealth States comprising over a quarter of the world's total population and also in those of the United States of America.

1.249 It is to be noted that, while Art. 9 does not specify any circumstances permitting derogation, Art. 12 - which provides (specifically, unlike the Declaration, for "everyone within the territory of a State") for the freedom of movement and residence - permitted "restrictions" to be imposed by law "to protect (inter alia) national security, public order, public health or morals." Art. 14(1) adopts the same criteria in permitting derogation from the principle of "public hearing" in the determination of any criminal charge or of the rights and obligations of any person in a suit at law; in the other clauses are to be found certain other common law safeguards applicable in case of criminal trials, such as, the presumption of innocence, the rule against double jeopardy, protection against self-incrimination and right of appeal etc. The Covenant also guarantees such political rights as freedom of expression, assembly and association (in Arts. 19, 21 and 22), subject of course to restrictions that may be imposed by law on grounds specified in each case, conforming broadly to the criteria adopted in Art. 12. Equality before the law and equal protection of the law are provided in Art. 26 but, unlike its precursor, Art. 7 of the Declaration, the new provision in positive terms provides that, "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, political or other opinion" etc. Art. 27 reiterates a similar protection in respect of ethnic, religious and minority groups in States.

1.250 Under Art. 2(3) each State-Party undertakes to ensure that "effective remedy" is provided in the respective national legal systems and that there shall also be provisions for the enforcement of such remedies. Part IV of the Covenant, in addition, provides a "Human Rights Committee" to consider measures taken to implement the Covenant and also a conciliation procedure to deal with allegations of violations. The Optional Protocol to the Covenant, also adopted in 1966 but not yet in

force, provides the right of individual applications, with elaborate procedure therefor. A detailed discussion of these provisions is beyond the scope of this study.

(C) The role of regional and sub-regional organisations

(a) The European Convention on Human Rights

1.251 The European Convention has been seen as "the first essay in giving specific legal content to human rights in an international agreement, and combining this with the establishment of machinery for supervision and enforcement."[61] The Convention was signed in 1950 and entered into force in 1953. The purpose of the Convention has been set out in detail in the preamble. It is stated that, "Government of countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law" subscribe to the Covenant "for the collective enforcement of certain of the Rights stated in the Universal Declaration". Art. 1 requires that the rights and freedoms defined in Section I of the Convention shall be secured "to everyone within their jurisdiction" by the parties. The "Nigerian" and the "Neo-Nigerian" Bills of Rights of Commonwealth Africa owe their origin to the European Convention (apparently by virtue of Art. 1 thereof) and came to be accordingly modelled on it.[62]

1.252 The scheme of Part III of the International Covenant of 1966 and the relevant provisions thereof, which we have already examined, corresponds broadly to Section I and the provisions thereof of the European Convention.[63] It also provides for similar safeguards as the right of being informed of the reasons for arrest, the right to bail, the right of habeas corpus and the right to compensation against false imprisonment which are almost similarly worded. Art. 6 corresponds broadly to Art. 14 of the 1966 Covenant with similarly worded criteria in respect of a similar derogation. Art. 7 corresponds to Art. 25 of the 1966 Covenant but unlike the latter the European Convention does

not speak of the freedom of movement and residence although it also provides for the freedoms of expression in Art. 10 and freedoms of assembly and association in Art. 11. The derogation provision in both articles also used the expression "necessary in a democratic society", along with the other criteria used in Arts. 19, 21 and 22 of the 1966 Covenant. The expression "democratic society" is not defined in the Convention, or even in the Covenant and guidance in both cases may therefore be sought from Art. 21 of the Universal Declaration.

1.253 Art. 15 permits derogation "in time of war or other public emergency threatening the life of the nation" conditionally in that it does not do away with "other obligations under international law" and also limits the measures "to the extent strictly required by the exigencies of the situation". Besides, in certain cases in respect of Arts. 2 and 4 and exclusively as respects Arts. 3 and 7 no derogation at all is permitted.[64] The provision of Art. 17 corresponds to those of Art. 5(1) of the 1966 Covenant. To ensure "the observance of the engagements undertaken" by the parties Art. 19 (of Section II) sets up two institutions, "the Commission" and "the Court". Art. 26 (of Section III which deals with the powers and procedure of the Commission) provides a six months limitation period in addition to the condition that "all domestic remedies" must be exhausted before invoking the jurisdiction of the Commission. The provisions of Section IV relate to powers and procedure of the Court. However, all petitions (whether by a State or by an individual) first go to the "Commission" which decides the question of "admissibility" and also makes "investigation" with the object mainly of effecting a "friendly settlement", if necessary through the "Committee of Ministers". The "Court" can entertain the case only on "the failure of efforts for a friendly settlement" and within three months thereof but the "right to bring a case before the Court" vests only in the States and the "Commission", subject to the further condition that the States concerned

have accepted "compulsory jurisdiction" of the Court.

1.254 Thus, the enforcement provisions of the Convention providing, unlike the 1966 Covenant, a judicial forum, and conferring the right of "individual application" (which is not provided in the Covenant but in the Optional Protocol, which has not yet entered force), are apparently better poised in securing the right to personal liberty, but it is doubtful if the European Court (which can, under Art. 50 of the Convention, "if necessary, afford just satisfaction to the injured party"), can order release from unlawful detention. Art. 5(4) envisages such a remedy but to be availed apparently at the national forum, in view of the provisions of Art. 1. However, the term "just satisfaction" has still to receive careful consideration of the European Court. According to a recent study the European Court is likely to give the "interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty."[65] Professor Roger Pinto's observation that the combined effect of Arts. 1 and 60 requires municipal law to be so construed as not to derogate from the rights conferred by the Convention, appears to have been vindicated by the recent decisions of English courts.[66] It may not be correct, as has been claimed, that the demand for a Bill of Rights in the United Kingdom has lost much of its force after adoption of the Convention,[67] but it cannot be disputed that English courts have shown a remarkable adaptability in so far as the effect of the Convention, and even of the 1948 Declaration, on the national legal system is concerned.

1.255 In R v MIAH,[68] Lord Reid referred to Art. 11(2) of the Declaration and Art. 7 of the Convention and held that it was "hardly credible that any government department would promote or that Parliament would pass a retrospective criminal legislation"[69] although in the instant case his Lordship rejected the plea that s.34(1) of the Immigration Act 1971 was in fact retrospective. In the BHAJAN SINGH case[70] in the Court of Appeal, Lord Widgery, C.J., not only referred to

Art. 12 of the Convention and to the court's unreported decision in the BIRDI case[71] but also referred to the decision of the European Court in the GOLDER case.[72] An illegal immigrant in detention pending deportation had applied for a mandamus to be issued to the Home Secretary for facilities to be afforded to him to marry in the exercise of the right conferred by Art. 12. His Lordship held that Art. 12 was to be read subject to Art. 5(1)(f) and that Art. 12 did not contemplate a right to marry simpliciter but with the intention to found a family, which was neither pleaded by the applicant nor made out on the facts of the case. In fact, Lord Denning had set the tone earlier when he observed in 1969 in the COROCRAFT case[73] that "it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it." In this connection it has been noted that "although the United Kingdom's observance of the European Convention is so far only a matter of international obligation, the Convention has begun to be recognised by our courts as a factor to be considered in the interpretation of our own laws."[74] But we submit that in BHAJAN SINGH Lord Widgery had gone even further and was willing to enforce the obligations under the Convention against the executive.

1.256 In so far as the right to personal liberty is concerned the Convention has definitely brought a direct change in attitudes as respects the Northern Ireland situation, with which we propose to deal in greater detail.[75] The international dimension of the Northern Ireland problem found a positive expression when the Republic of Ireland raised the matter in the United Nations Security Council in August 1969 alleging a threat to international peace and security as a result of the situation obtaining there on account of systematic denial of human rights to a section of the population of that area.[76] Indeed, emergency measures taken there to deal with "terrorism" and "security" problems further aggravated the situation, necessitating the appointment of a number of

"Commissions" and "Committees" between 1969 and 1975 in the search for ways and means of reconciling conflicting principles in the complicated problem.[77] In August 1977 the Standing Advisory Commission on Human Rights submitted its Report on the question of a Bill of Rights for Northern Ireland,[78] in which the majority suggested that "comprehensive legislative protection for human rights in Northern Ireland could best be achieved in the context of legislation for the United Kingdom as a whole." On the other hand, in a lone dissent it was most appropriately observed that, "for centuries Great Britain has been in the fortunate position of having a system of government which has had the consent of all its citizens [but] this has not been the case in Northern Ireland."

(b) The Organisation of African Unity

1.257 In May 1963 thirty African nations met at Addis Ababa to form the Organisation. In the preamble of its "Charter" it is stated that its members reaffirm their adherence to the principles of the United Nations Charter and the Universal Declaration which "provide a solid foundation for peaceful and positive co-operation among States." Art. 2 defines the "purposes" and in cl.(1)(e) it speaks of "international co-operation having due regard" to the United Nations Charter and the Declaration. Art. 3 defines seven "fundamental principles", such as non-interference in the internal affairs of other states and respect for sovereignty and territorial integrity of each state. By virtue of Art. 19 the member-states are committed to settle "all disputes" by peaceful means through the "Commission of Mediation, Conciliation and Arbitration". The jurisdiction of the Commission is defined in Art. 12 which speaks of "disputes between states only". The term "dispute", however, has not been defined in the Charter but the principle of non-interference in Art. 3 is likely to exclude consideration of disputes concerning violation of human rights, notwithstanding the Universal Declaration being invoked in

general terms not only in the Preamble but also in Art. 2(1)(e). It is no wonder therefore that though many African states, particularly of the Commonwealth, are critical of the Amin regime in Uganda, matters concerning alleged violations of human rights there have not been brought before the Commission.

1.258 Indeed, President Amin has not "abrogated" the Constitution which contains a "Neo-Nigerian" Bill of Rights modelled on the European Convention, as happens to be the case with the Constitutions of most other African states of the Commonwealth. That apart, other European colonial powers which formerly ruled other African states, having acceded to the Convention, it could be reasonably expected that the Organisation as a body would take a positive stand on the enforceability of human rights on the basis of a common colonial background founded in the Convention. There is of course no doubt that in Commonwealth Africa this background had a fragile existence - too short a life to create any impact on aims and attitudes of the rulers and the people of the emergent African nations.[79]

(c) The International Commission of Jurists

1.259 The Geneva-based Commission has a"consultative status" with the United Nations. It has done a great deal of work in the field of human rights, with particular reference to Rule of Law. The fact that Khanna, J. of the Indian Supreme Court, has referred with approval in a recent case[80] to the "material content" given to the concept of Rule of Law by the Commission is significant in that contribution of the Commission to legal thought as respects personal liberty appears to be gaining recognition. In 1955 "free jurists" from 48 countries agreed on what was described as the "Act of Athens". The declaration reiterates, inter alia, that the State is subject to the law and that governments have to "respect the rights of the individual under the Rule of Law and provide effective means for their enforcement." It is further stated that - "Judges should be

guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges."[81]

1.260 In 1959, 185 judges, practising lawyers and teachers of law from 53 countries assembled under the aegis of the Commission in New Delhi and agreed on what is described as the Declaration of Delhi in which it is stated, inter alia, as follows:[82]

> . . . the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised. . .

In the African Conference on the Rule of Law consisting of 194 judges, practising lawyers and teachers of law from 23 African nations as well as 9 countries of other continents, held in 1961 under the aegis of the Commission, the Conference agreed on what is described as the Law of Lagos in which it is inter alia stated as follows:[83]

> 1. . . . the Rule of Law cannot be fully realised unless legislative bodies have been established in accordance with the will of the people who have adopted their Constitution freely;
>
> 3. . . . fundamental human rights, especially the right to personal liberty, should be written and entrenched in the Constitutions of all countries and that such personal liberty should not in peacetime be restricted without trial in a Court of Law;. . .

In 1962 the Commission succeeded in organizing an international gathering of judges and lawyers from 75 countries to agree on the "Resolution of Rio" in which emphasis was laid on "the encouragement of the establishment of International Courts of Human Rights on a regional basis."[84]

1.261 In 1966 the Commission conducted a special study of preventive detention laws on a global scale by circulating a standard questionnaire to all governments to elicit valuable information on all aspects of the law and practical application in different countries of the world. Unfortunately

all governments were not equally co-operative.[85] The questionnaire was in a sense an experiment in standard-setting although it is not possible to say that it achieved this particular purpose in any manner whatsoever, except possibly stimulating serious thought in the legislative circles, in some cases, on the need to enact wholesome safeguards (as indicated in the document) to minimise the sufferings of the detainees. Indeed, because of its special status the Commission cannot be labelled as a pressure group simpliciter. Nevertheless, it distinguished itself from the pressure groups properly so-called by adopting an objective standard in all cases even when it was organising seminars. Mention in this connection may be made of a recent seminar organised by it on "Human Rights, their protection and the Role of Law in a One Party State" at Dar-es-Salaam in September 1976. In a Paper read at the Seminar on "Administrative Procedures, Administrative Law and Public Participation in a One Party State", Professor J.P.W.B. McAuslan has rightly observed that lawyers trained in the colonial tradition are apt to be critical of the administrative process in a One Party State as they often forget that "social justice and the rule of law for the majority were conspicuous by their absence during the heyday of the economic transformation of the U.K. from an agrarian to an industrial society from the mid eighteenth to the late nineteenth century." Indeed, the process of decision-making was likely to bear the impress of the social and political climate of the State and the process of standard-setting ought to take notice of it, discarding a dogmatic approach.

(d) Amnesty International

1.262 The Amnesty is undoubtedly a London-based pressure group, but its activities in the field of human rights since its founding in 1961 cannot be underrated in spite of the fact that such activities may not have contributed in any positive manner to international standard-setting

in this field, for its avowed object was "to work for the release of and provide assistance to "persons who are imprisoned, detained or restricted or otherwise subjected to physical coercion or restraint by reason of their political, religious or other conscientiously held belief" in violation of Arts. 5, 9, 18 and 19 of the Universal Declaration. Nevertheless, its large range of publications containing mostly factual information do provide some insight into the practical application of preventive detention laws of the different countries of the world.

1.263 However, in November 1974 Professor Alfred Heijder of Amsterdam University prepared a report on the working of the Northern Ireland Emergency Provisions Act 1973[86] for Amnesty International, displaying a highly objective approach. He rightly observes that "The overriding consideration in any emergency legislation is, of course, security and restoration of law and order" and that, "This in itself can only create the conditions under which normal standards of justice and respect for fundamental rights may be restored." He also rightly adds that, "At the same time, however, I feel the executive authorities should themselves respect these fundamental freedoms as far as is reasonably possible by institutional means, lest the experience of Northern Ireland become a frightening first step in the destruction of human rights in any kind of political crisis." These observations ought to provide the right approach for the evolution of appropriate norms for standard-setting in acute situations of "terrorism" as encountered, not only in Northern Ireland, but in other parts of the world. Of course, such situation did obtain during the colonial era in the Malayan peninsula and also in Kenya but they do not obtain anywhere now in the Commonwealth.[87]

(3) Terrorism, self-determination and humanitarian law

1.264 It may be disputed that "terrorism" has roots that transcend the new world order, having its origin not in the American War of Independence

(which has been termed modern guerilla warfare) but in the mediaeval and ancient period.[88] There is no doubt, however, that motivations as well as strategy and methods have changed. Mao's Chinese model and Che Guevara's Cuban models are some of the examples of the large number of modern models of guerilla warfare. In the Commonwealth context, the British had to fight two "jungle wars" in the forties and fifties in this century in Malaya and Kenya, and are still fighting urban guerillas or "terrorists" in Northern Ireland. Similarly, there are "freedom fighters" still engaged in "national liberation movements" in Africa. These are indeed all situations of armed conflicts but in all cases the threat to the status quo is based mainly on the right of self-determination in the broadest sense of the term. Professor L.C. Green rightly asserts that the statements in the Charters of the United Nations and Organisation of African Unity make it difficult to secure a satisfactory definition of "terrorism" and an effective agreement on means to control it.[89] However, Robert Moss seeks to derive satisfaction from a simple definition saying that a "systematic use of intimidation for political purposes" may be called "terrorism". Proceeding further he makes an attempt to classify "terror" as "repressive", "defensive" and "oppressive" of which the last-mentioned class is meant to cover that used against a regime or a political system.[90]

1.265 In this connection it may be noted that, as Professor Yoram Dinstein observes, International Law does not encourage civil wars but it does not prohibit them either. He also rightly suggests that such a conflict is permitted in a negative way by strictly forbidding external intervention in internal conflicts.[91] Indeed, under International Law two parallel systems of rights have grown up: "human rights" for individuals and "collective rights" for a community of human beings such as a minority. Thus the right of self-determination, which is a collective right, recognised not only in the United Nations Charter

and the 1966 Covenant but also in customary International Law, gives rise to the right to secede, as Dinstein points out, when accorded to people not under colonial domination but living in independent countries.

1.266 In the above premises it is not possible to agree with Professor Green that there is no basis to "internationalise" the situation in Northern Ireland.[92] The issue of "terrorism", in so far as it is connected with the right of self-determination, is no longer a matter pure and simple of "emotional activation" as suggested by him.[93] An act of violence by a person who may be described by some as a freedom fighter and by others as a traitor or terrorist or bandit, according as one is activated by his emotion, is to be tested with reference to his motive. It is interesting to note that International Law thus makes a distinction, however vague and insecure, between what is being called "international terrorism" and "domestic terrorism" but against the latter a justification is advanced in what has been called "state terrorism". It has been recognised that hijacking and such other activities constituting international terrorism are illegitimate and measures have to be taken at international level to fight them.[94] On the other hand there also appears to be a growing recognition of what Arab delegates called "state terrorism" in describing the measures taken by states (such as Israel) against persons involved in what they described as legitimate struggle for liberation.[95]

1.267 In this connection it is to be noted that the United Nations is cognisant of the position that on account of their political activities the minority are more exposed to torture and other cruel, inhuman and degrading treatment or punishment.[96] Indeed, in 1975 appeared the "United Nations Declaration on the Protection of all Persons from being subjected to Torture etc."[97] Art. 1 of the Declaration defines torture and other prohibited acts but Art. 3 significantly states that "exceptional circumstances such as a state of war, or a threat of war,

internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment" while forbidding states from indulging in such acts.

1.268 It is to be noted that the Council of Europe adopted (with Ireland abstaining) the European Convention on Suppression of Terrorism in November 1976; it has entered force in April 1978. The Convention aims at facilitating the extradition and prosecution of perpetrators of terrorist acts, whether or not such acts were politically motivated.[98] Art. 1 of the Convention provides that the acts described therein shall not be regarded as "political offences" for the purpose of extradition. Clauses (a) to (d) describe acts which may well be described as acts of "international terrorism" but clause (e) significantly speaks of "an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons." Ireland rightly pointed out that the Convention could only be regarded as a "regional law" and, in providing for extradition for a "political offence", it was contravening the customary International Law.

1.269 Indeed, the Convention effaces the category of "political crime" and the status of "insurgent" recognised at International Law. An insurgent, under certain circumstances, is entitled to be treated as a prisoner-of-war and not as an ordinary criminal and he cannot be tried under ordinary criminal law. The "Humanitarian Law" laid down in the Geneva Conventions of 1899, 1925, 1929 and 1949 and The Hague Convention of 1907 are applicable in his case. However, until recently the scope of the 1949 Convention in regards to status of an insurgent was open to doubt. In April 1977 the Diplomatic Conference on the Humanitarian Laws of War clarified the scope of the Third Convention of 1949 and voted overwhelmingly for a proposal to give guerillas the status of prisoners-

of war.[99]

Conclusion

1.270 It cannot be gainsaid that under the new world order discriminatory treatment, whether on grounds of race, religion or colour, poses a greater threat to human rights than differences based on political belief (although President Nyerere does not consider religion as a source of potential threat). Speaking on the twentyfifth anniversary of the United Nations he said:[100]

> A man can change his religion if he wishes; he can accept a different political belief. . . But no man can change his colour or race. And if he suffers because of it, he must either become less than a man, or he must fight. . . mankind has been so created that many. . . will destroy peace rather than suffer under it. . .

The British Prime Minister, Harold Wilson, speaking in 1975 at the Helsinki Conference, referred to the "new Code of political and human relations" resulting from the participation of Russia which was reflected in what he called "detente" - "the spirit of live and let live."[101] This was appropriately projected into the Final Act of the Conference with the preamble speaking of "co-operating in the interest of mankind" despite the "individuality and diversity" of the position of the participants.[102]

1.271 It is true that the Final Act of Helsinki does not speak in express terms of the right to personal liberty but it is not, and was not meant to be, a lawyer's document. The importance of the document lies in the fact that it has tried to develop a universal "value concept" by recognising the worth of a human person, which is bound to secure firmly the foundations of personal liberty in the international society despite several aspects of unavoidable diversity. With the decolonisation process coming to a successful conclusion, the old colonial values are bound to yield place to progressive ideas of social and economic interdependence; the "third world" concept may also lose

its relevance in due course, leading to the founding of a "world community" which, according to Judge Kotaro Tanaka, has already come into being.[103] However, it is yet to be seen if the "world community" accepts his thesis - "The seat of human rights is not in any positive law, not in the public authorities, but in the conscience of mankind and 'moral law' which are nothing but natural law."[104]

# PART II

# INVASIONS OF PERSONAL LIBERTY: "SOCIAL-SECURITY"

## Chapter 2

### I. "Social-Security"

2.1 In delivering the first series of the Hamlyn Lectures Lord Denning observed that "personal freedom" must be matched with "social security" which he explained as meaning "peace and good order of the community" and proceeding further he maintained that "to protect itself from marauders" the society must have powers to arrest, to search and to imprison those who break the laws.[1] Thus, the concept of "social security" can be understood as signifying measures adopted for the protection of the society against such acts of individuals as are prejudicial to its interest. However, law recognises the position that in certain circumstances preventive measures can also serve "social security" without unduly restricting the liberty of the individual. Indeed, "preventive justice" is an old and ancient concept reflecting the perennial anxiety of the social and legal philosophers to appreciate and to fulfil the need of harmonising the conflicting values - the need to strike a just and proper balance between the interests of the society and the individual and also the need to bridge the gap between law and morality. In a sense, the "power of arrest" and "preventive justice" can be said to represent the two ends of the wide spectrum of the legal restraints imposed on the liberty of the person at different times at different places in the common law jurisdiction. Apparently, the former deserves greater attention but we propose to deal with the latter also, albeit in lesser detail.

### II. The Power of Arrest

2.2. It cannot be gainsaid that as a weapon of threshold restraint

on the liberty of the person the power of arrest exemplifies a serious invasion of personal liberty. An arrest, as Lord Simmonds has observed, "is the beginning of imprisonment".[2] On the other hand, it was judicially recognised as early as 1612 that the power to arrest any person must exist in law: "The King cannot arrest any man for the party cannot have any remedy against the King."[3] In his "Institutes" Coke is more clear and categorical. He asserts that the King cannot detain the meanest of his subjects at his mere will and pleasure but only by indictment and presentment (as provided by Magna Carta) or by a writ from a court or by a lawful warrant.[4]

2.3. It would be proper to classify the power of arrest broadly under two main heads: power of arrest at common law and statutory powers of arrest, respectively. However, powers of arrest exercised under emergency laws, albeit derived from statutes, deserve separate treatment; this is because, during war and similar situations threatening the even tenor of life of the community, the restraints on the liberty of the person acquire various forms and in addition their nature acquire a distinct character and justification which, as we shall see, are to be found in the concept of "state security", which such laws are supposed to embody.[5]

2.4. Notice has also to be taken of the fact that recent legislation[6] has blurred the distinction between the common law power of arrest and statutory powers to some extent; it will therefore be profitable to study the innovations introduced by the law but such a study requires the legal incidents of the common law power of arrest to be analysed first. Judicial interpretation has not yet been prolific on this aspect, and so the use of the expression "blurred" may be open to question. An attempt to justify it will be made in the proper context[7] but we turn now to survey the relevant history of English law.

## (1) The Evolution of the Common Law Power of Arrest

2 5. Prof. Plucknett supports the theory that the law of crime has grown out of the law of tort with admirable clarity of reasoning and expression: on the one hand, the aggrieved party recovered damages even for such causes as killing, mayhem, robbery etc. in Anglo-Saxon proceedings;[8] on the other hand, the concept of "the King's Peace" appears to have acquired a greater significance during the same period.[9] Certain offences were considered grave and contrary to public policy and for these the King could extract penalty. It was considered that such offences amounted to breaking the King's peace.[10] In fact the concept has a hoary past: it may be traced to Teutonic origins; the ancient German polity was founded on the concept of 'peace'. Any person who had broken the 'peace' forfeited his right to the protection of law and vengeance against him was not regarded as crime.[11] Thus we already see the beginnings of the classification of crime and also the power of the individual taking shape when the State has yet to step into the field.

2.6. What type of law-enforcement machinery the State provided, and what were the ancient laws that tackled this problem, we may now see. "The oldest of our institutions intended for this purpose," says Sir James Stephen, "was frankpledge, by which a joint responsibility was established amongst a certain number of persons for all the offences which any of them might commit. . . the whole population was formed into an institution, upon which was incumbent duty of <u>preventing</u> and detecting crime."[12]

2.7. A similar general account, but more graphic, comes from another celebrated authority, Sir Francis Palgrave: "There was no distinction between the soldier and the citizen; and the country was defended from rapine and spoil by guards who, whether called out to protect the lieges against the foreign enemy or to pursue the domestic robber and marauder, were equally arrayed as a military body. . . under the command of the

wardreve, who, in consideration of this service, held his own land free from taxation, like the Thannadars, the ancient peace officers of the Hindoo villages."[13]

2.8. Critchley penetrates to greater depth to explore the misty origin of the English police system.[14] It is to be found in the tribal laws and customs of the Danish and the Anglo-Saxon invaders, the nearest equivalent to the modern policeman being the Saxon tythingman. Above him was a hundredman and then the Shire-reve or Sheriff.

2.9. In Pollock and Maitland we get a useful account of the 'legal' process for the apprehension and punishment of the felon.[15] It is stated that the main rule was: felons ought to be summarily arrested and put in gaol; every man must take part in this process, one who neglects to do so faces punishment. Similarly, one who omits to raise "hue and cry" when a felony is committed, was held guilty of an amerciable offence. While stating the general rule, the authors, however, made an important point when they wrote that it was doubtful whether a charge of false imprisonment could have been met by an allegation that there was reasonable cause for suspicion. However, the supposed justification which the Sheriff and his officers could plead did not extend to an ordinary man. The last mentioned underlined phrase thus carries, it may be noted, an accumulated burden of many centuries and many efforts by the legislature, as well as by the judiciary have unfortunately been directed to augment it. Commentators have been critical of this curious edification and the matter will be examined in the proper context.[16]

2.10. When we come to the ancient laws, the Assize of Clarendon of 1166 may be taken as the starting point.[17] Bishop Stubbs calls it "a document of the greatest importance to our legal history".[18] He comments that it introduced far reaching changes into the system of administration of justice. To the commission of itinerant justices and the Sheriffs, the

several juries of the shires and the hundred were to present notorious and reputed offenders. This trend definitely indicates the early concern to administer preventive justice, although it speaks of the arrest of the indicted. Then there were Ordinances of 1195, 1233 and 1253 expressly conferring the power of arrest and at times making it obligatory for all men to arrest outlaws, robbers, thieves etc.[19]

2.11. Changes of considerable importance were, however, brought about by the Statute of Winchester 1285, which is described by Critchley as "the only general public measure of any consequence enacted to regulate the policing of the country between the Norman conquest and the Metropolitan Police Act 1829."[20] From Stubbs' translation we learn that its avowed object was 'to abate the power of felons'.[21] Salient features of some of its provisions may be thus stated: with the legal obligation to keep the King's peace, came the power to arrest felons, granted to every person in explicit terms; bailiffs of towns were required to make inquiry every fifteen days to find 'suspicious persons'; unpaid part-time watchmen were duty bound to arrest such persons and when they levied hue and cry upon them "such as keep the watch shall follow. . . with all the town and towns near, and so hue and cry shall be made from town to town, until that they be taken. . . and for the arrestments of such strangers none shall be punished."

2.12. It has been appropriately said that the Statute embodied a fusion of Anglo-Saxon and Norman ideas: a local man with regal authority inhering the Saxon principle of personal service to the community exercising powers of arrest under the common law.[22]

2.13. The Justice of the Peace Act 1360-61 (34 Edw. 3, c.1) may well be termed the last ancient statute that throws some light on the common law power of arrest. Justices of the peace were required to 'keep the peace' and given powers "to restrain the offenders, rioters and all other barators and to pursue, arrest, take and chastise them. . . according to the law and

custom of the realm. . ."

2.14. The course of development can be summed up by adopting Sir James Stephen's conclusion that the constitution of courts and the law relating to detection and prosecution of offenders together formed a comprehensive system for inquiring into offences and apprehending and punishing criminals.[23] In another work he says that a disciplined force in the nature of a standing army for the suppression of crime and apprehension of offenders was provided to cover the whole of England in successive steps.[24] In the same work he also comments that common law as to arrest remained unaltered substantially for a great length of time and is still in force, with some modifications effected by the changes made in the position of the officers enforcing the same.[25]

2.15. Writing in 1863 on the 'modern law of arrest', Sir James Fitzjames Stephen asserts that in the case of summary power of arrest there was very little difference between the rights of a peace officer and a private person except that in some cases the latter had a greater protection. The law on this subject is for the most part modern and consolidated by statute, 11 & 12 Vic. c. 42. "It has no other object than that of insuring the appearance of the person suspected of crime to take their trials and it is remarkable that the facilities which are afforded for this purpose in criminal cases are little greater than the facilities which, till very lately, were afforded to every one who wished to recover a debt by arrest or mense process".[26]

(2) <u>The Legal Incidents of the Common Law Power of Arrest</u>

(A) A General View:

2.16. Blackstone's views on this topic are too simple: "arrest is apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime."[27] He states that it can be effected in four different ways: by warrant, by an officer without a warrant, by a

private person also without a warrant and by a hue and cry.

2.17. The learned authors of the Digest of the Law of Criminal Procedure draw up a formidable list with an elaborate classification, placing reliance whenever necessary, on ancient authorities like Hale, Hawkins and Foster, and also on some decided cases.[28] To combine authenticity with brevity, relevant passages from the Digest are quoted to provide a lead to a purposeful discussion:[29]

> Art. 96 - Arrest without warrant
> Any person, whether a peace officer or not, may arrest. . . any one, who commits a felony in his presence, or
> who gives a dangerous wound in his presence, or
> whom he reasonably suspects of having committed a felony, if a felony has in fact been committed, or. . .
>
> Art. 98 - Arrest without warrant by Police officers
> A peace officer may arrest. . . in addition to the persons mentioned in the last articles, (inter alia)
>
> (a) any person whom he suspects upon reasonable grounds of having committed a felony, whether a felony has in fact been committed or not;
>
> (b) any person committing a breach of the peace in his presence; the peace officer may detain any such person while the breach of the peace continues or there is any danger of its renewal.

2.18. Sir Matthew Hale supplies, in some detail, the rationale of these rules:[30]

(a) A private person who knows that a felony has been committed is liable to be punished if the felon escapes for his failure to apprehend him; to call others to his assistance and to raise hue and cry are parts of his duty.

(b) In an action for false imprisonment it is a good justification as he can show what felony has been committed and that he discharged his duty in apprehending the plaintiff and delivering him to the 'constable'.

(c) Magna Carta does not at all concern such 'preparatory imprisonment' of a felon and as such his action in effecting the arrest will not be illegal.[31]

(d) If a felony has been committed, it is 'lawful and justifiable' for a private person to arrest one against whom he had 'probable cause of suspicion', "because if a person would be punished by an action of trespass

or false imprisonment. . . malefactors would escape to the common detriment of the people". Conditions for a valid arrest in such a case are: (i) there would be no ground for suspicion if a felony in fact had not been committed, (ii) suspicion must be that of the person arresting and (iii) he must have reasonable cause for it, which is to be alleged and proved.[32]

(e) "Probable causes are very many, e.g., common fame. . . hue and cry levied. . . hath taken part of the goods found upon him. . ."[33]

(f) Arrest on suspicion of felony by a private person is permitted by law and is therefore justifiable but it is not commanded by law and the party is not punishable if he omits. . . "for no man is judge of a man's suspicion but himself."[34]

Giving reasons for the greater protection provided by law in the case of arrests 'virtute officii', Hale says that, firstly, "they are more eminently trusted by law as in many other acts incidents to their office", secondly, they are punishable by law if they neglect their duty - their actions are not arbitrary but necessary duties, not permissions. He goes further and says that "it is no felony in these officers or those who assist them, that upon inevitable necessity [they] kill [some one], though possibly the party killed be innocent, because of resistance against the authority of the King."[35]

2.19. Of arrests made by police officers, at the instance of private persons, Hale says: If A suspects B, upon probable grounds, and desires the 'constable' to arrest B, the constable ought to inquire and examine the circumstances and causes of A's suspicion. Though it cannot be done upon oath, "yet such information may carry over the suspicion even to the constable" whereby it becomes his suspicion as well as A's. If this be not allowed, felons may escape and on the other hand B is not prejudiced as he may get discharge on bail or at trial.[36] This passage brings out the ancient attitude to law enforcement problems, balancing,

rather unevenly, the individual's right to personal liberty against the interest of the society, which is put at a premium.

2.20. As to the preventive aspect of the law enforcement problem, Hale says: In case of sudden affray through passion or excess of drink the 'constable' may put the person in stocks or prison till the heat of his passion or intemperance is over. . . He may break open doors and prevent danger to keep the peace if there be an affray inside the house.[37] So, an Englishman's home is not always a castle !

2.21. Of arrests of felons 'virtute praecepti' (by warrant), Hale also gives valuable information: All persons or courts having judicial power at common law or by virtue of Acts of Parliament for the conservation of peace, can grant warrants for arrest of felons. Among those named by him, Judges of the King's Bench, the Sheriff and also the Justices of the Peace, are empowered to issue warrants by the 'law of the land'. He questions Coke's opinion that the J.Ps did not have power to issue warrants before 'indictment'.[38]

2.22. The party praying for a warrant should be examined on oath as to the cause or causes of his suspicion.[39] The warrant ought not to be in general terms to answer such matters as shall be objected against him. The party arrested may be admitted to bail or even get a discharge by obtaining a writ of Habeas Corpus if the warrant be in general terms.[40]

2.23. If issued to a private person, he is bound to show it when demanded but the Sheriff or the 'constable' need not. It is enough for him to say, "I arrest you for felony in the King's name." But it is reasonable and also safe for the officer to acquaint the person arrested of the cause. It is great security for him that arrests and just for him who is arrested.[41]

2.24. We will now examine some of the leading decisions to see how the different aspects of the legal incidents of common law power of arrest have been expounded and developed to cope with the growing variety of the law

enforcement problems. The study will illustrate that common law fetters were difficult to break. The judiciary was absolved of this responsibility by the legislature as the changing situation demanded.

(B) Judicial interpretation of the scope and extent of the power

2.25. Prof. Glanville Williams has given a short and excellent account of the common law powers of arrest for felony[42] and another for breach of the peace[43] and in them they provide an authentic statement of law based on a study of leading cases. The object of our study being different, reference to some decisions, both new and old, will be necessary in greater detail, to trace the trend of the judicial approach to the problem of law enforcement vis-a-vis the question of personal liberty.

2.26. The omnipotent and pervasive influence of the general principles of common law has always been the basis for a proliferation of the individual's rights, correlative to the right to freedom from unlawful arrest. Law enforcement problems have thus been complicated and the judiciary was called upon to make such exposition of the various legal incidents of the power of arrest as could match the growing challenge. The judicial response therefore shows a dichotomy of approach. Some of the challenges, crystallizing into important rights, evoking judicial response are:

(i) the right to protection against arbitrary exercise of the power;

(ii) the right of not being subjected to unreasonable use of force in the lawful exercise of the power;

(iii) the right of resistance;

(iv) the right of rescue;

(v) the right of refuge;

(vi) the right to know the true reasons for arrest;

(vii) the right not to be detained under any 'pretence' of arrest;

(viii) the right not to be detained pending enquiry or for interrogation;

(ix) the right to be taken to the police station/Magistrate with reasonable dispatch;

(x) the right to an action of false imprisonment;

(xi) the right to have the verdict of jury on reasonable cause of suspicion.[43a]

2.27. Right to a writ of Habeas Corpus is a deliberate omission from the above list because it has come to be regarded as a constitutional right which has received a comprehensive treatment in this study befitting its merit. The present discussion of the decisions, in groups, will cover the above class as a whole, except the last mentioned right which is connected with the important and complicated question of 'reasonable suspicion', necessitating separate treatment. Similarly, the incidents of the power in relation to breach of the peace have to be dealt with separately.

2.28. As early as 1611, in the renowned MACKALLEY's case,[44] principles of enduring value were laid down. The appellant killed an officer who was orally directed by the court to arrest a debtor, on the complaint of the creditor, to prevent the arrest. On a special verdict of jury, 'all judges of England' met under King's command and held interalia as follows:-

(i) ". . . the arrest is to no other intent than to bring the party to justice. . ."[45]

(ii) ". . . the officer. . . ought to arrest him when he can find him. . . otherwise. . . plaintiff will have an action upon him and recover all his loss in damages. . . although he [defendant] can not see the officer when he hears him say I arrest you in the King's name etc., he ought to obey him. . . if the officer has not a lawful warrant he shall have his action of false imprisonment. But great inconvenience will ensue on the other side if those who are indebted go at their pleasure at night without danger of arrest, they turn a day into night. . . for felony and other crime arrest at night by a warrant may be directed. . ."[46]

(iii)"The officer ought to show, at whose suit, out of what Court and for what cause the arrest was made when the party submits himself, but not when he resists. The crime is murder if the officer is killed before he could make the arrest. The prisoner shall not take advantage of his own wrong. The officer had no opportunity to give reasons. The argument was that he would have paid the money and 'bought' his freedom if the reason had been given."[47]

(iv) "It is true that life of a man is much favoured in law, but the life of the law itself (which protects all in peace and safety) ought to be more favoured and the execution of the process of law and the offices of the conservators of peace, is the soul and life of the law, and the means by which justice is administered and peace of the realm kept. . . the officer. . . in the execution of his office, if he is resisted or assaulted is not bound to fly to the wall. . ."[48]

2.29. TOOLEY's case (1709)[49] is another leading decision in which the majority (seven judges) held the crime to be manslaughter while the minority (five judges) held it to be a murder. Besides dealing with the right of rescue, the case also dealt with the question of 'reasonable suspicion'; the latter aspect will be considered in the appropriate context. The defendants in this case insisted on the discharge of a woman whom the constable had taken into custody for disorderly conduct. The stranger who had come to the constable's assistance was killed. The majority held "if one be imprisoned upon an unlawful authority, it is sufficient provocation to all people out of compassion . . . more so when it was done under a colour of justice. . . when the liberty of the subject is invaded, it is a provocation to all subjects of England. . ." The majority also held (repelling the view of the minority that the woman being a stranger to the prisoners, there could be no provocation), that if any one, against the law, imprison a man, he is an offender against the Magna Carta. The constable acted as a 'common oppressor'.

2.30. Sir Michael Foster observes that the doctrine in the above case carried the law "in favour of private persons officiously interposing farther than sound reason founded in the principles of true policy. . ."[50] Interposition by a private person for preserving the peace and preventing blood-shed stands on a different footing. He further observes that the imprisonment of the woman was certainly unjustifiable: the constable was out of his precinct and had no special warrant; nor had the woman misbehaved. His assistant was not therefore under special protection of law. Hale is silent, he says, as to the right accruing from an act of oppression in the HUGET case which was relied upon in the TOOLEY case. The majority in the HUGET case held the offence to be manslaughter and Foster says that he does not disagree with the view that an act of oppression may be presumed to give to every man, friend and stranger, out of mere compassion, "an endeavour to rescue" was permitted by law.[51]

2.31. Unfortunately, Foster's opinion has not been construed in the proper perspective in some of the later decisions and courts seem to express the view that TOOLEY's case had been over-ruled by him. It is submitted that the new dimension added to the right of rescue in TOOLEY's case is not categorically rejected by Foster. Decisions following a somewhat mistaken view of Foster's opinion are the cases of MARY ADEY,[52] WARNER[53] and DAVIS[54] but no opinion appears to have been publicly given in the first mentioned of these cases, which was re-argued on this point in the Exchequer Chamber. In the second case, the prosecution conceded that the game-keepers had no right to apprehend the prisoners but the jury found a concert between the prisoners and also their purpose to be illegal and malicious. In the third case it was contended that the scope of the doctrine in MACKALLEY's case was only limited in TOOLEY's case and that it was not totally over-ruled. The Court rejected the prisoner's twin plea, that he could resist arrest and assault the sub-bailiff of the county court as mere production of the warrant was not sufficient

justification for the arrest, and that in cases where personal liberty was interfered with, 'jurisdiction' to do so must be shown.

2.32. In LEDWITH v CATCHPOLE[55] (1786), Lord Mansfield expresses serious concern for law enforcement problems when he says, "Many an innocent man has and may be taken up upon such suspicion; but the mischief and inconvenience to the public in this point of view is comparatively nothing." It is of great consequence to the police of the country. It was an action for false imprisonment and the question of 'reasonable suspicion' being the main issue, that aspect of the case will be discussed in the proper context.

2.33. In LAWRENCE v HEDGER[56] (1810), it was held that watchmen and beadles have authority at common law to arrest and detain for examination a person walking in the street at night, on suspicion, without proof of a felony having been committed. Chambre, J., held that, "At night, when the town is asleep, it is the especial duty of the watchmen and other officers to guard against malefactors. It is highly necessary that they should have such a power of detection." Lawrence, J., relied on an earlier decision in which there was an indictment against a constable for suffering a night-walker to escape. It was also an action for false imprisonment. As in LEDWITH's case, here also the plaintiff lost. The Court's holding on 'reasonable suspicion' does not carry much conviction.

2.34. In another action for false arrest, in the case of McARDLE v EGAN,[57] Lord Wright is more vocal on the point when he says (dismissing the action), ". . . it is to be remembered that in the public interest it is important that police officers should be protected in the reasonable and proper execution of their duty. They should not be hampered or terrified by being unduly criticised if they act on reasonable suspicion. . . their functions are not judicial but ministerial and it may well be that if they hesitate too long when they have a proper ground of suspicion against an individual, they may lose an opportunity. . . in many cases steps have to be taken to preserve evidence. . ."

2.35. In an earlier case, HOBBS v BRANSCOMB,[58] the ancient rule stated in WILLIAMS v DAWSON (1788) was reiterated, namely that if the police officer received a person into custody on a charge preferred by another of felony or breach of the peace, he is to be considered as a mere conduit and the person who preferred it is answerable if it turned out that there was no felony or breach of the peace. Lord Ellenborough added that the rule was reasonable: "very injurious consequences might follow to the police" [otherwise]. The plaintiff's action failed.

2.36. In WRIGHT v COURTS,[59] the facts were ugly and the plaintiff succeeded. He was assaulted, arrested, confined for three days before he was produced in court, in hand-cuffs, and again detained there for another twelve hours. Bayley, J., held that the period of confinement was unreasonable and the purpose was illegal. "It was the duty of every person who arrests another of felony to take him before a Magistrate as soon as he can." Even a Magistrate is not authorized by law to detain a person, much less a constable, except for a reasonable time, and only for the purpose of his being examined. The handcuffing was also held unjustifiable as it was not averred that the plaintiff attempted to escape. "Such degree of violence and restraint, even by a constable, could be justified only on 'good and special reasons'.

2.37. WALTERS v W.H. SMITH & SONS[60] was a case of an arrest by a private person who faced an action for false imprisonment and malicious prosecution. The acquittal was on jury's upholding plaintiff's plea that he had no felonious intent and the defendant having admitted that plaintiff had not 'stolen' the book. Numerous contentions were raised as the point did not appear to have been decided earlier. Sir Rufus Isaacs, C.J., had occasion to recall ancient authorities and restate the law: ". . . interference with the liberty of the subject and especially interference by a private person has ever been most jealously guarded by the common law of the land. . . I am convinced that the dominant intention in the minds of the defendants,

as shown by the fact of the arrest, was to give plaintiff in custody for having stolen the book and not merely for the purpose of initiating a judicial inquiry." The decision laid down that it is only by means of judicial process that the arrest can otherwise be justified; arrest for merely detaining a person and not initiating a judicial inquiry can not be justified. It was also held that it is only by reference to the earlier works on common law, which has never been altered, that one must ascertain the law of the land. The defendants, in this case, had used a 'trap' to detect theft of books from their shop in which the plaintiff was employed. A private detective first took the plaintiff into custody and interrogated him before taking him to the police station.

2.38. In the celebrated case of CHRISTIE v LEACHINSKY,[61] abandoning the original plea of lawful exercise of statutory power, police adopted the common law plea of justification in the action for false imprisonment.

2.39. Viscount Simon laid down the following general propositions which have come to stay as valuable guides to every one concerned with the law enforcement problems (quoted in extenso, ad verbatim).[62]

1. If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in the ordinary circumstances inform the person arrested of his true ground of his arrest.
   He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

2. If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.

3. The requirement that person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to freedom and is only required to submit to restraints on his freedom if he knows in substance why it is claimed that this restraint should be imposed.

5. The person arrested can not complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter.

2.40. Lord Simmonds, however, sounds a note of caution.[63] His lordship held, "If, then, the appellants reasonably suspected that the respondent had committed a felony, was it not their right to arrest him without warrant ? And if they did so arrest him, how is it that the arrest can be branded as illegal and an action for false imprisonment lie against them ? My Lords, it is here that the crux of the matter lies and it is not so easy to state the law as not on the one hand to impinge upon the liberty of the subject or on the other hand to make more difficult the duty of every subject of the King to preserve the King's peace." His lordship suggests a simple alternative test: "it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested, and then, since the affairs of life seldom admit an absolute standard or an unqualified proposition, see whether any qualification is of necessity imposed upon it." Two reasons are given to support this test: (a) in the case of arrest under a warrant, the charge is stated therein, (b) an analogous procedure obtained in the olden days in civil proceedings relating to imprisonment for debt.[64]

2.41. Lord du Parcq takes great pains in tracing in detail the evolution of the law and states the 'governing rule' of common law:[65] ". . . a man is entitled to his liberty and may, if necessary, defend his own freedom by force. If another man has a lawful reason for seeking to deprive him of that liberty, that person must, as a general rule, tell him what the reason is, for unless he is told, he can not be expected to submit to arrest, or blamed for resistance. The right to arrest and the duty to submit are co-relative. . ."

2.42. In trying to evaluate the consequences of this decision and its impact on law enforcement problems one contemporary observer laments that the principles enunciated in the above decision by the House of Lords are not scrupulously followed.[66] He discusses some of the recent cases in this context, KENLIN v GARDINER,[67] R v CONNOLLY[68] and R v INWOOD.[69] He concludes that Magistrates may regard it as being in the public interest to support the police. A citizen has a better chance if he can take the case to the judge and the jury. If statistics were taken, it is submitted, this is the course which citizens have preferred. His suggestions for tackling the problem are at once bold and novel. The use of miniature cassette records, the passing of radio messages to the station officer may perhaps breed more problems but the making of "arrest documents" on the spot is perhaps an easy and simple solution. Human ingenuity, it is submitted, has many edges. An absolute method to avoid any chances of fabrication is an impossibility.

2.43. How the doctrine laid down in CHRISTIE's case has been expanded in two subsequent cases, we may now see. In JOHN LEWIS & CO v TIMS,[70] a mother and daughter were accosted by a private detective of the appellant firm for having stolen some calendars from their shop. The mother was deaf. In the Court of Appeal, Asquith, L.J., held[71] that the arrestor could not be expected to do more than was reasonable to inform the person arrested of that with which he or she was charged. Lord Porter approved this dictum in the House of Lords, saying, "Respondent denied knowledge, but she was deaf; on the other hand the detective had no reason to suspect that she could not hear. She could not be at fault if the respondent did not hear."[72]

2.44. This case has, however, another important aspect which deserves attention. It was an action for false imprisonment. Arrest took place at 3.30 p.m. The police on being summoned arrived at 4.10 p.m. and the plaintiff was then taken to the police station at 4.30 p.m. Lord Porter held that it was in the interest of the person arrested that he should have the opportunity of avoiding the publicity of a public trial.[73] The object

of taking the accused to the police early was not that he might be bailed at once. Under the old law, there were three alternative destinations - gaol, constable or justice. The Court appears to have laid down a new rule stating that, "The question throughout should be - has the arrestor brought the arrested person to a place where his alleged offence can be dealt with as speedily as is reasonably possible ?"[74]

2.45. The recent decision in WHEATLEY v LODGE[75] follows the trail. It expressly holds that the JOHN LEWIS case[76] recognised a further exception to the general rule stated in CHRISTIE's case, namely, that when a police officer arrests a person who is deaf or who can not speak English[77] what he is to do is that which a reasonable person would do in the circumstances.

2.46. We may now briefly discuss the three cases[78] adverted to earlier. In KENLIN's case[79] two young schoolboys were held to have acted in self defence in assaulting two plain-clothes police officers who tried to restrain their movements to question them, with what were regarded as 'test questions' to help the police to make up their mind whether or not to arrest them. It was held that the work of the police officers did not constitute an integral step in the process of arrest but amounted to a "technical assault". In CONNOLLY's case[80] the plaintiff was arrested for obstructing police officers in the lawful exercise of their duty. He gave his name and address but refused to answer other questions. Lord Parker, C.J., observed: ". . . though every citizen has a moral duty or a social duty to assist the police, there is no legal duty to that effect and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority and a refusal to accompany those in authority to any particular place, short, of course, of arrest. . . there is all the difference. . . between telling deliberately a false story, something which on no view a citizen has a right to do, and preserving silence . . . which he has every right to do. . ." (Emphasis added).

However, in another passage his Lordship observed that ". . . it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury." (Emphasis added).

2.47. Relying on the above observations a different result was obtained in DONNELY v JACKSON[81] which has provoked a contemporary observer to comment that if the word "lawful" had been used in the expression underlined it would have represented the English law correctly.[82] It has been noticed, however, that the police officer will not have any defence in tort, whether technical or substantial, even for acts done bona fide, for tracking down criminals or collecting evidence when he will be naturally acting in the course of his duty. This double standard is sought to be justified by the de minimis principles of the criminal law, but the danger inherent in this justification is also recognized. More appropriate, however, is the reference made in the article to s.3 of Criminal Law Act 1967 but the provision, it is submitted, may not cover such situations; it is attracted, ex facie, to the real and integral steps of the process of arrest, not to any step which is a mere pretence.

2.48. The next case is INWOOD's,[83] in which the Court of Appeal quashed the conviction for assaulting a police constable in the execution of his duty, proceeding on a concession 'properly made' that there was an obligation on the police to make it clear to the defendant that he was under restraint. Although the authorities were not reviewed, the reason given is that no single or set formula will suit every case. It will be useful, however, to refer to an old authority on this point; in MEERING v GRAHAME-WHITE AVIATION CO.,[84] Duke, L.J., adverted to an ancient common law authority, Termes de la lay, to find 'imprisonment' being defined as "no other thing but restraint of a man's liberty, whether it bee in the open field or in stocks or in cage in the streets or in a man's owne home. . . and in all the places the party restrained is said to be a prisoner so long

as he hath not his liberty free to goe at all times to all places. . ." Atkin, L.J., agreed but referred to BIRD v JONES[85] and WARNER v BURFORD.[86] His Lordship enlarged the concept further, stating that a person could be imprisoned without his knowing it, as in sleep, or in a state of drunkenness or lunacy. "A person might complain if he were imprisoned, though the imprisonment began and ceased while he was in that state."

2.49. In the case of R v FRANCIS[87] the Court of Appeal upheld the conviction, for assaulting a police officer, of the person who had given refuge to a suspect who was followed by the police on a hot pursuit. The police officers were assaulted when they attempted to make a forcible entry to effect an arrest. The defence appears to have been the right of refuge, founded in the contention of unlawful arrest and based on the inapplicability of Ss. 2(1) and (6) of the Criminal Law Act 1967. It was rejected. On facts, the Court held that the police officers had the right of entry under S. 2(6) and were assaulted in the execution of their duty.

(C) The reasonable cause of suspicion:

We now come to a ticklish question which has (in the views of some critics)[88] apparently defied a satisfactory solution.

2.50. In order to grapple with this complicated problem a synthesis of the general principles discussed so far may prove helpful. For this we may draw equally from the process of evolution, from Coke, Hale, Stephen, Pollock and Maitland and Prof. Plucknett, besides the judicial exposition. The tentative propositions that emerge may be summed up first and then tested with reference to judicial pronouncement. Some of these may be thus stated -

(i) Liberty of the person came to be regarded as inviolable, to yield only to a 'lawful' restraint; actions of trespass to persons embrace this principle.

(ii) Lest the restraint becomes total and amounts to complete negation of liberty, the large measure of discretion that the summary power of arrest

carried with it, called for a limit to be set on it.

(iii) The power having first come to be vested in a private person who was vulnerable to actions of trespass to person, a corresponding protection had to be provided; it resulted in the plea of 'justification'.

(iv) The power manifested itself as an exercise of 'lawful authority' which had attached to it certain incidents; any violation of the authority was visited with a penalty and the elements of the criminal activity could be tested with reference to these legal incidents.

(v) Summary powers under common law being limited to cases of felony, and fresh problems of law enforcement having arisen from time to time with the change in the social conditions, similar powers created by statutes were provided with limitations, which were not always explicit.

(vi) The concept has retained a wholesome flexibility with variable factors contributing to its unfailing efficacy notwithstanding the apparent inadequacies, which are attributed to the judiciary's hesitation to freeze the concept.

2.51. However, the wisdom of the legislature in denying itself the opportunity to opt for a change can still be questioned at an appropriate forum. Whether the judiciary attempted to answer the question we may now examine. In the case of DALLISON v CAFFERY[89] Lord Denning said that the 'time-honoured' question of 'honest belief in guilt' had been asked of the juries for over 150 years and it has caused a 'cart-load of troubles'. However, it is in the opinion of Diplock, L.J., that we have to seek the exposition of the law. We quote him at some length.[90]

2.52. It is in the public interest that felons should be caught and punished. At common law a person who acts honestly and reasonably commits no actionable wrong. What is honesty in this connection does not change: what is reasonable, changes as society and the organization for the enforcement of the criminal law evolves. . . 18th and 19th century authorities are illustrative of what was reasonable in the social conditions then existing. . . [the rule] applies alike to private persons and police officers but what is reasonable conduct in the circumstances may differ according to whether the arrestor is a private person or a police officer. . . Where a felony has been committed a person acts reasonably. . . if facts

> which he himself knows or of which he has been credibly informed at the time of the arrest make it probable that the person arrested committed the felony. This is what constitutes in law reasonable and probable cause for the arrest. Since arrest involves trespass to the person and any trespass to the person is prima facie tortious, the onus lies on the arrestor to justify the trespass by establishing reasonable and probable cause for the arrest. . . [emphasis added]

Amplifying further, his Lordship adds:

> . . . the test is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause.

2.53. In Halsbury[91] the meaning given to the expression in the HICKS' case has been adopted:

> . . . [it] has been said to be an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime committed.

A distinction is, however, drawn in Halsbury between the two types of action and it has been stated that in the case of malicious prosecution the onus is throughout on the plaintiff whereas in an action of false arrest the defendant has to prove justification.[92] This view finds echo in Lord Diplock's speech in Dallison's case.[93] Even in some of the old cases we find this arduously developed.

2.54 In SAVILE v ROBERTS[94], Holt, C.J., held that ". . . though this action will lie, yet it ought not to be favoured, but managed with great caution. For if the indictment be found, the defendant in such action will not be bound to shew a probable cause, but the plaintiff will be constrained to shew express malice. . ." It was an action for malicious prosecution but the Court held that damages may be of three kinds: ". . . such as are done to the person; where a man is put in danger to lose his life or limb or liberty, which has always been allowed a good foundation of such an action. . ." This decision was followed in GOLDING

v CROWLE[95] in which it was held that defendant had proved more than was necessary as he was not required to prove probable cause. It was also an action for malicious prosecution. This distinction, anciently made, shows that the arrestor was expected to exercise his discretion judiciously which acted as a sort of second limitation. Malice is more patent and apparent and is easy to prove which makes the prosecutor's burden lighter than that of the arrestor's.

2.55 However, the classical definition of the term came from Tindal, C.J., in BROAD v HAM[96] in which he held that "there must be a reasonable cause as would operate on the mind of a discreet man; and also a probable cause as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him." In an equally eloquent exposition, Coltman, J., said, "As the prosecutor would be justified by a probable cause, there should be an inquiry into the bona-fides of it. . ."

2.56 We may now have a second look at LEDWITH's[97] case and also its precursor, SAMUEL v PAYNE[98] in which the rule was rather widely stated in these terms: if a man charges another with felony and requires an officer to take him into custody and carry him before a Magistrate, it should be most mischievous that the officer should be bound first to try and at his peril exercise his judgment on the truth of the charge. . . The officer does his duty in carrying the accused before the Magistrate who is authorised to examine, commit or discharge the accused. This rule was limited by Buller, J., in LEDWITH's case by holding, "if he acts on suspicion. . . to make it a justification, there has to be reasonable ground of it in his own mind and knowledge, not merely upon information of others; if it is not so, he becomes the judge of the evidence, which is not his function. . ." [emphasis added]. Lord Mansfield makes a distinction and holds that if felony was not committed

in fact the question turns upon, "was the arrest bonafide; was the act done fairly and in pursuit of an offender or by design or malice or ill-will ?"

2.57 In McARDLE v EGAN[99] Lord Wright held:

> The inquiry is as to the state of mind of the constable at the time when he ordered the arrest and the inquiry involved that it must be ascertained what information he had at the time even though that information came from others, of course it must come in a way that justifies him in giving credit to it. . . their functions are not judicial but ministerial and it may well be that if they hesitate too long when they have a proper and sufficient ground of suspicion against an individual, they may lose an opportunity of arresting him because in many cases steps have to be taken at once to preserve evidence. . . once there appears to be reasonable suspicion. . . the police officer is not bound to make further inquiries . . . to make assurance doubly sure.

The importance of this decision lies in giving the police a positive guidance to avoid 'second sight'.

2.58 TOOLEY's case[100] is one of the earliest cases and it has been shown that the notion that it has been over-ruled is misconceived. Despite the division, all the twelve judges agreed to say, "it is not a constable's suspecting that will justify his taking up a person but it must be just ground of suspicion, for that is traversable. . . it would be hard that liberty of the subject shall depend on the will of the constable, and shall his not liking a woman's look be any cause of suspicion ?" [emphasis added].

2.59 In a recent case from Malaysia, HUSSEIN v CHONG FOOK KAM,[101] the Privy Council approved the decision of the Court of Appeal in DUMBELL v ROBERTS.[102] In both cases reasonableness of suspicion in relation to statutory power came up for consideration. In an illuminating passage, Lord Delvin says:[103]

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. . . it arises at or near the starting point of investigation of which the obtaining of prima facie proof is the end. . . to give power of arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many

> factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and obstruction of police inquiries are examples of these factors. . . there is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. . .

2.60 The appeal arose out of an action for false imprisonment and it would therefore be pertinent to point out that the rule laid down by Lord Delvin accords with the rule of 'second limitation' that we deduced from the difference in principles relating to onus of proof in such proceedings.[104] Lord Delvin's dictum also fulfils a void which Professor Glanville Williams discovered when he said, "There is no judicial authority to say that such arrests are illegal", referring to the 'general practice' according to which police make arrests without warrant where they have power to do so.[105]

2.61 In dealing with the question in relation to the statutory power of arrest, Professor Glanville Williams aptly suggests that what inquiries should reasonably be made in these cases may depend upon the situation contemplated by the statute concerned.[106] While examining judicial authorities on the question of 'reasonable belief' in relation to power under different statutes, he has discovered three different trends. In the two cases of HANWAY v BOULTBEE[107] and PARRINGTON v MOORE[108] it was held that the offence must actually have been committed with the requisite "malice". A contrary view was expressed in the cases of DOWNING v CAPEL[109] and GRIFFIN v TAYLOR[110] by holding that a reasonable belief of the offence having been committed came within the protection of the statute. In both groups the power was related to the words "found committing"; both were actions in tort.

2.62 Commenting on these decisions Professor Williams makes an important point when he says that although mistake is generally no defence in tort, it is so in criminal prosecution as it excludes mens rea and as such reasonable belief would afford protection in the latter case.

2.63 In the third group he discusses four cases: TREBECK v CROUDACE,[111] LEDWITH v ROBERTS,[112] BARNARD v GORMAN[113] and ISAACS v KEECH[114] and is apparently unhappy with the reasoning in the BARNARD case. It is submitted that in the BARNARD case Lord Wright held that it was the duty of the Court to balance the two conflicting principles-safeguarding liberty of the subject and to give effect to the expressed intention of the legislature to give power of arrest beyond those existing at common law. Lord Porter was more categorical in saying that both TREBECK's and LEDWITH's case only laid down the general proposition that in construing Acts of Parliament it was proper to have regard for the general purposes of the Act. It is submitted that the law was correctly stated and the reasoning was flawless.

2.64 Dr Leigh succinctly points out that police limitation, like executive discretion, must operate within the constitutional limitation imposed by the statutes and Courts and adds that Courts have grappled with the problem at two levels: enforcement of a particular law and use of discretion in a particular case.[115] It is true, as we find from our study, that the inexorable rule laid down in all decisions, has at its heart the requirement of an objective standard but it is difficult to ignore the fact that the different forms of the power cannot answer to the same measure of test. The use of discretion is bound to differ not only in particular cases but also in cases of particular statutes. If one is anxious to trace a single universal rule, without doubt it is the requirement of objective standard. In other respects, the approach of the Courts have been flexible. Whether this has really handicapped law enforcement machinery, as Lambert contends,[116] we may now examine.

2.65 The criticism is based on the premises that the measure of flexibility allowed to the police in the exercise of discretion is unwarranted and that Courts have found difficulty in prescribing a generalised requirement due to which the concept has not been invested with a positive content. It has been asserted that the American concept

imbibed this virtue as the test prescribed was purely objective, namely, whether the facts and circumstances before the police officer are such as to warrant a man of prudence and caution in believing that the offence has been committed; this was later expanded to include "trustworthy information" and facts and circumstances "within their knowledge". It is submitted that the English authorities, which we have scanned at some length purposefully, do not lay down a much different test. The flexibility of approach does not make the English objective test 'impure'.

2.66 It is not proposed to examine the American position in detail but we would look at few leading decisions and point out that it is highly desirable that certain basic differences between British and American polity should always be borne in mind. It is submitted that factors such as the statutory nature of the power of arrest and other powers of the police, federalism, the written constitution and the power of judicial review have contributed to the evolution of the so-called 'purely' objective test in the U.S.A. How far the differences in the social, economic and political situation obtaining there have influenced the decisions of the courts is an open question and it is not proposed to hazard a conclusion on such a premise.

2.67 We may first examine some of the striking features of a few state laws which will provide a surprising contrast with the common law position:

| | |
|---|---|
| New York Code of Criminal Procedure [emphasis added] | s.180-a A police officer may stop any person abroad in a public place whom he reasonably suspects is committing. . . and may demand of him his name, address and an explanation of his action. |
| Texas Cr.P.C. (Art.14.04) [emphasis added] | Where it has been shown by satisfactory proof to a peace officer, upon representation of a credible person . . . that the offender is about to escape so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest. . . |

2.68 The provisions of the fourth amendment providing protection against arbitrary search, seizure and arrest and of the fourteenth amendment with its renowned 'due process' clause of the federal Constitution are two well-known to be quoted. But it may be useful to point out that the most sensitive area of the problem zone in the States is currently provided by the anti-drug laws. The courts have applied the same standard for 'probable cause' in search, seizure and arrest.

2.69 In a recent case, WHITELEY v WARDEN[117] it was held that the standards applicable to the factual basis supporting an officer's "probable cause" assessment at the time of a warrantless arrest are at least as stringent as the standards applied with respect to a Magistrate's assessment as a prelude to issuing a warrant for arrest and search. It was a case of an arrest under a warrant followed up by a radio bulletin by the Sheriff. It was held that the Magistrate's findings were vitiated as they contained nothing more than the Sheriff's conclusion, which itself was based on an informer's tip but this latter fact as well as other operative facts were omitted in the Sheriff's complaint. The arrest was held violative of the fourth and fourteenth amendment. In his dissent, however, Black, J., with whom Burger, C.J., agreed, held that: "In deciding this question this should always be remembered that the fourth amendment itself does not expressly command that evidence obtained by its infraction should always be excluded from proof", after holding that it would be a distortion of the fourth amendment's meaning if the arrest and the seizure were held "unreasonable" in the instant case. To this a significant remark was added: "My disagreement with the majority concerning the wisdom and constitutional necessity of a 'little trial' before a Magistrate or J.P. prior to the issue of a search or arrest warrant is a matter of record." Does it not accord with the English disapproval of the "second sight" rule ? Does not the exclusionary rule find a parallel in the series of decisions of English Courts following SCOTT v BAKER ?[118]

2.70 In BRINEGAR v U.S.[119] we can trace an echo of the Privy Council decision in HUSSEIN's case; it held: ". . . probable cause such as may justify an arrest or a search or a seizure, without warrant is a reasonable ground for the belief of the guilt; and this means less than evidence which would justify condemnation or conviction. . ." That flexibility of approach is not entirely ruled out even in the States is borne out by another passage: "In dealing with probable cause, as the very name applies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable. . . men, act."

2.71 KER v CALIFORNIA[120] typifies another American problem. It was contended that although the arrest might have been based upon probable cause, it was vitiated by the method of entry. Repelling his argument, the Court held that it had long been recognised in cases under the fourth amendment that "lawfulness of arrests for federal offences is to be determined by reference to state law in so far as it is not violative of the federal Constitution". Mention was also made of the fact that early common law permitted breaking open premises in executing an arrest under certain circumstances.

2.72 We stop here to make a hurried reiteration of our view that flexibility is wholesome and even in this respect the approach of the American Courts is, in the first place, not frozen, and next, diverges from that of the English Courts only marginally.

(3) Breach of the peace and the power of arrest at Common Law

(A) A General View

2.73 We have so far discussed in some detail the different aspects of the law concerning power of arrest for felony at common law and only briefly indicated that there also existed at common law summary power of arrest for breach of the peace.[121] It has been observed that the term "breach of the peace" has acquired a technical content as opposed to the

King's peace.[122] Indeed, the concept of "breach of the peace" was exported to overseas possessions and even at home it was adapted for the same purpose, namely, for dispensing "preventive justice".[123] The Indian Criminal Procedure Code, which became a model for parallel enactments in other territories retained the concept in so far as it served the cause of "preventive justice" but discarded it in so far as it related to summary power of arrest; few countries of Africa, however, followed a different scheme.[124]

2.74 The power of arrest for felony, as we have seen, was a procedural and not substantive power. But the power of arrest for breach of the peace was a substantive power. As Hale says, its object was to "prevent" breach of the peace; the constable could not arrest even on information if the "danger was past".[125] The statement in Kenny that the power of a police officer was wider than that of a private person in the sense that the arrest by a constable could be followed by a "permanent detention"[126] finds support from Stephen who says that "a peace officer may detain [any person] while the breach continues or there is danger of its renewal".[127]

2.75 Professor Glanville Williams qualifies the scope of the power of arrest of "any person" by saying that the arrest has to be "promptly made" but he enlarges its ambit by extending it to cases of "reasonable apprehension" in addition to actual occurrence (breach of the peace in the presence of the arrestor).[128] In Halsbury the ambit of the power is further enlarged. It is stated that, "If an offender, after committing a breach of the peace, immediately escapes, he may be arrested by a private person on fresh pursuit commencing immediately and being continued without a break."[129] It is also stated in Halsbury that a constable may arrest anyone who aids and abets those who commit a breach of the peace in his presence.[130]

(B) The Problem of Definition

2.76 According to Professor Glenville Williams the term "breach of the peace" lacks an authoritative definition. He adds that its meaning is capable of being illustrated by reference to instances such as, riot, unlawful assembly short of riot, fight between two or more persons, when both or all may be arrested without deciding the merit of the affair.[131] The imprecision and vagueness associated with the concept can only be explained by the fact that efforts to isolate it from the parent concept of the King's peace were not wholly successful.

2.77 In TIMOTHY v SIMPSON,[132] (an action in trespass for assault and false imprisonment) the plaintiff had come to make some purchase in the defendant's shop. Some dispute arose between him and the defendant's salesman which resulted in a scuffle between the two. On the plaintiff's refusal to leave the premises, the defendant called the police and gave the plaintiff into custody. The court held:

> The defendant gave the plaintiff in charge in order to preserve the public peace but the fact of an assault on the plaintiff was not proved and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence.
>
> [emphasis added]

2.78 The facts of the case, COHEN v HUSKISSON[133] were almost similar. Lord Abinger, C.B., held as follows:

> The uttering of the abusive words imputed to the plaintiff, abstractedly speaking, undoubtedly would not make it so, but if they are so uttered in such a place as to attract a crowd of a hundred persons. . . nobody can tell whether the passion of the crowd may not thereby be inflamed and whether they may not proceed to execute the vengeance which the party himself invokes and threatens. . . the plaintiff and his wife made great noise and disturbance in the public street. . . in breach of the King's peace and caused riot and disturbance. . .
>
> [emphasis added]

2.79 In INGLE v BELL[134] the defendant pleaded that the plaintiff had endeavoured to forcibly break into his business premises and had caused a disturbance in the street causing a mob to collect there. Lord Abinger, C.B.,

held that "I question whether this plea does not in term state a riot." Parke, B. held that, "I should say there is enough set forth to plead that there was an unlawful assembly." [emphasis added in either case]

2.80 In PRICE v SEELEY,[135] it was held in the House of Lords as follows:

> The party who makes this invasion of the premises where the wall was being constructed did not evidently desist from breach of the peace in which it is admitted he was engaged. But being forcibly expelled from the premises, he again comes on them, again does what the word "affray" is used to represent, threatens to renew the assault. . . all of which acts are in the plea distinctly alleged to be against the peace of the Queen. [emphasis added]

2.81 However, in GRANT v MOSER[136] it was held that the use of the expression "Queen's peace" in the plea was mere verba sonantia. The court held that to make a good defence there should be direct allegation either of a breach of the peace being committed at the time of giving the plaintiff into custody or that it had been committed or that reasonable grounds existed as to apprehension of its renewal. Apparently the court was conscious of the wide sweep of the power of arrest and was anxious to curb it.

(C) The nexus between "breach of the peace" and "preventive justice"

2.82 In this connection, reference may be made to a significant remark of Dr. Brownlie. He has said that, "On historical grounds a case for treating it as a generic crime could be readily established and indeed breach of the peace is an offence in the criminal law of Scotland".[137] The decisions discussed above support this view. However, it is to be noted that in the Justice of the Peace Act 1361 the existing common law provision was amplified as respecting the power of the court to bind over any person to keep the peace and to be of good behaviour. It signified, according to Burn, a shift in emphasis from the concept of the King's peace to that of deportment of a person.[138] According to Dr. Brownlie "the Act extends to a variety of situations in which a disturbance of the peace

is apprehended as a probable consequence of activity which is planned or activity which is repeated."[139] Indeed, the power to bind over existed at common law and it was associated with the concept of the King's Peace while there was also available at common law, power of arrest for breach of the peace. The Act therefore married the two concepts, recognising the necessity of providing flexible "norms of restraints" for controlling potentially criminal, and possibly, even mere anti-social activities,[140] for dispensing what has been called "preventive justice".[141] However, as social conditions changed, problems of law-enforcement assumed new forms requiring new laws embodying new norms to be enacted to serve the needs of preventive justice.

2.83 Among the large body of laws enacted in this field, reference may be made to Vagrancy Act 1824, City of London Police Act 1839, The Metropolitan Police Act 1839, The Town Police Clauses Act 1847, The Prevention of Offences Act 1851, The Offences Against the Person Act 1861, The Prevention of Crime Act 1871, The Public Meeting Act 1908 and the Public Order Act 1936. Each of these Acts conferred summary power of arrest, in some cases on "any person" and in others on the police officers exclusively. The limitation on, or the criteria for, exercise of the power was expressed in the use of such terms as "on view", "committing", "found committing" etc. which were meant to be read in conjunction with the offences mentioned in the enactments concerned. It must however be noted that many of these Acts now exist as mere skeletons. The Criminal Justice Act 1948, The Police Act 1964 and the Criminal Law Act 1967 have replaced them in most part. As problems connected with "social security" assumed new forms, legislative response fashioned itself accordingly. One recent instance is noteworthy: the term "breach of the peace" has been introduced in s.5(b) of the Public Order Act 1936 by s.7 of the Race Relations Act 1965. It signifies the importance of the concept of "social security" in the context of politically sensitive issues.[142]

(4) Power of Arrest and Codification of Criminal Law in England, Commonwealth Africa and Asia

(A) Historical perspective

2.84 There is no doubt that English criminal law as part of the common law of England was exported to the dependencies including the American colonies and that it has come to prevail in the form of what Stephen has called "70 or 80 versions" in the different parts of the world including America, besides the Commonwealth.[143] The different "versions" apparently resulted from the process of codification, which was set in motion by the British Parliament when a Commission was appointed in 1834 (vide 3 & 4 Will.IV, c.85, s.53) to draft laws common to all classes of inhabitants of India. In 1837 Macaulay, who was the main architect of the Indian Penal Code, submitted the draft with the opinion that, "the Penal Code cannot be clear and explicit while the substantive civil law and the law of procedure are dark and confused."[144] Later, a second Law Commission was appointed in 1853 and a Criminal Procedure Code was also drafted. The two Codes were enacted, one in 1860 and the other in 1861 and brought into force in British India in 1862. Stephen took over in 1869 as the Legal Member of the Viceroy's Council in India. During his tenure of office, extending over three years, he added new sections to the Penal Code and recasted the Criminal Procedure Code. As Professor Radzinowicz has pointed out, after his return from India he "began to frame a theory of codification for England. . . [and] urged the English in England to follow the lead of the English in India."[145]

2.85 In 1878 a Royal Commission was appointed, with Stephen as one of its members, to consider the draft which was given the caption of "law relating to indictable offences." The Commissioners accepted the main changes proposed by Stephen in the draft including abolition of the distinction between felony and misdemeanour.[146] This apparently corresponded with the position obtaining under the Indian Codes. However the attempted

codification of English criminal law in England failed: the draft never became law. Almost a century later, by the Criminal Law Act 1967 the distinction was finally abolished which purported to codify partially power of arrest available under common law. Admittedly the 1967 Act has not taken matters very far. It is conceded that the Act aimed "purely to replace the [existing] law of arrest on account of felony" and that it was not meant to deal with the power of arrest in general.[147]

2.86 Some important developments elsewhere in the Commonwealth may now be referred to. In 1877 Mr. Justice Wright prepared a draft for a Criminal Code for Jamaica which was settled by Stephen. It has been suggested that the Gold Coast Code was based on it.[148] The Queensland Code of 1899, it is asserted, became the model for the Nigerian Code.[149] But it is to be noted that Northern Nigeria in 1959 and Ghana in 1960 enacted new Codes which follow the Indian Codes in the use of "illustrations" which are absent in the Queensland Code and also in Stephen's draft of the English Code. The Penal Codes enacted in 1930 in the East African territories, it is asserted, are also based on the Queensland model.[150] Sierra Leone alone, among the African states of the Commonwealth, does not have a Criminal Code and the law there is "very close to English law both in form and content."[151] In Gambia a Criminal Code was enacted in 1933 which, according to Read, was based on the East African model.[152] In Commonwealth Africa the process of codification assumed a bizarre form. The most significant aspect of the process was the initial reception of Indian Codes and eventual replacement thereof by a more pure English criminal law. For this the European settler community of East Africa was wholly responsible; the Indian Codes were "generally acceptable" to all sections of the people, the bench and the bar in particular; the settlers only considered them to be "totally unsuited for application to a free-born English community."[153] However, as we shall see, certain provisions such as those relating to power of arrest and those labelled generally everywhere

in Commonwealth Asia and Africa as "security provisions" - the provisions of immediate relevance to this study - assumed a common form based on the Indian model.

2.87 In Ceylon (later Sri Lanka) Roman-Dutch law was administered both in civil and criminal cases until 1799 but when a "Supreme Court of Criminal Justice" was established there in 1801 under the Proclamation of 1799, one of the judges of the said court "digested a useful criminal code."[154] Eventually in 1883 two Ordinances, Nos. 2 and 3, enacted respectively the Penal Code and the Criminal Procedure Codes, both based on the Indian model.[155] In the Malayan peninsula, in the Straits Settlements Colony (which included Singapore) the experiment to establish firmly pure English criminal law in 1870 failed and in 1873 choice was finally made for the Indian model.[156] Elsewhere in the peninsula, the Criminal Procedure Codes of 1902 and 1903 (also modelled on the Indian Codes) applied originally only to the Federated Malay States. The original Codes were repealed and re-enacted in 1926 which came to prevail in due course in the whole mainland of the peninsula.[157] In substance, however, there is very little difference between the Singapore and the mainland Code. In the other two states covered by this study, Pakistan and Bangladesh, the Indian model (Code of 1898) has continued to apply although in the new Criminal Procedure Code enacted in India in 1973 there are some wholesome changes.

(B) Statutory powers of arrest in England

(a) Power under the Criminal Law Act 1967

2.88 The enactment is admittedly a half-hearted attempt at codification of power of arrest in England: it has simply blurred the distinction between the old and new powers. Common law did not deal with power of arrest for misdemeanours and specific provisions therefor appeared in several specific enactments. This position is not altered and what the 1967 Act has achieved is that it has replaced "felony" by "arrestable offence" which is defined in s.2(1) of the Act to mean "offences for which

the sentence is fixed by law or for which a person (not previously convicted) may under or by virtue of any enactment be sentenced to imprisonment for a term of five years." But, as under the old law, a distinction is maintained between the power of "any person" and that of "a constable" in sub-ss. (2) to (5). In all cases the requirement of "reasonable cause" of suspicion apply for the exercise of summary power of arrest by "any person" when an arrestable offence is committed and when somebody is "committing such an offence"; on the other hand, "a constable" may arrest when he "with reasonable cause suspects" that such an offence has been committed and when somebody is "about to commit" such an offence.

2.89 Indeed the Law Revision Committee was faced with a great dilemma as it had to decide if it should abolish the basic difference between the powers of a private person and a police officer which was prominently focussed in WALTERS v. W.H. SMITH.[158] Considering the question as one of "major policy" it refused to disturb the rule.[159] This refusal has invited strong criticism as the rule in the WALTERS case, it is asserted, lacked logical foundations.[160] It has also been rightly pointed out that the power of "red-handed" apprehension could have been better expressed by the phrase "in the course of committing" as the phrase "in the act of committing" (used in s.2(2)) is bound to be construed narrowly.[161]

2.90 Sub-s.(7) of s.2 provides that the provisions of the section are not to "prejudice any power of arrest conferred by law apart from this section", thereby saving among others, the power of arrest for breach of the peace at common law. One commentator has taken pains to catalogue some of the statutory powers that are saved by sub-s.(7) and adds that common law power of arrest to prevent personal injury has also been saved.[162] However, the scope of the sub-s. (7) is far from clear and it has still to receive an authoritative judicial pronouncement. Apart from the question of what powers are actually saved, it is also necessary to settle the question whether any or all of the rights evolved qualifying the power

of arrest at common law are also either fully or partially saved although the same commentator has listed some of them as having continuing force.[163] It is to be noted in this connection that ss. 2(6) and 3 have expressly dealt with some of the ancillary rights, available under common law. At common law the "power of entry" extended to private persons also when about to arrest a person who was "about to commit a felony" which, under s.2(7) can only be exercised by a constable.[164] Sub-s.(2) of s.3 expressly "replaces the rules of common law" relating to use of force in making arrest and tampers with the right of resistance. However, it is submitted that the provision of s.3 is likely to provide some guidance in the interpretation of the scope of s.2(7); the use of the expression "prevention of crime" in sub-s.(1) of s.3 itself denotes the wider sweep of the section.

(b) Power under the Vagrancy Act 1824

2.91 In the Home Office Working Paper published in 1974 the history of the law concerning vagrancy since the Statute of Labourers of 1349 has been succinctly stated.[165] It has identified the two main elements of the earlier legislation as, (1) fear that activities of the "vagrant class" were a potential political threat, recalling the Peasant Revolt of 1381, and (2) anxiety of the state to protect those who could not earn their living for no fault of their own. Holdsworth states that up to 1539 the able-bodied vagrants were punished by law.[166] Indeed, as Chambliss observes, the contemporary legislation articulated the concern for the control of felons as a direct reaction to social changes following the growth of trade and commerce and "vested groups" such as the powerful landowners, merchants and traders as being responsible for the legislation.[167] The subsequent development of the law, according to the Working Paper, is concerned mainly with the classification of offenders into "idle and disorderly persons", "rogues and vagabonds" and "incorrigible rogues" which continues to appear in the 1824 Act; the 1782 Act brought within its pale persons suspected of criminal activities against whom actual

felony could not be proved and the Acts of 1800 and 1811 introduced the concepts of "suspected persons" and "reputed thieves" frequenting and loitering in public places with intent to commit an offence.[168] The genesis of these laws is also traced in LEDWITH v ROBERTS.[169] However, Scarman, L.J., pointed out in R v JACKSON[170] that the law in its present form (the 1824 Act) is not fitted to the modern apparatus of the administration of criminal justice referring in particular to what he called "picturesque phrases", namely, "rogue", "vagabond" and "incorrigible rogue". While he takes objection to the use of the expression "frequenting and loitering", Professor Glanville Williams rightly points out that such a law is "desirable as an essential part of the machinery of law enforcement" but it requires "proper administration" and that there has to be "insistence upon full proof of criminal intent."[171]

2.92 The extant provisions of the 1824 Act are ss.3 to 6, 8 and 10 of which ss.3 and 4 create offences of different types and s.6 provides the power of arrest in relation to those offences. Power to "apprehend" under s.6 is given to "any person whatsoever" to be used against a person "found offending", who is described as "idle and disorderly" in s.3 and "rogue and vagabond" in s.4. The "incorrigible rogue" is separately treated in s.10. Of the great variety of the activities of these classes which acquire a criminal character, two are noteworthy: (1) "being upon in or upon" one of the specified places, and (2) "suspected person and reputed thief frequenting and loitering about or in" one of the specified places "with intent to commit an arrestable offence". The judiciary has been criticised for adopting "artificiality in reasoning" in the interpretation of the provisions but it is submitted that the phraseology (the "deeming"provisions) necessitated such an approach.[172] Indeed, it has been rightly pointed out that if there was a "general offence of preparation" such legislation as the Vagrancy Act, could be repealed.[173]

2.93 Apparently the power of arrest under the Act assumed a double

character: it was basically procedural but it had also a substantive character in that it played a preventive role also, depending upon the facts of the case. Thus, judicial response was likely to be ambivalent as a proper balance had to be struck in each case between the liberty of the person and protection of society taking note of the fact that the latter, on a priori considerations, postulated a jurisdiction based on suspicion. In HORLEY v ROGERS[174] the refusal by the constable to make an arrest was upheld upon holding that summary powers of arrest were given by statute where the offence was "apparent" and "in the course of preparation" while in the instant case the offence was not "obvious to the eyes and senses" of the constable when the charge was made. On the other hand, in MORAN v JONES[175] it was held that the word "found" should not be "too strictly" construed. It was held that a person may be "found" upon the premises within the meaning of the section although he is not apprehended until after he has quitted the premises; it is only necessary that the offender is discovered upon the premises during the act which constitutes the unlawful purpose. Professor Glanville Williams comments that the court confuses in this case the law of arrest with the substantive criminal law and observes that the court ought to have noted that an illegal arrest did not invalidate subsequent proceeding.[176] However, as we shall see, this general principal has been relaxed by the judiciary in interpreting Road Traffic Laws in connection with arrest for the offence of drunken driving.[177]

2.94 In HARTLEY v ELLNOR[178] it was held that the two expressions "suspected person" and "reputed thief" were not synonymous: one may be a "suspected person" on a particular day even though he had not been convicted previously or had bad past records. This decision was dissented from in LEDWITH v ROBERTS,[179] in which the court considered in detail the scheme of the Act and the legislative history. It was held that the language of s.4 was not clear and that the exceptional powers conferred on the police

by the Act were meant to be exercised against such persons, who by their previous conduct and antecedent acts, had become "suspected persons"; and that "any other view would put a respectable person loitering in a street for a reasonable cause at the mercy of the constable who knew nothing about him."[180] It was further held that having regard to the importance of the subject matter in relation to the liberty of the subject, the legislature would have said in clear terms if it intended to enlarge the scope of the common law power as s.6 conferred the power on "any person" and not merely on the constable.[181] The decision in TREBECK v CROUDACE[182] was distinguished on facts as the "emergency test" evolved in that case in the context of a different statute was held inapplicable in this case.

2.95 The power of arrest under the Vagrancy Act has been used in many recent cases in connection with contemporary problems of motor car thefts which has generally met with judicial approval which has supplied new content to the expression "loitering with intent to commit a crime".[183] It can be reasonably concluded that the courts are inclined to take the view that activities which are potentially dangerous to the community at large, similar to the breach of the peace, have not only to be punished, but effectively prevented. At common law there is power of arrest for breach of the peace that can be exercised by "any person" but the Act also provides the power; so the courts had to find a new measure for the amplitude of the statutory power. They therefore evolved such tests as of "emergency" and "imminent danger", to solve tricky law-enforcement problems by dispensing "preventive justice".

(c) Power under Road Traffic Act 1972

2.96 Concern for the safety of road-users has, no doubt, acquired new dimensions in the laws framed since 1930 but it is also found expressed in the laws dating back to 1872. The Licensing Act passed that year made it an offence for a person who was drunk to be "in charge of" a carriage on a highway. The underlined expression also appears in modern statutes but

it is bound to be seen in a different colour as fast-moving motor vehicles have replaced "carriages" and social habits have also changed. Indeed, it has been rightly asserted in the contemporary context that the prevention of road accidents caused by drink is largely a social problem.[184] In the Acts of 1960 and 1962 the gist of the offence was "impaired driving". The courts, however, got no guidance on the degree of impairment from the evidence of scientific test produced before them in respect of blood-alcohol levels of the offenders. The police had to be given power to detect and apprehend persons whose driving capacity was impaired without a change in appearance and outward behaviour. This was done in 1967 by the new Road Safety Act which utilised the scientific discovery of the "breath test" to give the police the necessary powers.

2.97 The Road Traffic Act 1972 consolidated the earlier legislation without however recasting the law in proper form.[185] It has been rightly observed that the novelty of the offence and enforcement procedure and infelicitious draftsmanship of the Acts have produced considerable judicial confusion.[186] Under s.5(1) it is an offence for a person who is "unfit" through drink or drug to drive or attempt to drive at a public place; sub-s.(2), which is supposed to provide guidance to the court, states that a person is to be considered "unfit" if his ability to drive properly is impaired for the time being. An arrest follows a "breath test" under s.8, for a positive test under sub-s.(4) and for failure to provide a specimen, under sub-s.(5). It is also contemplated that the driver then proceeds to a police station for another breath test and there he has to provide a specimen for laboratory test. Should he refuse to oblige the police he risks an uncertain and indefinite detention under s.11 of which an authoritative judicial interpretation is however still to come. But it is judicially confirmed that the Act is silent as to such situations as when the motorist voluntarily provides a specimen for laboratory test and when he takes the breath test not before but after arrest.[187]

2.98 There are also other, rather significant and more outstanding aspects of the power of arrest. Admittedly, the arrest used for preventing commission of the offence (drunken driving) and for bringing the offender to justice are the normal aspects of the power. But in what category can we place the power to collect evidence against the accused and that too by forcing him to provide the same ? The strength of the power at its zenith is, however, manifest in the consequence that follows the laboratory test: the evidence furnished by him (the motorist) becomes conclusive evidence of his guilt. Conviction follows mechanically. We thus find that not only the ultimate result which resembles suspension of habeas corpus but the total effect of the pervasive operation of the power of arrest also likened the Act to an emergency legislation. Some of the important protections evolved at common law against the use of power of arrest are swept away and the halo of inviolability built up by these protections around the right to personal liberty vanishes without more ado. Some of the casualties are noteworthy: the right to protection against self-incrimination, the right of being informed of the true reasons for arrest, the right not to be held under pretension of a "lawful" arrest, the right not to be stopped for questioning or held for interrogation or investigation (namely, prohibition against detention pending investigation).[188] How the "value-concept" of personal liberty is scaled down in relation to "social-security" in public opinion in respect of the Act is reflected in the following comment appearing in a law journal:[189]

> It is surely right that. . . to reduce the road casualties, the liberty of the individual not to be stopped on the road by the police should be given less prominence by the law than in the other areas of law enforcement.

2.99 Indeed, the "value-process" operates through "public opinion" at all levels and thus the judiciary also responded to it even in 1918 when the plaintiff lost his action for false imprisonment in TREBACK v CROUDACE,[190] where the arrest was upheld as "lawful", albeit by employing a different technique. It was held that the nature of the offence

specified in the statute (the Licensing Act 1872) requires such construction to be given so that the subject has a real protection against undue interference with liberty in being able to require the verdict of a jury to be taken upon the question of "honest belief" although the power of arrest was not qualified by the requirement of "reasonable suspicion".[191] The judicial interposition of the jury, obviously to facilitate operation of "public opinion" was the significant aspect of the decision. This technique of indirect operation of the "value-process" was not applied in a more recent decision (in 1965) in WILTSHIRE v BARRETT.[192] The test of "honest belief in guilt" did not find favour with Lord Denning who observed that it would be a bad day for all if the police gave up arresting any motorist who was drunk for fear of an action for false imprisonment and that the most effective way to ensure the safety of road-users was to arrest immediately the person who appeared to the police to be unfit to drive through drink.[193] Davis, J., spoke of the "public interest" in the exercise of the power.[194]

2.100 A later decision has however become a subject of great controversy. It is SCOTT v BAKER[195] in which the actual decision turns on a very small point, namely, the proof of approval of the "Alcotest-80" devise which is used for the controversial "breath test" introduced by the 1967 Act. The court has however held that the real question is not of admissibility of evidence but of construing s.1 of the Act which creates the offence.[196] It was held that under the 1960 Act the offence could be proved without a breath test but under s.1 of the 1967 Act "before a person can be convicted it must be shown that a specimen has been provided as laid down in s.3."[197] One critic has said that the decision emphasizes the unusual feature of the offence in that it provides an exception to the general rule that it is no defence in a criminal charge that the prosecutor's evidence has been obtained in an irregular fashion.[198] Later, in D.P.P. v CAREY[199] and WALKER v LOVEL[200] it was urged that the decision ought to be overruled but the challenge was repelled by the court albeit with great

reluctance. Indeed, Dr. Leigh has criticised Lord Diplock's view in CAREY's case (supra) in which his Lordship tried to uphold SCOTT v BAKER (supra). However, it is interesting to note that in WALKER v LOVEL (supra) Lord Diplock contemplated an informal restraint before a formal arrest and thus added a new dimension to the power of arrest, as follows:[201]

> All that the constable was entitled to at this stage was to require the driver to remain at the place where the breath test was carried out until it was completed by the constable's looking to see what the device indicated. [emphasis added]

2.101 The decision in SAKUJA v ALLEN[202] is important for the reason that it took a particular note of the "loose draftsmanship" of the Act and applied, as in the case of emergency legislation, ad hoc norms of construction.[203] There should be, it was said, "reasonable construction of the statute in order to prevent the obvious intention of the legislature being largely and wrongly frustrated."[204] This was a notable departure from the usual common law rule of "strict construction" of penal statutes. Their Lordships tried to explain their earlier decision in PINNER v EVERETT[205] in which they had arrived at a different result by tracing a close relationship between "driving" (by the offender) and "suspicion" (of the police). In the instant case it was held that the word "driving" should be given a "reasonably liberal construction".[206] In R v HOLAH[207] the court insisted on compliance in the true sense with the common law rule stated in the CHRISTIE case;[208] although in the House of Lords the decision met with disapproval from some of the judges in WALKER v LOVEL (supra).[209]

2.102 Thus we find that as in the case of the Vagrancy Act the judges construed the Road Traffic Act with a view to dispensing "preventive justice" to ensure "social-security" by adopting a flexible approach even while evolving ad hoc norms which was a manifestation of bizarre operation of the "value process" in the field of "preventive justice".

(C) Power of Arrest under the Commonwealth Criminal Codes (Asia and Africa)

2.103 It is true that in Africa, as a corollary of "indirect rule", there were two parallel legal systems, "Native" and "English" (general) but the latter, in fact, was not purely English. In Africa, as elsewhere, the English Criminal Law appeared in a modified version which in some territories leaned more on English traditions and in others, on the Indian Codes. However, in respect of the summary power of arrest, despite differences inter se, mostly of a minor nature, all African and Asian Codes conformed generally to the Indian model (Indian Criminal Procedure Code 1898). In this connection it is important to note that in all cases the private person's common law power of arrest was debilitated[210] and in the case of the police officer, his power was well-defined.[211] It is also to be noted that in all cases the common law power of arrest linked particularly to the concept of "hue and cry" was abandoned.[212] On the other hand, the common law power of arrest for breach of the peace was retained in many cases, albeit in a modified form (conferred only on the police officer), whereas in India it was totally abandoned.[213] The inter se differences possibly reflected mainly the inherently experimental nature of the codification process; they cannot obviously be related to any distinctive feature of the social requirement of any of the countries. For, even in India in the Law Commissioners' draft of the Criminal Procedure Code there were some provisions which were not enacted either in the first Code of 1861 or in the subsequent re-enactments while some of its other provisions which, though not enacted in the first Code, appeared in all subsequent re-enactments (1872, 1882 and 1898). Although summary power of arrest for a private person was recommended in the draft it was not provided in the 1861 Code, but it came in all subsequent re-enactments; power of arrest for a police officer to prevent breach of the peace recommended

in the draft was not provided either in the first enactment or in any of the subsequent re-enactments.[214]

2.104 The provision embodying the focal point of the summary power of arrest of the police officer in the Indian model may be quoted:

> first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
>
> [emphasis added]

The provision quoted above embraces the provisions of only one of the several sub-clauses of s.54(1) (of 1882 and 1898 Codes), each of which laid down similarly the several specific circumstances and situations and also the conditions subject to which the power could be exercised. It is to be noted that the expression "credible information" was absent in the earlier enactments of 1861 and 1872. On the other hand, the expression "in the sight of such police officer commits a [cognizable] offence" which occurred in the two earlier versions disappeared in the later versions. Thus, although the power of the police officer was progressively increased it was simultaneously adequately circumscribed to prevent its arbitrary use. Indeed, the new phraseology, "concerned in any cognizable offence" was a definite improvement, implying a well-defined and guided discretion. Among the powers posited in the other sub-clauses, most notable was the one providing for the arrest of a person" who obstructs a police officer while in the execution of his duty" (s.54(1), "fifth" sub-clause) which was a definite improvement on the common law position obtaining in England.

2.105 In Asia, the "first" sub-clause of s.54(1) of the Indian model was almost verbatim reproduced in the Criminal Procedure Codes of Ceylon (later Sri Lanka), Singapore and the Federated Malaya States (later, Malaysia). In Africa, the expressions "reasonable complaint" and "credible information" were omitted in the parallel provisions, everywhere except Northern Nigeria. The expression "cognizable offence" appeared in Northern Nigeria but in the southern states of Nigeria it was

replaced by "indictable offence" and in Ghana by "felony or misdemeanour". It is necessary however to point out that in the Northern Nigerian Code, apparently as a result of an accidental slip which has surprisingly gone unnoticed so far, the words "without warrant" do not occur in the opening paragraph of the section which provides that a police officer may arrest any person under the different circumstances and situations enumerated in the section.

2.106 Although the terms "suspected persons" and "reputed thieves" are not used (unlike English Vagrancy Act) in all Codes, Asian and African, the police officer ("in charge of a police station" in some Codes) has in almost all cases summary power of arrest in respect of persons belonging to a similar category who are variously described in the several Codes such as a person who has either no ostensible means of livelihood or who cannot give a satisfactory account of himself or who is taking precautions to conceal his presence with a view to committing a cognizable offence or who is by repute a habitual robber, housebreaker or thief.[215] Apparently the ambit of the power is restricted in the Indian model as, unlike English law, not only the power has been denied to a private person but its use is generally restricted to the senior police officers. The Indian model has made another significant improvement on the English law: it contemplates expressly the use of the power of what is described as the "preventive action of the police" by empowering the police officer to arrest without warrant in the case of "design to commit a cognizable offence".[216] This provision is likely to make up to a great extent the deficiency in all jurisdictions of a general offence of preparation. In the Northern Nigerian Code there appears a novel provision in s.27 under which a police officer can require any person to accompany him to the police station whom he suspects, on reasonable grounds, to have committed "an offence of any kind".

2.107 In Tanzania, the "People's Militia" is contemplated as an agency of law-enforcement parallel to the police force manifesting the distinctive features of institutions of One-party States. Every member of the militia

can exercise such powers of arrest and search as are exercised by a police officer of the rank of a constable according to s.3 of Act No. 25 of 1975 (People's Militia [Power of Arrest] Act 1975). In view of the provision that such powers may be exercised "subject to the same limitations, restrictions and conditions as apply in relation to an arrest or search affected by such police officer", the provisions of the Criminal Procedure Code are attracted in the case of exercise of the power of arrest by the militia.

2.108 In the Indian model the summary power of arrest of a private person is constricted drastically: he may only arrest a person "who in his presence commits a non-bailable and cognizable offence".[217] However, in Africa, there is also what may be called an English dimension of power of arrest of the private person: owners of property and their servants are expressly invested with the power to be used in the case of an "offence involving injury to property".[218]

2.109 The common law protections in the Indian model are spread out in both parts of the Code - the Penal Code and the Criminal Procedure Code in almost all cases. In 1973, in India, s.50 of the new Criminal Procedure Code has embodied the rule in the CHRISTIE case (to inform of reasons for arrest) although the Indian Bill of Rights, like others, already contained such a protection. However, it is to be noted that the Indian model has more clearly stated and effectively curtailed the use of force in the making of arrest and in preventing escape.[219] It expressly states that there is no "right to cause death" in such matters "of a person who is not accused of an offence punishable with death or imprisonment for life". In all cases the Codes (albeit the Bills of Rights also) provide an express time-limit of 24 hours for detention (following arrest) without judicial interposition to accord supreme primacy to the common law doctrine that any restraint on the liberty of a person was prima facie illegal. In the case of an arrest by a private person he is required to give the person arrested into police custody "without unnecessary delay". This express

provision is a definite improvement on the common law position.[220] In the Penal Codes, the rights of resistance and rescue are to be found in well-defined provisions.[221]

## III. Preventive Justice: Prevention of Crime

### (1) Power to Bind Over

#### (A) England

2.110 There is no doubt that the power to bind over transcended the concept of the King's peace and that it had its roots in Anglo-Saxon institution of "bork or pledge" (during the period of Edgar to Cnut) and "decennaries or frankpledges" (during Alfred's reign).[1] With the progressive development of the concept of the King's peace the institution of Conservators of the Peace was firmly established, who had the power to take recognizance of the peace at Common Law. Dalton, however, denies this power to the King himself because, he says, "recognizance is made to himself" although the King was the principal Conservator of the Peace.[2] The power could be exercised, says Dalton, "upon prairer of the Surety of the Peace made to them" when process could be issued for the arrest of the party who could be committed to prison in default of finding surety. But he adds that this power had fallen into disuse and authority for keeping the peace was invested by the King's Commission of the Peace.[3]

2.111 Dalton rightly comments that under the Commission, the Justices had "all ancillary power touching the Peace which the Conservators of the Peace had by the Common Law, as also that whole authority which the statutes have since added thereto."[4] For, in the Justice of the Peace Act 1361 we find them empowered inter alia to "take of all them that be not of good fame . . . sufficient surety. . . of their Good behaviour towards the King and his people. . . to intent that the people be not by such rioters . . . endangered nor the Peace blemished. . ." [emphasis added]. Thus, we see that the statute has articulated the twofold jurisdiction in the matter of binding over - surety of the peace and surety for good behaviour.

The expression "that be not of good fame" is explained by Blackstone in terms of contra bonos mores and contra pacem.[5] This indicates the difficulty the early jurists faced in identifying the thin line between law and morality - the difficulty of bridging the hiatus between social and legal norms. Indeed, this difficulty is also manifested in Burn's suggestion that it was the language of the Act which had brought about a shift in the emphasis, from the concept of the King's peace to that of deportment of the person and that "the sense of the statute", he says, "hath been extended not only to offences immediately relating to breach of the peace but to divers misbehaviours".[6]

2.112 Archbold and Stone deal with the recent enactments concerning this power. These are: The Magistrates' Courts Act 1952 (c.55), The Criminal Law Act 1967 (c.58), The Justice of the Peace Act 1968 (c.69), The Magistrates' Courts (Appeals from Binding Over Order) Act 1956 (c.44) as amended by the Criminal Justice Act 1967 (c.80) and the Courts Act (c.23). To make a detailed assessment of the effect of these enactments is beyond the scope of our study. Archbold has succinctly summarised an important aspect of the present law which may be profitably quoted:[7]

> A person convicted of any offence which prior to the Criminal Law Act 1967 was a misdemeanour, whether at common law or by statute, may, in addition to, or in substitution for, any other punishment, be required to enter recognizance, with or without sureties, to keep the peace and to be of good behaviour for a reasonable time to be specified in the order. . . Where such an order is made it usually prescribes imprisonment until recognizances are entered into.

It has however to be noted that fixed periods have been prescribed under various enactments for the imprisonment in default; the 1952 Act (c.55) has fixed one year as the maximum period, without fixing, however, a similar ceiling on the period for which a person may be bound over. At common law a person may be bound over for his entire life so the new law does not affect any radical improvement in this matter. On the other hand, the provision of a right of appeal is indeed a noteworthy improvement

as such orders could be challenged earlier only by a proceeding in certiorari which was itself discretionary in nature.

2.113 It is too early to say how the right of appeal eventually affects the discretionary nature of the jurisdiction of the justices but it cannot be gainsaid that there has always been, by and large, a judicial exercise of the jurisdiction which has imparted to it a wholesome flexibility making possible satisfactory solution of the ever-growing variety of law-enforcement problems. Indeed, the jurisdiction exemplified at once the feasibility and the desirability of adjustable norms of "restraints" as well as of "protections" in so far as personal liberty vis-a-vis "jurisdiction of suspicion" was concerned. Reference in this connection may be made to some leading decisions. The most notable is LANSBURY v RILEY,[8] which was concerned with the women's liberation movement in England. The appellant was a supporter, not a member, of the Women's Social and Political Union, whose object was to secure voting rights for women by militant means, including destruction of buildings by fire and explosives. The court upheld the order binding him over for good behaviour passed on the information which charged him that he incited others to commit a breach of the peace and that he was likely to persevere in such unlawful conduct. It is clear that there was no allegation of any direct threat of personal danger or bodily harm and, in particular, to any particular person, in which case only, according to QUEEN v DUNN[9] the jurisdiction could be exercised. Even so, the court upheld the order to meet a situation which resembled some form of "emergency". In such situations, in modern times, such persons are usually held under "preventive detention" in the New Commonwealth but the decision illustrates that a restraint of lesser severity could adequately meet the requirement of the situation and indeed in some states "emergency legislations" provide both alternatives, "detention" and "restriction".

2.114 In similar terms in an earlier case, R v WILKINS[10] it was held

that by virtue of the "general power" under their Commission the justices could bind over "any person" if the person was guilty of a "violent" conduct tending to a breach of the peace though there was no proof of a threat to any particular person. Justices in this case had bound over both the complainant and his adversary. This decision was followed in a recent case, SHELDON v BROMFIELD[11] where Lord Parker, C.J. observed

> It is well known that the Justices have power pursuant to their Commission or pursuant to the Justice of the Peace Act 1361 to bind over all persons brought before them. It is very important jurisdiction and is in the nature of preventive justice. No offence need be proved at all.
>
> [emphasis added]

(B) Asian and African states of the Commonwealth

(a) A general view

2.115 The power to bind over under the Asian and African Criminal Codes is also modelled, as in the case of power of arrest, on the provisions of the Indian Criminal Procedure Code, described earlier as the Indian model. Following the English law the Indian model also provides for a twofold jurisdiction: courts are empowered to require any person to furnish under specified circumstances "security for keeping the peace" and "security for good behaviour".[12] The important difference may however be noted. In each of the several provisions contemplating such orders, the maximum period for which a person can be bound over is prescribed in each case in the Indian model which in itself is a great improvement on the English law, apart from the fact that wide sweep of the power is also otherwise curtailed by laying down in each case the conditions-precedent or the jurisdictional requirement for the exercise of the power. The phraseology in respect of the said requirement is of course not uniform. Under some Codes orders may be made by a Magistrate when he "receives information" while in other cases when he is "informed on oath", about the offensive activities of the person concerned.

2.116 The Indian model provides generally for the order to bind over to

be made in four different types of cases. A person convicted of any of the specified offences or of an offence "involving breach of the peace" can be bound over by the court to keep the peace when sentence is passed against him.[13] A person can also be bound over to keep the peace if he "is likely to commit a breach of the peace or disturb public tranquillity or to do any wrongful act that may probably occasion a breach of the peace."[14] The "suspected person" is described variously in the different codes and the Codes, except the Northern Nigerian Code, provide that such persons may be bound over to be of "good behaviour". The expressions used to describe such persons are - "taking precaution to conceal his presence with a view to committing a cognizable offence"; (persons ... having) "no ostensible means of subsistence"; and (persons who are) "unable to give a satisfactory account of themselves".[15] An order binding over a person to be of "good behaviour" may also be passed against "habitual offenders" who are adequately described by specifying the relevant offences, such as theft, robbery etc.[16] In all Codes the "procedure for inquiry" to be followed in these proceedings are stated in detail. In the new Criminal Procedure Code enacted in India in 1973 many wholesome changes in the substantive provisions have been introduced in the relevant chapter following recommendations of the Law Commission.[17]

(b) Vagrancy and some other aspects

2.117 The English concept of vagrancy was not retained in the Indian Code in express terms for good and valid reasons but the phraseology used to describe the "suspected person" (quoted above) was in fact borrowed from s.X of Bengal Regulation XXII of 1793 which authorised the darogah (police officer) to apprehend and send to the Magistrate "vagrants or suspected persons" and the latter could, after finding such persons, on inquiry, to be "disorderly and ill-disposed" either employ them in any public work or discharge them on their furnishing security for good behaviour. (In Bombay, however, Regulation II of 1827 was modelled on the English Vagrancy Act of

1824 and it provided for penal measures). There is yet another aspect of the legislative history: in the first and also in all successive re-enactments of the Indian Code, in the marginal note of the relevant section, with the term "suspected persons" also appeared the term "vagabond". Thus, the legislative history possibly unduly influenced the judicial interpretation of the relevant provisions leading to an indirect re-incorporation of the concept of vagrancy in the form of "status-criminality".[18] As a result the enforcement of the provision was found to have given rise to genuine complaints of hardship in many parts of the country as the concept was foreign to Indian social manners and habits.[19] In the re-enacted Code of 1973 however the mischief has been remedied and the language of the relevant provision (s.109) and its marginal note has been suitably amended. Despite the judicial misadventure the fact remained that in India the process of codification did not contemplate penal measures as in England.

2.118 In the African states however the approach as respects vagrancy was entirely different. Except in Northern Nigeria where the 1959 Code does not have a provision parallel to s.109 of the Indian model, the approach in Africa is distinctly English and penal measures are provided, in all Codes including that of Northern Nigeria but excluding that of the new Code of Ghana. The relevant provisions use the phraseology of the English law in describing and classifying the vagrants in all cases. In Northern Nigeria however the Code takes notice of the social habits of the Fulani tribe and thus in the explanation to s.405(1) it is provided that a nomad cannot be convicted if he gives satisfactory account of himself and has apparent means of subsistence, even if he has no "settled home". In Kenya, besides the provisions in the Code there is also The Vagrancy Act 1968 (cap. 58), which provides for the "detention of vagrants and for the care and rehabilitation of beggars". The Act however makes a distinction between a citizen and a non-citizen in the matter of treatment in some respects of the person concerned although the measure

generally carries a reformative bias; it is not a penal measure.[20]

2.119 In the two Codes of Nigeria, in the North, s.25 and in the South s.300, contain provisions which have no parallel in the Indian model. The provisions employ in both cases the same phraseology to empower the courts to,

> bind over the complainant or accused [defendant] or both [any of them] with or without surety or sureties to be of good behaviour. . . and order any person so bound, in default of compliance. . . to be imprisoned for a term not exceeding three months in addition to any other punishment. . .

Apparently the wide sweep of the power is reflected in the absence of any conditions-precedent for its exercise and of a ceiling on the period for which a person may be bound over which is traceable directly to common law origin. Indeed, the wide sweep of the power and the absence of a parallel provision "in any enactment of any other country" [emphasis added] has been judicially noticed.[21]

(2) Control of the Recidivist

(A) England

2.120 The common law has served as a vehicle of two parallel currents of thought in so far as the control of the recidivist is concerned. The "savage" and "uncertain" character of English criminal law a priori postulated reliance on a deterrent penal policy.[22] On the other hand, the idea of "preventive justice" manifested in the provision for binding over postulated use of preventive measures to pre-empt danger to society. However, it may be said that the nineteenth century marked the watershed. It ushered in an era of "liberalism" and "Reform" and Bentham was its prophet. A spate of legislation brought in numerous changes in the criminal law and greatly reduced the number of capital sentences.[23] This well-intentioned and benevolent move perhaps brought to the forefront the problem of recidivism by providing opportunity therefor or, as has been said, making it a "practical possibility".[24] The continuing conflict between the sentencing policy and the underlying policy of the anti-recidivist laws

may possibly explain to some extent the paradox of the perennial nature of the problem.

2.121 The admitted position is that the theory of reformation was a "recent arrival" in English penology and in the field of anti-recidivism.[25] Legislative effort to deal with recidivism was first made in 1871 when the Prevention of Crime Act was enacted in that year. Then came the Act bearing the same title in 1908 following the report of the Gladstone Commission on Prisons (1895). There was, however, a reference to the problem in an earlier report of another Commission which was inquiring in 1863 into the operation of Transportation and Penal Servitude Laws. It was suggested then that the recidivists should be "compulsorily withdrawn from their accustomed haunts" as they inflicted "loss upon the public" by continual repetition of offences though minor in nature.[26] According to the Gladstone Commission a recidivist was a "nuisance to the community" and for his "deliberately acquired habit of crime" it was useless to punish him "for the particular offence"; he was to be "segregated" by which "the community would gain" on the one hand and on the other hand "loss of liberty would to him prove eventually the chief deterrent".[27] Thus the recidivist was not considered as a "sick" man requiring "reform therapy". In s.10(1) of the 1908 Act therefore the remedy came in the form of "preventive detention" for not less than five but not exceeding ten years. The justification for the measure was also set out in the section, namely, "protection of the public", from "habitual criminals".

2.122 In 1948 the Criminal Justice Act dealt with the problem. It also used the expression "protection of the public" but now it was to be from the "persistent offender". A recidivist was classified according to his age and the sentence in one case was, as before, "preventive detention" but in the other case, "corrective training"; the former, for a period of not less than five but not more than fourteen years and the latter, for

not less than two but not more than four years. The Criminal Justice Act 1967 has retained the concept of "protection of the public" but now the court can impose an "extended term of imprisonment". In 1973 the Criminal Courts Act merely re-enacted the 1967 provisions. Thus, we see that the idea of deterrence (which originated in the "dual-track" punishment of penal servitude and preventive detention) all along remained embedded in all successive provisions despite a great deal of exercise in semantics. The treatment of the recidivist was neither preceded by a proper diagnosis nor was it followed up by a proper prognosis. Indeed, Marc Ancel rightly lays great stress on evolving a "modern penal policy" when defending his "New Theory of Social Defence".[28] As he says, there is an urgent need of co-ordinating the activities of the different agencies and institutions connected with the enactment, administration and enforcement of the relevant law to impart "fresh strength to the renewal of the preventive or reformative activity";[29] there is a need to understand crime both as a social and as an individual phenomenon.[30]

(B) Commonwealth Asia and Africa

2.123 As we have already seen, in Commonwealth Asia and Africa a habitual offender is bound over to be of good behaviour under the so-called "security provisions" of the several Criminal Codes. However, in British India in the Criminal Tribes Act enacted as early as 1871 provision was made not for detention but for establishing industrial, agricultural and reformatory settlements to achieve at once "segregation" and "reformation". Professor Pillai provides in the Tagore Law Lecture delivered in 1920 the genesis of the Act, saying that the members of the tribe had been reduced to their present state "as a result of economic and political vicissitude of fortunes during a long period of history."[31] Indeed, in ancient India members of the tribe were employed for watch and ward service in the villages.[31a] The Act has been superseded long ago by regional laws in different parts of India. In 1947 The Bombay Habitual Offenders Restriction Act came into being. Under this Act a Magistrate can

pass an "order of restriction" either in lieu or in addition to an order binding over the person concerned to be of good behaviour. The order inter alia contemplates restriction of the movements of the person concerned to a specified area but before passing the order the Magistrate has to be satisfied that the person concerned has either adequate means of earning his livelihood within the specified area or he ordinarily resides there. Thus the order of restrictions in conforming to the modern concept of "internment" and "externment" eschews the hardship inherent in a "detention". A parallel provision was enacted in Madras also first in 1943 which was replaced by the Madras Restriction of Habitual Offenders Act 1948. The common feature of both Bombay and Madras enactments is the provision relating to the establishment of "settlements" to apply "reform therapy".

2.124 In other provinces (later, states) similar measures were enacted to deal with goondaism which has been described as "mainly an urban phenomenon" embracing the activities of goondas who are said to be gamblers, smugglers, bootleggers, pimps, brothel-owners, dope-peddlars, blackmailers, hired ruffians, eve-teasers, bullies etc.[32] The enactments were called Goonda Acts and they were enacted, among others, in Bengal in 1923, U.P. in 1932 and C.P. & Berar in 1946. In 1966 a study was conducted into the problem by the Sub-committee on Goondaism constituted by the Inspectors-General of Police of the states which gave an important finding which is noteworthy:[33]

> . . . unless a goonda is uprooted from his established base and moorings from amongst his criminal associates he will pose a constant threat to the community. . .

The Committee suggested enactment of a Federal law on the lines of the Bombay Police Act 1951 (which had passed judicial scrutiny),[34] as the courts had struck down as unconstitutional (after the Bill of Rights had come into force in 1950) provisions of several such Acts, such as the U.P. Goonda Act[35] and the C.P. & Berar Goonda Act.[36]

2.125 The problem of recidivism appears to have been dealt with with a minimum of sophistry in Africa: punitive measures reflecting a deterrent

penal policy dominate the field there. In almost all states the Codes authorise a subordinate court to commit the accused to a superior court for passing a heavier sentence in view of his "character and antecedent".[37] Following the lead of the English Prevention of Crimes Act 1908 in Uganda the Habitual Criminals (Preventive Detention) Act enacted similar provisions.[38] Ghana and Malawi provide, albeit on the same lines, "preventive custody" instead of "preventive detention" which is a mere verbal change. In Malawi the provision is contained in s.11 of the Criminal Code itself (cap. 8.01); in Ghana it is contained in the Punishment of Habitual Criminals Act 1963. In all cases, the justification is the same as in England, namely, "protection of the public". However, the procedural safeguards do not conform to a single pattern in all cases; Ghana have more wholesome safeguards than the other two.

## IV . The International System and "Social-security"

2.126 Under the international system the concept of "social-security" has acquired an important place in the "value-triangle" of personal liberty:[1] the development of the "Human Rights" jurisprudence under the international system has had a profound effect on the norms of protections of personal liberty that existed under the civil law tradition in Europe. Indeed civil law, which distinguished itself from common law (English tradition) by according primacy to its "Codes" and the process of codification while attributing, at the same time, a subordinate role to the judiciary, faced a new challenge under the new world order. The emergence of modern nation-states destroyed the traditional base of the Civil Law - the Roman-canonic jus commune: national legal systems in the new states replaced the jus commune.[2] And, when this happened the theory of codification underlying the Corpus Juris Civilis was not accepted in all jurisdictions as the inexorable rule.[3] Secondly, in several jurisdictions (e.g. Italy and Germany) with the establishment of "constitutional courts" the judiciary found itself invested with a role which was superior to that of the English

judiciary. Thus, when the common law norms of protections of personal liberty came to be codified in the Universal Declaration, the International Covenant on Civil and Political Rights and more particularly in the European Convention, these norms found a fertile field in Europe to grow. Of course, the reception itself of the new norms was smooth and easy because of the institutional devices, both old and new. In many European states treaty obligations operate proprio vigore as part of the municipal law. Besides, under Art. 57 of the European Convention the Secretary-General of the Council of Europe can require each of the states "to furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of [the] Convention". In 1970 this provision was applied in respect of the right to compensation for unlawful detention.[4]

2.127 At Common Law a treaty is not self-executory. On the other hand the supremacy of Parliament in Britain makes it possible for the rulers to ride rough-shod over common law rights (norms of protection) and indeed in the Northern Ireland emergency legislation this position has been clearly established. Such norms of restraints as the "power of arrest" and "preventive detention", which are common to both "social-security" and "state-security", have acquired new dimensions under the said emergency legislation and the corresponding norms of protection have suffered severe debilitation. This apparent paradox - "better" protection of personal liberty in "Civil Law-Europe" and lesser in "Common Law-England" - has at last found an answer in the public debate on the necessity of a Bill of Rights for the United Kingdom.[5] The question of "better" protection of the general and also particular aspects of the right to personal liberty on a global basis is also engaging the attention of the United Nations and "arrest" and "detention" whether for the protection of the state or of society are sought to be contained by proper "safeguards".[6]

# PART III

# INVASIONS OF PERSONAL LIBERTY: "STATE SECURITY"

## Chapter 3

## EMERGENCY PROVISIONS UNDER COMMON LAW

### I. "State Security"

3.1 In this chapter as well as in the succeeding five chapters which comprise Part III of this study, we propose to discuss provisions of law which have, in the United Kingdom and other common law jurisdictions, during colonial rule as well as in the independence era, sought to embody the concept of "state-security", in contradistinction with the concept of "social-security" discussed in the last chapter comprising Part II of this study.

3.2 As we have seen, with the rise of powerful nation-states and the centralisation of power in each state, the concern for preserving the political framework of the community assumed greater importance. Indeed, the central theme of the new world order is itself a manifestation of the desperate attempt of the world community directed towards "harmonizing the actions of nations" in achieving, among other aims, friendly relations among them "based on respect for the principle of equal rights and self-determination of peoples" in the context of "faith in fundamental human rights" and the "worth of the human person".[1] This is a recognition of the fact that the conflict of interests which is of greater concern to the modern world is found in the first of the two perennial dilemmas of liberty: the individual vs. the state - a more pressing issue than that of the individual vs. society.

3.3 It will not be disputed that "liberty" and "security" are both, in a sense, "value-concepts", so, also, are "state" and "[human] persons". Ever since the dawn of civilisation, as we have seen, these concepts have assumed different forms and have acquired different values according to

time, place, conditions and circumstances.[2] At one time, the value of a person was determined in terms of his being either a "freeman" or a "slave" or a "villein". Later, a man could be considered to be either a "subject" or "citizen" or a "native subject" or an "alien"; he could be a "freedom fighter" or a "criminal", - a "republican", a "loyalist", a "terrorist". Similarly a "state" could be as the ruler wished it to be - whether "democratic" (whether monarchical or republican or a one-party state, in form) or "totalitarian" or "despotic". On the other hand, it was the nexus between the values of the different institutions representing the two sets of concepts that provided the measure for the "value-concepts" of "liberty" and "security". The nexus was provided, as we have pointed out, by such factors as time, place, conditions and circumstances. It was this nexus which was of the utmost importance and great interest to the lawyers. The different factors constituted the key elements of the "value-process"; they regulated the measure of the concepts of "liberty" and "security".

3.4 At Common Law, this nexus was termed "necessity" whereas its perverted view, as we shall see, found manifestation in the concept of "Martial Law" used in the colonies. We propose to examine both of them in this chapter. Under legislation the concept was termed "emergency", which will be examined in the succeeding five chapters. In each of the states of the New Commonwealth the Constitutions contained emergency provisions in some form or other. During the colonial rule also "Emergency Regulations" were made in those territories but, as we shall see, these provisions in the Malayan peninsula in South-East Asia were in no manner different from the provisions of the "State Security (Detention of Persons) Decrees" of the Military Government of Nigeria passed in the last decade. Indeed, the "value-process" ranged over a very wide spectrum, which can be aptly described by the Nigerian terminology, "State Security". We proceed now to examine first the common law provisions for the protection of the state, for "state-security".

## II. Necessity

### (1) A General View

3.5 In legal terms "necessity" has always been described as a defence and has been allotted the category of "justification" whether in tort or criminal law as in both cases the question of breach of a legal duty is involved. But there are other species of "necessity" as well, such as "state necessity" and "military necessity", based on the notion of exercise of power.

3.6 It has been observed that there is no English case in which the defence of necessity has been raised with success although there may be a valid "excuse" in the case of a trivial offence.[3] Another authority points out that the term conveys a variety of ideas[4] and that the English courts have not defined it in such terms as would lay down a general principle.[5] Glanville Williams discards as obsolete Bacon's view that an act done under necessity was involuntary and endorses Hobbes who says that "it is still an exercise of the will; it is hardness of the choice."[6] If it represented an implied exception to a particular rule of law, as Glanville Williams contends,[7] the defence was likely to become, in the words of Edmund Davies, L.J., "a mask for anarchy"[8] which would subject judicial discretion to great strain.

3.7 Macaulay and the other Indian Law Commissioners in their report on the Indian Penal Code stated that they had considered the "desirability" of excepting acts committed in good faith and motivated by a desire for self-preservation but had rejected the idea. Such a course would, they appear to suggest, undermine the basic assumption of the Penal Code which rested on prevention through deterrence as the end of punishment.[9] In reality, as we have seen, Macaulay attached greater importance to legislative judgment and saw no place for any implied exception in an enacted Code.[10] On the other hand, any act which involved a judgment of values so as to be admitted as an implied exception was, a priori, liable

to be subjected to a judicial test. The "illustrations" provided in the Code were meant to pre-empt such an exercise by the judiciary.

3.8 Ironically, necessity as a defence has been recognised in the modern criminal codes of the United States and Germany, and also in the Soviet Criminal Law. The common element everywhere is to be found in the twin concepts of "imminent and unavoidable danger" and "harm caused to be less than that prevented."[11] Justice Cardozo's comment on the American case, HOLMES,[12] that ". . . when two or more are overtaken by a common disaster there is no right on the part of one to save the lives of some by the killing of another. . ."[13] however, suggests the existence of a continuing debate. Nevertheless, it is useful to note that the concept of necessity in criminal law may justify the conjecture that the concept is open to further development and wider acceptance. In fact, Art.15 (derogation clause) of the European Convention on Human Rights illustrates the term "public emergency" by using the expression "threatening the life of the nation". And, although Lord Mansfield's concept of "civil necessity" in STRATTON's case (infra) was not accepted as a defence to a criminal charge, the dictum was used by the Pakistan Court, as we shall see, even by interpolating the words "or State", to avert a constitutional crisis. We proceed now to examine the concept of "state necessity".

(2) State Necessity

3.9 The leading case is that of SHIPMONEY[14] between the King and John Hampden who had refused to pay his dues of 20 sh. under the "writ of shipmoney" issued by King Charles I. The King invited the judges to give their opinion in the Exchequer Chamber. The levy was sought to be justified on the ground that the English Navy had to be strengthened against the Dutch and the French. It was also suggested that there were piratical attacks on English shipping and that the North Sea fisheries had to be protected.[15]

3.10 The judges were divided and Hampden lost the cause. In their "answer" to the "question" formulated by the King the judges observed as

follows:[16]

> . . . when the good and safety of the kingdom in general is concerned, and the whole kingdom is in danger, your Majesty may by writ. . . command all the subjects of this kingdom, at their charge, to provide. . . for such time as your Majesty shall think fit, for the defence and safeguard of the kingdom . . . in such case, your Majesty is the sole judge, both of the danger and when and how the same is to be prevented and avoided. [emphasis added]

3.11 The law was thus stated in such broad terms that powers exercisable by the Crown under "necessity" exceeded even those that were conceded to it as "royal prerogative". For, in the latter case when a prerogative was disputed the court could rule as to its existence and otherwise too, generally, as to its content. While the Petition of Right deprived the Crown of the right it claimed in the use of Martial Law, in this case, as Holdsworth observes, "power to tax was linked up with power to use Martial Law".[17] Holdsworth further observes that the majority of the judges ruled in favour of the position that in any case of even an "apprehended danger" as distinguished from actual danger the Crown could act "as it pleased".[18] The two powers which related apparently to two different sets of values, of life and property, were thus placed by the court in the same scale. This exercise necessarily resulted in judicial abdication which projected a perverted view of the test of "necessity".

3.12 It is therefore not surprising that Holdsworth asserted that the decision was wrong in that it was violative of the Petition of Right.[19] Indeed, by making the Crown the "sole judge" of the "danger" in all its aspects the test was robbed of its practical utility; on the facts too no case of necessity had been made out. In giving his opinion in the case Sir George Crooke, a judge of the King's Bench, had observed: ". . . for a general charge of money upon the people it cannot be upon any pretence of danger or necessity. . . no necessity can procure a charge without Parliament. . .[20]

3.13 The majority in the above case appears to have invoked necessity as a "supra-constitutional principle" [21] to provide legal warrant for an

unconstitutional act of the Executive, giving rise to the concept of "state necessity". Commenting on the decision Professor Glanville Williams equates the concept evolved with prerogative[22] and the fact that it was likely to jeopardise private rights and individual liberty[23] led him to hold the view that it would serve best communist states and totalitarian regimes professing "ends justify means". The judiciary in the New Commonwealth however surpassed his expectations by putting the concept to use in different situations of constitutional breakdown by modifying its content to suit local needs. Professor de Smith takes note of the process but appears to overlook the role of the decision in SHIPMONEY as precursor and innovator.[24]

3.14 It is, however, true that recognising "necessity" as a vague and elusive concept, legislation, which has been classified as "emergency laws" in the United Kingdom has subsumed the concept in such terminological expressions as "public safety", "defence of the realm", "maintenance of public order" etc., to represent the element of "danger" inherent in the concept of "necessity". Such legislation was perhaps called for by the absence of a written constitution which was likely to encourage frequent resort to the doctrine by the executive in emergency situations resulting in the exercise of unguided and uncanalised power impairing and imperilling the freedom and liberties of the citizen. As we have seen, in the SHIPMONEY case the court conceded the use of Martial Law in violation of the provisions of the Petition of Right.[25] It was therefore considered necessary to fortify the common law protection by legislation.

3.15 On the other hand, in a comparable jurisdiction, in the United States, the court undertook the task. The justification grounded on "necessity" for the use of "Martial Law" was rejected by the American Supreme Court in Ex parte MILLIGAN.[26] The civil war was over and the civil courts were functioning. Still the petitioner - a civilian - was tried by a military court which passed the death sentence upon him.

Davis, J., of the Supreme Court observed as follows:

> The Constitution of the United States is a law for rulers and people, equally in war and peace and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of the provisions can be suspended during any of the great exigencies of the Government. . . the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence as has been happily proved. . .

3.16 Reference may now be made to another decision of the American Supreme Court in HORN v LOCKHART.[27] The claim of the legatees against the Executor was upheld in this case on the ground that the latter was not entitled to be discharged on offering payment in the Bonds of the Confederate Government that he had purchased during the civil war. Field, J., held that the Bonds were issued by the Confederate States for raising funds to prosecute war against the Government of the United States. The purchase of the Bonds was an invalid transaction as it amounted to giving aid and comfort to the enemies of the United States. What was apparently an obiter dictum came to be regarded as providing the basis for the modern doctrine of civil/state necessity. It was as follows:

> . . . the acts of the several states in their individual capacities and of their different departments of Government, executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority or the just rights of the citizens under the Constitution are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society or do away with the civil government or regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced. . . as in the peace time. . .

We have supplied emphasis in the above extract to indicate the qualification of the rule as well as its rationale.

3.17 It is difficult to overlook the obvious fact that the doctrine was inspired by the maxim, "Quod fieri non debuit factum valet".[28] The observations of the Supreme Court in TEXAS v WHITE,[29] the first of the

"Civil War cases" fortifies this conclusion. In that case the court hed observed: "it is an historical fact the Government of Texas then in full control of its state was its only actual Government. . . a defacto Government and its acts, during the period of its existence would be effectual and in almost all respects valid."

3.18 On the other hand the decision in R v STRATTON,[29a] which was relied upon by the Pakistan Court, related to a criminal charge. The Governor of Madras (in British India) was imprisoned by the members of his own council. They were brought to England and were put upon trial. Their defence was that the Governor, acting illegally by ignoring the decision of the majority of the council, had created a stalemate in the administration. They were convicted by the jury notwithstanding the charge to the contrary by Lord Mansfield, who observed as follows:

> I cannot be warranted to put you any case of civil necessity that justifies illegal acts. . . imagination may suggest a case. . . a man overturning a Magistrate and beginning a new Government. . . in India; in England it cannot happen. . .; but in that case it must be imminent, extreme, necessity; there must be no other remedy to apply for redress. . . with a view to preserving the society and themselves. . . the intervention must tend to the preservation of it.

The emphasis supplied in the above extract indicates the common rationale of the rule in the American and the English case and of course the terminology as well.

3.19 However, the Pakistan court in SPECIAL REFERENCE NO. 1 of 1955[30] observes thus: ". . . the situation presented by the Reference is governed by the rules which are part of the common law of all civilised states and which every written constitution of a civilised people takes for granted. This branch of law is, in the words of Lord Mansfield, the law of civil or state necessity." [emphasis added] The court went on to say that it was "as much a part of the unwritten law as the law of military necessity." The Reference was a sequel to USIF PATEL v CROWN[31] in which the same court had questioned the power of the Governor General to validate laws. The Governor General was functioning under the Government of India Act 1935.

He unlawfully dissolved the Constituent Assembly and assumed legislative powers. The opinion of the court was sought in the Reference made by the Governor General upon the validity of his actions including the creation of a new Constituent Assembly. The Governor-General's actions were upheld.

3.20 The Pakistan court, evidently, changed the label from "civil necessity" to "civil or state necessity" in its determined bid to solve a constitutional tangle. The justification for such an enterprise is provided by the common aspect of the two cases - the political aspect - the considerations of the safety and stability of the state. In fact the Pakistan court emphatically asserted this by expressly applying the maxim: "salus populi suprema lex". The Cyprus Court, on the other hand, relied on the Criminal Code of the state which expressly recognised necessity as a defence in cases of "inevitable and irreparable evil".

3.21 In A.G. v MUSTAFA IBRAHIM[32] a similar constitutional problem confronted the court. The Cyprus Constitution provided for power-sharing between the Greeks and the Turks at all levels and in all departments of Government in an inexorable fashion. The Turks having completely withdrawn their participation all the three wings of Government became paralysed. The Court, whose own jurisdiction had been impaired as a result of non-participation of the Turkish judge, upheld the law which was challenged as invalid on account of the legislature and the executive being similarly afflicted affecting respectively the process of legislation and promulgation. The impugned law purported to change the basic structure of the Constitution by dispensing with the participation of the Turkish judge. The decision thus invested the concept of necessity with a "supra-constitutional" significance transcending the character imparted to it in the Criminal Code.

3.22 In MADZIMBAMUTO v LARDNER-BURKE[33] detention under a Regulation made under the Constitution promulgated by the rebel South Rhodesian regime was challenged. In the High Court the majority appear to follow the line adopted in the American civil war cases by holding the regime as "de facto"

and the Regulation as "lawful" having been enacted by the "only effective government". Fieldsend, A.J.A. in a separate judgment also upheld the law by holding that it did not defeat the rights of the citizen under the abrogated Constitution. The detention in fact originated under a law enacted under that Constitution and the new Regulation merely continued it. His reasoning, therefore, conforms to the qualification stated in the American cases. He does not appear to take a new line, as has been contended,[34] by holding that it was the duty of the court to protect the civil rights of the citizens.

3.23 On appeal to the Judicial Committee of the Privy Council, Lord Pearce, in his dissenting judgment, appears to accept the argument based on necessity.[35] His Lordship, however, appears to engraft one important qualification upon those formulated in the American case. It was laid down that not only should the impugned act not help the usurpation, but that also it should not run contrary to the policy of the lawful Sovereign. This was perhaps warranted by the difference in the nature of the two polities. Another reason may be the difference in the factual situation. The decision in the American case delivered after termination of the civil war was not required to be projected into the future so as to include in the limitations conformity also with public policy of the legitimate Government.

3.24 In a similar operation the Supreme Court of Nigeria took note of the factual difference in the situation in applying the doctrine of necessity in LAKANMI and OLA v A.G.[36] The contention advanced by the state (albeit unsuccessfully) was founded upon Kelsen's theory, which was accepted by the Pakistan court in STATE v DOSSO.[37] The Nigerian court preferred to project their decision into the future and said that the take-over by the Military Government was not permanent and that the said Government was an instrument of necessity as its operations depended on the existence of circumstances of necessity. The "grundnorm" or the Constitution was not totally overthrown; it became a part of the new

"grundnorm". The factual situation in the two countries evidenced by the military take-over was so similar in its general outlines that the distinction has been rightly termed as "far-fetched" by Professor de Smith.[38] In both countries a revolutionary change had taken place but under different processes. Moreover, the overthrow next day of President Mirza who had abrogated the Constitution in Pakistan and had invited the military take-over proved that Kelsen's theory was not appropriate for judicial application and it was rightly discarded in ASMA JILANI.[39]

3.25 It has been rightly suggested that in JILANI's case the court added an "important gloss" to the doctrine by introducing the principle of "condonation".[40] It has however to be borne in mind that in this case as well as in the American civil war cases the occasion for judicial review arose after the revolutionary situation had disappeared. The scope for interference by the court was free from inhibitions. The situation in DOSSO as well as in MADZIMBAMUTO and LAKANMI differed materially in this respect. On the other hand, the SPECIAL REFERENCE case in Pakistan and MUSTAFA IBRAHIM in Cyprus signified another totally different situation. Barring DOSSO, in all other cases, the concept of necessity was used to solve different problems under different situations. The extent of judicial review was therefore bound to vary. In all cases the decisions of the courts appear to have been based on the twin considerations - how far the civil rights of the citizens were to be protected and how far the pre-existing constitutional set-up was to be maintained.

3.26 It has been contended that judicial review in cases of constitutional breakdown has to be partially conceded: the court should only consider whether the doctrine operates and not how it operates or how it is applied.[41] At the same time it is also asserted that the doctrine operates from outside a legal order in the case of a written constitution in particular.[42] Judicial opinion in the United States, as we have seen, runs counter to these statements, with the exception of the Japanese cases

(infra) in certain respects. The courts in the New Commonwealth have also, we have seen, generally followed the line adopted in the American cases. History has proved that in constitutional crises the judiciary represents the only stable institution. Among the organs of the Government it has attained a position of pre-eminence in the United States which has enabled it to regulate the functions of the other organs. Its masterful exposition of the Constitution has enabled it to dispense with the auxiliary concept of necessity. Elsewhere the judiciary has still to attain a similar status and reliance on auxiliary legal concepts becomes inevitable.

(3) Military Necessity

3.27 The Pakistan court had referred to the concept of "military necessity" but it was careful not to equate the two concepts.[43] The decision in the American case, MILLIGAN (supra) on the other hand, dealt with what has come to be known as the "war-power" of the Congress and the President, under the Constitution. Although it did not specifically speak of "military necessity", the military jurisdiction under "Martial Law" (in contrast with "Military Law" and "Military Rule") was related to the exercise of "war-power" but the express limitation on the jurisdiction prescribed by the Court contemplated that the situation must be such that "ordinary law no longer adequately secured public safety and private rights". We are entitled to say that the limitation embodied the test of military necessity.

3.28 The decision in STERLING v CONSTANTIN[44] is almost to the same effect. The Governor of Texas had declared Martial Law and has passed an order regulating the production of oil. It was held that at a time and place where courts are open and functioning the enforcing of an executive order by the military arm of the State was not "due process of law". The court could control the means of enforcing Martial Law. The nature of power implied that there was a permitted range of honest judgment of measures to be taken. The plea of "military necessity" was rejected, holding that

there was no actual uprising, no closure of courts and no failure of civil authority.

3.29 A discordant note was however struck in the cases arising out of the legislation affecting the liberty of the citizens of Japanese origin during the second world war. It cannot be suggested that the Supreme Court in the United States had changed its views. We can however say that the enterprise had a parallel in the English wartime cases.[45] In HIRABAYASHI v US[45a] the court upheld a conviction for violation of a curfew order passed under an Act of Congress by the Military Commander of the West Coast, during the second world war, requiring citizens of Japanese descent to stay at home between certain hours. It was held that the war-power extended to "every matter and activity which was so related to war as substantially to affect its conduct and progress and is not restricted to winning of victories in the field and repulse of enemy forces; that it embraced every phase of national defence including. . . danger of sabotage and espionage . . ." It was also held that the exercise of the discretionary power by the Military Commander was not reviewable.

3.30 In KOREMATSU v US[46] the court upheld as a just exercise of war-power an order passed under an enactment excluding citizens of Japanese origin from certain areas of the West Coast. In a strong dissent Murphy, J. however, observed that there must be a definite limit to military discretion. Relying on STERLING v CONSTANTIN (supra) his Lordship appears to have held that the plea of military necessity was justiciable. Whether the deprivation of constitutional rights was reasonably related to a public danger that was so "immediate, imminent and impending" as not to admit delay and not to permit the intervention of ordinary constitutional process to alleviate the danger - that was the "judicial test", he said.

3.31 In England, the "war-prerogative" of the Crown embodied the American concept of "war-power". However, it must be noted that a standing army in England having come into existence very late, an ordinary citizen

wielded considerable power under the Common Law in connection with defence of the realm. Although the correctness of the decision in the SALTPETRE case[47] has been doubted, we submit that it was not unusual in those days for the court to hold that every man as well as the King and his officials might, for the defence of the realm, enter upon another man's land and make trenches or bulwarks there, but after the danger was over these ought to be removed.

3.32 In a modern case, BURMAH OIL CO v LORD ADVOCATE[48] the matter was discussed in considerable detail. The plaintiff had claimed damages on account of the destruction in Burma of its installations and stocks of petroleum by the military under orders of the Home Government in pursuance of what was called a "scorched earth policy" during the second world war. For the Crown it was contended that the action taken was likely to conduce to the general prosecution of the war effort and it was in the exercise of the royal prerogative. A greater right accrued to the Crown in the case of extreme emergency and if the law prevented or discouraged preparation, it might be too late to be effective.

3.33 The court, ~~which~~ on appeal, referred to the SHIPMONEY case (supra) and cited the instances quoted therein to say that even at the zenith of royal prerogative power, property could not be taken in times of war without compensation. During the first world war and the Napoleonic war, statute authorised taking of property on payment of compensation. Lord Reid observed that the peculiarity of the case was that the act was not done to hamper the advance of the enemy. Both sides admitted that the destruction was expedient for the defence of other territories. His Lordship held that the immediate occasion for the destruction was immaterial, the necessity must arise out of military operation. The distinction drawn by Vattel between acts done deliberately and damage caused by inevitable necessity was endorsed. The view expressed in the American cases was dissented from on the ground that there was likely to be a difference

between the President's war-power and the royal prerogative. The right to compensation cannot depend on whether the Executive waits until the last moment, his Lordship held.

3.34 Lord Radcliffe held that the prerogative excluded the concept of necessity. The act was directed by virtue of necessity, not in the exercise of prerogative. His Lordship went on to hold that "the acts of necessity performed in sudden and extreme emergency, when there is, in effect only one thing to be done for the public safety" were not discretionary or arbitrary in any typical sense. His Lordship followed the American decisions and held that there was no distinction between accidental damage and damage through a "scorched earth policy". Lord Pearce, on the other hand, held that "when the motive of destruction was a long-term strategy the subject was entitled to compensation unless the Crown could show that the damage had an impact and importance for the purpose of the battle."

3.35 Military necessity was thus adjudged as a justiciable issue. The extent of judicial review went so far as to import consideration of reasonableness by insisting on a proximate connection between the act and the object sought to be achieved. Lord Radcliffe's dictum bears out our conclusion that the decision in SHIPMONEY . . . saw necessity as a "supra-constitutional" principle, surpassing the royal prerogative. No doubt a strong reaction against the despotic Stuart regime had procured the impeachment of the judges ruling for the Crown in that case and the effect of the judgment was also neutralised by a statute, but the line taken by those judges does not appear to have lost its appeal for judges and jurists of the twentieth century.

3.36 Reverting to the "Japanese-American cases", we have to say that these have been analysed in depth.[49] The measures conferring authority on the military have been termed as "comparable to civil war times"[50] and contrasted with the British approach to the problem.[51] It has been rightly pointed out that power was deliberately entrusted to the military "to ensure

constitutionality."[52] The change in approach is attributed to an undue concern for keeping up war morale.[53] The critique goes so far as to say that even Jackson, J., who in his dissent had observed that the majority was "distorting the Constitution to approve all that the military might deem expedient" did not concede judicial review in the required measure. The critique rightly points out that the military enjoy greater immunity than do the civil authorities from inquiry and publicity and the judicial review was necessary to stimulate "self-correction".[54] Nevertheless, the suggestion stops short at limiting judicial review to non-combatant activities of the military.[55]

3.37 It may therefore be useful to examine the role of necessity in the sphere of combat activities. Oppenheim adverts to the German proverb - necessity in war overrules the manner of warfare[56] - and observes that the modern warfare is no longer regulated by usages only, but to a greater extent than formerly by laws also. He goes on to say that these "conventional and customary rules" (the laws) cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self-preservation. He cites the case of the PELEUS, decided in 1945 by a British Military Court which had rejected the plea of necessity. The commander of a German submarine in that case had killed by machine-gun five survivors of a sunken ship, clinging to a piece of wreckage, in order to make the pursuit of the submarine improbable by removing every trace of the sinking.[57] In the MILCH case, decided by the American Military Tribunal at Nuremberg in 1947, it was held that ". . . these rules and customs are designed for all phases of war."[58] [emphasis added]

3.38 In the Preamble to The Hague Convention IV it is stated that, ". . . these provisions. . . [have] been inspired by the desire to diminish the evils of war as far as military requirements permit." This was meant to preclude reliance on military necessity as an excuse for violation of the provisions. Art.22 of the Convention stipulates that the belligerent did not have an unlimited right in adopting means of injuring the enemy.

3.39 In the context of the American civil war Dr. Francis Leiber had defined military necessity to mean "measures indispensable for securing ends of war", specifically prohibiting cruelty, torture, perfidy or "wanton devastation".[59]

3.40 The Martens clause of The Hague Conventions appears to imbibe the underlying idea of the definition by providing that, although the Conventions do not form a complete Code of War, the inhabitants and the belligerents shall remain under the protection and rule of the principles of the law of nature "as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of public conscience." [emphasis added] Similarly, Art.43 of the Convention requires the occupying power to "respect the laws in force in the country unless absolutely prevented from doing so" in restoring and ensuring public order and safety. [emphasis added] Likewise, Art.1 of each of the four Conventions requires parties to respect and ensure respect for the Conventions "in all circumstances" to indicate that military necessity as a general excuse was excluded.

3.41 The question whether the same norms ought to apply in case of "guerrilla fighting and the use of armed force by any group struggling for freedom from oppressive government or alien rule" has also been considered.[60] The report of the Secretary-General of the United Nations has been quoted which says that "all struggles for self-determination and liberation from colonial and foreign rule" ought to be considered "international" conflict, if not "interstate".[61] Accordingly it has been categorically asserted that military necessity in case of guerrilla fighting ought not to form a separate category.[62] This proposition is sought to be buttressed by invoking Art.3 of the Conventions which bind equally the people and the state.[63]

Conclusion

3.42 We thus find that in case of combat activities also the position does not alter significantly. Whether the question is agitated before the

ordinary courts administering civil law or before the military tribunals administering military law the plea of necessity has not only been considered justiciable but has been held as not debarring humanitarian considerations which, in turn, import the concept of reasonableness. We concede that the same standard cannot necessarily apply to all situations and circumstances. Necessity, we submit, ought to be considered as a self-regulating concept with judicial review as one of its necessary incidents which does not lose its standing when questions are agitated durante bello.

III. Martial Law

(1) The origin and the content of the doctrine

(A) The terminological confusion

3.43 It is a notorious fact that legal protection of personal liberty reaches almost a vanishing point when "Martial Law" is "promulgated". The crux of the matter, however, is that the law in this field has been misunderstood and as Professor de Smith suggests, "the terminological confusion lingered on" despite the efforts made in the Petition of Right in 1628 to rectify the position arising from the use of a perverted notion of common law.[64]

3.44 The term "Martial Law" was at one time considered to be a part of "Military Law" but to guard against any possible confusion it is desirable to point out the so-called "doctrine of Martial Law" has nothing to do with "Military Law" which is now understood as dealing with the discipline and conduct of the members of the armed forces. Nor is it concerned with the exercise of powers by an Army Commander in an enemy country. In these discussions the term is used in relation to the powers of the army in dealing with internal disorders which assume different forms and proportions under different conditions and circumstances.

3.45 It is necessary to recall in this connection the classic statement of Dicey which is almost forgotten now resulting in the confusion being

worst confounded. About a hundred years ago the distinguished jurist wrote as follows:[65]

> "Martial Law" in the proper sense of that term, in which it means the suspension of the ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. [emphasis added]

3.46 Indeed, we shall soon see that the doctrine, as Dicey has tersely stated and as it is understood, has no sanction of law in England. It was evolved as well as legitimated merely by use in the British colonial possessions in different parts of the world, including Ireland.[66] Briefly put, it was a mere exercise of executive power without authority of law. In other words "Martial Law" was not a law at all; it was at once an exercise in illegality and semantics, a euphemism in legal terminology. The metamorphosis of this exercise of the executive into a doctrine of law resulted from a further exercise by another organ, the judiciary, as we will discover later in this section.

(B) Juristic interpretations

(a) A General View

3.47 Hargrave appears to have traced the origin of the doctrine to Royal Prerogative in giving his opinion on the contemporary legislative activity in England and Ireland in the wake of the "Irish Disorders" of 1798 in the following terms:[67]

> I see these statutes as amounting to a melancholy change, first most unhappily generated in the Code of Irish Legislation by the heated atmosphere of civil convulsions in Ireland, and then insensibly, as it seems, insinuated into a Code of English law. . . not so much as stating the terrible prerogative. . . but engrating it. . .
>
> [emphasis added]

3.48 Professor de Smith observes that "A proclamation purporting to introduce a state of martial law is of no legal effect in itself; martial law is justified only by paramount necessity."[68] Brownlie is more specific. He observes that "if the matter is either one of 'aid to civil power' or executive action done under necessity, then the doctrine

is one of justification in terms of fact and law and not of non-justiciability tout court."[69] Brownlie was referring to the treatment of Martial Law by Heuston, Dicey and Keir and Lawson who appeared to hold divergent views. Brownlie's views, it appears, were anticipated by Sir Frederick Pollock who had defined the term as "an unhappy name for the justification by the Common Law of acts done by necessity when there is war within the realm" but went on to add that "Such acts are not necessarily acts of personal force or constraint. They may be punitive as well as preventive."[70]

3.49 Pollock contemplates Common Law requirements of good faith and reasonable and probable cause for the Common Law defence of justification with which he equates Martial Law.[71] He is silent on the issue of justiciability while Brownlie uses a guarded expression to say that the views expressed by Heuston and others did not exhaust the content of Martial Law. Brownlie offers justification for telescoping the enquiry by saying that in the United Kingdom the "emergency powers" are now based upon statutory powers. Martial Law, he says, is employed in certain Commonwealth countries.[72] Thus, we see that both Pollock and Brownlie, while recognising the common law basis for the power, stop short of answering the issue of justiciability. The connection which Pollock appears to establish between the content and character of the power does not unfortunately offer a clear answer to the issue of justiciability. Professor de Smith, however, makes certain positive assertions in this respect relying on case-law which we shall examine in due course.[73]

3.50 We may also examine the Petition of Right; s.7 makes grievance against the issue of commissions under the Great Seal by which certain persons were authorised to proceed:

> . . . against soldiers or mariners or other dissolute persons. . . [according to] such summary course and order as is agreeable to martiall lawe and as is used in armies in times of war to proceed to trial and condemnation of such offenders. . .

In s.8 an assurance is sought from the King that

> . . . no freeman in any such manner as is before mentioned be imprisoned or detained. . . [and that] . . . aforesaid commissions for proceeding by martiall lawe. . . be revoked or annulled. . . lest by colour of them any. . . subject be destroyed. . . contrary to the laws and franchise of the land. . .

A reference to chapter 29 of Magna Carta of 1215 was implicit in the expressions used for, as has been rightly observed, "the Charter had to be vigorously invoked" during the Stuart regime.[74]

3.51 In Magna Carta as well as in the Petition of Right the emphasis is on the "law of the land". Holdsworth gives us some idea about the relevant aspect of the law by saying that Common Law recognised the jurisdiction of the Crown over soldiers abroad and over soldiers within the kingdom, in times of war only; the Petition of Right was, he asserts, a restatement of the "old law".[75] It was a time when, he says, "any citizen might be called upon to serve in defence of his country [and] jurisdiction over soldiers might be easily confused with a jurisdiction over all citizens."[76] Stephen holds similar views and adds that jurisdiction over troops abroad in actual service was exercised by the Constable and the Marshal which became obsolete finally with the enactment in 1879 of the Army Discipline Act.[77] The law also said, observes Holdsworth, "If the Chancery and Courts of Westminster be shut up. . . it is time of war. . ."[78]

3.52 In tracing the subsequent development of the law he appears to use the term "Military Law" to include Martial Law in dealing with the phase between 1688 and 1879, when the Army Discipline and Regulation Act came into being. During this period military law rested partly upon the authority of the Mutiny Acts and partly on the prerogative of the Crown expressed in the Articles of War, says Holdsworth.[79] He concludes his observation by saying that the jurisdiction of the crown over the army gradually increased but over all subjects in time of rebellion it gradually decayed. His reference is perhaps to greater reliance on

legislation dealing with riots by abandoning the use of Martial Law which was not a law in fact but a practice resorted to by the despotic Stuart Kings in England and later used as a part of colonial policy abroad.

3.53 Stephen cites Coke as saying that it was illegal on the part of the Crown to resort to Martial Law as a special mode of punishing rebellion in contravention of chapter 29 of Magna Carta.[80] Forsyth quotes Coke's speech made in the debate on the Petition of Right: a rebel may be slain in the rebellion but if he is taken he cannot be put to death by Martial Law.[81] Lord Chief Justice Roll, says Forsyth, added to this saying, "He is to be tried by Common Law". It has to be remembered that the Common Law jurists and legislators used the term "martiall lawe" in the sense in which we understand the modern military law. Subsequently the illegal practice of applying the military law to civilians came to be euphemistically called Martial Law, and a search started for giving it a legal character.

(b) Special perspective - the doctrine as a particular rule of common law

3.54 As the search proceeded perforce within the confines of Common Law some found it easier to attribute it to the Royal Prerogative and allot to it a category "out of the ordinary course of the common law" to fit in with the definition of prerogative[82] given by Blackstone. [emphasis added] Others allowed it to remain as a part of the ordinary course of Common Law but held divergent views as to choice of rules. We have already seen that Pollock and Brownlie expressed their preference for the rules of justification but there were others who stated that Martial Law was a manifestation of the Common Law rule that permitted use of force against force, which we may now discuss.

3.55 Tracing the origin of the rule Stephen observes:

> In the earlier stages of our history power and turbulence of our nobility was so great that private war was all but continual and preservation of peace by force of arms was

> the first duty of all rulers. Violence in all its forms was so common and suppression of it by force was so simple a matter that special legislation did not appear necessary.[83]

The statutes of 1279 and 1304 were followed by one enacted in 1393 which dealt particularly with the suppression of riots for the first time. The Statute of Treason (1 & 2 Ph & Mary, c.10) which expressly excluded private war from the definition of treason gave recognition to the fact that preservation of peace by force of arms was the first duty of all rulers. Finally, the Riot Act of 1704 which continued until its repeal in 1967 by the Criminal Law Act, provided the Magistrates and those acting under them to be indemnified if any person was killed, maimed or hurt in dispersing, seizing or apprehending rioters. At Common Law an ordinary citizen was duty bound to suppress a riot, says Stephen, using only reasonable force. Accordingly, he argues that the indemnity ought to be limited and a soldier ought to be protected for carrying out such orders "for which he might reasonably believe his officers to have good grounds."[84]

3.56 Dicey also speaks of the "legal duty" of every subject to put down breaches of the peace. At the same time he speaks of Martial Law as "the right or power essential to the very existence of orderly government."[85] The occasion on which force can be used and the kind and degree of force is determined by the "necessity" of the case, adds Dicey.[86] Proceeding further he says categorically that Martial Law in England was not equivalent to the declaration of "state of siege" in France and other countries. He also refers to the case of WOLFE TONE,[87] the Irish rebel, whose trial by a Court Martial was held to be illegal on the ground that such jurisdiction could be exercised by the Crown over its military personnel only without attaching any importance to the fact that the trial took place during actual disorder, namely, "in times of war".

3.57 Heuston quotes Maitland who had spoken of Martial Law as "an improvised justice administered by soldiers." Dealing with the content

of the power Heuston observes that such summary trial without indictment and jury in respect of offences not known to Common Law was objectionable and was forbidden by the Petition of Right.[88] Proceeding further he explains the significance of the term by saying that the power of the Crown was like that of every other citizen, reflecting the position which arose when ordinary courts were "unable" to function. It was derived from and measured by the "necessity" of the case. At the same time he points out its "peculiarity" that acts done durante bello are not justiciable by the ordinary tribunals, although reviewable afterwards.[89] He refers to the decision in EGAN v MACREADY[90] by the Irish Court and expressly rejects the theory that it was a prerogative right and calls it an "extension" of the Common Law rule.

3.58 Lord MacDermott also discusses Irish cases and in rejecting the prerogative theory he asserts that "it is practical means of discharging the common law duty of restoring order". In describing its application he observes that the military occupies the area, maintains order under the direction of the Commander and establishes courts and procedures as may be deemed necessary: martial law does not exist in Northern Ireland, he adds.[91]

3.59 The factual situation envisaged by MacDermott virtually conforms in substance to one contemplated under a declaration of a "state of siege" which, unlike Martial Law, being regulated by statute, bore the stamp of legality, in the language of Joseph Minnattur.[92] In fact the consequences of "promulgation" of Martial Law are more pernicious than its civil law counterpart. As aptly pointed out by Minnattur, in the latter case, the essentials of the procedure are abridged but not dispensed with and the constitutional guarantee is also not infringed. However, we find ourselves in disagreement with Minnattur in the assessment of evil consequences ensuing from Martial Law which, according to him, are the same as that of the "state of siege".[93] Legality may also have constitutional and political angles and the test of necessity which

Minnattur suggests may have different aspects - these factors, we submit, merit more serious consideration in an accurate assessment.

3.60 We do not belittle the difficulty of making such assessments. Professor de Smith has also observed that, "our constitutional law books are silent on its legal consequences" while pointing out that a situation involving a "proclamation" of Martial Law has not arisen in modern times in Britain.[94]

3.61 More than a century ago, the American Attorney General, Mr. Cushing, spoke in a similar vein, albeit in a comprehensive manner:[95]

> I say we are without law on the subject. . . There undoubtedly are and have been emergencies of necessity capable of themselves producing and therefore justifying such suspension of all laws and involving for the time omnipotence of military power. But such a necessity is not of the range or of mere legal questions. When Martial Law is proclaimed under circumstances of assumed necessity the proclamation must be regarded as the statement of existing facts rather than legal creation of that fact. . . power to suspend the laws and to substitute the military authority in place of civil authority is not a power within the legal attributes of a Governor of one of the territories of the United States. . . [emphasis added]

3.62 However, in the modern American perspective the power has been viewed in the Encyclopaedia of Social Science, as inhering a potential "dictatorship".[96] Reference has been made to its absence of use in labour disputes in England, unlike America.[97] It has also been pointed out that the turning point towards a constitutional pattern in England came with the enactment of the Emergency Powers Act 1920. This was not, we submit, a correct assessment. For the reasons stated earlier, we reiterate on the strength of the authorities cited that the unconstitutional phase had spanned over the period of the Stuart rule and had ceased shortly afterwards. The Defence of the Realm Acts 1914-15 could not strictly be ascribed to the unconstitutional phase as the emergency power derived thereunder was based on legislative authority.[98]

3.63 It is necessary however to point out that in both jurisdictions in the later period the same concept of the military being called in "aid

of civil power" acquired paramount importance. As observed earlier, greater reliance on statutes dealing with riots perhaps brought about this change in England. Professor Radzinowicz has traced the history of the growth of the concept in some detail and has dealt with the sequence of events that followed the Gordon Riots culminating in the Queen's Regulations being framed for the guidance of the military in such situations.[99] He discourages the use of the army in lieu of police in such situations by pointing to the necessity that had been occasioned of amending the Regulations from time to time and observing that "no formula however ingenious would be satisfactory."[100]

(C) The Colonial Experience: the hard core of the doctrine

3.64 It may be true, as Brownlie contends, that statutorily-based emergency powers provide in the United Kingdom the modern substitute for Martial Law.[101] It is also true that there is no statutory provision in English law to meet a crisis situation similar to the declaration of a "state of siege" under civil law.[102] But these statements can be accepted only as general propositions. It has been observed that emergency laws enacted during the current decade to deal with the situation in Northern Ireland are only a step short of Martial Law.[103] On the other hand, we may note that the Emergency Powers Act 1920, which is a permanent measure, does not provide for powers similar to those exercised under Martial Law; it rather negates the doctrine in that the proviso to s.2(3) of the Act debars both punishment without trial and alteration of the usual procedure followed in criminal cases and thereby rules out trial by military courts. Even the emergency enactments of the second world war did not contemplate powers exercisable under Martial Law. The 1940 Act (3 & 4 Geo.6, c.45) provided for making regulations for trial by "special courts, not being Courts Martial". [emphasis added] Brownlie apparently overlooked the fact that there is no record of the use of Martial Law in Great Britain since it was proscribed by the Petition of Right in 1628; all recorded incidents

relate to the overseas possessions.

3.65 Turning now to the colonial experience, we have to say that although a vague and uncodified concept of Martial Law passing under the label of Common Law best subserved the colonial policy which allowed law to be perverted to meet any exigency, expediency dictated a different approach on certain occasions. It was sometimes considered necessary in certain situations to provide prior sanctions to the excesses in which the executive was expected to indulge in suppressing any uprising, instead of passing Indemnity Acts as ex post facto justification of the repressive measures that had already been taken. In so far as the states of the New Commonwealth are concerned, Martial Law had been "promulgated" under colonial rule in Jamaica, Ceylon and India:[104] on many occasions legislative measures were enacted but when this was not done and the military action was sought to be justified under Common Law, Indemnity Acts had to be passed. The attitude of the executive is best expressed in the words of Sir David Dundas which explain how the colonial policy was implemented when disturbances took place in Ceylon:[105]

> . . . the law of England is that a Governor, like the Crown has vested in him the right, where necessity arises, of judging it, and being responsible for his work afterwards so to deal with the laws as to supersede them all and to proclaim Martial Law for the safety of the colony. . ."

The emphasis indicates the perverted view. Even Stephen, who endorsed the statement as "substantially correct" found it difficult to concede such vast powers as the underlined expression appears to exact. He observes that the "proclamation" was relatable to common law duty but refers to the Petition of Right to say that the offenders could not be punished by the army. He adds, relying on WRIGHT v FITZGERALD,[106] that the army could not even use cruel and excessive means in the exercise of its legitimate function.

3.66 However, as noted earlier, the Irish dimension is of special significance. We quote a passage from Keir and Lawson where the position

in the Irish context has been explained:[107]

> It is admitted that a 'state of war' exists when the military find themselves compelled to act, not within their legal powers but according to the necessities of the case; and it may be that the Restoration of Order in Ireland Act by increasing the legal powers of the military postponed the necessity for recourse to extra-legal measures. . . and the courts retained their jurisdiction. [emphasis added]

3.67 The enactment mentioned in the above passage was passed in 1920 to deal with the situation that had developed as a result of the "guerrilla war" that the Sinn Fein movement was carrying on in their struggle to wrest independence from British rule and establish a united Irish Republic. But the independence movement in Ireland had started earlier and an "Irish Republic" had been proclaimed by the rebels in 1798. The effects of this uprising and its "bloody suppression" have been stated to be "deep and lasting".[108] This was to provide inspiration to the military wing of the Sinn Fein movement which had named itself the Irish Republican Army. There were sporadic disorders between 1798 and 1920 necessitating in some cases enactments of legislative measures. Stephen makes a passing reference to the Insurrection Act of 1833 but specifically deals with the earlier enactment of 1799 (39 Geo. 3, c.11) and observes as follows:[109]

> . . . the words in the Irish Act would only mean that the Crown has an undoubted prerogative to carry on war against an army of rebels as it would against an invading army and to exercise all powers as might be necessary to suppress the rebellion and to restore peace and permit Common Law to take effect. As soon, however, as the actual conflict was at an end it would be the duty of the military authorities to hand over the prisoners to civil power. This was affirmed in Wolfe Tone's case. [emphasis added]

3.68 In ss.13 and 14 of the 1833 Act a similar position was reflected in that Parliament had to confer special authority on the military courts to try civilians as such power did not exist at Common Law. The fact that s.28 of the Act barred judicial review of the actions taken under the Act meant that it was an incident of the new power created under the Act and it was not related in any way to the common law doctrine of necessity. For, it was

meant to provide an escape from the doctrine inhering a regulatory role which was supposed to be monitored by the courts through judicial review. This is made further clear by s.31 which purports to neutralise the right to secure the writ of habeas corpus.

3.69 We may also see how the concept was "insinuated" into other legislation of general application in the United Kingdom. In the Emergency Powers (Defence)(No.2) Act 1940 we notice the legislature tinkering with the concept in a different way. In the 1833 Act the "Court Martial" was invested with "power, authorities and jurisdiction of any Court Martial and also power, right, jurisdiction and authority of. . . any Court of Oyer and Terminer, Gaol Delivery or Sessions of the Peace. . ." but the 1940 Act empowered Regulations to be made for trial of civilians and others alike by "such special courts, not being Courts Martial." [emphasis added] Earlier, the Defence of the Realm Consolidation Act 1914 (and the Restoration of Order in Ireland Act 1920) had, however, introduced a concept of dual jurisdiction of Courts Martial and Courts of Summary Jurisdiction regulated by the severity of the offence. The 1920 Act embellished the new concept further by providing that one of the members of the Court Martial shall be nominated by the Lord Lieutenant of Ireland after he was certified as a person of "legal knowledge and experience" by either the Lord Chancellor of Ireland or the Lord Chief Justice of England.

3.70 Notice may now be taken of the enterprise carried on in some other overseas possessions. Reference in this connection may be made to an early enactment of British India; The Bengal Regulation No. X of 1804 empowered the Governor General in Council to "declare and establish Martial Law. . . for the safety of British possessions and for the security of the lives and property of the inhabitants thereof by the immediate punishment of persons. . . who may be taken in arms in open hostility. . . or in the actual commission of any overt act of rebellion. . . or in the act of aiding and abetting. . ." [emphasis added] The enactment did not contemplate

a situation where courts were not functioning. On the other hand s.2 expressly authorised suspension "in whole or in part the functions of ordinary criminal courts" and establishment of "Martial Law" for "immediate trial by Courts Martial"; sentence was prescribed by s.3 which could be death and forfeiture of property. It may be noted that the 1833 Act discussed above also had "prompt and effectual punishment" as its object. Subsequent Indian enactments however enlarged the scope of the power. In BUGGA v EMPEROR, the Lahore High Court[110] and on appeal the Privy Council also,[111] held that the power conferred by the Martial Law Ordinance of 1919 was not limited to operate on persons "taken in arms". This case was in connection with Martial Law "established" in the Punjab but in Sind in 1942 it was "proclaimed" without any supporting enactment and subsequently the Martial Law (Indemnity) Ordinance No. XVIII of 1943 was enacted to give protection for any "act done in good faith and in reasonable belief" that it was necessary for the purpose intended to be secured thereby.

3.71 In the passage from Keir and Lawson quoted earlier, the provision of trial by Court Martial has been referred to as "increasing legal powers of the military" and the expression underlined immediately following it is apparently used to convey the idea that such measures are not sanctioned by common law. We have also noted a similar comment by Stephen in respect of the 1799 Act. Besides, it has also to be noted that in the 1833 Act an express saving was made in respect of the action that could be taken in the exercise of Royal prerogative which is used in conjunction with the term "Martial Law". A similar provision using the two terms in conjunction had provoked Hargrave to remark in respect of the provisions of the 1799 Act that they had "insinuated" into English law the so-called doctrine of Martial Law. The views of the American Attorney General have also been noted. It is clear, we submit, that despite conflicting claims and apparent confusion, the disputed doctrine was a creature of statute pure

and simple and it originated in a law enacted to deal with a colonial problem, that of Ireland. It has been erroneously confused with the common-law concept of necessity. It was imported from colonial Ireland, reaffirmed in English statutes but legitimated mainly by user in other overseas possessions where a similar process of buttressing it, often by legislation, was also followed. In fact the doctrine formed an important part of the colonial policy which sanctioned all measures that would entrench and perpetuate colonial rule. Unfortunately, as we shall soon see, this "public policy", as the judiciary appears to have accepted it, converted the perverted notion of common law into a legal doctrine.

(2) The doctrine and "justiciability"

3.72 The importance of the issue of justiciability to the so-called doctrine is reflected in the fact that one contemporary observer has been misled to say that the executive can "declare martial law" in England but the power is controlled by the courts who determine whether facts and circumstances justifying the declaration exist.[112] He also overlooks, like Brownlie, the important fact that "Martial Law" was declared in overseas territories and the English courts were called upon to state the law in that context. Nevertheless, we propose to examine the decisions not to confirm the narrow aspect but to gain a comprehensive view.

3.73 In PHILLIPS v EYRE,[113] which was an action for false imprisonment, the Governor of Jamaica was sued. A rebellion had broken out in the colony which was suppressed by "proclaiming Martial Law". Subsequently the local legislature passed an Act of Indemnity. The action was dismissed. In the Exchequer Chamber it was held that "whether the proper, as distinguished from the legal, course has been pursued by the Governor in so great a crisis, it is not within the province of a court of law to pronounce. . ." In an action of this type the onus was upon the defendant to prove justification which in this case was provided by the enactment. It was therefore incumbent upon the court to adjudge the legality of the

action complained of by the standard laid down in the law but the court, after tracing the power to the common law duty of "all the Queen's subjects" of suppressing a riot went on to hold that "To act under such circumstances within the precise limits of the law is a difficult and may be an impossible task. . ." The court thus refrained from applying even the usual test of necessity as a logical course to be followed and blessed the efforts of the executive to pervert the common law.

3.74 We have seen Stephen's views on indemnity and also Pollock and Brownlie's views on justification and the test of necessity. The only rational explanation for the observations quoted above could be found in the fact that the court had unwittingly altered the content of the power with the result that it lost its original character so that the connection which the authorities had established between the content and character of the power was broken. The judiciary, by giving the executive a carte blenche, became a party to the process which led to the entrenchment of the perverted notion of the power available at common law. Also implied in the decision is the faint hint of the confusion between the general common law character and the prerogative character of the power. This confusion, it is possible to argue, may have led the court to hold that the issue was completely non-justiciable. For, although in the case of PROHIBITION del ROY[114] and in the PROCLAMATION[115] case it was held that prerogative was a part of the common law, in DARNEL's case[116] the court held that the manner and mode of its exercise could not be examined. The content being still examineble, judicial review in this case also, we submit, was not completely barred.

3.75 The way in which the common law was altered by the court in the above case has not been taken note of by any authority but it is admitted that in the case of Exparte D.P. MARAIS[117] the Privy Council had performed such an operation. The case arose out of the Boer War in the Cape Colony of South Africa. After establishing Martial Law the Army Commander had

promulgated Martial Law Regulations. Any person "reasonably suspected" of having committed any offence against the Regulations was liable to be summarily arrested and sent out of the District to be dealt with by a military court which could inflict the death penalty. Such acts as being found actively in arms against the Crown, inciting others to take up arms, actively aiding and assisting the enemy and committing any overt act endangering the safety of the armed forces and the subjects of the Crown constituted offences. The petitioner, who was arrested and detained pending trial, having unsuccessfully pleaded for his release in the Supreme Court of Cape Colony, came up with an application for leave to appeal to the Privy Council. The application was rejected.

3.76 The court held:

> . . . when actual war is raging acts done by the military authorities are not justiciable by ordinary Tribunals and that the war in this case was actually raging. . . is sufficiently evidenced by the facts disclosed by the petitioner's own petition and the affidavit. . . the fact that for some purposes some Tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. . ." [emphasis added]

3.77 Proceeding further the court observed:

> . . . Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question where a mere riot or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of military force was necessary. . . [and] . . . the framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of illegality of unconstitutional procedure. . .

3.78 The Common Law rule that when the courts were closed it was "time of war" was apparently altered by this decision: the test had to lose its supposed conclusive character. In fact, however, the old rule was founded on necessity: the courts are unable to function when a war is actually raging: the rule was indicative of this factual position. The conclusive character was imparted to it later to guard against possible misuse of "martiall lawe" as it was then understood. For, as Holdsworth

observes, the early Stuart Kings extended their jurisdiction by interpreting "time of war" to include a time of apprehended disturbance and using against other persons the power which could be applied only against the military personnel (namely, "martiall lawe").[118]

3.79 As we have seen, at Common Law, "martiall lawe" could not be used against civilians whether in time of war or in peace: use of force against force was meant to suppress rebellion and although a rebel could be slain in battle if he was taken into custody he had to be tried and punished by the Common Law. The court appears to draw a distinction between riot and disturbance on one hand and war on the other hand and to concede in the case of war measures of "excessive severity" which was contrary to common law. The Court appears to have acted on the assumption that the use of martial law ("martiall lawe") was permitted at common law against any person. This basic assumption, in our submission, was wrong. Acting on the same assumption, unfortunately, the court also appears to lay down the broad proposition that any act done by the military authorities was not justiciable when actual war was raging. The scope of judicial review which was inherent in the test of necessity was thus restricted to determining whether or not actual war was raging.

3.80 This decision became the fundamental authority for the long line of Irish decisions arising out of the 1920-21 disorder. Heuston's commendation of these decisions, which we are unfortunately unable to endorse, appear to be based on his misconstrued "simplicity of the original common law position."[119] We propose to demonstrate this by examining the leading case, R v ALLEN[120] at some length. On December 10 in 1920 the Lord Lieutenant of Ireland proclaimed martial law in certain counties and cities. On December 12 the Army Chief there promulgated Regulations which interalia provided that any unauthorised person found in possession of arms and ammunition on conviction by a military court was liable to suffer death. On January 19 in 1921 the petitioner, a civilian, was

arrested in possession of arms inside the proclaimed area. After the military court had passed a sentence of death the petitioner made an application on February 9 praying for writs of habeas corpus and certiorari.

3.81 The court formulated certain questions. In trying to find out the powers of the executive in dealing with an armed insurrection the court took account of the various insurrections and rebellions since the time of Richard II ending with the Irish insurrection of 1798 and observed that "all these were exhibitions of armed forces publicly displayed in the field and followed in most cases by Indemnity Acts." It was noticed that in Ireland three different kinds of legislation were used. After referring to the fact that habeas corpus was temporarily suspended and Indemnity Acts were passed, the provisions of the 1799 Act (39 Geo. 3, c.11 noticed by us earlier) were discussed. When the court said that this enactment gave statutory effect to the "proclamation" that was made by the Lord Lieutenant, the erroneous concept of martial law seems to be operating in its reasoning. Accordingly, relying on the MARAIS case (supra) the court went on to hold that

> . . . when martial law is imposed and the necessity for it exists, or in other words war is still raging, the court has no jurisdiction to question any act done by the military. . .

The court took note of the "guerrilla character" of the warfare but credited the executive with the same power that could be otherwise used.

3.82 Reliance was also placed on the MARAIS case to answer in the affirmative the question, could the military court act as the ordinary courts in the area were open, although the court realised that the language employed in the MARAIS case was too wide. Having noted earlier that necessity was the proper test the court slipped into an error in not applying it. It was incumbent on the court to determine if necessity warranted the trial to be held by the military court and not by the ordinary courts that were open. The common law rule was misunderstood and the

executive was allowed to pervert the law as the Stuart kings had done.

3.83 In dealing with the last question as to whether the military court could impose the death sentence the test of necessity was thus construed: ". . . during the continuance of hostilities, and while martial law exists, the necessities of the situation are for the decision of the military authorities. . ."[121] The test was thus robbed of its sterling quality of judicial review which it inhered. The perverse effect of the exercise becomes apparent when it is viewed in the light of the court's refusal to give due consideration to the fact that Parliament had passed special laws such as the Restoration of Order in Ireland Act and the Firearms Act which provided special procedure and penalties which were less onerous. The court gave primacy to the act of the executive in proclaiming martial law and misconstruing the enactments held that, ". . . the objection is one rather for the consideration of Parliament than for this court, which cannot, durante bello, control the military authorities or question any sentence imposed in the exercise of martial law."[122]

3.84 We submit that the common law test of necessity affirmed the principles inherent in the Rule of Law. The "objection" appears to have been based on the principles of equal protection of the law. The Restoration of Order in Ireland Act became law on 9th August 1920. In s.1(1) its purpose was stated:

> . . . owing to the existence of a state of disorder in Ireland, the ordinary law is inadequate for the prevention and punishment of crime or the maintenance of order, His Majesty in Council may issue regulations under the Defence of the Realm Consolidation Act 1914. . . for securing the restoration and maintenance of order in Ireland, and as to the powers and duties of the Lord Lieutenant. . . and of the members of His Majesty's forces. . .

The subsequent "promulgation" of Martial Law pursuant to the common law duty of suppressing the rebellion could not be in derogation of this law which, significantly, did not expressly save the powers of the executive to pursue another course bypassing this Act. But the position adopted by the court

vested the military authorities with the discretion either to proceed under this Act which was less onerous, or otherwise. They could pick and choose any person and deal with him more severely.

3.85 The court referred to Stephen's observation that "the military courts were committees formed for the purpose of carrying into execution the discretionary powers assumed by the Government."[123] Certainly, a writ of certiorari would not issue to such committee but the detention being in pursuance of an illegal trial - a trial which was a nullity in law being held by persons who had no jurisdiction in law to do so - a writ of habeas corpus could certainly issue. The decision, we submit, cannot be supported on any ground. It relied on a dictum of Lord Hailsbury in the TILONKO case[124] which had arisen out of the Boer War, but stretched it too far. The dictum ran thus:

> The proceedings of a military court derive their sole justification and authority from the existence of actual rebellion, and the duty of doing whatever may be necessary to quell it, and to restore peace and order. [emphasis added]

The dictum agreed with the common law concept and Stephen's explanation of the duty: the duty to quell did not necessarily include the duty to try and punish.

3.86 In EGAN v MACREADY,[125] O'Connor, M.R. displayed great courage and independence of judgment in dissenting from the above decision although the facts of the case were similar. It was observed that the I.R.A. was employing the method of irregular war and the help of the army was invoked to suppress the rebellion but it remained to be seen "whether it deprived the liege subjects of the King of the protection the common and statute law of the British Constitution afforded them." The court rightly identified the two elements that were present in the case, namely, the "court" which assumed jurisdiction had no legal status whatsoever and the death penalty for the offence charged (possession of ammunition in this case) had no legal sanction from British law.

3.87 The court accepted Dicey's comment on the MARAIS case (supra), that

the law was widely stated there, but said that even if the principles of the case were held to be of universal application, in this case there was an additional factor. Powers of the military being derived from the Crown, whether and to what extent the prerogative was limited by the Restoration of Order in Ireland Act, merited examination.

3.88 The court observed that the Act was not merely enabling but prohibitory too; that the claim of the military authority to override special legislation made for a state of war would seem to call for a new Bill of Rights; and that the claim was negated by the DE KEYSER case.[126]

3.89 The court rightly pointed out that Parliament did not think that

> . . . if England itself became the theatre of war, the military authority could. . . disregard this provision and try any one in any way it chose.[127]

This observation could be taken to mean that the executive was deliberately perverting the common law in colonial territories, as contended by us.

3.90 The case we submit presented a correct statement of the law and Heuston is not right in saying that O'Connor M.R. did not follow it later in R (CHILDERS) v ADJUTANT GENERAL[128] for the decision in that case had to take account of the changed legal position. He also criticises the decision as being based on the less acceptable theory that martial law was a prerogative right. In fact the debate as to whether it was traceable to Royal Prerogative or to common law duty to meet force with force was a futile exercise in semantics; statutory provision would prevail equally against both and it was on this footing that the case was decided. The court expressly held that Parliament could legislate that any person not killed in conflict should be tried according to law in reply to the contention that the military had the right at common law to kill any person in meeting force by force.

3.91 In the CHILDERS case the court held that the Restoration of Order

in Ireland Act was not applicable as the Irish Free State with a provisional Constitution had come into being and the Act had to be specially adapted before it could be applied. The Act did not apply proprio vigore to the army of the Irish Free State. There is however one difference in this case. While in the EGANS case (supra) the court assumed/without accepting jurisdiction the proposition laid down in the MARAIS case (supra), the proposition is not questioned here and the line taken in the ALLEN case (supra) is followed.

3.92 Molony, C.J. who had delivered judgment in ALLEN held in R (GARDE) v STRICKLAND[129] that the only question which arose for the decision in the case was whether war was still continuing and after discussing the evidence given on affidavits answered it in the affirmative. This approach of the court arising, as we have submitted earlier, from a misunderstanding of the true rule of common law later crystallised into a strait-jacket formula to deal with every case.

3.93 The omnibus test evolved by the court was challenged in R (RONAYNE) v STRICKLAND.[130] The prerogative theory used in EGAN appears to have been pressed into service by the petitioner. The court refused to be drawn into what it called "academic inquiry" and observed that although the King was at the head of a standing army he could declare war inside his own dominion merely by proclamation. The court then proceeded on what it called a 'concession' to hold that without such proclamation a state of things may exist when the military forces of the Crown may be employed in "executing Martial Law". By accepting the concession and adopting it as the basis of the decision the base of the concept which allowed calling the military in "aid of civil power" was broadened and equated with "Martial Law". The decision epitomised the process of metamorphosis hinted at earlier.

3.94 In CLIFFORD v O'SULLIVAN[131] the court accepted a technical plea and dismissed the application for a writ of Prohibition, holding it to be

misconceived. The petitioner had come up with a prayer in appeal to the House of Lords for a direction to the military authorities not to proceed with his trial after being unsuccessful in the Irish court. It was held by the House of Lords that such a writ could only be issued against an inferior court preventing them from usurping a jurisdiction which was not vested in it. The officers in this case did not act under any commission from the Crown but were merely carrying out the instructions of the Army Chief. It was neither necessary nor desirable, the court held, to discuss as such, important questions of constitutional law.

3.95 The decision of the Irish Court of Appeal in JOHNSTONE v O'SULLIVAN[132] can perhaps be supported on its own facts in that it was "statutory" Martial Law and not common law, as the courts appeared to hold, in execution of which mother and daughter were being tried. In this case an armed rebellion had broken out after the Government of the Irish Free State was constituted and Parliament had met, which it had convened. With the approval of Parliament the Government had sanctioned setting up of courts and committees by the army to inquire into and punish certain offences such as possession of arms and ammunition with which the petitioners were charged.

3.96 In repelling the contention that the right to quell the rebellion belonged to the British army and that the Provisional government of the Irish Free State had no "paper title" to raise or use any army, it was held, "It is not of the essence of the principle of MARAIS' case that the army which invokes the protection of that principle should be subject to this or that Code. It is sufficient that it should be an army properly centralised to undertake that task."[133]

3.97 Proceeding further O'Connor, L.J. observed that the principle involved in the case was salus populi suprema lex; so long as the rebellion was raging the courts had no power to interfere with the action of the army. Pim, J. on the other hand, invoked the common law principle that it was the bounden duty of the government to defend itself when attacked "and

in doing so to use any force which is necessary and to call on all well-disposed persons to assist it."[134] Here also, as in MARAIS, the proposition was broadly stated: neither principle, in our submission, could be extended generally to confer unqualified power of trial and punishment of any person by the army. On the other hand, power in this case was derived apparently from the parliamentary approval of the measures but their Lordships unfortunately overlooked this aspect.

3.98 The decision was apparently influenced by the doctrine evolved in the English cases; no effort was made to evaluate it. The fact that the courts of independent states of common law jurisdiction were not bound by the English decisions appears to have been overlooked. It was open to such courts to find out the true position at common law. We have already seen that the rule that actions of the executive durante bello were not justiciable followed from a widely-stated and possibly inadvertent dictum in the MARAIS case. Unfortunately it was accepted in the later decisions without question. We have seen that the decisions in MARAIS, ALLEN and SULLIVAN did not state the true position in common law as respects the rule which permitted the use of force against force and which postulated the army being called in aid and not in replacement of civil power. On a priori considerations the acts of the army were liable to be subjected to the test of necessity. We have also seen that the old test (when courts were closed it was time of war) was also founded on "necessity". Although this test has been termed rigid the new test, we submit, was equally rigid in that the court concerned itself in determining mainly as the preliminary issue - whether "actual war is raging"; the decision on the issue of justiciability durante bello was to follow as a necessary corollary although the inter-relation between the two was never specified. Thus, the English courts did not properly tackle the issue

of justiciability in a comprehensive manner - they limited "justiciability" to a narrow compass. This happened, as we have seen, in deciding as a preliminary issue what, under the old test, was a conclusive fact and could not be in "issue" at all.

3.99 The point which is of paramount consideration in evaluating the merits of the doctrine was brought into focus by O'Connor, M.R. in EGAN, when he stated that if England had become the "theatre of war" the position would have been different; in other words, the doctrine which was evolved in the context of colonial situations would not have, most probably, seen the light of day. It is submitted, therefore, that in the absence of judicial response to a parallel situation actually arising in England the propositions enunciated in wide terms in a few English cases in the colonial context do not commend themselves as constituting a valid doctrine of law with a common law basis.

3.100 It is interesting to note that the doctrine has not been accepted in the United States despite a vague claim made to the contrary;[135] we submit that the law stated in MILLIGAN[136] still represents the correct position. In a Hawaiian statute of 1900, the term "Martial Law" is used. During the second world war the Governor placed the territory under "Martial Law" in exercise of powers conferred by the Act and military courts were also set up there. In DUNCAN v KAHANAMOKU[137] the Supreme Court finally decided in favour of the prisoner who had been convicted by such a court and had applied for habeas corpus. The court evaluated the doctrine and rejected it by tracing the legislative history of the Act to say that the term was not used to mean "supplanting" of civil courts by military tribunals. The decision in MOYER v PEABODY[138] did not, as contended, weaken the authority of MILLIGAN. In that case an action for false imprisonment against the State Governor was dismissed. It was not a case of "Martial Law" but of a "state of insurrection" being declared, as envisaged under the State

Constitution. We proceed now to examine the response to the doctrine in another common law jurisdiction, the New Commonwealth.

(3) The doctrine and the New Commonwealth

(A) A General View

3.101 In 1947 British India was split up into two independent states, India and Pakistan; and in 1949 and 1956 respectively each of these states had its own "autochthonous" Constitution. The eastern wing of Pakistan "proclaimed" its independence in March 1971; and in November 1972 the sovereign state of the Peoples Republic of Bangladesh enacted its own Constitution. In the same year Ceylon also, which had become independent in 1948, enacted its "autochthonous" Constitution. We have seen that there was a colonial tradition for the use of "martial law" in the territories comprising these new states but it was only in Pakistan at first and then in Bangladesh that we notice a practical application of this doctrine. We propose to discuss therefore, separately, the developments there in the constitutional context of the two states.

3.102 In the following two decades we see constitutional developments taking place in South-east Asia and Africa. In 1957 the Federation of Malaya and Ghana, and in the succeeding years, Nigeria, Tanganyika (later renamed Tanzania), Uganda, Kenya, Malawi and Zambia were born. We shall have occasion to trace in some detail, in appropriate contexts, the post-independence constitutional developments that had taken place in each of these states. All these states, as well as Ceylon (later renamed Sri Lanka) had, however, one point in common which was relevant to the present context: neither in the Independence Constitutions nor in the successive "autochthonous" Constitutions was any mention of the term "martial law" made in any manner. In this respect these Constitutions provided a close parallel to that of the United States. On the other hand, in the Indian Constitution, as well as in the successive Pakistan Constitutions (1956,

1962, and 1972), except the last one of 1973, the term "martial law" was used, although not defined. The Indian provision which appeared in Part III, captioned, "Fundamental Rights", may be quoted in extenso:

> Art.34 - Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

In virtue of Art.35(a)(i) power to make laws referred to in Art.34 was conferred exclusively on Parliament; clause (b) contemplated continuance of the "law in force immediately before the commencement of the Constitution" in respect of the matters referred to in sub-clause (a)(i). Explanation I of Art. 372 defined the term "law in force" in an "inclusive" manner although it did not, in term, refer to common law.

3.103 However, the accepted position is that the term "law in force" included common law but it is also to be noted at the same time that the courts of Republican India were not bound to follow the English decisions. In other words, we submit they were not bound to accept "martial law" as a doctrine of common law. Even so, we concede that it is difficult to predict the course that the judicial approach could take in this matter should "martial law" be used at any time in independent India. The reason is twofold. Although the term was not defined, the reference to "sentence" and "punishment" in Art.34 coupled with the fact that the provision was in derogation of "fundamental rights" guaranteed under articles 20 to 22, in particular, envisaged the possibility of the military wing of the state exercising at times both legislative and judicial functions in such manner as to resemble a situation obtaining under "martial law". However, it can be argued that the provision in terms did not contemplate military intervention and that the expression "or any other person" related to the

"indemnity clause" constituting the first part of the article and not to the "validation" clause" constituting the second part. It is also to be noted that the "validation clause" did not in term refer to a legislative action and the two expressions "sentence" and "punishment" could be related respectively to the exercise of judicial and executive functions. That apart, the provision contained in the article merely authorised ex post facto legislation; it did not in term debar judicial review durante bello.

3.104 There is another formidable line of reasoning raised by the proposition that the doctrine has been recognised in the Constitution in Art.359.[139] The article authorised the President to "suspend" the right to move any court for the enforcement of all or any of the rights conferred by Part III (fundamental rights) when and where the "Proclamation of Emergency" (made under art.352) was in operation. This indeed curtailed the scope of justiciability durante bello but this fact did not, we submit, per se constitute a recognition of the doctrine.[139a] The executive power of the Union, or for that matter of the President, was, according to Art. 73, co-extensive with the legislative power. All powers available under the constitution were therefore to be found in the legislative lists contained in the Seventh Schedule; new powers could not accrue during the emergency. It is noteworthy that there is no mention of "Martial Law" in any of the entries of the legislative lists and although Art. 248 spoke of "residuary powers of legislation" of Parliament the provision was specifically related to the Concurrent and State Lists and it did not enlarge the ambit of the Union List de hors those two lists. It is doubtful, we submit, if the President exercising the executive power of the Union could authorise the military, during the currency of the Proclamation, to supersede civil administration completely so as to issue "Martial Law Regulations" and establish military tribunals to try

civilians either for the breach of any regulation or for any offence. It is therefore incorrect to say, we submit, that declaration of emergency and suspension of fundamental rights was "nothing else than declaration of martial law."[140]

3.105 The position in South-east Asia appears to be less ambiguous in view of the fact that although the Constitution of Malaysia was modelled on that of India it did not contain any provision similar to Art. 34 of the Indian Constitution, as is also the case in Singapore. In this respect the position generally in Sri Lanka as well as in the African states of the Commonwealth was not much different. There was, of course, some difference in the position, inter se. Ceylon did not have a Bill of Rights but excepting Ghana and Tanganyika, the Independence Constitutions of other African states contained justiciable Bills of Rights, saddled albeit with "special" derogation clauses for times of emergency.[141] Although Sri Lanka's autochthonous Constitution contained a chapter on "Fundamental Rights and Freedoms", following Kenya's example, it replaced the concept of "emergency" by that of "public security" but it has to be noted that the relevant provisions of the two States were not exactly similar. In other African states also there were changes, as we shall see, introduced by successive "autochthonous" Constitutions.[142] Nevertheless there was at least one point common to the "emergency" provisions of the Constitutions of all states, including those of the Indian sub-continent, namely, in each case the declaration of emergency was subjected to parliamentary control. Thus, all measures taken during emergency derived validity from parliamentary sanction and the doctrine could have little scope to operate. Even in England, as we shall see, legislative provisions are made to cope with "emergency" situations;[143] in times of war the writ of habeas corpus was "suspended" by legislation in the past but later different measures were adopted with the object, albeit, of curtailing judicial review.[144] The

Indian provision (art. 359) which purported to suspend the writ of habeas corpus did not have a parallel in African Constitutions. Thus, on the question of justiciability durante bello the Indian Constitution definitely formed a separate category.

3.106 On the other hand, we submit that as in India, in other states also, the Constitutions did not envisage such measures to be taken during emergency as authorising the military to "promulgate regulations" and to try and punish offenders. It is to be noted that although the executive power was vested in the Head of State in each case, the provision everywhere was not exactly similar. The provision of Sri Lanka Constitution is noteworthy in that s.5, which described the "supreme instruments of state power" contemplated exercise of the "executive power of the people" through the President and the Cabinet Ministers. The various functions of the President were defined in detail in s.21 but there was no mention in it of "martial law". On the other end of the spectrum stood the Zambian provision: s.53 contemplated that the executive power shall vest in the President but it also stated that "unless otherwise provided" he shall act in his own deliberate judgment and shall not be bound to follow any advice tendered. By s.54 the supreme command of the armed forces was also vested in him and he was expressly empowered "to determine the operational use of the armed forces". Despite the diversity of form of the provisions respecting executive power, the power did not embrace, we submit, the doctrine of martial law even in the case of those Constitutions which contained "emergency provisions".

3.107 The last point to be noted in this connection is as respects the "existing laws". Despite the verbal difference in the relevant provisions of the different Constitutions, as in India, in the other states also English Common Law was saved, as an "existing law", to be continued in force until altered. Nevertheless, the courts of the independent states were not bound to follow the English decisions in which the so-called

doctrine of martial law was evolved except in cases where the appellate jurisdiction of the Privy Council was not abolished. It is interesting to note that in not a single Constitution was the definition of the term "existing law" explicitly referred to law laid down by the courts although reference was made to written or enacted law; in many cases the definitions carried an exhaustive sense - "means".[145]

3.108 Notice has also to be taken of the difference in the factual position respecting colonial tradition. In the African states covered by this study as well as in Southeast Asia the colonial rulers did not, it appears, use "martial law", as they had done in British India and Ceylon. Perhaps it is due to this reason that not only the civil governments, but even the military governments in Africa did not use "martial law" during the independence era. The situation in this respect differed materially from that of Pakistan and Bangladesh which we proceed to examine now.

(B) Martial Law in Pakistan and Bangladesh

(a) A General View

3.109 In Pakistan, the Provincial government of Punjab had first proclaimed martial law in the city of Lahore in March 1953. The second time it was the Federal government who announced on the 21st April 1977 that disturbances (riots etc. arising from protests against what was called "rigged" general elections in March) had passed beyond the powers of the Provincial governments to control them and that it had therefore directed the armed forces to "aid the civil power". "Martial law" was imposed on three cities, Lahore, Karachi and Hyderabad and the military was empowered to set-up courts for trial and punishment of offenders in those cities.[146] A few months later, in July, following a coup d'etat, the Chief of Army Staff, who assumed the office of Chief Martial Law Administrator, "proclaimed martial law" throughout the country.[147] Earlier also, on two occasions, there were similar coups in Pakistan, in 1958 and 1969, and

each time "martial law" was imposed on the country. Each time the military rulers made "Martial Law Regulations" and also set up military courts to try and punish offenders.

3.110 In East Pakistan "martial law" was declared in March 1971 and military rule continued there during the Pakistan army's control over the territory which ceased in December with their surrender to a joint command of Indian and Bangladesh forces. On 15th August 1975 there was a coup d'etat in Bangladesh and President Mujibur Rahman was killed. It was announced over the Dacca Radio that the armed forces had "taken over" and that "martial law" had been proclaimed.[148]

3.111 In the Bangladesh Constitution, Part III, captioned "Fundamental Rights", contained Art. 46 which corresponded to Art. 34 of the Indian Constitution but it differed materially in one respect from its Indian counterpart in that the words"Martial Law" was omitted from it. On the other hand, in Pakistan, Art. 196 of the first Constitution of 1956 reproduced verbatim the Indian Art. 34. Later, the Constitutions of 1962 and of 1972 also contained similar provisions in Articles 223A and 278 respectively. Although the 1973 Constitution did not follow the precedent it provided in Art. 245(1) that "The Armed Forces shall, under the direction of the Federal Government, defend Pakistan against threat of war, and, subject to law, act in aid of civil power when called upon to do so." [emphasis added] The article was amended and the two under-noted, among other clauses, were later added:

(2) The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.

(3) A High Court shall not exercise any jurisdiction under Art. 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being acting in aid of civil power in pursuance of art. 245.

It may be noted in this connection that Art. 199 (1)(b)(i) embodied the remedy of habeas corpus without naming it in terms and that during an

"emergency" the Federal government could make "provisions for suspending in whole or in part, the operation of any provisions of the Constitution", under Art. 232(2)(c). In Part X ("Emergency Provisions") which contained the last-mentioned article, also appeared Art.237 as follows:

> Nothing in the Constitution shall prevent the Parliament from making any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan.

(b) The Judicial Response

3.112 In an early case, UMAR KHAN v CROWN[149] the Pakistan court appears to have displayed an ambivalent approach to the doctrine in that although at one place it held that "in pure Anglo-Saxon law" setting up of military tribunals for exercise of judicial power was not recognised at all,[150] at another place in the judgment it was also held that "durante bello . . . the will of the military commander is as supreme in the area as if he were in military occupation of enemy territory"[151] although the court hastened to add that once "martial law" was lifted, the courts functioned in the usual way and acts of military involvement could be called into question.[152] In this case the application for habeas corpus was filed after "martial law" was lifted, which had been "proclaimed in Lahore by the Provincial government in 1953. The prisoner had been convicted and sentenced for the breach of a Martial Law Regulation by a military court. An Ordinance had been passed validating such sentences. The vires of the Ordinance was upheld which was the sole question to be determined in the case, according to the court. Thus the validity of the "proclamation of martial law" was not in question but certain general observations made by the court gave rise to some misunderstanding in a later case, as we shall see.

3.113 During military rule the same High Court in MIR HASAN v STATE,[153] which de Smith commends as a "courageous decision",[154] stated the law more

accurately and precisely, thus: "in a country where the army takes over to suppress riots or disorder and to restore peace and order by the proclamation of martial law it would be described as the law of necessity . . . even if there is military rule in the country, such rule is not arbitrary or uncontrolled by principles nor is it the simple and pure will of the Commander. . ."[155] In equally strong language the court jealously guarded the right of judicial review and said, "it is the inherent jurisdiction of the superior courts of the country to interpret the law. . ."[156] By using its power of interpretation the court struck down the Martial Law Regulation by which the case of the petitioner was transferred from the ordinary criminal court to a special military court and thereby shattered the myth of non-justiciability, durante bello, of the actions of the executive.[156a]

3.114 The Supreme Court performed a similar operation by striking down two Martial Law Instruments in ASMA JILANI v GOVERNMENT OF PUNJAB.[157] One of the regulations authorised detention of any person by the military authorities and the other took away the right of judicial review of the courts. The court traced in some detail the use of martial law in British India and also in Ireland and South Africa and observed that "the test of interference has always been the test of necessity." This was undoubtedly a correct statement of the law but the factual situation did not correspond to it: the English Courts had, as we have shown, adopted a strait-jacket formula of limited justiciability.

3.115 Proceeding further the court observed that the maxim, inter armes leges silent, applied in the municipal field in such a situation where it had become impossible for the courts to function. We have already seen how the common law rule on this point ("time of war") was wrongly stated in the MARAIS case (supra). The old common law rule was adhered to by their Lordships when they said: ". . . it is a well-established principle that where civil courts are sitting and civil authorities are

functioning, establishment of Martial Law cannot be justified."[158]

3.116 In STATE v ZIA-UR-RAHMAN[159] the Supreme Court was called upon to determine the validity of Art.281 of Pakistan's Interim Constitution of 1972 which purported to preclude judicial challenge to the acts done under the military regime that the new Constitution had replaced. The court upheld the provision but held that it merely validated the acts done, proceedings taken or orders made in the exercise of powers derived from the measures enacted by the Martial Law regime but it did not oust the jurisdiction of the courts to pronounce upon them.

3.117 The full bench of Lahore High Court declared illegal in DARVESH ARBEY v FEDERATION OF PAKISTAN,[160] the "martial law" proclaimed in Lahore in 1977 in pursuance of Art.245(1) of the 1973 Constitution, by the civil government. The court unequivocally rejected the doctrine and observed that reliance on Common Law by the Attorney General was misplaced in that in England there was no written Constitution as in Pakistan and that the term "martial law" did not occur in the 1973 Constitution although it occurred in the previous Constitutions and also in the Indian Constitution. The court also pointed out that the new Art. 237 did not embody the old provision as it did not have any"validation clause". The court also referred to the decisions in UMAR KHAN, ASMA JILANI and ZIA-UR-RAHMAN (all supra) and observed that "martial law" was not recognised in those cases also. The newly inserted clause (3) of Art.245 (by the Constitution [Seventh Amendment] Act 1977) was read with clause (1) and construed to hold that the court's jurisdiction to entertain the application was not ousted. It was held that clause (3) did not become operative inasmuch as the army did not act "in aid of civil power" in conformity with clause (1) in that the army had to act "subject to law" and the Pakistan Army (Amendment) Act 1977 was ultra vires clause (1) itself. It was held that the amended Act authorised the army to act not in

aid but in derogation of civil power by subjecting civilians to the Army Act and providing that they could be tried by Courts Martial.

3.118 In dealing with contemporaneous situation in Karachi, the High Court there came to a different conclusion in NIAZ AHMED KHAN v PROVINCE OF SIND.[161] The court quoted with approval a passage from the UMAR KHAN case (supra) which ran thus:

> In the third sense in which it is part of English constitutional law, martial law means rights and obligations of the military under common and statute law of the country to repel force by force while assisting the civil authorities to suppress riots, insurrections or other disorders in the land.

The court then went on to hold as follows:[162]

> It may be stated generally that subject to applicable constitutional limitation, the Martial Law Authorities in the enforcement of the martial law may do all acts which are reasonably necessary for the purpose of restoring and maintaining public order. [emphasis added]

The court did not express any opinion on the validity of the Pakistan Army (Amendment) Act 1977 but held that the amendment of the Constitution (the new clauses (2) to (4) of Art. 245) was valid and the hearing of the petition therefore remained suspended by virtue of Art. 245(4). In the petition a declaration was sought that "the proclamation of martial law" and setting up of military courts were illegal. One of the judges however observed that although the army can apprehend those who threaten to disturb peace ~~but~~ such persons can only be tried by ordinary civil courts which had admittedly not ceased to function.[163]

3.119 In respect of the "martial law" declared by the Chief of Army Staff a few months later, the same High Court, in SIDDIQUE KHARAV v PAKISTAN,[164] repelled the contention that it was declared under Art. 245 of the Constitution. The court held that the Federal Government itself ceased to exist by virtue of the Proclamation but refused to go further into the matter as neither was the Proclamation challenged nor was the Chief Martial Law Administrator made party to the proceedings.

Conclusion

3.120 In the absence of any reported decision it is difficult to express any opinion about the approach of the Bangladesh judiciary to the so-called doctrine of martial law but it can at least be said that in the usual course the Bangladesh courts are expected to follow the decision of the Pakistan courts in maintaining the continuity of the judicial tradition in that territory which, until recently, formed a part of Pakistan.[165] It is apparent that the Pakistan courts generally refused to accept the doctrine at its face value. In Bangladesh also, it appears that courts have refused to accept "martial law" as a norm of "legitimacy" and in many cases the High Court has released "political prisoners" detained by the military rulers.[166] Evidently the military rulers in both countries staked their claim to "legitimacy" on the promulgation of "martial law" relying on colonial traditions. Indeed the latter could only be effectively refuted by the constant pressure of intelligent and vigorous "public opinion" which could ensure a fully satisfactory operation of the "value-process" at all levels. Although such pressure has in fact built up in Pakistan possibly as a reaction to recurrent military intervention it had not reached the desired level. It was perhaps for this reason that in some of the Pakistan decisions the rejection of the doctrine is made in a feeble and equivocal manner. There is, however, no doubt that as in Northern Ireland (albeit there it was ordinary military intervention and not "martial law") the Pakistan courts were bound to be influenced by the contemporary environmental background provided by military "excesses".[167]

# Chapter 4

## EMERGENCY PROVISIONS UNDER LEGISLATION: UNITED KINGDOM

### I. Legislation for the "Defence of the Realm"

#### (1) A General View

4.1 In discussing the decision in the SHIPMONEY case we have noticed how the court installed the concept of "necessity" as a supra-constitutional norm.[1] We also had occasion to point out that the relevance of the ancient decision is not lost.[2] In the law enacted and declared during the last two world wars we find ample support for this proposition. We propose to discuss these now and see how the concept "defence of the realm", born out of "necessity", developed gradually to suit the changing conditions of the modern age. In this inquiry we will confine ourselves, for obvious reasons, mainly to the provisions respecting detention without trial.

4.2 The English kings had to fight many battles for the defence of the realm. For the conduct of war they arrogated to themselves wide powers which came to be acknowledged as the "war-prerogative" of the Crown. We have already seen that like other prerogative powers its scope was also delimited, albeit gradually, with the encroachment thereon of the parliamentary enactments which had the effect of increasing the power of the Crown over the armed forces.[3] By leaving untouched the common law protection of personal liberty of the citizen which had crystallised in the provisions of Magna Carta, the Petition of Right, the Bill of Rights and in the right to the writ of habeas corpus, it was expected that the judiciary would strike the right balance between the interest of the state and the citizen by using the auxiliary concept of "necessity" to meet the exigencies of war. Parliament also stepped in at times and during the Napoleonic wars it passed what came to be popularly known as the Habeas Corpus Suspension Acts.

4.3 As Sir Charleton Kemp Allen observes, when war broke out in 1914 the public realised that there was a "national emergency" such as had not existed for over a hundred years.[4] Three enactments were passed in quick succession in 1914, on the 8th and 25th August and on the 27th November, to be hereafter called collectively as the first series.[4a] The last one, named The Defence of the Realm Consolidation Act 1914 (hereafter called the Consolidation Act) which amended the law and repealed the earlier enactments, was itself amended in 1915.[4b] The purpose of the law was spelled out in the preamble of the first Act: "to confer on His Majesty in Council power to make Regulations during the present war for the Defence of the Realm." The underlined expression also figured in the short title of each one of the successive enactments passed in 1914-15.

4.4 In contrast, during the second world war, each one of the three enactments passed in 1939-40 carried the short title, Emergency Powers (Defence) Act, and the preamble of the first Act of this series (hereafter called the second series) also stated the purpose differently, as follows:

> . . . to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency; and to make further provision for purposes connected with the defence of the realm. [emphasis added]

4.5 The gradual change in the approach of the law-makers is reflected in a few more important points of difference. In 1637, the judges in the SHIPMONEY case had "conferred" power on the King to take measures that he deemed expedient for the "good and safety of the kingdom" when the "whole kingdom was in danger". In 1914, in a similar context, the parliament used the expression, "the public safety and the defence of the realm". In 1939, Parliament widened the concept further using a chain of expressions running thus: "the public safety, the defence of the realm, the maintenance of public order, efficient prosecution of war, maintaining supplies and services essential to the life of the community."

4.6 Events attending and following the first world war brought home to the Government the realities of the "emergency" situations with a great variety of problems of domestic importance which could not be expressed adequately by the term "public safety" alone. It is therefore not surprising to find that some of the expressions used in the 1939 Act mentioned above have been borrowed from the Emergency Powers Act 1920 which was enacted at the end of the first world war as a permanent provision "for the protection of the Community in cases of Emergency". The 1920 Act contemplated the declaration of a "state of emergency" when "there have occurred or are about to occur events of such a nature"as are likely to deprive the community of the essentials of life as a result of disruption in the supply and distribution of food, water, fuel, light etc. During the currency of the Proclamation of Emergency regulations could be made for securing the essentials of life to the community and for the preservation of peace.

4.7 Although the new concept of "emergency" was born in 1920 the concept of "war-prerogative" was never lost sight of. There was, nevertheless, a difference in the treatment of the old concept in the two series of Acts which does not appear to have been taken note of anywhere. In the second series of Acts, s.5 of the 1939 Act expressly stated that "the power conferred by or under the Act shall be in addition to, and not in derogation of, the power exercisable by virtue of the prerogative of the crown." (emphasis added) Although the provision was not free from ambiguity there was a clear indication that all regulations made under the Act had to be within the four corners of the authority delegated under the Act. No mention was made of prerogative in s.1 of the Act which dealt with the regulation-making power. In contrast, its counterparts in the first series, ss.1 of both the first as well as the Consolidation Act use common language to state that -

> His Majesty in Council has power during the continuance of the present war to issue regulations. . . [emphasis added]

4.8 In the Consolidation Act there was, no doubt, a change in the collocation of words following those quoted above. We shall have to deal with this aspect in greater detail but for the present we submit that s.1 of the first series of Acts was in two parts: the first part asserted the existence of prerogative power and the second part indicated the power created and conferred by the statute. This position, we submit, remained unchanged in the Consolidation Act. It was not affected by the juxtaposition of words and phrases following those quoted above. We concede that the decision of the House of Lords, to be discussed presently, was to the contrary. The legislative history of the first series of Acts stated by Prof. G.W. Keeton however, supports our proposition although he does not arrive at the same conclusion as ours.[5]

4.9 Prof. Keeton observes that the first two Acts of the series only declared that the Crown had power to issue regulations concerning the existing powers and duties of the Admiralty and the Army Council but the Executive interpreted it in a different sense and made regulations directing arrests etc. which were declared ultra vires by the courts leading to the enactment of the third Act, the Consolidation Act. It is clear therefore that the Acts contemplated and regulated the exercise of the "war-prerogative" which, according to us, was contemplated by the first part only.

4.10 Indeed, as we have seen, Common Law did not concede to the Crown any prerogative to interfere with the personal liberty of the citizen. The use of Martial Law against citizens in the purported exercise of the war-prerogative was forbidden.[6] Did the change in the language in the Consolidation Act, aimed at conferring this power, really achieve its object ? The House of Lords said yes. We hear in their Lordships' decision an echo of the SHIPMONEY case. We submit that the law was "strained" by their Lordships and we rely on Allen's observations made in connection with the effect of the first world war. The courts were not, he says, "averse, on occasions, from straining the law in favour of

obvious necessities of a time of peril" and that "the resistance to the regulations was generally unsuccessful".[7] This state of affairs may have, perhaps, prompted the observation that the "constitutional phase" in England did not start until the enactment of the Emergency Powers Act 1920.[8]

(2) The first world war and the provision for internment

(A) The Acts and the Regulation

4.11 We proceed to examine now the law enacted in 1914 on detention without trial and the leading decision thereon, of the House of Lords, to which we have referred above. An extract from the relevant provision of the Consolidation Act is quoted below:-

s.1(1) His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, AND as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in this behalf; AND may by such regulations authorise the trial by courts-martial, or in the case of minor offences by courts of summary jurisdiction, and punishment of persons committing offences against the regulations and in particular against any of the provisions of such regulations designed -

(a) to prevent persons communicating with the enemy. . .
(b) to secure the safety of His Majesty's forces. . .
(c) to prevent the spread of false reports. . .
(d) to secure the navigation of vessels. . .
(e) otherwise to prevent assistance being given to the enemy. . .

[emphasis added; the word AND written in capitals at two places in the first para for emphasis]

4.12 It was under this provision that Reg.14B was framed but before we inscribe that we may quote below the provisions of s.1 of the Defence of the Realm Act 1914 (the first Act) so that the change in the collocation of words can be better appreciated.

s.1 His Majesty. . .has power. . . to issue regulations as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces, and other persons acting in his behalf for securing the public safety and the defence of the realm; AND may, by such regulations, authorise the trial by courts martial and punishment of persons contravening any of the provisions of such regulations designed -

(a) to prevent persons communicating with the enemy. . .
(b) to secure the safety of any means of communication. . .

[emphasis added; the word AND written in capitals at one place in the first para for emphasis]

4.13 We submit that the semi-colon in the first paragraph of s.1 in both the Acts divides the provision into parts. It is our contention that the first part was declaratory of the war-prerogative and in this connection it is to be noted that the expression "the public safety and the defence of the realm" signified this power and the expression, in both the Acts, retained its place in the first part. In the later Act there was some juxtaposition of words within the first part which affected the said expression and it was on this change that the House of Lords placed greatest reliance.

4.14 We may now quote the relevant parts of Reg.14B:

> Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned, it appears to the Secretary of State for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or association of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed and reside in, such place as may be specified in the order, and to comply with such direction as to reporting to the police, restriction of movement and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order.
>
> Provided that any such order shall, in the case of any person who is not a subject of a state at war with His Majesty, include express provision for the due consideration by one of such advisory committee of any representation he may make against the order. [emphasis added]

4.15 It is necessary to indicate some other important provisions of the Regulation not covered by the above extract. Non-compliance with the order was made an offence. Interned persons were to be treated as Prisoners of War. The advisory committee was to be presided over by a person who held or had held "high judicial office".

(B) The Judicial Response

4.16 We proceed to examine the interpretation of the above provisions that appeared in the decision of the House of Lords in R v HALLIDAY, ex p. ZADIG.[9]

4.17 The matter arose out of an application for Habeas Corpus which

was refused by the Kings Bench. The decision being affirmed by the Courts of Appeal the matter came up in appeal before the House of Lords. The short question that was agitated at each stage was that the regulation was ultra vires.

4.18 The appellant Arthur Zadig was born in Germany of German parents in 1871. He became a naturalised British subject in 1905. In October 1915 he was arrested and interned under an order passed by the Home Secretary under Reg.14B which ran thus:

> Whereas on the recommendation of competent military authority appointed under the Defence of the Realm Regulation it appears to me for securing public safety and defence of the realm. . . I hereby order that Arthur Zadig. . . be interned. .[emphasis added]

4.19 It is to be noted that the expressions "public safety" and "defence of the realm" were connected by the conjunction "and" in the order which was also the position in the Acts but in the regulation itself the conjunction used was "or". This position appears to have been overlooked by the appellant who challenged the vires of the regulation on the following grounds, among others:

(a) The legislative history of detention without trial could be traced back to 1696 when the statute (7 & 8 Will.3, c.11) did not in terms suspend the Habeas Corpus Act. It gave definite powers to six members of the Privy Council to imprison persons suspected of high treason and treasonable practices without trial or mainprize. It was also subject to a time-limit on the expiry of which the right to the writ of Habeas Corpus was expressly revived.

(b) Power of detention without trial could be conferred by express words only - the provisions of Magna Carta and habeas corpus could not be repealed by implication.

(c) The statute in this case conferred unlimited power on the executive subject to only one qualification, namely, "during the continuance of the present war".

(d) Some limitation therefore ought to be placed upon the general words.

(e) The Act itself provides one limitation in that it provides for the trial of persons for breach of the regulation and does not expressly provide for imprisonment without trial.

4.20 On behalf of the Crown it was inter alia, contended that the power to intern necessarily flowed from the language of sub-s. (1) of s.1 of the Consolidation Act and that it was not conferred by vague and general words. Although the Habeas Corpus Act was not suspended Parliament has sought to obtain the same result by a simpler and more humane method. The detentions under the regulation ought not to be treated as punitive. As espionage and sabotage were rampant, there should exist in the executive, for public safety, a power of preventive detention. The power was necessary to achieve the objects specified in the Act, especially those enumerated in clauses (a), (c) and (e) of s.1(1).

4.21 The appeal was dismissed by the majority. The lone dissent was entered by Lord Shaw. In the leading judgement Lord Finlay categorically rejected appellant's plea to read an implied limitation and observed:[10]

> . . . it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council and . . . Parliament may do so feeling certain that such powers will be reasonably exercised. [emphasis added]

Earlier in the judgment his Lordship referred to the provision of the advisory committee and observed that means were provided "for ascertaining whether any complaint against the justice or necessity of the order is well-founded."[11] Proceeding further his Lordship observed that the measure was "precautionary" and not "punitive". The statute was passed at a time of "supreme national danger".[12] The restraint imposed may be a necessary measure of precaution and "in the interest of the whole nation" it may be expedient to pass such order in suitable cases. That was, said his Lordship, "the meaning of the statute". Every reasonable precaution, consistent with the object of the regulation, was taken.

4.22 It is needless to mention that the dominant note of the judgment is influenced by the doctrine of necessity. In giving effect to the intention of the legislature more attention is paid to the surrounding circumstances than to the language of the statute. One is entitled to ask if such interpretation accorded well with the accepted norms. To decide the question of vires of the regulation one would have expected the court to examine the provisions of the Act and the regulation more closely. No doubt, it was, at bottom, a matter relating to choice of rules of interpretation and the court had made its choice and laid down a new norm. In interpreting emergency laws more importance was to be attached to the broad object of the statute and wide delegation of power to the executive was to be upheld on the ground of "necessity". It is true that the doctrine of separation of power in a strict sense did not form (unlike the U.S.A.) the cornerstone of the British Constitution. For this reason, perhaps, the court found it easier to discard the theory of excessive delegation in the particular context of emergency laws.

4.23 This aspect of the matter was dealt with in another light by Lord Dunedin, who said - ". . . the powers are drastic and might be abused. . . but the fault lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument. . ."[13]

4.24 Lord Atkinson however dealt with the case at greater length and brought to bear upon the matter a different approach which has been, wrongly, we submit, dubbed as "curious misconception".[14] It is not correct to say, we submit, that the Justice of the Peace Act 1360 had "little relevancy" to the question. His Lordship rightly, we submit, referred to the Act and observed that "preventive justice" was not a new thing in the laws of England. The law of preventive detention was rightly traced to the genus of "preventive justice" for, the law, like the Justice of the Peace Act 1360, gave rise to a jurisdiction based

on suspicion. This jurisdiction was, in one case, vested in the judiciary and in the other case, in the executive. In such cases, as his Lordship observed, suffering and inconvenience to the suspected person was inevitable. It had only to be seen whether adequate safeguards were provided "to prevent error or abuse".[15]

4.25 In another respect his Lordship's opinion had a great importance. One of his observations as we shall see, became the main burden of the leading case under the 1939 Act.[16] His Lordship observed: "The order sets out upon its face all the requirements necessary for its validity. . . it shows upon its face jurisdiction to make it."[17]

4.26 His Lordship took notice of the change in the language that was brought about in the Consolidation Act. The earlier Act was termed as "entirely punitive" and it was observed:[18]

> . . . presumably that was found to be insufficient to secure the safety of the public and the defence of the realm to the extent desired. . . the second statute goes much beyond the scope of the first in the methods. . . it provides that the regulations <u>may not only</u> deal with the powers and duties of Admiralty and so forth but to issue regulation for securing <u>directly</u> the public safety and the defence of the realm. These are wide powers. They are <u>new words</u>. Some effect must be given to them. They obviously cover preventive methods. . . as well as. . . which are truly punitive. . . [emphasis added]

4.27 We have already pointed out that the change in the language did not materially affect the position and achieve the purpose indicated in the above passage by his Lordship. The words were not new; their position was only changed, within the first part of the sub-section. The word 'AND' in the first part had to be read in the conjunctive sense and not disjunctively as his Lordship had done. The words, "powers and duties <u>for that purpose</u> of the Admiralty. . ." were merely descriptive of the expression "the public safety and defence of the realm" which, we submit, was a term of art which had subsumed the concept of war-prerogative. No importance was attached by his Lordship to the words underlined above. In fact, the majority opinion as a whole totally overlooked the role of

prerogative to which, as we shall see, Lord Shaw, in his dissenting judgment had only incidentally referred and even he attached no importance to the words "has power" following the opening words, "His Majesty in Council" of s.1(1).

4.28 In support of their finding that the power to make regulations for preventive detention was duly introduced in the Consolidation Act the majority placed reliance especially on the provisions of clauses (a), (c) and (e) of sub-s.(1) but it may be noted that clause (a) was not new. It occurred in the same form in the first Act also. The word "prevent" recurring in clauses (a), (c) and (e) appears to have caused the confusion. These and other sub-clauses were controlled by second part of sub-s.(1) which provided for "punishment" of persons committing offences against the regulations. Trial by courts-martial for punishment of offenders had to be "authorised" by the statute in the second part of the sub-section inasmuch as the Crown, in the exercise of its prerogative power, could not authorise such trials.

4.29 Lord Atkinson however struck a refreshing note when he observed that, "if on the face of the regulation it enforced or required some thing to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm, it would be ultra vires and void."[19]

4.30 The tune was picked up by Lord Wrenbury who said that the appellant was entitled to be discharged if he could establish either the fact that he was not of hostile origin or association or that the regulation itself was ultra vires.[20]

4.31 Thus, the majority did not totally rule out judicial review in spite of the words, "where. . . it appears to the Secretary of State. . ." occurring in the regulation. This aspect of the decision, as we shall see, was overlooked by the courts in Northern Ireland.[21] It is also necessary to point out that the theory of subjective satisfaction, as Lord Atkin observed, was not born until the decision in the GREENE

case (infra) was handed down by the Court of Appeal.[22]

4.32 We may now examine in some detail the illuminating dissent of Lord Shaw. While Lord Atkinson had held that the Consolidation Act and the order passed thereunder having become law of the land the contention that there was an implied repeal of the provisions of the Magna Carta and Habeas Corpus was without any substance,[23] Lord Shaw upheld the contention. His Lordship observed:[24]

> There is constructive repeal. . . no parallel in our annals - a getting behind the Habeas Corpus by an implied but none the less effective repeal of the most famous provisions of Magna Carta itself.

Proceeding further his Lordship observed that the words "to issue regulations for securing. . . realm" ought not to be so construed as to remove "the two main rights of civil society" or to efface "the two most distinguishing characteristics of our Constitution."[25] Reference was also made to the DARNEL case[26] and the Petition of Right.

4.33 His Lordship also referred to what he called the "practice of Constitution" and observed that in the past, in the "exceptional legislation" the mode of dealing with foreign attack, political unrest and civil war has been "frank, free and open", namely, a temporary suspension of the Habeas Corpus Act.[27] Reliance was also placed on Blackstone (i, 136) to say that confinement of a person may be necessary when the state is in "real danger" but detention in such cases is not by the executive but by Parliament which suspends the Habeas Corpus Acts. It is noteworthy that his Lordship adopted Blackstone's "real danger" test which made Parliament the judge of the situation contrary to the decision in the SHIPMONEY case.

4.34 The argument based on prerogative was noted but it does not, unfortunately, get proper treatment perhaps for the reason that it was only "incidentally alluded to". His Lordship observed: "Do not let the thing which has been done be associated with royal prerogative - its validity depends on the Act of Parliament."[28]

4.35 His Lordship referred to each of the four Acts of the series and came very close to realising the fact that the power to issue regulations under the Acts was an amalgam of two powers - prerogative and statutory - when his Lordship said that the power already existed but had to be "specified" or "amplified". Proceeding further his Lordship observed that the object of the enactments was two-fold: to draw up and notify the citizens of "a certain line of duty or course of conduct" and to append the sanction of punishment to disobedience of the regulations.[29] In effect his Lordship appears to hold that each of the Acts dealt with punitive provisions only and in each one of them "the right of the subject to trial in accordance with law was guarded and preserved."[30] Reference in this connection was made to the 1915 Act which conceded to the British subjects the right to claim trial by a civil court with a jury, vide s.1(2).

4.36 Dissenting from the majority view his Lordship held that the change in the collocation of words brought about in the Consolidation Act did not introduce the concept of preventive detention.[31] This conclusion, it may be noted, was in accord with the view which we have put forward but his Lordship interprets the effect of the change differently. It was held that ". . . now the regulations issue direct from the King in Council."

4.37 How far this corresponded to the factual position we are unable to testify but we would have expected his Lordship to say that the "existing" power (prerogative) being incapable of tampering with the liberty of the citizen the change which "amplified" or "specified" this power could not achieve the desired result. No doubt, in his conclusion, his Lordship did observe that the appellant had been (i) interned, (ii) without trial, (iii) because he was of hostile origin or association, but Parliament never said in words any of these things.[32] Earlier also, at one place, it was stated that Parliament would not, "under cover of words . . . safety and defence," make such "colossal delegation of power".[33]

4.38 The right of judicial review appears to have been recognised as an implied limitation on wide delegation of power in that the absence of scope for judicial review in the instant case was commented upon in these terms: "No court of law could dare set up its judgment on the merits of an issue - a public and political issue - of safety and defence".[34]

4.39 The safeguard of an advisory committee was held to be illusory on two grounds: (1) power to recommend, and power to make an order for detention vested in the executive itself, albeit in two departments; (2) the Committee's decisions were not binding on the executive.

4.40 Thus in the dissenting judgment a more painstaking effort was made to deal with the question of vires of the regulation conforming closely to the accepted norms of interpretation of statutes, unlike the majority opinion which laid down a new norm. Unfortunately, the latter norm prevailed with the majority opinion in the leading case under the 1939 Act which will soon be discussed. It could be said that this norm was founded upon the notion that - "because a country is at war it has the right to commit 'acts of war' against its own citizens."[36]

(3) The second world war and the provision for detention

(A) The Acts and the Regulation

4.41 We propose to discuss now the law enacted and declared during the second world war with reference to the same series of Acts, namely: the Emergency Powers Defence Acts 1939-40 (chapters 62 - 2 & 3 Geo 6, and 20 & 45 - 3 & 4 Geo 6). However, before we quote the relevant provisions of the first Act of the series we may point out that the political structure of the world order had undergone tremendous changes since the first world war. The new totalitarian regimes were making efforts, it has been observed, to infiltrate the democracies with their doctrines to weaken resistance to aggression leading to the propagation of what has been called a "supra-national creed".[37] Fascism of Italian origin acquired a following in England, making it necessary to deal with persons of suspected

fascist sympathies who posed a real threat to the security of the state. Such was therefore, the situation that prevailed in England during the second world war.

4.42 The material part of the relevent provision of the Act may now be quoted:[37a]

> s.1(1) Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations. . . as may appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war . . . and for maintaining supplies and services essential to the life of the community.
>
> (2) Without prejudice to the generality of the powers conferred by the preceding subsection. . .Regulations may. . . for any of the purposes mentioned in that subsection -
>
> (a) make provision for the apprehension, trial and punishment of persons offending against the Regulations and for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm; [emphasis added]

4.43 By sub-clause (d) the power of amending, suspending and applying any enactment with or without modification was conferred on the executive. This was perhaps without parallel in the legislative history of England. By sub-s.(3) the power of sub-delegation was introduced in very wide terms. In sub-s.(4) a non-obstante clause was installed. On the other hand the concept of trials by courts-martial was expressly excluded. By s.4 parliamentary control was envisaged, albeit by the process of "negative resolution" (prayer for annulment). In s.5, as we have earlier observed,[38] a dubious effort was made to leave untouched the prerogative.

4.44 The second Act of the series conferred more draconian powers. It has been observed that it acquired the popular name of "Everything & Everybody Act".[39] In pursuance to s.1(1) of the Act provisions could be made by regulations for -[39a]

> requiring persons to place themselves, their services, and their property at the disposal of His Majesty, as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm. . .

4.45 By the third Act power was conferred to make provision by regulations for trial of offences by special courts ("not being Courts Martial") in certain areas. It was however circumscribed by a limitation inscribed in s.1(1), in the following terms:

> . . . where by reason of recent or immediately apprehended enemy action the <u>military situation</u> is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary courts. . . [emphasis added][40]

It may be noted that "military necessity" was made the test.

4.46 The regulation for preventive detention made under the first Act had a history which has to be stated but first it is necessary to state that the provisions made in the Second Series were definitely constituted an improvement on the earlier legislation. As we have seen, sub-ss. (1) and (2) of s.1 of the first Act removed the duality, in definite terms, respecting the source of power. There is no reference of any kind to prerogative powers. Moreover, sub-clause (a) provided for a power of preventive detention in definite terms but it has to be noted that there still remained some ambiguity in respect of the scope of the power. Could it also be exercised for such purposes as maintenance of public order etc. mentioned in sub-s.(1), which were expressly excluded from sub-clause (a)? On the other hand it is also noteworthy that unlike the 1914 Act the two expressions, public safety and defence of the realm were joined by the conjunction "or", instead of "and". Could it be contended that the other purposes were subsumed by the term "public safety" which was not to be considered any longer as a term of art having <u>ejesdem generis</u> significance with "defence of the realm" ?

4.47 We now come to the history. The decision of the House of Lords, which we shall shortly discuss, immediately gave rise to a lively debate among eminent legal scholars in the course of which serious effort appears to have been made to unearth the circumstances surrounding the birth of Reg.18B which provided for preventive detention.[41] There has been a

continuous research on this aspect but we propose to rely on recent accounts to relate its history in brief. The 1939 Act was enacted on August 24. The first set of regulations were made on August 25 but the regulation providing for preventive detention appeared in the second set made on September 1 (S.R.& O No.978). It gave power to the Secretary of State to detain "any person. . . if satisfied. . . that it is necessary to do so. . ." [emphasis added]

4.48 It has been observed that the language was found objectionable in that it conferred wide powers and the provision was hotly debated in the House of Commons. It was eventually decided by the House that an "informal conference" of the members of the House should consider the matter. As a result the entire set of regulations was withdrawn and later re-issued in an amended form on November 23 (S.R.& O No.1681).[42] As to what transpired at the informal conference nothing could be definitely said, as the minutes of the conference do not reveal any clue in respect of the amendment.[43] The intention of the amendment was sought to be gathered, in the earlier research, from a speech made in the House of Commons in 1941 by Sir John Anderson, who was the Home Secretary at the relevant time. The material part of the statement relied upon was to the effect that the amendment was to emphasize that the Home Secretary must direct his personal attention to making orders of preventive detention.[44]

4.49 We may now set down the amended form of Reg.18B in its material parts:

(1) If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

(1A) If the Secretary of State has reasonable cause to believe any person to have been or to be a member of. . . any such organization as is hereinafter mentioned, and that it is necessary to exercise control over him, he may make an order. . . that he be detained.

> The organizations hereinbefore referred to are any organization as respects which the Secretary of State is satisfied that either
>
> (a) the organization is subject to foreign influence or control, or
> (b) the persons in control of the organization have. . . associations. . . or sympathies with the system of government of, any Power with which His Majesty is at war, and in either case that there is danger of utilisation of the organization for purposes prejudicial to the public safety, the defence of the realm. . . (&c.) [emphasis added]

4.50 Paragraph (2) of the regulation empowered the Secretary of State to suspend the order on specified conditions. In para (3) we find the important provision relating to an "advisory committee". It contemplated "objections" by the aggrieved person to be made to the committee against the order and also against refusal to suspend the order, against any condition attached to the suspension order and against revocation of the suspension order. More than one advisory committee could be constituted with members and Chairman appointed by the Secretary of State who was, unfortunately, not given any guidance as to their qualifications.

4.51 By para (4) it was made the "duty" of the Secretary of State to afford the aggrieved person "the earliest practicable opportunity" of making "representation" to him in writing and to inform such person of his right to "objection" to an advisory committee. Similarly by para (5) it was made the "duty" of the Chairman nominated to preside over the meeting of such committee "to inform the objector of the grounds on which the order [had] been made against him and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable him to present his case". [emphasis added] Nothing was spelled out in respect of the power, function and procedure of the committee.

4.52 However, para (6) indicated that the Secretary of State was not bound to follow the advice of the committee. Nevertheless, it subjected him to parliamentary control by requiring him to report to Parliament "at

least once in every month" on such matters as number of persons detained and the number of cases in which he had rejected the committee's advice.

4.53 The violation of the conditions of the suspension order was made an offence by para (7) and by para (8) it was provided, apparently to forestall claims of false imprisonment, that any person detained under the regulation at any "authorized" place shall be "deemed to be in lawful custody".

4.54 It may be noted that the power of detention was circumscribed by two important conditions underlined in paragraphs (1) and (1A) of the Regulation, quoted above. It has also to be observed that the meaning of the governing expression in the two paragraphs, "if the Secretary of State has reasonable cause to believe", depended to a great extent on the emphasis one placed on the words "has" on one hand and "reasonable cause" on the other hand. It was this ambiguity which was the bone of contention in the decision which we will presently discuss. It may also be noted that this ambiguity was accentuated by use of the word "satisfied" that occurred in para (1A) and in some other regulations.

4.55 It is worthwhile to compare and contrast Reg.18B with Reg.14B of 1914. By doing away with the pre-requisite of a "recommendation" for detention, the power is only apparently enhanced in 1939 but the professed rationale of the change has been rightly traced to the increased reliance on the principle of "Ministerial responsibility".[45] The express provision for parliamentary control supports this premise. The use of the expression "reasonable cause to believe" brought in an element of ambiguity in the power while in Reg.14B no such difficulty was presented by the words "it appears". The base of the power is broadened by adding a number of alternative premises to the twin expressions, hostile origin or association, that occurred in Reg.14B. In para (1A) realities of the contemporary situation were taken note of and a new ground for the exercise of the power was created but it was doubly circumscribed. Membership of

the organization per se was not offensive. There must be a present danger of the organization being utilised in a particular manner. The concept of "internment" being associated with POW status and such status being not conceded to the detainee, substitution of the word "detained" for "interned" was a happy choice. On the other hand, an important, albeit unhappy, change is introduced in the new provision relating to the advisory committee. The "Chairman" is required to preside over the "meeting" and not over the "committee", and he is not necessarily to be a "judicial" person. It is needless to emphasize that the weight of the "advice" of the Committee depended on its constitution and the status of its personnel.

(B) The Judicial Response

4.56 We may now proceed to examine the interpretation of Reg.18B in the decision of the House of Lords in the case of LIVERSIDGE v ANDERSON.[46]

4.57 The appeal arose out of an interlocutary order in an action for a declaration that the detention was unlawful and injunction against continued detention and also for damages for false imprisonment. The plaintiff had applied for certain particulars to be furnished to him, namely, the grounds on which the defendant had reasonable cause to believe that the plaintiff was of hostile association and that by reason of such association it was necessary to exercise control over him. The Kings Bench rejected the application and its decision having been upheld by the Court of Appeal the matter came up before the House of Lords. As Viscount Maugham observed in the leading judgment, the real object of the application was to raise at the early stage the vital question, as to what onus, if any, lies on the defendant.[47]

4.58 The short point that their Lordships were called upon to decide was to interpret the expression, "If the Secretary of State has reasonable cause to believe", that occurred in Reg.18B. In the absence of a context, Viscount Maugham held, it meant that if there was "in fact"

reasonable cause for believing but that was not the only meaning. In the present context, the meaning was, his Lordship observed, "what he thinks is reasonable cause", acting in good faith. This was because the matter was for the exercise of his exclusive discretion and the facts were essentially within his knowledge. If the facts could be brought before the court it could only enquire into the question of hostile origin or association but as to the fulfilment of the second condition, the necessity of exercising control, there could be no enquiry in any court. Moreover, the Secretary of State being competent to act on hearsay his decision could not be questioned in any court. In most cases, the information might be of a confidential nature and the Crown could claim privilege. The Secretary of State was answerable to Parliament for discharge of his duties and he was not in the same position as that of a police constable.[48]

4.59 In dealing with the argument based on the change of language in the amended regulation and use of the word "satisfied" in para (1A) and in some other regulations, his Lordship held as follows:[49]

(a) The same importance was not to be attached to alteration in language in the case of an Order in Council as in the case of a statute as an alteration in the former case does not receive the same "attention and scrutiny".

(b) Even in a statute a change of word may occur without a change of meaning being intended.

(c) The words "to believe" indicate that the Secretary of State must himself consider the matter as it involved deprivation of liberty of a person for an uncertain period whereas the word "satisfied" meant that he could act on the report of subordinates.

4.60 Lord Macmillan held that the expression could have only one meaning if it was expressed in an impersonal form, namely, "if there was reasonable cause for belief". The wording used introduced a "personal request" to the Secretary of State.[50] The change in the language was

aimed at giving greater protection against claims for damages by making reasonableness of the cause not justiciable.[51] Echoing the language of the HALLIDAY case, his Lordship observed that production by the Secretary of State of an order, ex facie regularly and duly authenticated, constituted a peremptory defence in an action for false imprisonment. The burden lies on the plaintiff to establish that the order was unwarranted, defective or otherwise invalid.[52] Prof. A.L. Goodhart, however, attaches greater importance to his Lordship's observation that if the regulation was so construed as to make reasonableness justiciable it would not have commended itself as an "emergency measure".[53] This approach of his Lordship, we submit, conformed to what we have called a new norm of interpretation expounded in the HALLIDAY case.[54]

4.61 Lord Wright is more forthright in saying that the case was covered by the principles enunciated in the HALLIDAY case despite the difference in the language of the two enactments. His Lordship also referred to the legislative practice of substituting for the jurisdiction of courts, specially constituted tribunals. His Lordship also said that reasonable cause was "an element present to [the Minister's] mind" which determined his belief and "cause to believe" was part of the "content of his mind". The regulation had substituted the Secretary of State for the court and had also specified the circumstances under which he should act, namely, belief which was a mental state of his mind. At one point his Lordship had observed that too much importance should not be attached to the single word "reasonable", which was itself "ambiguous and inconclusive". Dr. C.K. Allen has referred to this and is rightly critical of this observation.[55] The word, we submit, was one of the most commonly used expressions known to the Common Law and at legal parlance its meaning was well-established. Most convincing ground given by his Lordship was, we submit, his observation that as the Secretary of State being required to act in his own responsibility it implied a duty

to act in the national interest and the performance of that duty could not be subject to the decision of a judge.[56]

4.62 Lord Romer attempts to set a measure to this duty by saying that, "Not only is the belief to be his. The estimation of the reasonableness of the causes that have induced such belief is also to be his and his alone."[57] This attempt to block judicial review completely could perhaps be foiled by challenging the fact that in estimating the reasonableness the Minister had relied on the opinion and belief of others by which it no longer remained his belief. However, his Lordship further observed that the Act and the regulation were enacted to remedy a mischief. A dilemma was avoided by making it unnecessary to disclose facts for, on one hand non-disclosure of full facts would have entitled the detainee to be released by the court while on the other hand the purpose of securing public safety etc. was likely to be defeated by disclosure of the facts.[58] His Lordship also endorsed categorically the view that the rule of literal interpretation was inapplicable in the instant case.

4.63 We may now proceed to examine at some length the memorable and powerful dissent of Lord Atkin. We will be surprised to find that his opinion became the trend setter for the new course of development of administrative law in England of which due notice is taken by Professor Heuston.[59] He has referred to a number of modern decisions to say that although the LIVERSIDGE case was cited therein the subjective test laid down by the majority was not applied in those cases. He also predicts that the court will now, even in cases involving personal liberty in times of war or civil commotion, feel disposed to follow the approach of Lord Atkin.[60] This guess, as we shall see, is not, unfortunately, fully justified by the divergent approach of English and Northern Ireland courts in the context of the present turbulent situation there.[61] On the other hand the lasting and immediate influence of his Lordship's opinion is to be found, we submit, in the provisions of the Indian Constitution which

was enacted in the same decade. This aspect will receive our detailed consideration in appropriate context.[62]

4.64 The main burden of his Lordship's opinion is to be found in the following short passage:[63]

> The words in question are not ambiguous. . . they have only one plain and natural meaning. . . used at common law and in numerous statutes. . . they give rise to a justiciable issue. . . the framers of the Defence Regulations themselves were fully aware of the true meaning of the words. . .

No doubt, his Lordship began his judgment by discrediting the theory of subjective satisfaction by saying that although the Court of Appeal in the GREEN case (infra) first propounded the theory it was also observed there that the "simple words" meant a conditional authority.[64]

4.65 His Lordship brought to bear upon the matter a legal and what we would prefer to call a perfectly legitimate approach by examining in detail the incidents of both common law and statutory power of arrest[65] and appears to arrive at the conclusion that in a matter concerning the liberty of the person there was always involved an "objective issue" to be decided by the courts. The "plain and natural" meaning of the words, "has reasonable cause" imported a fact or state of facts and not the mere belief by the person challenged that the fact or the state of facts existed. This point was further illustrated and amplified by referring to the requirement of establishing "absence of reasonable and probable cause" in action for malicious prosecution and the respective roles of the judge and the jury in the determination of the issue.[66]

4.66 Sir William Holdsworth was however critical of this approach. He observed that the real question was whether the decision or action did in fact raise a justiciable issue and not that a justiciable issue was implied in such matters as held by his Lordship. He further observed that an issue was justiciable when it had to be determined solely by application of law and went further to state that a distinction was to be drawn between a

justiciable issue and an administrative and political issue.[67] Holdsworth's approach, we submit, corresponded to the new norm evolved in the HALLIDAY case.[68] Whether such a norm was proper and suitable for all circumstances and all conditions and all countries of the new commonwealth is a question that we do not propose to answer until the conclusion of this study. In so far as the interpretation of the law in the case under consideration was concerned one could agree with Professor Keeton's contention that the grounds of detention were "administrative" and the procedure was "not even quasi-judicial".[69]

4.67 His Lordship also took great pains to make analysis on an elaborate scale of the use of the expressions "reasonable cause to believe" and "satisfied" in cognate provisions of the regulations and also the effect of the amended form of Reg.18B itself.[70] His Lordship referred to the fact that the word "satisfied" was also used in the original regulation in question and concluded that the use of the new expression meant a well-known safeguard against arbitrary imprisonment. His Lordship also referred to the decision in the HALLIDAY case to say that the court there refused to limit the natural meaning of the expression used in the enactment there.[71]

4.68 Having postulated judicial review his Lordship proceeded to define its scope and observed that the judge had a "duty" to see that the conditions for the exercise of the power were satisfied. He had no "further duty" to decide whether he would have formed the same belief. If, on the information before him the Minister decided that a particular person was of hostile origin a ruling by the court to the contrary was not possible either in an action for false imprisonment or in a habeas corpus proceeding.[72] Dealing with the particular issue involved in the case, his Lordship observed:[73]

> I find myself unable to comprehend how it can be compulsory, as it is, to furnish the objector before the committee with the grounds and particulars and yet impossible in the public interest to furnish the objector with them in court.

The above passage and the one quoted in the following paragraph, as we shall see, reflect substantially the position in Indian law.[74]

4.69 By now we have examined the decision at considerable length and have also offered appropriate comments. We proceed therefore to examine briefly a few other cases and take up first the decision in GREEN v SECRETARY OF STATE FOR HOME AFFAIRS,[75] to maintain continuity of discussion as Lord Atkin observed in the LIVERSIDGE case that his opinion in that case would cover this case. Accordingly we propose to quote immediately the short passage in which his Lordship dealt specifically with the GREEN case, which fits in with the context of the preceding paragraph of this study. His Lordship observed:[76]

> . . . the "reasons" given are not stated in the order but the "particulars" are vouched in affidavit by the Home Secretary as particulars of original reason of "hostile association" . . . the Home Secretary can withhold any information as confidential which cannot be disclosed in the public interest. . . [emphasis added]

4.70 It is necessary to state the facts of the case to understand the implications of the passage quoted above. The appeal in this case was concerned with an application for habeas corpus. In the detention order passed by the Home Secretary the ground given was "hostile association" but the prisoner was informed by the Advisory Committee that he was detained because he was concerned in "acts prejudicial to public safety and the defence of the realm and in the preparation of such acts". The Home Secretary made an affidavit in court and reiterated the grounds given in the detention order and also conceded that he could not explain the error committed by the advisory committee. By an unanimous opinion the appeal was dismissed. It was held that the appellant had not shown that he was prejudiced by the error in the document sent to him by the advisory committee.

4.71 The other contention in the case was that the Home Secretary never had a reasonable or any case for believing that the appellant was a person of hostile association. The appellant had filed an affidavit to

support his contention. There was also an affidavit by the Home Secretary, Viscount Maugham observed:[77]

> . . . in the present case the circumstances that the Secretary of State is entitled to withhold from the court the ground or some of the grounds on which he formed his belief constitutes a further reason why, if there had been no affidavit by the Secretary of State, the Divisional Court would have acted wisely in refusing the application. . .

4.72 It is necessary however to examine briefly the judgment of the Court of Appeal in the above case as the subjective satisfaction theory was first expounded there.[78] Scott, L.J., lays down the premises by saying that the King in Council, in practice, was the cabinet itself and that "it was to that authority representing the executive government that Parliament did during the duration of the emergency entrust an almost plenary discretion."[79] His Lordship then discussed the legislative history and also the HALLIDAY case and arrived at the following conclusions:

> . . . The whole regulation deals with a topic which is necessarily of a confidential character. It invites a decision, at least as a preliminary to action by an executive member of the crown who occupies a position of the utmost confidence, who has at his disposal much secret information which ought not to be made public - above all, during a war - who is under a duty to keep that information and its sources secret. . .[80]

and

> . . . If the Secretary of State's information is confidential, its confidential character. . . necessitates logically the conclusion that the regulation makes him the final judge of the reasonableness of the cause on which he takes action. . . that condition is subjective, not objective.[81]

4.73 It is apparent, we submit, that the birth of the theory could be traced to the same new norm of interpretation. Ostensibly, emphasis is laid on reading the regulation as a "whole", in its context, which conformed to the established canons but additional importance was attached to the character of the context, the war and the nature of the duty to be performed in the situation of war.

4.74 In the above case, reference was made to the decision in R v HOME SECRETARY Ex-p. LEES[82] which happened to be the first reported

case concerning habeas corpus applications against orders made under Reg.18B. The applicant was in the service of the Crown for 23 years. He was detained for association with the British Union which was known to have sympathies with the fascist cause. The Home Secretary had sworn an affidavit that he had studied confidential reports and that he had reasonable cause to exercise control over the applicant. The Solicitor General admitted that the court could inquire into the validity of the order but contested the position that it could also have before it all the material on which the order was based.[83]

4.75 In upholding the contention the court observed that it was "concerned only to inquire into the legality of the detention" [emphasis added]. Disclosure of information, which was necessarily of confidential nature, would be prejudicial to the interest of the state.[84] In the Court of Appeal, Mackinnon L.J., referred to the Home Secretary's affidavit and observed:[85]

> . . . I have no reason to think that it was otherwise than strictly honest and correct. He has proved to my satisfaction that he had reasonable cause to believe and did honestly believe, in terms of the regulation and that being so the order was validly issued pursuant to the regulation. . . [emphasis added]

The scope of judicial review was thus limited to the element of "honesty" but the onus of establishing it was placed, rather surprisingly, on the Home Secretary. This was an unusual feature of the decision which, equally surprisingly, has not attracted the attention it deserved.

4.76 The decision in R v HOME SECRETARY Ex-p BUDD[86] appears to be the only reported decision in which the applicant had at one stage successfully pursued his habeas corpus application. The decision in LEES case (supra) figured more prominently in the proceedings on the second application in the lone dissent of Stable, J. who observed that the decision of the Kings Bench having been upheld by the Court of Appeal the opinion of Humphreys, J. of the Kings Bench should be considered as binding.

But what Humphreys, J. had said was that for inquiring into the "validity" of the order (Court of Appeal said "legality") the court could ascertain whether the Home Secretary had reasonable cause for the belief expressed in the order, but no general rule could be laid down as to how that had to be done. However, his Lordship also said that the Minister's belief in the instant case was not affected by the fact that the grounds therefor had been stated in the alternative as the law did not require the order to be expressed in any particular form.

4.77 Budd, like Lees, was also in the service of the Crown when the detention order was passed against him. He held a commission in the army. He had also served in the first world war. He was named, along with many other persons, in the schedule attached to the order. The ground that appeared in the document given to him stated that the persons concerned were of "hostile association" which came under para (1) but in the order that was passed by the Home Secretary the ground given came under para (1A). The detention was said to be on account of their membership of an "organization" called the British Union of Fascists. The prejudice was real and the court held that the order "not only did not give the applicant proper information to enable him to exercise his right under Regulation 188(4) but it gave him wrong information and moreover failed in its purpose of providing authority for the applicant's detention."[87]

4.78 After his release he was almost immediately re-arrested and detained on the strength of a new order, on the same ground, namely, membership of the British Union of Fascists. Apparently there was no scope for a plea of double jeopardy on the facts of the case but Stable, J. observed that the applicant was being deprived of the benefit of the court's order in the first case. Admittedly, there was not sufficient material before the court in the present case to deal with the applicant's contention that a release by habeas corpus was a bar to fresh detention in certain circumstances.[88] In the affidavit by the Secretary of State

the "nature" and "existence" of acts of membership of the applicant to the British Union were not stated.[89] It was not necessary to disclose the sources but the material facts that constituted the "reasonable belief" had to be stated according to his Lordship.[90] The Secretary of State was to bring additional facts before the court, his Lordship held.

4.79 The majority was led by the Lord Chief Justice Viscount Caldecote who itemised the reasons for the success of the first application - "the unsatisfactory nature of the documents in the case such as the absence of any statement that it was necessary to exercise control over the applicant, the inclusion in one order of a large number of persons, the mistakes in the supposed copy of the Home Secretary's order handed over to the applicant and the fact that the Home Secretary had sworn an affidavit many months after the original order and the applicant's arrest had been made."[91] None of those circumstances were to be found in the present case, his Lordship added.[92] The applicant admitted his membership of the British Union, it was further observed. After referring to the Habeas Corpus Acts of 1640 and 1679, his Lordship held that the first order being bad for the reasons mentioned, "it was lawful to make a second order. . . in such circumstances and in such form as to admit of a different result."[93]

4.80 An appeal was taken but in the meantime the House of Lords had given their decision in the LIVERSIDGE and the GREEN cases (supra). The Court of Appeal however explained the term "legality" of the detention order and said that the relevant facts that could be inquired into were such as the bonafides of the Secretary of State, the genuineness of the order and the identity of the detainee.[94]

4.81 The BUDD case, as we have seen, raised the important issue of double jeopardy. The decision demonstrates the fact that the scope of such a plea succeeding in preventive detention cases was, generally, very limited. Only on the ground of absence of bonafides, perhaps, could such

a plea be sustained. Was Lord Mackinnon thinking of such a case when he placed the onus of proving "honest" belief on the Secretary of State ?

4.82 We propose to refer briefly to two more cases to show that the grounds of challenge which collectively appealed to Viscount Caldecote in the BUDD case proved ineffective individually. In STUART v ANDERSON & MORRISON[95] an action in damages for false imprisonment was dismissed. The order was challenged on the grounds that the plaintiff's name among others was set out in a schedule attached to the order. It was held that the Regulations did not prescribe any form and therefore the order was not ex facie bad. The court observed: ". . . production of an order of this kind, admitted to be signed by the Home Secretary shifts the onus to the plaintiff. . ."[96]

4.83 In R v GOVERNOR OF BRIXTON PRISON Ex p. PITT-RIVERS[97] Humphreys, J. spoke in the same tune and held that it was not necessary to state the belief in the order in a "legal language".[98] It was only necessary to enable the detainee to exercise his right under para (4). The challenge was based on the ground that the order did not contain the recital that it was necessary to "exercise control" over the detainee; it failed. Viscount Caldecote however observed that the Secretary of State in his affidavit stated that, "it seemed to him that it was implicit in the making of the order and it was unnecessary to recite it." The statement was accepted and it was held that the contention was a mere technicality, "going only to the form and not to the substance."[99]

4.84 One is entitled to ask why a strict compliance with a statute dealing with liberty of the citizen should not be insisted on ? In both cases, we submit, the contentions touched the jurisdictional requirement prescribed by the law. If the expression "the Secretary of State has reasonable cause to believe" meant that the Secretary had to personally apply his mind to each and every individual case, how could breach of this duty not affect his jurisdiction ? Although the Act did not prescribe any

particular form, passing a separate order in each and every case was implied in the duty of considering each and every case separately. Similarly, the fact that the Secretary of State was satisfied that it was necessary to exercise control over the detainee, being a condition-precedent for the exercise of power, it must appear on the face of the order to have been satisfied.

4.85 There is, therefore, one general answer to the question as to why the court held to the contrary in the above cases. It is because the new norm of interpretation had by now struck deep roots. In each and every decision discussed above we find that the majority view had tried to conform to the approach that was adopted by the court in the HALLIDAY case. The "emergency" provisions were designed to remedy a mischief of a grave order, the defence of the realm and public safety; that purpose of the statute must be carried out, according to Heydon's rule. In each individual case a challenge was posed to the purpose of the enactment. In each case it had to be met differently. This task was to be performed by the judiciary.

Conclusion

4.86 We therefore find that judicial review in each case was curtailed in different degrees but not totally negated. The common law tradition of flexibility of approach could make efficient performance of this task possible - the task of striking a delicate balance between the interest of the citizen and the state in the face of a common "danger", the War.[100] These cases, therefore, as the courts themselves observed - a fact which we have endeavoured to project in bold relief - had to be limited to the war-time situation of England. Unfortunately, as we shall see in some of the succeeding chapters, in many jurisdictions of the New Commonwealth, courts have overlooked this important fact. As a result, the edifice of the jurisprudence of preventive detention there has come to be built upon insecure and unsound legal foundations. However, the English courts too, in the Northern Ireland context, performed a bizarre operation : the "value-process" operated unsatisfactorily in the absence of an intelligent and effective "public opinion".[101]

## II. Law, "Disorder" and "Terrorism" in Northern Ireland

### (1) The Backdrop: History, Politics, Civil War, Law, Legitimacy and the Constitution in Northern Ireland

4.87 The problem of Northern Ireland is of a multi-dimensional form and it can be projected only on a matching backdrop. Why the problem has assumed such a form is not difficult to answer. The problem is essentially a colonial legacy. The island had never been treated as a part of Britain[1] although as far back as 1171 King Henry II of England had landed in Ireland "to establish his overlordship" over the native Irish rulers and in 1541 King Henry VIII proclaimed himself the King of Ireland.

4.88 In Ulster, part of which is now known as Northern Ireland, "plantation" under Royal Charter started contemporaneously with that of Virginia in America. As Professor Richard Rose observes, "The process of encouraging Protestant immigration and driving the native Irish out of Ulster by force of arms continued throughout the century."[2] The process had in fact started in 1607 with the flight, after leading an unsuccessful uprising, of the Catholic, Gaelic Earls from Ulster which, at the beginning of the seventeenth century was the "most conservative" part of Ireland and "the last Gaelic area" to come under the control of the English administration.[3]

4.89 Two great historic events which have to this day influenced the thought and action of the people perpetuating the great divide in Northern Ireland need special mention. The Catholic King James II of England having fled the country went to Ireland in 1689. The city of Londonderry[4] was besieged by his forces. After fifteen weeks of siege when Governor Lundy was willing to negotiate terms, thirteen Apprentice Boys of the Protestant section shut the city gates and eventually the siege was raised on the 12th of August.[5] The Catholic King was finally defeated at the battle of the Boyne in July 1690 by William of Orange

after whom the powerful "Orange Order" came to be established as a symbol of Protestant ascendancy in Northern Ireland.

4.90 Catholic Ireland had to pay a heavy price for supporting King James II. The penal enactments there for more than a century thereafter challenged the "religious faith, material security, professional advancement and the unity of family life, which deliberately sought to depress the Catholics to the lowest level of society."[6] It has been observed that the Crown adopted a deliberate policy of coercion seeking compliance from its Catholic subjects while abandoning hope for their support by placing control of the new Parliament established in Dublin in Protestant hands. The natives were treated as "disloyal and inferior subjects" as could be expected in a colonial situation and were debarred from holding lands and public offices.[7] The repressive measures, however, proved counterproductive adding momentum to the independence movement and giving rise to what has been described as the "Fenian Terrorism".[8] As we have seen, the rebellion was fought by the Insurrection Acts.[9]

4.91 The struggle for freedom in Ireland is a saga of a long and bloody tale of the people fighting the state and also Catholics and Protestants fighting each other, "to ensure compliance with the laws which they thought right, without regard to the laws or the officers of the nominal regime."[10] Although eventually the island was partitioned and Northern Ireland got a separate government under the Government of Ireland Act 1920, which was repudiated by Southern Ireland, it is this pattern of relationship between the people <u>inter se</u> of the six counties which formed Northern Ireland and between the people and the state, that has continued unchanged. In 1912 Sir Edward Carson, in voicing the opposition of the Unionist Party to the Home Rule Bill had proclaimed that they would have a "Protestant Province of Ulster" and later the first Prime Minister of Northern Ireland echoed his sentiments, saying that his regime was a "Protestant Government" having a "Protestant Parliament

for a Protestant People."[12]

4.92 Similarly, although Southern Ireland first attained Dominion Status under the Irish Free State Constitution Act and then became a Republic in the autochthonous Constitution that it enacted legal form was given to the fact that it was not reconciled to the partition of the island. "The Irish Republican Army" which fought the "Civil War" in the freedom struggle between 1920 and 1922 continued its activities and on the 12th of December 1956 it issued a formal declaration of war on the Northern Ireland regime modelled after the proclamation of the "Irish Republic" in 1916.

4.93 The 1920 Act which gave the Northern Ireland Government its Constitution made no pretence of establishing a federal structure for the United Kingdom. The Government at Stormont in both executive and legislative matters was, according to the Constitution, subject to the final veto from London but in practice the authority at Stormont was virtually "semi-independent". Without any effective provision to protect the interests of the strong and effective Catholic minority the monolithically Protestant Unionist Party securely saddled in the seat of power at Stormont since its inception was encouraged to misuse the authority to the detriment of the minority.

4.94 Professor de Smith expresses surprise that s.8(6) of the Constitution which contemplated a prohibition against discrimination by executive action had not been extensively used.[13] In s.5 also there was a similar provision on discrimination on religious grounds. The answer to this paradox lie, in our opinion, in the general distrust with which the minority viewed each and every institution of the Northern Ireland regime. Indeed, it has been observed that the Catholic minority regarded "the use of the legal system to support the Unionist regime as wholly unjustifiable": legitimacy of the courts was questioned and the whole legal system was dubbed as the "puppet" of the Unionists.[14]

4.95 The two provisions mentioned above as well as the other provisions of the 1920 Act (the Constitution) were meant to apply, it must be remembered, to the two Governments at Dublin and Stormont contemplated under the Act for solving the Irish and the Ulster questions. These questions were so complex that, as Professor Claire Palley observes, they can best be understood and analysed with reference to "imperialism and colonialism". After introducing the settlers into Ireland for defensive purposes, England gave "residual support" to them when withdrawing in her own interests. She further adds that the stage is now reached when the support is found to be costly and politically inexpedient.[15] It is this fear of being abandoned by the Imperial power leading eventually to the dreaded reunification which, in our opinion, made the Ultra-Protestant Groups more militant and motivated their action in opposing the peaceful movement which started with the founding of the Civil Rights Association in 1967.

4.96 The movement aimed at focussing attention on the grievances of the Catholic population in such matters as discrimination, gerrymandering, unemployment, partisanship in the operation of public services, police oppression etc.[16] The violent reaction of the "loyalists" embarrassed the Unionist regime and made their task of maintaining law and order difficult. The regime which lacked "legitimacy"[17] now began to crumble, being unable to withstand challenge to its authority from two mutually opposing factions. The situation resembled a civil war. Both wings of the I.R.A., the official and the provisional, were carrying on guerrilla warfare against the state, the former for establishing a united Ireland and the latter for defending the "Catholic Ghettoes" in Northern Ireland against attacks from the "Ultras" as well as the police. The "Ultras" too were not only fighting the Catholics and the police but were also engaged in subversive activities by blowing up electricity and water supply installations.[18] The regime enlisted the aid of the British Army to

maintain its authority but failed. Serving under two masters, the Army itself, it appears, was caught up in the vortex of sectarian political controversy. Eventually, with the imposition of direct rule from London in March 1972 the regime was formally liquidated.

4.97 It cannot be gainsaid that rebellion against the Unionist regime was writ large in the use of violence as a "conscious effort"[19] by the opposing factions which had repudiated various measures of the regime. James Callaghan, then Home Secretary in London, took note of the success of the rebellion saying that, ". . . for two years or more before 1969, parts of Belfast and Londonderry had remained almost outside the law and under their own so-called jurisdiction."[20] From his account one can also conclude that the British Government was compelled to suggest the "reform measures" to the Unionist regime under pressure from world opinion.[21] The regime however failed to pursue honestly and discreetly the "two wars strategy".[22] This fact is borne out by the Cameron Commission[23] which had brought to light the repressive action of the regime and the "ultras" to which the Civil Rights marches and rallies in Dungannon and Armagh between August and December 1968 and in Belfast and Londonderry in October 1968 and January 1969 had been subjected.

4.98 There was also, it appears, growing apprehension of external interference permissible under International Law in civil wars and internal conflicts inasmuch as the legal concept of such conflicts had been undergoing change.[24] The Irish Government, in fact, attempted to have the matter placed on the agenda of the Security Council at the United Nations;[25] and the Prime Minister of the Irish Republic spoke of the necessity of a United Nations' Peace-keeping Force being inducted into Northern Ireland.[26] In a speech made in the House of Commons the Prime Minister, Mr. Edward Heath, also acknowledged the international dimension of the responsibility for "law and order" in Northern Ireland saying that "it was not merely domestic - it was a matter of international concern as

well."[27] The 1972 Green Paper on Northern Ireland also acknowledged "repercussions at international level" of the use of emergency powers and the armed forces.[28]

4.99 No doubt, under traditional international law recognition of insurgents as a belligerent power required certain conditions to be satisfied.[29] In some respects the conditions were substantially satisfied too, but the traditionalists would hesitate to accord the conflict the status of civil war. On the other hand it may be pointed out that international recognition was given to the Biafra War in Nigeria, which has been described as a "rebellion" as it had as its object redress of the wrongs of one group within the community.[30] The effect of recognition would have entitled political prisoners in Northern Ireland to be treated as POWs with immunity from criminal prosecution. Stormont and Whitehall naturally tried to avoid such a course, although the international dimension of the problem could not be ignored.

4.100 With this background we propose to examine now the law enacted at different times to meet the unique situation in Northern Ireland which has been, since inception, under a continuous state of emergency.

(2) The Emergency Legislation

(A) Pre-Constitution Position

4.101 The Irish Parliament had enacted, as we have seen, special emergency laws to deal with "disorders" in the united Ireland using the concept of "Martial Law" but the fact that the struggle for independence was of a violent character and of endemic type perhaps required greater reliance to be placed on s.16 of the Habeas Corpus (Ireland) Act 1781 which provided for suspending the Act in times of rebellion or actual invasion. However, s.67 of the Constitution of 1920 took away the power of suspension of the Governor and the Privy Council provided by s.16 and thereby enlarged the scope of a constitutional guarantee of personal liberty in Northern Ireland. This, unfortunately, made little difference

in practice, for, the Restoration of Order in Ireland Act 1920, enacted by the British Parliament, conferred wide powers on the Executive for making Regulations for "securing the restoration and maintenance of order", under the Defence of the Realm Consolidation Act 1914. Political expediency having rendered this Act inapplicable,[31] an occasion arose for the Northern Ireland Parliament to enact in 1922 special emergency measures to deal with the situation created by the rebellious activities of the "Irish Republican Army" operating on both sides of the Border.

(B) The Civil Authorities (Special Powers) Act 1922 and the Regulations

(a) A General View

4.102 Hereinafter the Act will be described by its popular name, the Special Powers Act, SPA, in short. It was enacted as a temporary measure and was renewed from year to year until in 1933 it was made permanent. After imposition of "direct rule" the Act was repealed by the Northern Ireland (Temporary Provision) Act 1973, enacted by the British Parliament. Indeed, the draconian powers conferred by it on the Executive had made it an instrument of oppression in the particular context of Northern Ireland. The Unionist regime having monopolised the right to govern through its uninterrupted possession of the entire power structure of the government machinery was in no mood to allow any democratic norm to operate. Events in Northern Ireland have proved that an oppressive provision enforced in a partial manner was most likely to prove counter productive and to be discarded in the end for its inability to deal with the new challenge.[32] The working of the Act was examined in a study conducted in 1936 which described the Act as a "permanent machine of dictatorship" and observed as follows:[33]

> . . . the Northern Irish Government has used Special Powers towards securing the domination of one particular political faction and, at the same time, towards curtailing the lawful activities of its opponents. The driving of legitimate movements into illegality, the intimidating or branding as lawbreakers their adherents however innocent of crime, has

> tended to encourage violence and bigotry on the part of government supporters as well as to beget in its opponents an intolerance of "law and order" thus maintained.

4.103 On the other hand, the enactment has been justified as a response to the "troubles" of 1922 when 230 persons were killed and its continuation in the absence of an Extradition Treaty between the United Kingdom and the Irish Government has also been considered necessary having regard to "constant threat to internal security of the state".[34] The nature of the power enjoyed under the Act by the Government were, according to one commentator, "similar to those current in time of martial law".[35] It has also been observed that the power of arrest and detention under the Act was in fact used and directed against "Roman Catholics and Republicans" particularly in 1938 and 1956[36] and also in 1971.[37]

4.104 The main provisions of the Act, which we proceed to examine now, justify ex facie the criticism that the Act evidences a radical departure from procedural safeguards "traditionally and justifiably regarded as desirable for preservation of civil liberties"[38] but there was scope for what we propose to call a "humanitarian" interpretation.

4.105 The power to make Regulations conferred on the Executive under the Defence of the Realm Consolidation Act 1914 was expressly limited to the period of "continuance of the present war". The Restoration of Order in Ireland Act 1920 provided a different justification stating that the "ordinary law [was] inadequate for prevention and punishment of crime or maintenance of order". Under the Special Powers Act, the Executive was not only endowed with similar power, albeit without any express limitation or justification, but also with power "to take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order, according to and in the execution of this Act and the regulation." However, sub-s.(1) of s.1, which contained this provision, was saddled with the following proviso embodying impliedly the concept of "necessity":

> . . . the ordinary course of law and avocations of life and the enjoyment of property shall be interfered with as little as may be permitted by the exigencies of the steps required to be taken under this Act.

We find no basis, in the language of the proviso, to support the proposition that "practical realities" of the power exercisable under the Act made it "hollow and illusory" or that it contained merely "noble sentiments".[39] The proviso conferred on the citizen, we submit, the right to obtain judicial review and it was not a mere embodiment of directive principles.

4.106 It must be commented that s.1 was the core of the Act and that its other sub-sections, (2) and (4), apparently unaffected as they were by the proviso to sub-s.(1), succeeded, in the context of "practical realities" of Northern Ireland, in investing the Executive with wide discretionary powers. However, the expression "subject to the provisions of the Act" used in sub-s.(3) could be reasonably construed as subjecting the regulation making power of the Minister to the prohibitions of the proviso to sub-s.(1). Although the Act was a "penal" statute in the traditional sense, rules of interpretation permitted a harmonious construction which, in the case of statutes of this nature, with the concept of "necessity" expressly engrafted, could be justifiably labelled, in the modern context, as "humanitarian" interpretation. We have already observed that the humanitarian aspects of the Geneva Convention have infused a new meaning and content into the concept of "necessity".[40]

4.107 The Royal Ulster Constabulary (hereafter described as RUC) has been described, on cogent evidence, as the repository of "military power" in Northern Ireland passed off as a police force to overcome constitutional objections.[41] In the United States the military authorities were involved in the operation and enforcement of emergency laws but there was no tradition of such an exercise in the United Kingdom. Delegation of power under sub-s.(2) to "any officer" of the Constabulary was therefore unjustified generally as well as on the ground of excessive delegation.

4.108 In fact the vice of excessive delegation can be said to afflict generally the Regulation-making power conferred by sub-s.(3) in that the terms "further provision" in clause (a) and "varying and revoking any provision of the regulations" in clause (b) in themselves constitute legislative abdication. Although a general case on similar lines has been made out challenging the validity of the Act as a whole,[42] we would prefer to sustain it by laying stress on the expression "subject to the provisions of this Act" occurring in the same sub-section and reading the same with the proviso to sub-s.(1), as indicated earlier.

4.109 However, we support the proposition that the Act as a whole was liable to be challenged as ultra vires s.4(1)(3) of the Constitution of 1920 being an Act in respect of "the defence of the realm".[43] The Constitutional provision is quoted below:

> para (3) of s.4(1)
>
> The navy, the army, the air force, the territorial army, or any other naval, military or air force, or the defence of the realm. . .
>
> (S.4(1) defined the legislative competence of the Northern Ireland legislature and in para (3) it posited one class of excluded subject matter).[44]

Both sub-ss.(1) and (2) of s.1 of the Act contemplated a positive role for the "military wing" of the state - for preserving the peace and maintaining order - and with the excision of sub-s.(1) the Act was liable to become unworkable and fall as a whole. In particular s.7, which conferred power of arrest among others on "any member of any of His Majesty's forces", was void on the same ground. How far the legislative history connecting it with the Defence of the Realm Consolidation Act 1914 can serve as a useful tool in this operation is however doubtful inasmuch as such connection is not expressly maintained by the Act, unlike the Restoration of Order in Ireland Act 1920.

4.110 Although commentators have not grounded challenge to the Act on paragraph 7 of s.4(1) of the Constitution, the activities of the I.R.A., against whom the Act was mainly used, partaking of the nature of "treason,

treason felony" a case for such a challenge could also be made out.

4.111 Among other provisions of the Act, the punishments of death (s.6) in respect of offences under the Explosive Substance Act and of whipping (s.5) for other offences also, have been rightly called "barbarous",[45] but the penalty of whipping may well be ultra vires Art.3 of the European Convention as "inhuman or degrading" punishment.[46] The exceptional character of s.2(4), described as creating an "unprecedented offence"[47] and as violative of the principles of nulla poena sine lege,[48] make it necessary to be quoted:

> If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be deemed to be guilty of an offence against the regulations.

4.112 The provision has perhaps no parallel in the Commonwealth and the criticism is well founded. It has also to be noted that the expression "preservation of the peace or maintenance of order" was not defined and as such by virtue of the powers under s.1(1) the Executive could take "steps" at any time to prosecute any person for "any act" it considered to be "prejudicial". Albeit, the ultimate say rested with the judiciary but the initial onslaught on the personal liberty could not be avoided. However, in the modern context the provision was liable to be struck down as offending Article 7 read with Article 15(2) of the European Convention of Human Rights to which the United Kingdom is a party.[49] Even otherwise, we submit, enjoying the same status as that of a subordinate legislature, the Northern Ireland Parliament could not enact any law immune from the operation of the wider import of the doctrine of ultra vires and the provision was liable to be declared void on grounds of vagueness and unreasonableness.[50]

4.113 Giving power to the Executive in times of emergency was not unusual but what was unusual about Northern Ireland was the manner in which the power was exercised. The scheduled regulations were "varied" by the Executive in an extraordinarily liberal manner. Provisions respecting search and seizure, arrest, interrogation, detention and internment in particular deserve special mention in this connection. Although there was a "large scale revocation" of existing regulations between 1949 and 1951 the reinstatement of most of these provisions in the succeeding years took a more offensive form.

(b) Arrest, Interrogation, Detention and Internment

(i) A composite view of the restraints

The important restraints on personal liberty contemplated under the Act and the Regulations may be examined together at first, under respective heads.

Arrest

4.114 We have noticed earlier s.7 relating to power of arrest. Although it did not expressly state the requirement of reasonable grounds of suspicion it made the power exercisable as "at common law". By an amendment in 1967 the underlined expression was deleted. As a result the police and the army personnel and even any "authorised" person making the arrest (without warrant) were given an absolute protection. It is difficult to conceive of any successful action for false imprisonment or even a prosecution for assault in the present circumstances.

4.115 While the power under s.7 was exercisable "in respect of any crime or any offence against the regulations", summary power of arrest of substantive nature was conferred by Regulations 10 and 11. By the former any officer of the Royal Ulster Constabulary could authorise such arrest for the "preservation of the peace and maintenance of order" and the person so arrested could be detained for a period of "not more than 48 hours", for the purpose of "interrogation". In 1955 the period was 24

hours; it was changed to 48 hours in 1957.

4.116 Under Regulation 11 the beneficiaries of the power were the same as under s.7 but the power could be exercised against any person who was suspected of "acting or of having acted or being about to act in a manner prejudicial to the preservation of the peace and maintenance of order". This power, unlike that of Reg.10 was circumscribed in that it provided some sort of objective criteria by specifically stating that for arrest on suspicion of possession of any prejudicial article the arrestor had to "give ground for such suspicion". But the detention that could follow such arrest was of a different character and will be dealt with separately. It is noteworthy however that in 1950 the power could be exercised only by "any police officer or constable" and that the change came in 1956 which affected the consequential detention also.

Interrogation without arrest (power of questioning)

4.117 Another notable departure from Common Law is evidenced by Regulation 7 which made it the "duty" of every person to stop and answer any question "reasonably addressed" to him by a police officer or constable. Refusal or failure to stop or answer was made an offence; the position, at Common Law, as we have seen, was just the reverse.[51] The supposed safeguard apparently did little to control the mischief of random questioning permitted by the regulation. It appears to have been meant as a defence in the event of prosecution and not as a check on the power. One could possibly rely on the proviso to s.1(1) and contend in his defence that the right to silence available to him in "the ordinary course of law" could be "interfered with as little" as possible and that he was not obliged to answer self-incriminating questions. The court ought to hold such questions as not having been "reasonably addressed" within the meaning of the proviso.

4.118 However, if the judiciary felt disposed to construe the expression "the ordinary course of law" to mean common law, and to hold

that the proviso had, in effect, saved the common law, it was possible also to contend that the power to stop and question ought to be inhibited by the requirement of a reasonable suspicion.

4.119 It is interesting to note that under Regulation 6, or even under 5, there was no "duty" to stop on any person; a police officer or a constable was required expressly to act only when he had "suspicion". A vehicle used for any "prejudicial purpose" under Reg.5 and a person carrying any "prejudicial article" (firearms etc.) under Reg.6 could be stopped and searched. Reg.7 being part of the same scheme, the omission in it of the requirement of "suspicion" could, without doing violence to its language, be safely supplied, despite the use of the word "duty" therein. It was necessary, it is submitted, to read the scheme of the regulations in the light of the proviso. Unfortunately the Executive appears to have taken the view that the law-makers had created new powers in Northern Ireland in the same manner as they had created "Martial Law" in United Ireland.[52] As a result, when the Army came in, even an unarmed person was sometimes fatally shot for his failure to stop.[53] Such power is not to be found in the "yellow card".[54] On the contrary, r.17 of the yellow card empowered the army to challenge a person who was "acting suspiciously" and in r.19 there was a specific injunction against opening fire at an unarmed person.[54a]

Detention

4.120 In 1950 it was necessary for the Civil Authority to be "satisfied" that "with a view to preventing him" from acting in a prejudicial manner it was necessary so to do, before the detention of the arrested person could be ordered. Such detention without a charge could not be for more than 7 days. [emphasis added]

4.121 In 1956 it was provided that the person arrested may, "on the order of the Civil Authority be detained", until he was discharged by direction of the Attorney-General or was produced before a court. For his release on

bail such person had to apply to the Civil Authority who could direct in writing for his discharge by the Resident Magistrate.

Internment

4.122 Regulation 12 in its present form was introduced in 1956. It provided for internment, in the following terms:

> When it appears to the Minister of Home Affairs. . . on the recommendation of an Officer of the Royal Ulster Constabulary . . . or of an advisory committee that for securing the preservation of the peace and the maintenance of order. . . it is expedient that a person who is suspected of acting or having acted or being about to act in a manner prejudicial to . . . shall be subjected to such obligations and restrictions . . . [he may] . . . require that person forthwith or from time to time, either to remain in, or to proceed to and reside in such place as may be specified. . . and to comply with such directions as to reporting to the police. . . or to be interned as may be directed in the order.
>
> Provided that [the] order. . . shall include express provision for the due consideration by an advisory committee of any representations. . . [made] against the order. [emphasis added]

4.123 It was also provided that the Advisory Committee shall be appointed by the Minister and that such Committee shall be presided over "by a person who holds or has held high judicial office or is a Recorder or County Court Judge or a practising Barrister of at least ten years' standing".

4.124 Removal of the "person interned" to "any place of internment" was also contemplated besides providing for his removal to and detention at "any place where his presence is required. . . in the interest of justice or for. . . any public inquiry." A person "detained" could also be likewise removed "in the interest of justice". [emphasis added]

4.125 With the avowed object of "preventing any tampering with evidence or any plans of escape or for other like considerations", the person detained or interned was, by Regulation 13, subjected to further restriction in the matter of communicating either orally or in writing with other persons. The stringent provisions were also sought to be justified on grounds of "prevention of crime, maintenance of order and

security, good order and government of the place of detention or internment". In 1971 additional provisions were engrafted on it. Such person had to be placed "under the supervision, control or discipline of any person authorised by the Ministry of Home Affairs". [emphasis added] This provision was apparently in derogation of the Prison Rules and was perhaps meant to deal with hardened "terrorists" but it appears to have underwritten a pervasive role for the Army, which was reflected in the disturbances that took place in different prisons.[55]

(ii) "Detention", "Internment" and their operation

4.126 The provisions relating to "detention" and "internment" quoted above at some length deserve to be examined in detail in relation to their factual operation and consequences.

4.127 The Regulations contemplated two stages in the detention operation: by the police (for interrogation) for a limited period, up to 48 hours; and an indefinite extension under orders of the Civil Authority. It appears that despite the possibility of the extension acquiring the same character by virtue of the provision of delegation to the police of any function of the Civil Authority (s.1(2)), some distinction was sought to be maintained between the two stages until the law was changed in 1956. As a result of the "interrogation" the Civil Authority could say that it was "satisfied" that the person arrested was expected to indulge in prejudicial activities and to "prevent" him from doing so it was necessary to detain him. The fact that such detention without charge could not extend beyond 7 days signified that the Executive anticipated some imminent danger.

4.128 In 1956, on the other hand, detention being authorised for an indefinite period without the necessity of fulfilling any other requirement obliterated the distinction and enabled the interrogation process to be continued. It had not to end before the passing of the detention order, as was required, one may reasonably interpret, under the old law. As we shall see, interrogation now proceeded indefinitely, perhaps with greater zeal and vehemence, accentuated by the interposition of the army who,

supposedly, possessed the necessary expertise. The change, it appears, was motivated by the desire of the Executive to legalise the illegal practices, for the police interrogation even under the old law, was also accompanied by physical violence and the motive of such interrogation has been rightly termed "intimidation".[56]

4.129 The perverted use of the expression "in the interest of justice" is noteworthy. One can reasonably contend that the "detention" operation in fact commenced at the point of arrest in that the Executive appears to have been acting under the belief that the common law requirement of informing the person of the reasons for arrest was done away with by the Act. This position, as we shall see, was noticed by the Judiciary and the illegality of the practice was pointed out in clear terms.[57] In the Compton Report notice is taken of the modus operandi of arrests: soldiers who had made mass arrests on August 9 of 1971 were instructed to say as follows:[58]

> I am arresting you under the powers conferred by the. . . (SPA) . . . I am not required to give any further explanation. I warn you that if you resist arrest you may have committed an offence.

4.130 The Act was thus so operated that from the point of arrest the person concerned lost all civil liberties including the right of having legal advice. We will have more to say about the factual position regarding arrests, detention and internment but it will be apposite to refer here to the complaint made by the National Council for Civil Liberties that even relatives of the arrested person had to approach them and other organizations to ascertain for them the whereabouts of the arrested persons.[59]

4.131 It is incomprehensible that the expression "in the interest of justice" could be used as a legal sanction for such reprehensible practices which, it was alleged, amounted to torture, through "interrogation in depth" after the arrested person was "removed" to a "place of detention" following the "processing" at the "holding centre".[60]

4.132 The provision of "internment" however was not as bald as that of detention but in practice the safeguard proved to be illusory. The expression "it appears" was qualified in that the Minister could act on the recommendation of the specified authorities. Unfortunately, the Royal Ulster Constabulary, which figured mostly in making these recommendations did not enjoy the confidence of the minority and had in fact come to be recognised by them as a partisan force[61] dehors its para-military character to which reference has been made in the beginning.[62]

4.133 It cannot be denied that the purpose of the safeguard in a drastic measure like detention without trial ("internment" was nothing less than that) was not only to provide a check on the possible abuse of the power but also to inspire confidence in such safeguards of the group of people against whom such measure was proposed to be used to underline the preventive character of the measure. The fact that resort to internment in August 1971, evoked a violent reaction from the Catholic minority followed by a Protestant backlash and military repression resulting in great loss of life and property[63] prove the hypothesis that the measure was considered by them as a punitive sanction against anti-government activities. It has been observed that in fact no attempt was made to distinguish between an "opponent of government" and a "terrorist" who was supposed to be the target of the measure.[64] The recommending authority, it appears, paid scant regard to the legal requirement of "securing the preservation of the peace and the maintenance of order."

4.134 The provision of review of cases of internment by the advisory committee also suffers from more than one infirmity. In the first place the right conceded to the interned person of making representation to the committee could not be effectively exercised in the absence of an express provision for the grounds of internment being furnished to him. Secondly, such an order could be made and served on the detainee

at any time and also reviewed by the committee at any time, although it was natural to expect such drastic provision to be balanced by regulating its operation through a time-scale. The cumulative effect of the twin provision of detention and internment was indefinite incarceration of a citizen from the moment of his arrest. A person who was "detained" and had not been served with an internment order could apply for his release on bail not to the court but to the Civil Authority which, in effect, would mean his arrestor. The provision did not expressly make it incumbent on the Executive to provide reasonable opportunity to the arrested person to secure his release. All avenues of judicial review were thus skilfully blocked. The possibility of the use by the judiciary of the proviso to s.1(1) never posed a serious threat to the Executive for reasons which we shall have occasion to investigate.

4.135 It is also noteworthy that there was no duty on the Executive to make periodic review of the cases suo motu. Neither was the person interned entitled to make representation to the Executive itself so that in cases of mistaken identity and other similar gross mistakes he could have an immediate redress. In view of the fact that an arrest could eventually turn into an internment and there were serious allegations against the police of acting in a partisan manner, it was necessary to exclude the possibility of this power being exercised in a discriminatory manner. This aspect of the matter in fact formed an important part of the case of the Republic of Ireland in which they challenged the validity of the provisions of interrogation, internment and detention and their application before the European Commission of Human Rights. The Commission found no difficulty in holding admissible and worth considering the plea that the discriminatory enforcement of the Act was violative of Articles 14 and 5 and 6 read with 15.[65] The European Court at Strasbourg, later, set aside the unanimous findings of the Commission and held that the "sensory deprivation" interrogation technique did not constitute an

"administrative practice" of torture. The majority opinion held although the object of such practices was the extraction of confession and other evidence, and that although they were systematically used they did not occasion suffering of the particular intensity and cruelty imparted by "torture". Such practices, the court however held, constituted inhuman and degrading treatment and were violative of Art.3 of the Convention. It was also found that such practices were in fact used against detainees in 1971 although, the court held, the allegation of discrimination in the matter of "internment" was not substantiated and therefore the complaint that Art.14 was also violated, failed.[66]

(C) "Terrorism" and Legislative Provisions under Direct Rule

(a) The Legislative Measures

The change in approach to the problem following imposition of direct rule from Westminster in 1972 was prominently reflected in the very first measure which made no secret that it was a fight against "terrorism" and not an ordinary problem of law and order of which the legal measures must take account. The British had the experience of fighting "terrorists" in the Malayan peninsula and also in Kenya and they had no doubt that the battle against "terrorists" could not be fought even in Northern Ireland by preventive measures alone. The change in the constitutional position as a result of the new obligation of the United Kingdom under the European Convention of Human Rights also supported this approach. The new measures may now be examined.

(i) The Detention of Terrorists (N.I.) Order 1972

4.136 The order was made on November 1 in the exercise of powers conferred under s.1(3) of Northern Ireland (Temp.Provn.) Act 1972. It came into operation on November 7, during the currency of the Special Powers Act and pendency of the Application No.5310/71 before the European Commission of Human Rights by the Republic of Ireland. It may also be observed that in the meantime the appointment of the Diplock Commission was announced on October 18, to suggest arrangements "to deal more

effectively with terrorist organisations, otherwise than by internment."[67]

4.137 It was natural to expect therefore that the Order was enacted with the object of mollifying the rigours of the Special Powers Act. It provided for passing an "interim custody order" by the Secretary of State when it "appeared" to him that a person was suspected inter alia of "having been concerned in the commission or attempted commission of any act of terrorism" (vide Pr.4). A person could be detained under the said order up to 28 days. If his case was in the meantime referred by the Chief Constable of the R.U.C. to a Commissioner appointed under the Act the detention could continue until his case was "determined".

4.138 "Terrorism" was defined in an inclusive way to mean use of violence for political ends and any use of violence for putting the public in fear.[68] Scope of "adjudication by the Commissioner" was also outlined in detail. It is important to note that the apparently subjective nature of the satisfaction of the Secretary of State was to lose its force as soon as the matter came before the Commissioner, who had to be satisfied himself on two grounds before he passed a "detention order". The first ground was common with that of "interim custody order". In addition he had to be satisfied that the detention was "necessary for the protection of the public". The detention order had to contain "a statement of the grounds" and was required to be served on the detainee. In contrast, it may be noted that no ground need be stated in making either the interim custody order or the reference to the Commissioner.

4.139 An appeal against the detention order could be made to the Tribunal appointed under the Act. A Commissioner could also be appointed as a member of the Tribunal but he was not to act if the appeal was against his decision. Fresh evidence could be tendered at the appeal "with the consent of the Tribunal" but it was arguable if the right was limited to the appellant. Copy of the record of the proceedings before the Commissioner excluding that part which took place in his absence

could also be obtained by the appellant.

4.140 The Secretary of State could also refer to the Commissioner, for review, at any time, the case of any person detained under a "detention order". In such cases the detainee could be discharged by the Commissioner unless the latter considered that his "continued detention was necessary for the protection of the public". In the case of a person detained under an "interim custody order" the Secretary of State could direct his discharge at any time. He could also release conditionally any person detained under a "detention order".

4.141 It was also provided that a person detained under either a detention order or an interim custody order could be detained at any place approved by the Secretary of State and when so detained he should be deemed to be in lawful custody.

4.142 Regulations 11(2) and (4) to (6), 12, 13 and 23D of the Special Powers Act were revoked, thereby repealing the most offensive provisions of the Act. Although the power of detention for 48 hours for interrogation under Reg.10 was not disturbed, an attempt was made by means of the revocations to take out the sting.

4.143 On the other hand, power of arrest under Reg.11(1) was also preserved without modification in spite of the fact that new ground was prescribed for the "interim custody order" which replaced the "detention order" contemplated under Reg.11(2). By retaining the two powers under Regs.10 and 11(1) the wholesome effect of the new measures appears to have been curtailed, although the "interim custody order" was made independent of the fact of arrest. Similarly, although the power of the RUC to make recommendation for internment was taken away, the power to make reference to the Commissioner by the Chief Constable took its place.

4.144 However, specific provision on an elaborate scale was made in the Schedule of the Order in respect of the procedure to be followed during hearing before the Commissioner and the Tribunal. In the case of

a hearing before the Commissioner the detainee had to be served with "a statement in writing as to the nature of the terrorist activities" at least three days in advance. This period was later raised to seven days in the Northern Ireland (Emergency Provisions) Act 1973. Proceedings were however contemplated in camera, although the presence of the detainee was not dispensed with except on the grounds of his disorderly conduct, interest of public security, safety of any person. Legal representation was allowed subject to the last-mentioned two qualifications. Rules of evidence were however radically altered although the detainee was given the right to adduce evidence and make representations to the Commissioner. The Commissioner could receive even such evidence which was legally inadmissible, and could question any person including the detainee and could cause inquiries to be made in relation to any matter. Mention must however be made of one important safeguard which required the Commissioner to inform the detainee and his counsel of the substance of the matter dealt with during their absence.

4.145 It was provided that the provisions relating to hearing before the Commissioner ~~was~~ were, mutatis mutandis, to apply to the proceedings in appeal and the Tribunal. At each forum, the authority was vested with residual powers to regulate its own procedure; the detainee could not however claim attendance before the Tribunal as of right.

4.146 In a well-founded double-edged criticism levelled against the Order, it has been pointed out that the periodic right of review ought not to be subject to the discretion of the Secretary of State and at the same time it is also stated that the detainee ought to be produced before the Commissioner so that the delay in hearing could be controlled.[69] It was also necessary, we submit, to provide some safeguard to change the peremptory nature of the "interim custody order". The detainee ought to have been provided with a right to make representation and a consequent duty laid on the Secretary of State to dispose of the same within a short and specified period.

(ii) The Northern Ireland (Emergency Provisions) Act 1973

4.147 The Act was based on the report of the Diplock Commission, which had observed as follows:[70]

> . . . we regard our task. . . to consider whether there are any changes in the procedures for bringing criminals to trial, in the conduct of the trial itself or in the composition of the court of trial which could obviate or reduce the need to resort to detention under this new Order of individuals involved in terrorist activities. [emphasis added]

4.148 The Commission saw the distinction between terrorist activities and other crimes involving acts or threats of violence but observed that motive did not provide a practical criterion for defining the different kinds of crimes with which it had to deal with. It also laid emphasis on the fact that ordinary criminals whose motivation for any particular act may be private gain or personal revenge were also attracted to the ranks of terrorist organisations whose object was to bring about a political change in Northern Ireland by violent means. It was also observed that "effect [of acts committed by such criminals] on public safety and on public fear is no different because the motive with which they are committed is more base."[71] Similarly, after classifying terrorism as "Republican" and "Loyalist", meaning the activities, respectively, of the Catholics and the Protestants, the Commission observed that it had to deal mainly with the former class as information pertaining to the latter class was not made available to the Commission. The Report, however, records that the effect of the activities of both factions on the administration of justice was the same.[72]

4.149 The Report takes note of Articles 6 and 15 of the European Convention on Human Rights and underlines the necessity of ensuring compliance with what it called "minimum requirements", meaning perhaps "a fair and public hearing within a reasonable time by an independent and impartial tribunal" envisaged by Art. 6. It is doubtful however if by merely insulating the witnesses from fear of terrorist organisations, as the Report contends, the requirements could be fulfilled. Unfortunately this appears

to be the main burden of the report.[73] The fact that a trial is preceded usually by arrest and investigation and that they have important bearings on the trial, appear to have been overlooked. The "fair" hearing contemplated under Art.6 could not be ensured, we submit, without taking note of the other provisions of the Conventions, such as Arts. 3, 5, 7, 14 and paragraph 2 of Art.15 which restricted the right of derogation. In view of the fact that the Commission also suggested changes, prejudicial to the defendant, in the rules of evidence, it was also necessary, it is submitted, to insulate not only the witnesses but also the defendant from fear of the police and army to enable them to give true and voluntary evidence.

4.150 It is apparent that the Report carried the security bias too far. The need for retaining the detention provision was justified on the grounds that witnesses would not be prepared to testify against terrorists if the operational capability of the organisations remained unimpaired.[74] It was observed that deprivation of liberty per se of persons guilty of what could properly be called only a "political crime" did not partake of a punitive character if the detainee was identified with certainty.[75] It is however difficult to understand how the threshold mischief was to any appreciable degree remedied by the Detention of Terrorists Order 1972, as the Report contends.[76] We have already pointed out the lack of safeguard in the provision relating to the "interim custody order". In fact this aspect appears to have been overlooked for the Report merely examines the provisions relating to proceedings before the Commissioner and the Tribunal.

4.151 The Commission examined the powers of arrest under Regs.10 and 11(1) and noted with concern the application of common law rules by courts in Northern Ireland resulting in "serious handicap to the security forces in performing their difficult and dangerous duty."[77] It was suggested that the common law requirement be expressly negated. On the

other hand detention for interrogation was limited to four hours and the specific purpose of "establishing identity" was spelled out.[78]

4.152 It is however surprising to note that the important changes suggested in the rules of evidence by making confessions admissible was sought to be supported by Art 3 of the Convention. It was suggested that "any inculpatory admission made by the accused may be given in evidence unless it is proved on a balance of probabilities that it was obtained by subjecting the accused to torture or to inhuman or degrading treatment."[79] The expressions underlined indicate the delicate nature of the exercise. How Art 3 was complied with is inconceivable inasmuch as the onus of proof being placed on the accused, though it was made light, the protection afforded by it was rendered hollow and illusory. The following rationale supplied by the Commission to the interrogation procedure to exact confession lends support to our contention:[80]

> Only the innocent will wish to speak at the start. The whole technique of skilled interrogation is to build up an atmosphere in which the initial desire to remain silent is replaced by an urge to confide in the questioner. This does not involve cruel or degrading treatment. . .

4.153 Thus, by suggesting various changes of far-reaching nature in respect of matters touching the mode of trial, arrest, bail and conduct of the trial, the common law procedure of ordinary criminal courts was "contaminated" to a great extent. The object was to ensure successful prosecution for terrorist offences which were called "Scheduled Offences" so that reliance on detentions under executive order could be reduced. In other words the provisions aimed at changing as far as possible the status of the terrorists from that of political detainees to ordinary criminals by making "political crimes" triable at ordinary courts. Consequently, the Act took the shape of a comprehensive code combining punitive and preventive measures and laid down both executive and judicial procedure. It replaced both the Special Powers Act and the Detention of Terrorists Order.

4.154 Prof. W.L. Twining has examined the provisions of the Act at some length and observed that it enacted "most draconian measures since the Emergency Powers (Defence) Act 1939 and may well be the precursor of similar laws to deal with emergency situations in future".[81] He has enunciated certain basic principles for dealing with emergency situations which, according to him, reflect problems which are as much political and social as legal. He has criticised the Diplock Report for its preference for "tampering with" the ordinary process of criminal procedure and has suggested the alternative of establishing "special emergency courts". This alternative has certainly much to commend it and in fact this practice was followed in many countries, particularly Malaysia, which had almost identical terrorist problems.

4.155 It is however difficult to agree with Professor Twining, for reasons already stated, that the Diplock Report has, in fact, insisted on strict compliance with international law and internationally accepted standards of civilised government laid down in the Universal Declaration as well as the European Convention on Human Rights. Two negative features of the Report indicated by him, however, merit consideration. It is deficient in providing what he calls balancing factor and also effective safeguards against abuse in respect both of introduction of each individual power and its exercise. By balancing factor he means special procedure and remedies for dealing with complaints and for compensation for injuries suffered as a result of unreasonable use of power.

4.156 The Act, he rightly observes, instead of making a clean break with the past which was a political and also a psychological necessity, retained some of the most objectionable features of Special Powers Act. How far his last assertion is correct we may examine now in respect particularly of arrest, detention and internment.

4.157 ss.10 and 11 confer power of arrest on "any constable" but by virtue of the definition of the term in s.28(1) the power is also exercisable

by"any member of the Royal Navy, Military or Air Force Police". Sub. ss.(1) and (3) of s.10 authorised summary arrest of any person "suspected of being a terrorist" and his detention "in the right of the arrest" up to 72 hours. The underlined expression clearly introduced a new concept and expended the old power of detention up to 48 hours for interrogation after arrest contemplated under Reg.10. This was not recommended in the Diplock Report.

4.158 Some light may be obtained from sub-sections (4) and (5) and also from the definition of the term "terrorist" in s.28(1) to construe the new power. It appears that the new power combines in it the old power under Reg.11(1) in addition to that of Reg.10. Detention in the right of arrest could now follow a detention under an interim custody order passed by virtue of paragraph 11 read with sub-section (5) of s.10. It has also to be noted that sub-s.(4) conformed to the terms of para (3) of Reg.11. Thus, not only the old powers were reinstated but in the new form the scope of abuse of the power was further increased. The absence of a provision parallel to proviso to s.1(1) of the Special Powers Act increased this risk.

4.159 The general power of arrest under s.7 of the Special Powers Act was split up and posited in two different forms in ss.11 and 12 in the 1973 Act. The power of the member of the armed forces in s.12 was increased in that a person could be detained by him up to four hours after arrest. He was also not required to state the grounds of arrest and was thus entitled to greater protection, following recommendation of the Diplock Report. Unfortunately, the Diplock recommendation that the purpose of detention ought to be spelled out as establishing identity was not followed. Power under both sections could be exercised, unlike under s.7 of the Special Powers Act, not only in respect of the offence committed by any person but also when he was committing or was about to commit any offence.

4.160 s.16 provided for the power to stop and question. Unlike its predecessor it was much circumscribed although power was also bestowed on any member of the armed forces. A question could now be directed only to establishing the identity and movement of the person and his knowledge about any recent explosion or any other incident endangering life or concerning any person killed or injured in any such explosion or incident.

4.161 The provisions of the Detention of Terrorists Order 1972 which had replaced the provisions of detention and internment of the Special Powers Act were repeated in the Act with minor changes. The life of these provisions as well as some other provisions was however limited to one year with provision for extension for another year. The cumulative effect of the various provisions of the Act has been summed up by one keen observer by stating that the Army was enabled to act independently and not in aid of civil power.[82] This we submit, was not unprecedented in that the perverted notion of "Martial Law", as we have seen, was born in Ireland itself.[83]

(iii) The Northern Ireland (Emergency Provisions)(Amendment) Act 1975

4.162 It has been observed that the purpose of the Act was to revise the provisions of the 1973 Act "in the light of the Report of the Gardiner Committee".[84] It is therefore necessary to examine the report of the Committee which was expressly required to consider the provisions of the existing Act in the light of "civil liberties and human rights". The Committee was conscious of what it called "the difficult task of maintaining a double perspective" and observed as follows:[85]

> While liberty of the subject is a human right to be preserved under all possible conditions, it is not, and cannot be, an absolute right, because one man may use his liberty to take away the liberty of another and must be restrained from doing so. Where freedoms conflict, the state has a duty to protect those in need of protection.

4.163 This approach finds further expression in the Committee's emphasis on Art.17 and on the words "exigencies of the situation" of paragraph 1 of the provisions of derogation contained in Art.15 of the European

Convention to hold that the 1973 Act was not in breach of international agreement.[86] Non-consideration of paragraph 2 of Art.15 and also of Arts. 3, 6, 7 and 14 has, we submit, vitiated this finding. In a similar manner another attempt has been made in the Report to play down the international dimension of the problem in the following passage:[87]

> The tragedy of Northern Ireland is that crime has become confused with politically motivated acts. The common criminal can flourish in a situation where there is a convenient political motive to cover anti-social acts; and the development of a "prisoner-of-war" mentality among prisoners with social approval and the hope of an amnesty, lends tacit support to violence and dishonesty.

4.164 The Committee was however cognisant of the fact that emergency powers must be synchronised with political and social realities of the situation that it had to deal with and that they do not provide a lasting solution. It recommended an enactment of a Bill of Right as a legal solution of the problem but in this Lord MacDermott dissented.[88]

4.165 Accordingly, the Committee brought to bear upon the problem a different approach which appears to proceed partly from its extensive study of the working of the existing detention procedure in respect of which it suggested a basic change of a radical nature in Chapter 6 and Appendix G of the Report. Some of the reasons for discarding the existing procedure are indeed persuasive but others are not. It has been noted that many months may elapse between referral by the Chief Constable and determination by the Commissioner.[89] Why the delay occurred has not been investigated to see whether it could be avoided. The fact that the "Republican respondents" do not attend hearings may be, as suggested, the reason for non-disposal of their cases but not for the general delay.[90] It has however been rightly observed that the hearings had become adversial in form while some of the practices founded not on procedure prescribed by the Act but dictated by security and other considerations had made such hearings farcical.[91] This may have very well contributed to the refusal of the "Republican respondents". The use of voice scramblers and

admission of hearsay evidence of the remotest degree, mainly by paid informers, did in fact make it easy for the Executive to make out its case for detention; the prospective detainee ("the respondent") was at a disadvantage. It was conceded that the "well-intentioned, quasi-judicial procedure" had failed to achieve its object.[92]

4.166 The Committee came to the conclusion, after considering at length arguments for and against retaining the provision for detention, as follows:[93]

> In short term, it may be an effective means of containing violence but the prolonged effects of the use of detention are ultimately inimical to community life, fan a widespread sense of grievance and injustice. . . can be tolerated in a democratic society in the most extreme circumstances; it must be used with the utmost restraint and retained only so long as it is strictly necessary. . .

Accordingly it adopted a basic change in approach by recommending that the "sole and ultimate responsibility" for detention should rest with the Secretary of State who was to be aided by a "Detention Advisory Board" which, unlike the Commissioners, was not to have any executive power.[94]

4.167 It is however refreshing to note that the 1975 Amendment Act in fact improved upon the recommendations in certain respects. Paragraph 4(1) of Schedule I of the Act provided that the Secretary of State could pass interim custody orders if "it appeared" to him that "<u>there were grounds</u> for suspecting" a person to be involved in the offensive activities. The expression underlined did not find a place in para 6(1) of Appendix G of the Report; sub-para (2) provided for a certificate setting out "suspicions and consideration" to be annexed. It is not impossible to contend, we submit, that the expression may provide the courts with the power to review such orders although such power has not been conceded in the earlier enactments, and therefore an argument to the contrary may be pressed with equal force.

4.168 On the other hand, the Act, instead of setting up multiple-member Advisory Boards made provision for an Advisor ignoring the cogent

reasons for a plural board given by the Committee.[95] The Committee and the legislature both attach importance to consideration of a case for detention solely by legally trained minds. It is difficult to understand why the opportunity was not availed to test the hypothesis that social and political considerations also, in addition to legal, ought to be weighed in exercising emergency powers. Maintaining the advisory character of the Board, a plural membership representing the relevant interests from the two communities was an experiment worth trying. In almost all Commonwealth countries a plural board was provided and in Northern Ireland it was all the more necessary.

4.169 Similarly, the Act, instead of requiring the case to be "forthwith" referred allowed 14 days' time while following the recommendation that the referring authority should be the Secretary of State rather than the police or any other person as was the case in the earlier enactments. It is not understood why the service on the detainee of the statement of terrorist activities of which he was suspected could not be made contemporaneous with the reference. However, following the recommendation, the Act provided for the representation to be submitted to the Secretary of State so that he could perhaps consider the case dehors the reference and grant earlier relief, if necessary. The time-scale provision for the different steps preceding hearing by the Advisor, as suggested by the Commission, would have made an ideal provision. To countervail this omission the Act provided for an automatic termination of interim custody at the expiry of 14 days.

4.170 The Committee had suggested that one of the criteria provided for passing detention orders ought to be raised so that the provision could be sparingly used. It had suggested the expression "protection of the public" be replaced by "if his freedom would seriously endanger the general security of the public."[96] The words underlined contained the meat of the matter but Lord MacDermott in his "Reservation" observed that

the new wording did not accomplish any significant change and it was better to retain the "existing and well-known form".[97] This advice was followed in the Act. The new wording which was proposed, it is submitted, could be construed to exclude the cases of persons who were involved in minor and sporadic incidents or who by virtue of their age or physical infirmity or otherwise did not pose a real threat to security.

4.171 Following the recommendation of the Committee the Act expressly negatived any scope for adversial practice or procedure to grow up by deleting legal representation and retaining the provision for private hearing. In its anxiety to make the right of the detainee to be present at the hearing of its representation the Act unfortunately used equivocal language which could be construed to vest the option in the Advisor rather than the detainee. In this connection we submit that even the earlier provision could have been so construed so as to prevent the mischief produced in the case of the "Republican respondents". Para 14(2) of Schedule 1 of 1973 Act was as follows:

> The respondent shall, subject to paragraph 17 below, be present on the hearing. . . unless the Commissioner direct his removal on grounds of his disorderly conduct.

The right being a qualified right, unlike the right of an accused in an ordinary criminal trial, it could be contended that it was not necessary to read the word "shall" in a mandatory sense. Similarly, the new provision by providing for submission by the detainee of "a written request that he be seen personally by the Advisor" made it possible for the Advisor to refuse the request in the absence of any other provision to indicate a contrary intention.

4.172 From the failure of the experiment in Northern Ireland one may safely conclude that legal means however manipulated, such as introduction of quasi-judicial procedure to review cases of political detentions, could never provide a satisfactory answer to a problem which was basically political rather than social in nature. Law could be used as a tool to

change social norms but political norms could be changed only by the consensus of the governed.

4.173 The Commission appeared to tread in a twilight zone between social and political frontiers by suggesting a re-settlement scheme for detainees in Appendix H of the report. It did not find favour with the legislature. On the other hand in paragraph 15 of Schedule 1 payments to persons released or about to be released from detention was contemplated which was perhaps meant to serve as a substitute for the scheme. It is submitted that a provision for supporting the families of the detainees during the period of their detention could have served a better purpose. When the earning member in the family was incarcerated for a long and indefinite period the hardship and consequent bitterness which was bound to follow need little emphasis. As we shall see, it would not have been difficult to find a parallel for such a provision.

4.174 It has to be stated that the Act has dealt with some of the objectionable provisions of the 1973 Act regarding bail, admission of hearsay evidence and confessions which we do not propose to examine but it is lamentable that the Report as well as the Act failed signally in not taking note of the offensive features of the powers of arrest which we have already pointed out. In respect of power to stop and question the Act implemented the recommendation that the power of the security forces to stop a person merely to establish his identity ought to be clarified. Nothing was done to check abuse of the power. It has been observed that very often a person has been stopped as many as four times in the same night by the same patrol.[98]

(iv) Prevention of Terrorism (Temp.Provision) Acts of 1974 (c.56) and 1976 (c.8)

4.175 So far we have discussed the enactments having local application in Northern Ireland. The bomb explosions in Birmingham in 1974 appears to have struck the British Government as adoption by the I.R.A. of a new

strategy by extending their activities to Great Britain.[99] The measures enacted in Part I of the 1974 Act, which were made inapplicable to Northern Ireland, accordingly directed themselves against the activities of the I.R.A. in Great Britain. To be a member of the I.R.A., to solicit or invite financial or other support for it and to arrange or address any meeting in its support was, according to s.1, an offence.

4.176 Part II of the Act is said to have been modelled on the Prevention of Violence (Temp.Provision) Act 1939 which had expired in December 1954.[100] The Secretary of State was empowered by s.3(3) to make orders (called "exclusion orders") prohibiting any person "from being in or entering Great Britain" if he was "satisfied" that such person ("whether in Great Britain or elsewhere") was either concerned in the commission, preparation or instigation of acts of terrorism or with a view to being so concerned, was attempting to enter Great Britain. Sub-ss.(2) and (3) outlined the guidelines for the exercise of the power. The "acts of terrorism" should be such as should appear to the Secretary of State to be "designed to influence public opinion or government policy with respect to affairs in Northern Ireland". In the case of a person "ordinarily resident in Great Britain" he was required to consider "that person's connection with any territory outside Great Britain."

4.177 s.7 dealt with the powers of arrest and detention and is of greater importance from the viewpoint of our study. Sub-s.(1) introduced reasonableness of suspicion while conferring summary power of arrest. It could be exercised against a person who was either guilty of an offence under s.1 or 3 or who was concerned in the commission, preparation or instigation of acts of terrorism, and also against one who was subject to an exclusion order passed under sub-s.(3). Sub-s.(2) authorised the detention of persons after arrest up to 48 hours "in the right of arrest", and empowered the Secretary of State to extend the period up to 5 days in any particular case. Sub-s.(5) specified that the power conferred by the

section was in addition and not in supersession of the power conferred by sections 2 of the Criminal Law Acts of England and Northern Ireland of 1967 and s.10 of the Northern Ireland (E.P.) Act 1973.

4.178 The 1976 Act repealed and re-enacted with minor changes the provisions of the 1974 Act which expired in December 1976. Like its predecessor it was also given a limited life. It created a new offence in s.11. Any information which might be of "material assistance" in preventing a terrorist act had to be disclosed to the police. Any person who had such information would be guilty of an offence if he failed "without reasonable cause" to disclose the same "as soon as reasonably practicable."

4.179 In respect of powers of arrest and detention there was only one, rather material change: the scope of old sub-s.(5) of s.7 was enlarged by substituting the expression "conferred by law" for the three enactments which had been earlier specified. It could thus embrace power not only under the common law and also under any future enactment but even under the unspecified provisions of any existing enactment. A case in point is the power under s.12 of the Northern Ireland (E.P) Act 1973. As we have observed earlier it not only empowered a soldier to make an arrest but expressly dispensed with the common law requirement of the grounds of arrest to be stated. Its importance becomes apparent when it is viewed in the context of another change brought in by the 1976 Act. The new Act also introduced power to exclude any person from Northern Ireland alone. The fact that the army played an active and prominent role there presaged grievances of abuse of the power.

4.180 The Acts for the first time introduced in England the concept of detention in the right of arrest on the lines of the provisions of the emergency laws of Northern Ireland with one material change that it was balanced by the common law requirement of reasonableness of suspicion, but the possibility of use of power under Northern Ireland laws being kept

open the wholesome effect of this provision was limited in extent especially in Northern Ireland as we shall see that the Court generally accorded primacy to the realities of the situation there and upheld, in many cases, unwarranted exercise of powers by the Army.[101]

4.181 Professor Harry Street rightly points out that the powers inhered by s.8 (s.13 under the new Act) are potentially more draconian.[102] The Secretary of State could by an order made under the section confer powers on "examining officers" of arresting and detaining any person pending his examination, and also pending decision of the Secretary of State whether an exclusion order was to be made in his case. The Act is silent on guidelines and safeguards. It cannot be gainsaid, as he observes, the need for "justice to those in police custody", especially in the Northern Ireland context, is more acute. It was necessary to provide such persons with such rights as to consult a lawyer, to have tape recording of the statement made, to have daily visits by Magistrates and to an impartial review of complaints about treatment during detention.

4.182 The Prevention of Terrorism (Supplementary Temporary Provision) Order 1974 made in the exercise of powers conferred by s.8 do not unfortunately contain any such provision. Art.4 of the Order provides examination of persons arriving in or leaving Great Britain. Art. 9 provides for the detention of persons (liable to examination and removal) up to 7 days. An instance has been cited of a person who had challenged an exclusion order being held in custody continuously for three weeks under the Act.[103] Although no appeal is provided against such order a representation may be made to the Secretary of State who must refer the same for advice to one or more persons and reconsider the matter after he has received the report.

4.183 The interposition of an independent advisory body was indeed a salutary provision but the time factor also merited equal consideration when the liberty of the citizen was involved. To avoid delay in decision

in the first place it was necessary to make it obligatory for the Secretary of State to consider the representation himself so that instant relief could be granted to the citizen if the suspicion turned out to be unfounded. In the second place the entire procedure ought to be time-scaled.

4.184 It is difficult to resist the conclusion that the power of "examination" contemplated under the Act appears to occupy the highest place in the hierarchy of new powers evolved to meet the situation in Northern Ireland such as to stop and question, to interrogate etc. In view of the latest decision of the House of Lords[103a] (discussed below) there are good reasons to suppose that the judiciary is unlikely to interfere lightly with the efforts of the Executive to control the situation in Northern Ireland by exercising these powers which are apparently out of tune with the British tradition and mark a wide departure from the accepted notions of justice and fair play. How far the judiciary can make the provisions of sub.ss.(2) and (3) of s.3 more purposeful is yet to be seen.

(b) The Balance Sheet: the dividends of the new approach

4.185 The new legislative measures paid rich dividends in so far as "detention" and "internment" were concerned. With the shift in emphasis greater reliance came to be placed on "due process of law": detentions without trial fell sharply: there were fewer new cases and even the existing detainees were progressively released. On 5th December 1975 the Secretary of State for Northern Ireland announced that the system of detention introduced by the Northern Ireland Government in 1971 ended when he signed the release order in respect of 73 detainees. It was disclosed that during the period of four years and four months 1,981 persons were detained and that 107 of them were "loyalists";[104] that 170 persons had been interned twice, of whom 97 had even been interned

three times. The total annual figures of detentions as well as releases were as follows:[105]

| Detentions | Releases | Year | |
|---|---|---|---|
| 775 | 129 | 1971 | (Detention introduced in August) |
| 559 | 889 | 1972 | (Direct Rule since March) |
| 512 | 208 | 1973 | |
| 312 | 361 | 1974 | |
| 11 | 554 | 1975 | |

4.186 We may now look at some other figures to see the other aspects of the new approach. It was disclosed in a statement made in the House of Commons on the 14th February 1973 that 1,193 persons were detained since August 1971 under SPA and the Detention of Terrorists Order 1972.[106] On 31st October 1973 it was published that 657 persons were held under the Emergency Provisions Act 1973 of whom 75 were "loyalists"[107] and that by August 330 persons had completed two years in detention.[108] On 5th April 1974 the Northern Ireland Secretary told the House of Commons that during the preceding year, since 1st April 1973, 1,292 "terrorists" were charged with serious criminal offences.[109] However, in December 1974, there were 1,501 "Republicans" and 627 "Loyalists" in prisons in connection with "terrorist-linked" offences.[110] In the Defence White Paper published on 17th March 1976 it was stated that during the year 1975 the police had arrested and charged 1,197 persons with "terrorist-type" offences, including 226 who were charged with murder and attempted murder;[111] during 1976, out of a total 1,276 arrested and similarly charged, 241 were charged with murder.[112] However, there were, it appears, some cases of grave failure of the due process of law - some persons held in the Long Kesh prison served long terms without trial - 7 persons for 5 years, 11 for 4 and 57 for 3 years, as on 1st April, 1975.[113] Similarly, there were few cases in which men who were duly sentenced were held under "interim custody orders".[114]

4.187 It is also necessary to take note of the casualty figures of the "civil war". It appeared in the statement made by the Northern Ireland

Secretary on 2nd September 1975 that since 1969 1,300 people were killed and another 13,000 injured.[115] In 1976 the death toll rose to 1,600 and it was stated that of these 400 belonged to the security forces.[116] Again, in 1977, during the first 8 months, 52 civilians were killed, whereas, it was claimed, during the corresponding period of 1976, the death toll was 187.[117] However, to appreciate the implications and the arithmetic of the civil war casualties as well as of detentions, internments and prosecutions, notice has to be taken of the fact that the total population of Northern Ireland was only 1.5 million and that 35 percent of the population was Roman Catholic.[118]

4.188 The justification for the new approach and the measure of its success is spelt out in the statement which the Northern Ireland Secretary made in the House of Commons on 23rd February 1977; the relevant passage is quoted below:[119]

> The great strength of the present policy was that it rested on law, on punishment for criminal acts proved beyond reasonable doubt in open court. Other measures may be needed at times, but in the long run that was the only way that law and order had ever been successfully achieved in a democracy.

A few months later, in July, the policy reiterated in the statement quoted above received a major boost when the Northern Ireland (Emergency Provisions)(Amendment) Act 1977 was enacted to increase the sentences in respect of certain offences "connected with terrorism" and the Northern Ireland (Emergency Provisions) Act 1973 (Amendment) Order 1977 was made to add to the list of "scheduled offences" of the parent Act of 1973. However, it appears that the policy has produced an anomalous situation: on the one hand, the replacement of "detention" produced a wholesome result in that "interrogation", which gave rise to the possibility of torture, vanished with "detention", but on the other hand the "contaminated" trial procedure, with the traditional safeguards whittled down, changed the basic concept of "due process of law" which the new policy professed to uphold. The policy apparently preferred

"legitimacy" to "legalism" and "legality" of the old colonial policy which, as we shall see, proved to be potent weapons in fighting "terrorism" in Africa (Kenya), and south-east Asia (Malaya and Singapore). This approach was evidently attuned to the requirements of the new world order and therefore aimed at compliance with the provisions of the European Convention but it was doubtful if it provided a complete answer to the issue of "civil war".

4.189 We quote below, in this connection, an observation of Lady Wootton of Abinger:[120]

> The I.R.A. believe themselves to be at war with the U.K. and they use the language appropriate to a state of war . . . We, on the other hand, deny that a state of war exists. . . and convict their bombers as murderers. . . Is the answer that a war is only a war if it is supported by a sovereign government ? If so, who is competent to decide the sovereignty ?

Whether the General Conventions or the customary international law relating to armed conflicts can supply an answer to the question posed is not proposed to be discussed as it is beyond the scope of our study. However, it cannot be denied that when a strong religious or ethnic minority chooses to exercise "the right of self-determination" in accordance with the norms of the new world order, the issue soon becomes a matter of international concern. Indeed the British Government has itself recognised in the case of Northern Ireland the "international dimension" of the problem while the Ibos of Eastern Nigeria had added a touch of reality to this new dimension when the independent Biafra state came to be proclaimed there in 1967.

(3) The Judicial Response

4.190 We may first examine the decision in R (O'HANLAN) v. GOVERNOR OF BELFAST PRISON[121] which may be aptly described as the trend-setter for the decades that followed in that the citizens until recently were led to believe that neither the provisions of the SPA nor any executive act performed thereunder could be challenged in courts. General distrust of courts as institutions of "unionism" (political beliefs and practices of

the ruling Unionist Party) by the Catholic minority against whom, as we have seen, the Act was mainly used in practice was obviously another reason for scanty case-law.

4.191 It was perhaps the earliest case under the Act that had come before the court when opportunity was taken to challenge the order of internment and detention and the provisions also, on more than one ground. It was an application for habeas corpus. After arrest the Minister passed the detention order the same day and followed it up by making an internment order a few weeks later. The orders were passed during the currency of the Regulations made under the Defence of the Realm Consolidation Act. The argument on behalf of the Crown that the decision in HALLIDAY's case[122] ought to be followed appears, therefore, to have found favour with the court. In a cryptic judgment Henry, L.C.J., observed as follows:

> The order is a modification - it is really nothing new - of orders made in England almost every day by the Home Secretary there during the war. . . The House of Lords in Halliday's case decided that the Home Secretary had power to make such orders and that the court was prevented from interfering with them. . . The Minister for Home Affairs Northern Ireland could make the regulations. . . they are not ultra vires. . .

It is unfortunate that although each and every contention raised in the case on behalf of the prisoner merited serious consideration, the court did not examine them. Arguments were advanced on the basis of ss.4, 61 and 67 of the 1920 Constitution. Reliance was also placed on BUSHELL's case[123] to say that the return to the writ must be specific whereas the detention was for an "unspecified offence". The internment, it was contended, was also for an "unspecified offence" on account of uncertainty indicated by the phrase "about to commit" contained in the Regulation.

4.192 We submit that the prisoner's contention sparked off constitutional points of great importance. In view of the provisions of s.75 the true nature of the supremacy of the Westminster Parliament over the affairs of Northern Ireland had to be determined. Could the Northern Ireland

Parliament enact laws derogating from common law - the law of the realm ? What was the combined effect of ss.4 and 61 of the 1920 Constitution ? Whether the enactment of the impugned regulations was tantamount to suspension of the writ of Habeas Corpus which was specifically prohibited by s.67 of the Constitution ? These issues still remain unanswered by the judiciary. The Executive however contended that the Habeas Corpus Act was "not interfered with in the slightest way".[124] This view has been seriously contested, rightly we submit, by the Commission of Inquiry appointed in 1936 by the National Council of Civil Liberties, albeit on different grounds.[125]

4.193 The decision has however come under strong criticism from another quarter,[126] on another ground, namely, for its reliance on Halliday's case (supra) in view of the difference in the language of the two provisions and also for misreading the judgment in Halliday's case. Atkinson and Wrenbury, L.J.J., it is rightly contended, did not totally rule out judicial review.[127]

4.194 For the first time in R (HUME & ORS) v LONDONDERRY JUSTICES[128] one of the regulations made under the Special Powers Act was successfully challenged as ultra vires s.4(1)(3) of the 1920 Constitution. The court quashed the conviction under Reg.38(1) which empowered the police (R.U.C.) as well as the army to order dispersal of unlawful assembly and made failure to comply with the order an offence.

4.195 Lowry, L.C.J. dealt extensively with the contentions of both sides in the course of his elaborate judgment and also compared the parallel provisions in the Constitutions of Northern Ireland, Canada and Australia. His lordship rightly rejected the plea of the Crown for the application of "incidental effect" doctrine and the "pith and substance" test. Instead, his lordship adverted to the "dual respection" of s.4(1) which is quoted below:

> s.4(1) subject to the provision of this Act. . . the Parliament of Northern Ireland shall. . . have power to make laws for the peace, order and good government of. . . Northern Ireland with the following limitations, namely, that they shall not have the power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction or some part thereof, and without prejudice to that general limitation that they shall not have power to make laws in respect of the following matters in particular, namely -
>
> [emphasis added]

4.196 His Lordship rejected the Crown's plea and held that the words "in respect of" had the same general meaning throughout s.4(1) and were nowhere confined to the imposition of burdens, controls and obligations, as was contended. The impugned regulation was struck down upon holding that the words of the regulation, "any commissioned officer/any member of Her Majesty's Forces on duty" were descriptive of the subject matter within the forbidden field comprised in s.4(1)(3), namely, the defence of the realm etc.[129]

4.197 The decision in re McELDUFF[130] is indeed a courageous one in that the legislative amendment of s.7 in 1967 which deleted the word "common law" was set at nought. The right to be informed of the reasons for arrest was termed as a "fundamental right of any man"[131] instead of common law right. The decision in CHRISTIE's case[132] was referred to and it was observed that the principle was not peculiar to criminal law; its application was not excluded by the Act. The clearest words were necessary to hold that the legislature intended to deny the right; to do so otherwise would be a "negation of justice". The Act envisaged power of arrest to be exercised in three "different and distinct ways, each with different and distinct consequences following."[133]

4.198 It is clear that although the court did not expressly state so, it was influenced by international obligations of the state under the European Convention and the Universal Declaration of Human Rights transcending the municipal law, both written and unwritten. In other words the court appears to have adopted what we have earlier called "humanitarian interpretation". This new approach having followed the complaint by the

Republic of Ireland to the European Commission of Human Rights challenging the Act, our proposition stands fortified. The same result could have been otherwise achieved by invoking the proviso to s.1(1). The preference for a new interpretation is therefore significant.

4.199 In this case a detention order was challenged and the court was therefore obliged to examine in detail the power of arrest under Reg.11 as it was of the opinion that if the arrest was illegal the detention would automatically fall. The Attorney-General having equated the detention with one made by the Home Secretary under the Defence Regulations of 1939, the decision in the LIVERSIDGE case[70] came to be considered at some length by the court. It was recognised that the regulation ex facie conferred "very arbitrary" power of arrest in that a person could be held for an "indefinite duration of time on foot of the arrest". The import of the word "suspect" on which the power was grounded was examined to see if it inhered the concept of "reasonableness" or of the "honest belief" of LIVERSIDGE's case. Eventually the court came to the conclusion that "however wide the power may be and however arbitrary and in reason unfounded the suspicion in the mind of the arrestor may be, if the suspicion is an honest genuine suspicion it is sufficient to ground the exercise of the power."[135]

4.200 The Crown did not rely on the original arrest under Reg.10 but adduced evidence of arrest under Reg.11(1) which was as follows:

> After having found [his] name. . . in the said list with the consequence that I suspected him. . . I arrested him acting under Reg.11(1). . . on the basis of my suspicion . . . and I told him that he was being arrested under [S.P.Act] but I did not specify to him the regulation. . .

The court held that the words used were not such "as to inform the prisoner of the fact that he was thereby arrested or re-arrested." It was further held that failure to inform him of the specific power which was exercised and of the grounds of suspicion invalidated the purported arrest.[136]

4.201 The court, we submit, appears to have realised the potentiality

of the original arrest under Reg.10 taking the form of detention and attempted to check the mischief by insisting that a nominal "re-arrest" in casual and cavalier manner would not be sufficient for a valid detention.

4.202 It is however necessary to take note of the proceedings that preceded the above decision. Two prisoners including the petitioner had first challenged Reg.11 itself before the Queens Bench in England in re KEENAN.[137] The exercise appears to have been inspired by a parallel enterprise in HUME's case (supra) but was unsuccessful. In HUME's case the court expressly held that the impugned regulation was a law "in respect of" the forbidden subject matter although it was also a law"in respect of preservation of the peace and maintenance of order."[138] The English court, on the other hand, held that S.P.A. "was not a law in respect of any naval, military or air force matter", (i.e. the forbidden subject matter). It did not seek to "impose obligation upon Her Majesty's forces or in any manner seek to restrain or regulate them."[139] The English court, we submit, was wrong in construing the Act as a piece of mere enabling legislation and also restricting the operation of the constitutional limitations prescribed under s.4(1).

4.203 It is also necessary to point out that the English court rejected almost summarily the objection that the prisoners were not told of the specific ground of their arrest - the point on which one of the prisoners succeeded later in the Northern Ireland court. It was observed that "the Minister was not asked to specify the ground". No notice was taken of either the proviso to s.1(1) or of international obligations. The complete disregard displayed in the decision for the traditional approach of upholding common law rights and the departure therefrom are inexplicable.

4.204 The matter was taken in appeal,[140] but without expressing any opinion on any other point, the Court of Appeal held that the English courts had no jurisdiction to issue a writ of habeas corpus to any authority in Northern Ireland.

4.205 In KELLY v FAULKNER[141] the court appears to have taken note of the proviso to s.1(1) and allowed damages for a part of the claim in an action for trespass, wrongful arrest and wrongful imprisonment. A detention order was made on the following date of the arrest and the internment order after about a month. The plaintiff was confined for nearly six months. The decision in McELDUFF's case (supra) was followed. The plaintiff was awarded damages for being held in unlawful custody during the period preceding the internment order.

4.206 The decision in CHRISTIE's case was referred and it was observed that there was "no obvious practical reason why the Civil Authority or the arresting officer should not make up his mind under which regulation he proposed to arrest the person or why when he does so, he should not disclose his reasons." [emphasis added] Referring to the proviso to s.1(1) the court observed: "No such exigency has been proved as would involve the abandonment of the rule of common law."[142]

4.207 Having thus found the arrest under cl.(1) of Reg.11 to be invalid the court found no difficulty in branding the detention similarly by referring to the expression "so arrested" of clause (2) as meaning validly arrested. The expression was apparently referable to the conditions laid down in clause (1) but the court insisted on fulfilment of common law requirement also as a condition of validity of arrest and of consequent detention.

4.208 The custodial sanction was considered as a necessary incident of arrest. The court took note of the transfers of custody that had taken place and observed that "it was necessary to consider in detail what happened to him [the plaintiff] when under restraint."[143] At each transfer, it appears, the test had to be satisfied. The statement in the detention order served on the plaintiff at the time of his transfer to the custody of prison service was examined. It was to the effect that the plaintiff was arrested under SPA; it did not state the ground of arrest. It was held

that the order did not fulfil the requirement of law. The concept of "re-arrest" introduced in McELDUFF's case (supra) was thus further embellished in that the "custody" was considered as a bridge between the different stages in the exercise of the same power, under Reg.11, and not between two different powers under Reg.10 and 11.

4.209 From this decision, we submit, an important consequence followed. The decision could be used for penetrating the barrier erected by clause (4) of Reg.11 against resort to court by the detainee to secure his liberty. A person is "taken into custody under the Regulation" (cf. clause (4) of Reg.11) after he is "arrested" either under s.7 or under Regs.10 or 11. If the custodial sanction inhered by the power of arrest exercised under those provisions lacked legal footing in any case, it would not be a case of being "taken into custody under the Regulation". The bar of clause (4) ought to be held inapplicable in such a case.

4.210 In respect of internment it was held that it did not depend on the legality of arrest; it depended on the recommendation of the specified authority and subjective satisfaction of the Minister. It was overlooked that of the two authorities which had concurrent powers one was also the beneficiary of the divers powers of arrest contemplated under the Act. After making an arrest and securing a detention order on the basis thereof the same authority could recommend internment and thus convert an arrest into internment. Admittedly, the scope for malafide exercise of power could not be a ground for striking down the provision but it ought to put the court on inquiry into the facts of the case.

4.211 While it is conceded that the argument suggested above does not appear to have been put forth in this case, it is unfortunate that the contention that the right to make representation to the Advisory Committee was nullified and rendered illusory by the order, should have been rejected by the court. It was held that the regulations did not contemplate the existence of such a committee on the date of the making of the order.

4.212 In an unreported decision, in the case of JOHN GERARD MACKEY,[144] the court had to consider the function of the Advisory Committee and the scope of hearing before it. In an application for a mandamus against the Committee the petitioner prayed for directions that he might be allowed legal representation and also supplied with a full statement of all evidence and allegations prejudicial to him that had come to the knowledge of the Committee. The prayer for legal representation was turned down upon holding that the refusal did not amount to a denial of natural justice having regard to the "character and function" of the Committee and the scope of hearing before it. The facts of the case did not disclose any unusual feature warranting such representation, the Court said. It was however held that by virtue of the common law right to appoint an agent, a solicitor or a counsel could be appointed as an agent, not qua solicitor or counsel.

4.213 The other prayer was partially allowed. Subject to certain qualifications the petitioner was entitled to be provided with a written summary of information revealed during hearing or already in the possession of the Chief Constable of the R.U.C. and the Minister of Home Affairs which gave rise to the suspicion that led to his internment. The following informations could however be excepted if the Minister considered them to be prejudicial to public safety:

(a) indicating the source of information and the identity of the informant because the work of the security forces might be prejudiced;

(b) enabling the nature and extent of knowledge of security forces;

(c) revealing the system of interrogation adopted by the security forces.

4.214 Professor de Smith has offered the following comments on the decision:[145]

(a) the difference between an agent and a legal representative was immaterial, as held in an English[146] as well as an Australian[147] decision;

(b) although an advisory committee could not be equated with a domestic tribunal there must be "an explicit recognition of the likelihood of detriment to an internee, coupled with an acknowledgment that fairness to the internee may be incompatible with exigencies of security which depends on the maintenance of a high level of secrecy";

(c) the decision conformed to the "familiar feature of British case-law" which permitted "modification" of rules of natural justice"to accommodate the requirements of public safety";

4.215 It appears that the court and also Professor de Smith overlooked the fact that Reg.12(1) allowed a person "to be interned as may be directed in the order". The wide sweep of power conceded to the Executive necessitated an equally effective check to be read into the provisions against abuse by insisting on a procedure that would make the remedy real. The regulation being silent on procedure such an exercise was warranted not on the facts of the case but at common law generally. Professor de Smith himself posed the question - "would the admission of legal representation materially increase security risks ?" - but left it unanswered. The material issue before the advisory committee in all cases would be - whether the internment was authorised by the terms of Reg.12(1) which allowed a large amount of latitude in the exercise of the power by envisaging different situations of suspicion. The Advisory Committee was not acting judicially and it was not expected to act on a presumption of innocence. Unless he was aided by a counsel, an internee was bound to be at a great disadvantage and on the other hand a restricted access to the materials as proposed by the court was likely to keep the security risk at a minimum. If the proviso to s.1(1) was to have a full play legal

representation was a necessity: it was possible for a legally trained mind only to breathe life into it. The growing role of international obligations in the field of law could be another reason for supporting the plea.

4.216 The House of Lords in ATTORNEY-GENERAL'S REFERENCE NO. 1 of 1975 (NORTHERN IRELAND)[148] construed the power to stop and question under s.16 of the Northern Ireland (Emergency Provisions) Act 1973 so widely that even an ordinary law came to acquire "emergency" character. The judiciary, in this case, appears to uphold the claim of the Executive adverted to earlier.[149] A soldier who had fired a fatal shot at an unarmed person who had run away when challenged pleaded that he had acted in the honest and reasonable belief, though mistaken, that the deceased was a terrorist. A judge sitting without a jury in Northern Ireland held that the killing was justifiable homicide.

4.217 The Crown expected, as the Attorney General contended, that the decision would lay down "guiding principles as to use of reasonable force" but Lord Russell observed as follows:[150]

> . . . The circumstances in which a death may result from action by members of the armed forces in their arduous, dangerous and unhappy task of controlling illegal violence, from whatever source, in Northern Ireland are likely to be infinitely variable; and I cannot think that the answer to the point of law in the present reference could afford guidance in other cases. . .

That was the actual decision in the case but Lord Diplock dealt with the matter at great length on merits and it is needless to stress that all obiter dicta of their Lordships of the House of Lords ~~was~~ were entitled to great respect.

4.218 Lord Diplock referred to s.3 of the Northern Ireland Criminal Law Act 1967 which was a verbatim copy of s.3 of its English counterpart. His lordship observed that force was used for the prevention of crime in this case and for the source of power his lordship turned to s.16 of the Northern Ireland (Emergency Provisions) Act of 1973. It may be observed here that in spite of Gardiner Committee's recommendation the

1975 Amendment Act did not make "terrorism" an offence,[151] although even in the suggested definition anticipated acts of violence were not covered. It is therefore interesting to note his lordship observing as follows:[152]

> . . . I propose to deal with the reference on the basis that the accused's honest and reasonable belief was that the deceased was a member of the Provisional I.R.A. who, if he got away, was likely sooner or later to participate in acts of violence. [emphasis added]

4219. In view of the fact that s.3 was invoked, it is submitted that the expression "prevention of crime" ought not to be so construed as to embrace any conduct or activity of any person which appeared to any other person to be criminal for, it has to be remembered that power to use force to prevent crime was conferred on "any person" by s.3. Guidance in the construction of the expression ought to be obtained from the preceding s.2, in particular sub-ss.(2) and (5) in this case. Before force was used against a person there must be reasonable cause to suspect that he was about to commit or was in the act of committing some offence known to law. His lordship appears to have ignored this requirement in that "likelihood" of "participation" in acts of violence could constitute an ingredient of "terrorism" if that was made an offence otherwise such inchoate conduct could not amount to an offence in law. His lordship considered many matters not germane to the point at issue and observed as follows, expanding immeasurably the scope of the narrow issue that had arisen for consideration:[153]

> . . . Where used for such temporary purposes (i.e. controlling riotous assembly) it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances in which the army is currently employed in aid of civil power in Northern Ireland. In some parts of the province there has existed for some years now a state of armed and clandestinely organised insurrection against the lawful government of Her Majesty by persons seeking to gain political ends by violent means. . . Due to the efforts of the army and the police to suppress it the insurrection has been sporadic. . . but. . . if vigilance is relaxed the violence erupts again. In theory it may be the duty of every citizen when an arrestable offence is about to be committed. . .

> to take whatever reasonable measures are available to him to prevent the commission of the crime. . . he is [not to] do anything by which he would expose himself to risk of personal injury, nor is he under any duty to search for criminals or seek out crime. In contrast. . . a soldier. . . is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm. . . from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death. [emphasis added]

4.220 It is clear that the approach displays perhaps undue concern for the practical realities of the situation resulting in the legal considerations (in his lordship's language "theoretical") to be relegated to a secondary place. It is difficult to concede that "search for criminals" could be embraced by the expression "prevention of crime". Similarly, legislature in its wisdom having rejected the recommendation to make "terrorism" a crime, how could the supposed "military law" (in fact an administrative order) gain primacy ? Still, the court unmistakably enlarged the army's power.

4.221 In examining the reasonableness of measures that could be taken, the court observed:[154]

> . . . in one scale of the balance the harm to which the deceased would be exposed if the accused aimed to hit him was predictable and grave and the risk of its occurrence high. In the other scale of the balance it would be open to the jury to take the view that it would not be unreasonable to assess the kind of harm to be averted by preventing the accused's escape as even graver - the killing or wounding of members of the patrol by the terrorists in ambush, and the effect of this success. . . in encouraging the continuance of the armed insurrection and all the misery and destruction of life and property. . .

For such a delicate task of balancing a stable fulcrum was needed and that, we submit, could be provided by insisting on the proof of reasonableness of suspicion or belief but, in this case, the court dispensed with the requirement, contrary to the usual practice, for reasons not stated.

4.222 In DEVLIN v ARMSTRONG[155] reliance was placed on the same s.3 by a civilian this time who was tried on a charge of riotous behaviour and of incitement to such behaviour. In this case the court did not fail

to observe that it was not suggested that there had in fact been any unlawful conduct on the part of the police although the appellant contended that she honestly and reasonably believed that the police were about to behave unlawfully by assaulting people and damaging property in the Bogside area of Londonderry. The court further observed that the force used was so excessive as to be unwarrantable by s.3. Throwing of petrol bombs at the police was held to be "utterly unwarranted and unlawful reaction".

Conclusion

4.223 The decision of the Northern Ireland courts[156] provide a strong contrast to the decisions of the English courts.[157] In fact the decision in McELDUFF is in line with the view of the English court as expressed in COROCRAFT[158] in which the importance of international obligations is stressed. Indeed, even in the later cases the English courts adhered to this view in cases arising in the domestic (English) context.[159] Why the English courts adopted a different approach in the Northern Ireland context is not easy to understand. Apparently they extended the application of "ad hoc norms" of interpretation evolved in the "wartime cases".[160] But is it right to equate external aggression with internal disturbance ? Only an intelligent and effective "public opinion" can provide an appropriate answer to this question. The divergence in approach to the question exhibited by the English and Northern Ireland courts indicate that in Northern Ireland the courts got an answer and indeed the right answer to the question in the inarticulate "public opinion" provided by the contemporary environmental background of the military "excesses". Obviously the English courts did not have this advantage. Thus, in England, the "value-process" at the judicial level did not operate satisfactorily in respect of Northern Ireland cases.

4.224 Indeed, as Cedric Thornberry points out, the law "recognises" the dual "danger" inherent in the identification of an "emergency".[161] It is true that an "emergency" may invite military interposition and then

it may also provide a "justification" for the military "excesses" in the claim grounded on the "legitimacy" of the declaration of emergency.[162] He deals with the international acknowledgment of emergency situations but we may add that it is also necessary to take notice of the lawyer's dilemma in dealing with the situation in Northern Ireland. If it is conceded that it is a civil war, the terrorists are entitled to POW status. On the other hand if Art.15 of the European Convention is invoked it will still be necessary to decide whether the situation is such that it "threatens the life" of the British nation.

# Chapter 5

# EMERGENCY PROVISIONS UNDER LEGISLATION: INDIAN SUBCONTINENT

## I. Colonial rule and personal liberty

### (1) The royal charters and the rule of the East India Company

#### (A) "Unlimited" government and an experiment in constitutionalism

5.1 On the Indian sub-continent not only the territories which now constitute the independent states of India, Pakistan and Bangladesh (which, with the exception of the native states, constituted the erstwhile British India) but also the island of Ceylon (Sri Lanka) were, in the beginning, subject to the rule of the East India Company (notwithstanding the separate "Constitution" that Ceylon had received from the British Crown in the form of the Commission of 19th April, 1798, issued under the Great Seal). The Governor was required under the "Instructions" to obey orders that he might receive not only from the Court of Governors or Court of Directors of the Company but also from the Governor-General of Fort William at Calcutta. However, Ceylon became a Crown Colony in 1802 when the Treaty of Amiens confirmed the British occupation of the erstwhile Dutch settlements there.[1] British India, on the other hand, continued to be governed by the East India Company until the passing of the Government of India Act 1858 by the British Parliament.

5.2 However, British interest in India, unlike that in Ceylon, did not originate in conquest. The first Charter which Queen Elizabeth I had granted on 31st December, 1600 (described by Ilbert as a Protestant counter-claim to Pope Alexander's Bull of 1493, by which the whole of the undiscovered non-Christian world was divided by the Pope between Spain and Portugal, awarding India to Portugal) merely conferred rights on certain London merchants for trading in the East Indies. In 1615 Sir Thomas Roe came as an envoy to the Mughal Court and in 1634 permission to trade

throughout India was obtained from the Mughal Emperor. In 1639 and 1696 respectively Fort George at Madras and Fort William at Calcutta were built, but the territorial acquisition in both cases was against valuable consideration; Bombay, on the other hand, was transferred to the Company in 1668 by King Charles II, who had acquired the territory in 1661 as part of the dowry of Catherine of Braganza.[2]

5.3 The first English "factory" in the East was built in 1613 at Surat, which maintained its pre-eminence until 1687 as the seat of central authority and, as Kaye tells us, "the will of the Chief of the factory was absolute" in civil cases but in criminal cases justice was administered by virtue of the King's Commission granted under the Great Seal "to punish and execute offenders by martial law", the extent of the authority being obviously limited to the Company's servants. The President and the members of the Council at Surat were all Company's servants.[3] The collegiate rule, according to Keith, curbed the President's discretion and he could not act like the Governor of a Crown Colony. However, the general position could be best summed up in Keith's own words:[4]

> The Company had merely trading stations without territorial sovereignty and it was only gradually that wider authority came to be exercised at Madras, Bombay and Calcutta under varying conditions dictated by different sources of its power. The general principle of the control of the business of the factories was the rule of the Council, the chief member of which was styled Governor or President.

5.4 The power of a "legislative character" granted to the Company in the first Charter was, in Keith's language "appropriate for municipal and commercial corporate bodies".[5] An important proviso appeared in the Charter granted in 1609:

> . . . the said laws, orders, constitutions, ordinances, imprisonments, fines, amerciaments to be reasonable and not contrary or repugnant to the laws, statutes or customs of this our realm.

This was repeated in the subsequent Charters of 1661 and 1668. Under the

1661 Charter the Company also obtained judicial power (albeit with a wider ambit) for the Governors and Councils of its factories "to judge all persons belonging to the said Company or that should live under them in all causes civil or criminal." [emphasis added] The Charter of 1726 brought about a limited separation of the judicial from the executive and the legislative powers by vesting the same in the Mayors' Courts, which it contemplated for Calcutta, Madras and Bombay. Besides, unlike earlier charters it vested legislative powers in the local potentates instead of the London-based Directors.[6] The independence of the judiciary was in fact ensured only when Supreme Courts were established in these towns in 1774, 1801 and 1823 respectively, but notice may now be taken of the experiment made by the British Parliament in enacting the Regulating Act in 1772 to establish the primacy of judicial power.

5.5 In 1765 Clive obtained the grant of Diwani (revenue administration) from the decrepit Mughal Emperor, Shah Alam II, of the subah of Bengal (reconstituted later into three provinces - Bengal, Bihar and Orissa, by the British) and unwittingly set in motion the process which eventually resulted in the acquisition of territorial sovereignty by the British in India. Before that he had established the military supremacy of the British at the battle of Plassey in 1757 which was unfortunately followed by a reign of terror and oppression by British factors and the servants of the Company which, in the words of Macaulay, "resembled the government of evil genii rather than the government of human tyrants".[7] A contemporary account of the administration of the diwani given by an English official is quoted by Archbold in which it was stated that "this fine country which flourished under the most despotic and arbitrary government is verging towards its ruin"[8] and, as Kaye observes, "Company's servants constituted themselves into tribunals. . . had power without responsibility and dealt with judgment without law".[9] It has been suggested by Cowell that the grant of diwani was in fact obtained to

formalise the authority which the English possessed in reality[10] but, as noted above, the mismanagement did not cease and eventually Parliament intervened and passed in 1772 the legislation which came to be known as the Regulating Act (13 Geo.III, c.63).

5.6 The Act had, however, wider import. It constituted the Governor-General's Council for the government of Bengal but it also provided that the Presidents and Councils of Madras and Bombay shall be subordinate to the Governor General and the Council of Bengal. By s.36 the "Supreme" Council was empowered "to make and issue rules, ordinances and regulations for the good and civil government" of the Company's possessions. This legislative power was subjected externally to the control of two masters and intrinsically to the provision that the laws had to be "just and reasonable" and "not repugnant to the laws of the realm". The regulations could not be valid unless they were registered in the Supreme Court, with the consent and approbation of the court. Besides the power of disallowance reserved to the Crown, an appeal could also be made to the King in Council against any regulation after it was approved and registered. It is observed that the establishment of the Supreme Court (contemplated by s.13 of the Act) was motivated by the desire to have "greater intervention by the English Government and Parliament in Indian affairs and greater control over the Company's proceedings".[11] Several factors, such as personal rivalries, local politics and some other circumstances, combined to make it difficult for the Supreme Council and the Supreme Court to work harmoniously under the Act and in 1780 the primacy of judicial power to veto legislation was taken away (vide 21 Geo. III, c.70).[12]

5.7 The 1780 Act, it is stated, settled the difficulties which had arisen under the Regulating Act and the settlement, though "crude and unsatisfactory", was copied in all other Presidencies and endured so long as the Company and the Mughal Empire existed.[13] It is important to note

that, although the jurisdiction of the Supreme Court was excluded in relation to "Regulations" and also "any Act, Order or other Matter done" by the Governor General and the Council, it was also provided that with respect to orders extending to "British subjects, the said court shall retain full jurisdiction as if this Act had not been made". On the other hand, neither the 1772 Act nor the 1780 Act defined precisely the relation in which the Indian territories stood to the British Crown and the term "British subject", as has been observed, was so used in both the Acts as to exclude the indigenous population.[14]

5.8 The Acts thus did not improve the basic position as respects the legislative power that obtained under the Charters: "regulations" repugnant to "laws, statutes and customs of the realm" could be made in so far as they affected the indigenous population. The only check appeared to lie in the power of disallowance (which could not be exercised after two years) in that, although the Act expressly provided that any functionary of the Company's government could be prosecuted (albeit only in England) for "abuse of powers", regulations could be enacted to assume wide powers to preclude the possibility of unpleasant consequences. It is also to be noted that although in 1784 the Crown assumed (vide 24 Geo.III, c.25) power to remove the Governor-General of Bengal, Governors of Madras and Bombay and the members of the several "Councils", they were all servants of the Company and all, except the Governor-General, were appointed by the Company. Thus, it is not possible to suggest that the "collegiate rule" acted as an intrinsic check on the exercise of legislative powers by the Company, to any appreciable extent.[15]

5.9 It is, however, suggested that, notwithstanding its loss of "veto", the Supreme Court "was not in terms nor in effect bound by any Regulations which were not duly registered by it".[16] It is to be noted that the requirement of "registration" continued until 1833 when for the first time it was rendered unnecessary by another Act (3 & 4 Wm.IV, c.85).

It is also to be noted that the 1772 Act required that the judges of the Supreme Court should be practising English lawyers and that they should be appointed by the Crown. Art.4 of the Charter of 1774, under which the first Supreme Court (at Calcutta) was established, invested the judges "with such jurisdiction and authority as our justices of our Court of King's Bench may lawfully exercise within that part of Great Britain called England". It is therefore not possible to agree with Cowell that "the plan of controlling the Company's government by the King's Court entirely failed."[17] However, it is interesting to note that Cowell himself concedes that in due course the Supreme Court acquired "authority and renown" and observes that "English lawyers in India have laid the foundation of a complete system of Anglo-Indian jurisprudence" and that "they have carried out the ultimate end and object of the Regulating Act".

5.10 It is therefore possible to suggest that the "unlimited" government of the East India Company was controlled more effectively by the "King's Courts" than by Parliament. It is observed that the exercise of the legislative power had in fact exceeded the grant and it is to be noted that Parliament could do nothing but express its acquiescence by endorsing in 1797 the legislation after several years of the making of the numerous "Regulations" which were published in 1793 in the shape of a "Revised Code" (see s.8, 37 Geo.III, c.142).[19] Whether the continuing sovereignty of the Mughal Emperor could explain the reticent mood of Parliament is difficult to say but the English Court, in THE INDIAN CHIEF,[20] decided in 1800, did in fact refer to it in the following terms:

> The sovereignty of the Mogul is occasionally brought forward for the purpose of policy, it hardly exists otherwise than as a phantom, it is not applied for actual regulation of our establishments. . .

5.11 Nevertheless, it has to be conceded that the 1797 Act endeavoured to limit to some extent the Company's government by requiring that all future Regulations of the Council (with "grounds" prefixed thereto),

affecting the rights, property and persons of the natives, should be printed with translations in local languages. The Governors and their Councils in Madras and Bombay were, in 1800 and 1807 respectively, invested with similar legislative powers, to be exercised independently.[21] In 1813 it was further provided that all "Regulations" made by the several governments in India should be laid before Parliament and in s.95 it was enacted that the provisions of the Act should not be construed to "prejudice or affect the undoubted sovereignty of the Crown" over the territories.[22] In 1833, when the legislative power was centralised in the Governor-General in Council, it was subjected to a similar limitation which expressly prohibited legislation in derogation of any royal prerogative or the authority of Parliament or of the unwritten laws or constitution of the United Kingdom "whereon may depend in any degree the allegiance of any person to the Crown" or the sovereignty of the Crown.[23] It was also provided that no law could be passed so as to abolish the courts established by royal charters. The overall authority of Parliament to legislate for Indian territories was expressly reserved.

(B) Some emergency provisions

(a) Preventive detention under Imperial Acts

5.12 As we have seen, the Regulating Act for the first time in 1772 endeavoured to impose drastic limitations on the powers of the "unlimited" government of the Company. With the establishment of the Supreme Court in Calcutta in 1774 any person detained there under the orders of the executive could apply to the court for a writ of habeas corpus and the Supreme Court could also veto any "regulation" that the executive might pass for detention without trial, as such law would have been "repugnant to the laws of the realm". Therefore it can be said that the 1780 Act enabled executive as well as legislative measures for "preventive detention" to be taken in relation to the indigenous population by circumscribing the jurisdiction of the Supreme Court. However, the

authorities could take such measures at their own peril in that such laws could be disallowed by the Crown and the authorities could also be prosecuted or even sued for false imprisonment, albeit only in England.

5.13 In 1784, however, Parliament authorised the Governor-General of Bengal and also the "Presidencies" of Madras and Bombay to issue "warrant for securing any person suspected of carrying on illicit correspondence dangerous to the British possessions in India, with any of the Princes, or other persons having authority there, or with the Commanders or Presidents of any factories established in the East Indies by any European power, contrary to the orders of the Company or of the Governor General and Council aforesaid".[24] After arrest witnesses (not the detainee) had to be examined in writing and there should appear "reasonable grounds for the charge" before the person concerned could be committed to "safe custody". Within five days the detainee had to be furnished with the "Accusation" on which he had been committed. The detainee was given the right to submit his "Defence in writing" and also examine witnesses in support of his "defence". The witnesses were required to be examined in the detainee's presence and their depositions had to be taken down in writing. If there still appeared "reasonable grounds for the former proceedings [arrest ?] and for continuing the confinement" the detention could be continued until his trial either in India or in England.

5.14 The provision apparently aimed at ensuring the security of the insecure British possessions in India and on that account it could be termed as an "emergency" measure but its character could hardly be termed as "preventive", <u>simpliciter</u>: the offensive activity was supposed to constitute an offence and a trial therefor was expressly contemplated. It might be recalled that rules of English criminal law were followed at the Supreme Court and, until the passing in 1861 of the Indian High Courts Act, there functioned in each of the Presidencies of Calcutta, Bombay and Madras

a parallel judicial system with Sadar Nizamat Adalat at the apex to administer criminal justice in areas outside the presidency towns with separate procedure prescribed by regulations.[25] It was possibly considered expedient to authorise a uniform procedure in specific terms for the class of cases contemplated by the provision on account of the departure made from rules of English common law in such matters as effecting arrest without stating the reasons and an indefinite pre-trial detention (without bail), and also perhaps for the additional reason that provision for such cases could not be made in the local regulations at a time when British rule was still insecure.[26]

(b) Some provisions under the Regulations

(i) Bengal Regulation 10 of 1804

5.15 The captioned Regulation was made for "declaring the power of the Governor-General in Council to provide for the immediate punishment of certain offences against the state by the sentence of Courts Martial". By s.1 the Governor-General in Council was authorised to "declare and establish Martial Law" and to provide for the "immediate punishment" of persons "who may be taken in arms in open hostility" or "in the actual commission of any overt act of rebellion" or "in the act of aiding or abetting the same". The justification of the measure was also indicated - "for the safety of the British possession and for the security of the lives and property of the inhabitants". The Regulation did not specify the procedure for trial but the sentence which the military court could impose was prescribed - death and also forfeiture of property.

5.16 The important point to be noted about the provision is that, despite the use of the term "Martial Law", it conformed to the common law requirements as indicated below:

(a) the trial of civilians by military courts could be for only the specified acts which corresponded to the common law concept of meeting force with force, and not for any offence;

(b) it was expressly provided that martial law could be established only for the period during which "war continues" and the functioning of the ordinary criminal courts was actually "suspended";

(c) if in any case trial by a military court did not "appear to be indispensably necessary" the offender could be "brought to trial at any time before ordinary courts" which corresponded to the common law concept of "necessity".

Another noteworthy feature of the Regulation was that it did not expressly exclude the jurisdiction of the superior courts, which lends support to our contention that non-justiciability durante bello advocated in some English decisions was not sanctioned by common law.[27]

(ii) Bengal Regulation 3 of 1818

5.17 The Regulation of 1818 could be termed as the true precursor of the modern law of preventive detention in India. In 1897 the Regulation was given the short title "The Bengal State Prisoners Regulation". It has to be noted that similar Regulations were also made in Madras in 1819 (No. 2) and in Bombay in 1827 (No. 25). The Regulation was extended from time to time to other parts of India and by 1929 the provision was in force in almost the whole of British India (see the State Prisoners Acts of 1850 and 1858).[28] At independence it was made applicable to the "Dominion of India"[29] and, rather surprisingly, it was continued in force in Republican India until 1952[30] even after the enactment in 1950 of the Preventive Detention Act. The point which deserves special notice is that sub-s.(3) of s.491 of the Code of Criminal Procedure 1898 made inapplicable the provision of that section (concerning writs in the nature of habeas corpus) to detentions under the Regulation and the allied Act.

5.18 The Regulation was enacted as a permanent measure and the object of the law was stated in considerable detail in the elaborate preamble, the relevant portion of which is quoted below:

> whereas reasons of state, embracing the due maintenance of alliances formed by the British government with foreign powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection and the security of the British dominions from foreign hostility and from internal commotion render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute judicial proceedings, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper; and whereas it is fit that. . . the determination to be taken should proceed immediately of the Governor General in Council; and whereas the ends of justice require that. . . the grounds of such determination should from time to time come under revision. . . [emphasis added]

The relevant parts of s.2 which contained the operative provision may also be quoted:

> When the reasons stated in the preamble of this Regulation may seem to the Governor General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature a warrant of commitment under the authority of the Governor General in Council, and under the hand of the Chief Secretary , . . shall be issued to the officer in whose custody such person is to be placed. [emphasis added]

5.19 The form of the "warrant" was also set out in the section and it was provided that "the warrant of commitment shall be sufficient authority for the detention of any state prisoner in any fortress, jail or other place within the territories subject to the Presidency. . ." In ss.3 and 4 provision was made for the submission of periodic reports to the Governor General in Council and for periodic visits by a Judge or a Magistrate to the prisoner to ascertain matters concerning the "treatment" of the prisoner and his "conduct", "health" and "comfort". A report was also contemplated, vide s.6, about the "degree of confinement" appropriate for the prisoner on grounds of health and about the "allowance" fixed for his own and his family's support, according to their rank in life. It is interesting to note that, although the preamble expressly contemplated a periodic "revision" of the detention, the only substantive provision dealing with this aspect was to be found in s.5, which is quoted in extenso:

> The Officer in whose custody any state prisoner may be placed is to forward, with such observations as may appear necessary, every representation which such State prisoner may from time to time be desirous of submitting to the Governor General in Council.

5.20 It is idle to speculate about the nature and effect of the "representation" but the provision, ex facie, did not partake of the character of any form of "safeguard" against abuse of power. There was no provision for furnishing the prisoner with the "grounds" of his detention. The duration of the detention was not limited but s.3 contemplated that the "order of detention" could be "modified" by the Governor General in Council on a consideration of the report submitted under the section on the "conduct", "health" and "comfort" of the prisoner. It is possible that the said "representation" could also be made on these matters and not on the "merits" of the detention. The Regulation did not expressly bar the jurisdiction of courts but such provision was perhaps unnecessary as the Governor-General and his Council were exempted by the 1780 Act from the jurisdiction of the Supreme Court in so far as those persons who were not British subjects were concerned. Although the provision was patently repugnant to common law ("laws of the realm"), an implied authority to enact it came from Parliament itself to buttress the powers of the "unlimited" government of the East India Company. As we shall see in AMEER KHAN[31], no prisoner could successfully prosecute application for habeas corpus against his detention under the Regulation.

(2) The "Constitution" Acts and Direct Government

(A) Constitutional limitations

5.21 The Government of India Act 1858 provided that the government of the territories "in the possession or under the government of the East India Company and all powers in relation to government vested in or exercised by the said company in trust for Her Majesty shall cease to be vested in or exercised by the said company" and that "India shall be governed by and in the name of Her Majesty". Subject to the provisions

of the Act, the existing law ("all Acts and Provisions now in force") was to continue by virtue of s.LXIV of the Act. The Act created new offices and institutions and also provided for new methods of appointment of the important functionaries but did not expressly deal with the extent, scope and authority of the legislative power. However, it is to be noted that, after the first experiment to control effectively the "unlimited" government of the Company in 1853, the legislative power of the Company was sought to be regulated by the British Parliament by another method. The 1853 Act (16 & 17 Vict., c.95) had enlarged the Council by adding "Legislative Members" of whom two were English judges of the Supreme Court at Calcutta. There were also some other changes as a result of which the legislative business in the Council was conducted in public instead of in secret.[32] It was possibly considered too early in 1858 to introduce any further change in this system.

5.22 That the assumption of direct government by the Crown came as a result of the Sepoy Mutiny of 1857 is an established fact of history. It is also possible to suggest that the subsequent constitutional development in British India took place as a response to the growth of the freedom movement spearheaded by the Indian National Congress, which was founded in 1883. The Government of India Act 1915 (amended in 1916 and 1919) established a proper framework of a Constitution for the territory.[33] The relevant provisions of the first Constitution deserve to be noticed although it has to be conceded that the Indian Councils Act 1861 provided the stepping stone for the foundation of parliamentary democracy and constitutional government in India.[34] In this connection it is important to note that, although the 1861 Act provided for the non-official members (comprising half the total membership of the Council) to be nominated by the Governor-General, the majority of such members, right from the start, were Indians.[35] In this respect the position in India provided a strong contrast with that of Africa.[36]

5.23 The 1915-19 Constitution Act envisaged a federal structure and it dismantled the old structure by repealing the earlier enactments including the 1861 Act, to make a clean start.[37] The "power" of the "Indian Legislature" and that of the "Local Legislatures" was defined in ss.65 and 80A respectively.[38] The Indian legislature could repeal or alter "any laws" for the time being in force and could make laws for "all persons, for all courts and for all places and things within British India". It could not make any law "repealing or affecting" (without the express authority of Parliament) any Act of Parliament passed after 1860 and extended to India and any law "affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom . . . whereon may depend in any degree the allegiance of any person to the Crown. . . or affecting the sovereignty or dominion of the Crown over any part of British India".[39] The local legislature could make laws "for the peace and good government of the territories for the time being constituting that province" but it could not make any law "affecting any Act of Parliament".

5.24 It has also to be noted that although the provisions of the Colonial Laws Validity Act 1865 did not apply to India, s.84 of the 1915-19 Act made provisions for "removal of doubts as to validity of certain Indian laws". In sub-s.(1) it was, inter alia, provided that any law made by any authority in British India should not be invalid merely because it affected the prerogative of the Crown but such law, if repugnant to the instant Act or to any other Act of Parliament, should be void to the extent of that repugnancy. The scope of judicial review was curtailed by sub-s.(2) by providing that the validity of any enactment should not be questioned for transgressing legislative competence as respects the allocated fields.

5.25 In Part IX (ss.101-114), captioned "The Indian High Courts", provision was made for the manning of the superior courts by competent

persons, and to secure their tenure of office to ensure the independence of the judiciary. The powers and jurisdiction of the High Courts as vested in them by respective "letters patent" were confirmed. Notice may, however, be taken of two important provisions. By s.110 the Governor-General, the Governors and the members of all Councils were exempted from the "original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity". By s.111 a written order by the Governor General was constituted "full justification" for any act done in relation to any person other than "any European British subject". This provision did not possibly extend protection to the acts of the subordinate functionaries in that s.124(1) provided that if "any person holding office under the Crown" oppressed any British subject he should be guilty of a misdemeanour.

5.26 The last-mentioned provision reflected an important aspect of the policy of "direct" government by the Crown, but a search for a "Bill of Rights" for an effective refutation of the"unlimited" government of the East India Company was bound to fail. The new "Constitution" also, like the early Charters, merely entrenched the protections afforded to a racial minority - "European British Subject". It may be noted in this connection that under s.65(3) the Indian legislature could not enact any law empowering any court other than a High Court to impose the death penalty on such subjects.

5.27 The next important landmark in the constitutional development was to be seen in the Government of India Act 1935. It was preceded by the appointment in 1927 of the Simon Commission and in 1930, 1931 and 1932 of the renowned "Round Table Conferences". The demand for a "Bill of Rights" was voiced by the Indian National Congress as early as 1918 and was later reiterated in 1928 in the report of the All-Parties Conference in the following terms:[40]

> our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances.

The demand was, however, rejected by the Simon Commission. It was observed that, "Abstract declarations are useless unless there exist the will and means to make them effective".[41] Later, the Joint Parliamentary Committee added their own observations stating that, "its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts".[42]

5.28 The main achievement of the 1935 Act was to complete the process of setting up a federal structure for the government which was started under the 1915-19 Act. Unfortunately a full-fledged federation never came into being before independence as the participation of the native states envisaged under the Act did not materialise. This was a significant fact as the native states between them constituted roughly one half of the area and one third of the population of the geographical territory of pre-independence India.[43] The Federal Legislature contemplated under the 1935 Act could make laws on subjects enumerated in List I which included an entry on "preventive detention". For the first time provision was made for a "Federal Court" (vide Chapter I of Part IX) which had the special feature of an advisory jurisdiction on a "question of law" (s.213). The existing powers and jurisdiction of the several High Courts were continued but the Federal Court in its original jurisdiction could not, unlike the High Courts, issue writs of habeas corpus as its original jurisdiction was limited to pronouncing a "declaratory judgment" (s.204(2)).

5.29 Although the demand for a "Bill of Rights" was rejected, notice may be taken of an important provision made in Chapter III ("with respect to discrimination etc.") in Part V ("Legislative Powers"). Section 111 provided, albeit on a reciprocal basis, for British subjects "domiciled in the United Kingdom" to be exempted from any law that imposed restrictions

on, among others, entry, travel and residence in British India on grounds of birth, race, descent, language, religion etc. A general provision against discrimination in matters of holding property and carrying on any occupation, trade, business or profession in British India by British subjects domiciled in India was however to be found in s.298.

5.30 One of the noteworthy features of the 1935 Act was the provision made in s.102 for the declaration by the Governor General in his discretion, by a "Proclamation", that a "grave emergency" existed, whereby the "security of India" was threatened "whether by war or by internal disturbance" or when he was satisfied that there was "imminent danger" thereof. It had to be communicated "forthwith" to the Secretary of State, who was required to lay the same before each House of Parliament and, unless "approved" by the latter, it ceased to operate at the expiration of six months. The provision was amended in 1946[44] so that the Federal legislature could make law not only on subjects within the exclusive competence of the Provincial legislature but also in respect of a matter not enumerated in any list. The previous sanction of the Governor-General was required for introducing any Bill or amendment for making provision for the emergency. The scope of judicial review was not, whether on grounds of emergency or any other grounds (as had been done in the past), tampered with in any manner.[45]

5.31 Thus we see that the constitutional limitations increased progressively, with the result that the exercise of arbitrary powers by the executive became more and more difficult. Although the legislature continued to function under the overall subordination of the Crown and the Imperial Parliament until independence, the early participation, and rapid increase in numerical strength, of Indians in the legislative process under "direct government" must have acted, we suggest, as an effective check on the exercise of legislative power as well. The continued

application of the rules of common law and the early constitutional prohibition against their abrogation must also be regarded as an important constitutional limitation on both the executive and the legislature on the one hand and, on the other hand, as buttressing the independence of the judiciary and the right of judicial review.

(B) Some emergency provisions

(a) The Anarchical and Revolutionary Crimes Act 1919

5.32 The "Rowlatt Act", as the captioned enactment came to be known, had earned great notoriety.[46] A Committee was appointed by the Governor-General in December 1917, with Sir Sidney Rowlatt (a judge of the King's Bench Division) as Chairman, to investigate and report on the nature and extent of criminal conspiracies connected with a revolutionary movement and to advise the government on suitable legislation to deal with the problem. The Committee recommended that the proposed legislative measures should be of two types, preventive as well as punitive, that the latter itself should be of two degrees varying in stringency and that the milder measures should be taken first. The Committee stressed the necessity for adequate safeguards to be provided in the proposed legislation, while taking note of the existing provisions of the Bengal Regulation of 1818 and also of the powers available under the temporary measures enacted in the Defence of India Act 1915 and rules made thereunder. Following the report a Bill was drafted but the Select Committee of the Indian legislature found itself divided on the measures suggested; all the four Indian members recorded dissents. The majority refuted the suggestion that the powers might be abused to "suppress legitimate political activity" and asserted that the changes proposed by them would spell out the object and scope of the Bill, namely, to cope with anarchical and revolutionary crime.[47] It is interesting, however, to note that several, though not all, points made in the dissents were accepted and incorporated in the Bill. The government rejected the suggestion that legal representation should be

allowed or that rules of evidence should be followed or that the inquiry contemplated in the Bill should not invariably be in camera. It also rejected the proposal that materials on which the government intended to act should first be placed before a judicial officer not below the rank of a Sessions Judge.[48]

5.33 In the Act the preamble stressed the necessity of "supplementing" ordinary criminal law and of conferring "emergency powers" to deal with "anarchical and revolutionary movements".[49] The Act was to continue in force for three years from the date of termination of the war. The Act contemplated different types of measures which were embodied in Parts I, II and III. Part IV provided that provisions of Part II could be applied to any person in respect of whom an order under rule 3 of the Defence of India (Consolidation) Rules 1915 was in force immediately before the expiry of the Defence of India (Criminal Law Amendment) Act 1915. Part V of the Act contained certain general provisions, of which s.42 deserves notice in that it precluded judicial review in the following terms:

> No order under this Act shall be called in question in any Court, and no suit or prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

By the underlined expression a purported exercise of power was sought to be protected so that no challenge could be grounded even on malice in fact.

5.34 Under s.3 the Governor-General in Council could make a "Declaration" to bring into force the provisions of Part I if it was "satisfied" that anarchical or revolutionary movements were being "promoted" in the whole or any part of British India and that "scheduled offences" were prevalent to such an extent that it was "expedient in the interests of the public safety" to provide for the "speedy trials" of such offences. The provisions of the Criminal Procedure Code, in so far as they were not modified by the Act, could apply to such trials but the right of appeal

and of bail and habeas corpus under the Code were expressly excluded and it was also provided that the trial could be held in camera. A special court constituted with three of the judges of the High Court nominated by the Chief Justice was contemplated for trial of offences under the Act. In certain matters the court could follow the rules of evidence specified in the Act in derogation of the provisions of the Indian Evidence Act.

5.35 Under s.21 the Governor-General in Council could make a similar "Declaration" to bring into operation the provisions of Part II, if it was "satisfied" that there was a likelihood of the commission of scheduled offences on account of anarchical or revolutionary movements. In s.22 various restrictions to which a person could be subjected were mentioned, but it was provided that, before an order was passed, all materials appertaining thereto had to be placed before a judicial officer (qualified to be a High Court judge) and his opinion taken. An "Investigating Authority" was contemplated under s.30, to be constituted with two judicial officers (of the rank of District and Sessions Judge) and one person not in the service of the Crown in India. The order under s.22 could be passed if the Local Government had "reasonable grounds for believing" that any person was concerned in the offensive movement and could be effective for one month unless extended for a further period up to one year. Before any extension could be made the case had to be referred to the Investigating Authority. The latter held an "inquiry in camera" into the "grounds", although s.23, which contemplated service of the restriction order on the person concerned, did not in terms also contemplate communication of the "grounds" on which the order was passed.

5.36 The provisions of Part III dealt with preventive detention and deserve greater attention. Under s.33 also a "Declaration" was contemplated, as in Parts I and II, but the situation in this case had to be such "as to endanger the public safety". In s.34 the requirement of s.22 was reproduced and it was inter alia, provided that the Local Government "may

further by order in writing direct" (a) arrest without warrant and (b) confinement "in such place and under such conditions and restrictions as it may specify". It was, however, provided that confinement should not be in "that part of a prison or other place which was used for confinement of convicted prisoners". Any arrest made pursuant to such an order had to be reported "forthwith" and, "pending receipt of the orders of the Local Government", the arrested person could be detained up to seven days and, if the Local Government so directed, up to fifteen days. The provision of inquiry contemplated in Part II in case of a restriction order was made applicable to detention orders for which also the same period of one year was fixed, albeit referentially. It has to be noted that in either case in the final order the "conclusions of the investigating authority" had to be recited in the final order.

5.37 Besides the fact the "inquiry" contemplated under the Act was to be in camera and that there was no obligation to furnish the "grounds" in either case, the scope of the inquiry was strictly limited to find whether "the person whose case is under investigation is or has been actively concerned in any movement of the nature referred to in s.21". Legal representation at the inquiry was expressly barred and the investigating authority was similarly debarred from disclosing any fact which might endanger public safety or the safety of any individual. It was provided that the inquiry should be conducted in a manner "best suited to elicit the facts of the case" and that the Authority "shall not be bound to observe the rule of the law of evidence". There was no right of "representation" to either the Local Government or to the Authority but the latter was required, "unless for reasons to be recorded in writing it deems it unnecessary so to do", to secure the attendance of any person or the production of any document or thing requested by the person concerned. The Act also provided for the appointment of "Visiting Committees to report upon the welfare and treatment" of the persons concerned in either case.

(b) Some provisions of the 1939 Defence of India Act and Rules

5.38 We have already noted that the "Rowlatt Act" was enacted during the currency of the 1915 Defence of India Act and Rules, and the Committee presided over by Sir Sidney Rowlatt had observed that adequate safeguards should be incorporated in the Act: however, the provision of preventive detention did not give effect to the Committee's recommendations. The measures enacted during the Second World War gave rise to a spate of litigation and we shall have occasion to examine a few leading decisions. It is necessary therefore to examine the relevant provisions. It may be recalled in this connection that the 1935 Act specifically provided for the declaration of emergency and for making laws for "preventive detention". On the other hand it is to be noted that the freedom movement in India gained ascendancy during the Second World War and the Congress Party refused to participate in the war effort.[50] It has been observed that the power of preventive detention was extensively used and in 1940 about 25,000 people were taken into custody in connection with the "civil disobedience movement". In 1942, in early August, within a space of three or four days, about 26,000 persons were rounded up, including top-ranking leaders of the Congress Party.[51]

5.39 The sum total of the main provisions and their operation has been succinctly stated in the following words:[52]

> Both the Central and the Provincial Governments were given the power to arrest and detain any person if satisfied that it was necessary to do so in order to prevent the said person from acting "in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order in the efficient prosecution of the war"; and having vested with these powers both the Central and State [sic] Governments were given the right to delegate their authority to "any officer or subordinate". In practice the power was usually delegated to district magistrates and in some cases to sub-divisional magistrates but in theory it could have been delegated even to a police constable. No reasons had to be given for the detention. There was no right to make a representation and no one (except the authorities) knew or could be told where the person was detained. No one could see him and he was not allowed to have legal advice.

5.40 The Defence of India Act 1939 carried a recital that the Governor-General had made a declaration of emergency under s.102 (of 1935 Constitution) and by s.2(1) it empowered the Central Government to make rules for various purposes which were illustrated in sub-s.(2), of which para (x) is relevant for our purpose and is quoted below:

> the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India. . . [emphasis added]

Sub-s.(1) stated that the making of the rules should appear "necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community". Another important provision of the Act was contained in s.16(1) which is also quoted below:

> No order made in the exercise of any power conferred by or under this Act shall be called in question in any court.

5.41 Notice may now be taken of the relevant rules framed under the Act. Under clause (b) of r.26(1) either the Central or a Provincial Government could pass an order for the detention of any person if "satisfied" that it was necessary to do so "with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order. . . or the efficient prosecution of war." The grounds on which a detention order could be passed generally corresponded to the rule-making power given under s.2(1) of the Act but the rule suffered from one apparent infirmity. It did not contain the requirement of "reasonable suspicion" of para (x) of s.2(2) and the vires of the rule was therefore open to challenge. However, following the decision in KESHAV TALPADE v EMPEROR[53] a new clause was substituted for para (x) of s.2(2) by Ordinance No. 14 of 1943.

5.42 The other clauses of r.26 (1) described various other types of

restraints to which a person might be subjected by an order passed under the rule and further provisions in respect of those restraints were made in sub-r.(3) and (4). The provisions made in sub-rr.(5A) to (5C) were as respects detentions. It was inter alia, provided that a person could be detained "in such place and under such conditions as to maintenance, discipline and the punishment of offences and breach of discipline" as the appropriate government might "from time to time determine". The rule apparently contemplated a general order and therefore any specific order passed in any particular in breach of the rule could possibly be challenged as ultra vires notwithstanding the bar of s.16(1) in that such an order could not be an order made "in exercise of any power conferred by or under the Act". It was therefore open, we submit, to challenge any order passed in any particular case denying legal advice which could not be in any way related to either "maintenance" or "discipline" or "punishment of offences for breach of discipline".

5.43 We may now quote the material parts of r.129(1):

> Any police officer or any other officer of government empowered in this behalf by general or special order of the. . . government. . . may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or being about to act -
> (a) with intent to assist any State at war with His Majesty, or in a manner prejudicial to the public safety or to the efficient prosecution of war;

Clauses (b) and (c) were concerned respectively with prejudicial activities such as were calculated to assist or promote rebellion and those that were connected with the safety of any place, area, industry and machinery. The fact of arrest had to be communicated "forthwith" to the government and the arrested person could be committed to custody "by an order in writing", and detained up to fifteen days "pending the receipt" of the orders of the government, but in no case could the detention under the rule exceed two months. The indefinite detention contemplated under r.26(1)

without the requirement of "reasonable suspicion" therefore stood in a strange contrast to this provision, by which the government limited its power of detention to two months despite the fact that the arrest was made on "reasonable suspicion". Sub-r.(4) of r.129, however, contemplated the government passing, on the receipt of the report of the arrest "a final order as to detention" etc. "in addition to" an order extending the duration of temporary custody up to two months. It is therefore possible to suggest that the courts could have insisted on the government satisfying them as to the reasonableness of suspicion in the case of a detention order made under r.26(1), by reading the same subject to r.129(4). It has also to be noted in this connection that s.3 of the 1943 Ordinance, which had nullified the effect of the decision in KESHAVE TALPADE (supra), did not deal with this issue.[54]

5.44 The measures enacted in British India during the Second World War thus invested the executive with draconian powers and were devoid of any patent safeguard, unlike their English counterpart.[56] There was no right of representation to any authority at any stage against any order made, whether under r.26 or under r.129. However, the Act and the rules did not expressly tamper with the right to habeas corpus. We proceed therefore to examine now the law relating to the writ of habeas corpus in the Indian subcontinent.

## II. Habeas Corpus in the Indian Sub-Continent

### (1) The pre-independence position in relation to British India

#### (A) First phase

5.45 The right to the writ of habeas corpus evidently depended upon the fact of introduction of English law into India. The position in this respect was not as simple as that obtaining in Commonwealth Africa:[1] there was no wholesale introduction of English common and statute law in India on and from any particular date. That apart, the right to the writ at common law was, as we have seen, directly related to the command of the

sovereign.[2] In India even until the year 1800 the court was reluctant to hold categorically in THE INDIAN CHIEF[3] that sovereignty de jure vested in the British Crown. The reluctance of the English courts to determine the question of sovereignty continued for a long time. In 1837 the Privy Council in THE MAYOR OF THE CITY OF LYONS v EAST INDIA COMPANY[4] observed that it was difficult to trace "at what precise time and by what precise process they [the Company] exchanged the character of subjects for that of sovereign. . . or acquired with the help of the Crown, and for the Crown, the right of sovereignty." The Privy Council again in 1863, was content to hold in ADVOCATE GENERAL, BENGAL v RANEE SURNOMOYEE DOSEE,[5] as follows:

> European Christians. . . have usually been allowed by indulgence or weakness of the potentates of those countries to retain their own laws, and their factories have for many purposes been treated as part of the territory of the sovereign from whose dominions they came.

This was indeed a mere re-statement in a negative form of the ancient rule laid down in 1608 in the CALVIN case[6] that the Englishman carried his law with him when he entered a territory where no civilised law was practised and yet India had a rich heritage of a highly developed legal system.

5.46 We have seen that the very fact of territorial acquisitions in Calcutta and Madras did not vest in the British Crown sovereignty over those places[7] but it can be said that with the establishment of the Supreme Court in 1774 in Calcutta and later in Madras and Bombay, these courts first acquired de jure authority (under respective Charters) to issue the writ possibly in respect of only the British European subjects resident there, for the status of the other inhabitants of those towns remained uncertain for a long time.[8] It is, however, interesting to note that the Supreme Court at Calcutta (possibly the courts at Madras and Bombay also) started issuing writs of habeas corpus from the very beginning even to places outside the town and that too to release persons who were not "British subjects".[9] The 1780 Act confirmed the correct position in law

in so far as the writ was concerned by stating that the provisions of the Act did not affect the jurisdiction which the court possessed in relation to "British subjects".[10]

5.47 In re JUSTICES OF THE SUPREME COURT,[11] the Privy Council was directly confronted in 1829 with the question of the legality of the writs issued by the Supreme Court in Bombay, particularly in two cases concerning "natives". Although no reasons were recorded, the opinion that the Board tendered indicated that the writs were improperly issued. The case arose out of a petition to Her Majesty in Council by a judge of the Supreme Court impugning the conduct of the Governor and his Council for addressing a private communication to the judges challenging their authority to issue the writs. The main arguments of the parties deserve to be noticed. On behalf of the Justices it was contended as follows:

> It appears. . . that at that early period the reform of Indian courts and the superintendence of English law over the settlement were considered synonymous; and one great object contemplated by the Company itself was the introduction of the writ of habeas corpus authorising any man deprived of his personal freedom to compel the other party who imprisoned him to show that he did so by authority of law.

It was also contended that the Letter Missive by the Governor was tantamount to repeal of the Letters Patent by the King establishing the Supreme Court. On behalf of the Company it was contended in reply that although English law prevailed for at least a century in the presidency towns it did not apply to all persons. There also resided in those towns "persons not subject to the King's courts [who were] living under their own laws" and that they might be "considered for many purposes as a separate nation under a different government."

5.48 The submission made in the above case on behalf of the Company, which apparently prevailed with the Privy Council, indeed embodied the correct legal and factual position, albeit in a general fashion only. Unfortunately there is lack of unanimity as respects the date of introduction of English law as some authorities claim that such introduction took place

by the first Charter of 1600,[12] others refer to the Charter of 1661[13] and some others put the date at 1726, which is generally accepted now as correct. In 1927, Sir George Rankin, speaking judicially, observed that, "the English common law, and statute law as it existed in the year 1726 was applied in Calcutta not merely to Europeans in Calcutta but to all persons within the limits of the original Jurisdiction of this Court".[14] The position of Calcutta in relation to habeas corpus was more explicitly stated in 1842 in the case of the MAHARANEE OF LAHORE:[15]

> . . . English law as to personal liberty does prevail in Calcutta as to all its inhabitants. . . beyond the local limits of Calcutta, the English law on this subject is the personal law of a class, viz., British subjects which they carry with them. The common law of England, which gives the right to this writ, has been introduced in Calcutta with the general body of the English law.

5.49 A general account of the process of reception is given by Sir Frederick Pollock, who labels his own account as a "summary description" of the process which according to him was - "judicial application confirmed and extended by legislation".[16] This corresponds with the account given by Sir Whitley Stokes as respects reception of English statutes.[17] In 1874 he had observed that the judges of the Supreme Courts and High Courts "assumed the function of declaring what statutes shall be deemed in force within local limits of the ordinary original jurisdiction" of the courts, as respects statutes enacted in England up to 1726; later statutes were extended either expressly or by necessary implication. There was no dispute that the English Habeas Corpus Act of 1679 applied in the Presidency towns but he indicated the uncertain position of the latter Act of 1816 by pointing to an observation of Phear, J., expressing a negative opinion, in R v VAUGHAN.[18]

5.50 The twofold uncertainty could be said to have continued at least until 1858. Although the reservation in favour of the Crown in respect of sovereignty over the territorial acquisitions of the Company was made in the early Charter of 1698 in general terms and then more explicitly in the

Acts of 1813 (53 Geo. III, c.155) and 1833 (3 & 4 Wm.IV, c.85), it was only in the 1858 Act that provision was made for direct government thereby extending unequivocally the status of "British subjects" to all inhabitants of British India. It is also important to note that Queen Victoria had made a "Proclamation" in 1858 assuring the inhabitants of India of the "equal and impartial protection of law".[19] In this connection reference may be made to the fact that the important limitation which was imposed on the legislative competence of the Company's government in the 1833 Act (vide s.43), evidently for the protection of the British European subjects, was not only continued after assumption of direct government but was retained and reproduced verbatim first in s.22 of the 1861 Act (Indian Councils Act) and then in s.65 of the 1915-19 Constitution Act. It has to be noted that s.43 of the 1833 Act empowered the newly-ordained central legislature to make laws for "all persons, whether British or native" and therefore it was perhaps considered necessary to guard against any probable attempt that might be made by the new legislature to deprive the Englishmen in India of their ancient liberties. Since the provision principally aimed at unification of laws, the Indian inhabitants also became the beneficiaries of the protection. On this view it can be contended that the application of English law as to personal liberty was impliedly extended to the Indian inhabitants in 1833 but there can be no doubt that when the Indians acquired the status of "British subjects" in 1858 there was an end to the uncertainty that existed in this respect. The enactment of s.22 in the 1861 Act merely confirmed this position.

5.51 Thus, we submit that in 1858, the "phantom" of the sovereignty of the Mughal having disappeared for good, the impediment (according to the cases discussed above) to the application of English law generally to the Indian inhabitants ceased to exist and by virtue of the general application of English common and statute law as to personal liberty, and also of the acquisition of sovereignty by the British Crown, the Supreme Courts in India

acquired de jure jurisdiction to issue the writ of habeas corpus on the application of Indian inhabitants even beyond the territorial limits of the Presidency towns - a power which, as we have seen, the Supreme Courts at Calcutta, Madras and Bombay had de facto exercised long before 1858.

5.52 No doubt, the Company's courts, the Sadr Nizamat and Sadr Diwany Adalats, were not abolished until 1862 (see s.8 of the Indian High Courts Act,[20] which also abolished the Supreme Courts and created "High Courts" to combine in one superior court the function of the two superior tribunals functioning in parallel until then). However, it must be noted that s.11 of the Act continued the application expressly of "all provisions then in force in India" in respect of the "Supreme Courts" to the newly-established "High Courts" and by s.16 the same provision was also made applicable to any High Court that might be subsequently set up under the Act, subject to the provisions of the respective "Letters Patent". In 1865 clause 45 of the Letters Patent of the Calcutta High Court provided that the provisions of the 1774 Charter which were not "inconsistent" should not be "void". As the Letters Patent contained no provision on habeas corpus, the power and jurisdiction under the 1774 Charter in respect of the writ therefore continued.

5.53 In the first Criminal Procedure Code enacted by the Indian legislature and brought into force in 1862 there were no provisions concerning habeas corpus. In the 1872 Code, s.81 did not in terms name the writ but provided that any European British subject detained in custody, whether within or without the High Court's original jurisdiction, could apply for an order directing the applicant to be produced before the High Court. The controversial provision of s.82 of the 1872 Code may now be quoted in extenso:

> Neither the High Court nor any Judge of such High Courts shall issue any writ of habeas corpus, mainprise, de homine replegiando, nor any other writ of the like nature beyond the Presidency Towns.

5.54 In GIRINDRANATH v BIRENDRANATH, Sir George Rankin, Chief Justice of the Calcutta High Court held that the prohibition contained in s.82 was valid, absolute and unqualified.[21] His Lordship appeared to suggest that the provisions of ss.81 and 82 were the legislative response to the decision of Norman, J., of the same court, in 1870, in AMEER KHAN,[22] that the court could issue habeas corpus outside its original jurisdiction on the application of a non-European British subject. Although his Lordship did not categorically disapprove of the decision of Norman, J., he referred to two decisions[23] in which the reliance on Art.4 of the 1774 Charter[24] by Norman, J., for the purpose of the decision, was criticised. The decision of Rankin, C.J., was approved by the Privy Council in the case of SHIBNATH BANERJI,[25] but their Lordships did not express any opinion about the correctness of the decision of Norman, J. The final position that emerges therefore is that between 1858 and 1872 it could not be disputed that all inhabitants of India equally enjoyed the right to the writ.

(B) Second phase

(a) The extinction of the common law writ

5.55 We may now take note of s.148 of the High Courts Criminal Procedure Act, 1875, which gave rise to a spate of litigation culminating in the decisions of the Privy Council in the pre-independence era (in 1939) and of the Supreme Court in the Republican era (in 1964 and 1976) that in India the common law right to the writ no longer exists.[26] Under Art.141 of the Republican Constitution the law declared by the Supreme Court is binding on all courts in India but what we propose to suggest is that there is scope for reconsideration of the position. It is to be noted that s.148 of the 1875 Act is the precursor of s.491 of the Criminal Procedure Code of 1898, which is still in force in Pakistan and Bangladesh and was in force in India until 1973. The section, in its material parts, ran as follows:

> Any of the High Courts of Judicature at Fort William, Madras and Bombay may, whenever it thinks fit, direct:
>
> (a) That a prisoner, legally committed and within the local limits of its Ordinary Original Criminal Jurisdiction, be brought before it to be bailed;
> (b) that a person within such limits be brought before the court to be dealt with according to law;
> (c) that a person illegally or improperly detained in a public or private custody within such limits be set at liberty;
> (d). . . (e). . . (f) . . . (g) . . .;
>
> and neither the High Court nor any Judge thereof shall hereafter issue any writ of Habeas Corpus for any of the above purposes.
>
> (emphasis added)

The section also empowered the said High Courts to frame rules to regulate procedure in the matter and it was further provided that the section did not apply to persons detained under Bengal Regulation 3 of 1818 and other allied Regulations of Madras and Bombay and the Acts of 1850 and 1858.

5.56 In the Criminal Procedure Codes re-enacted in 1882 and 1898 a similar provision was made in s.491, of which clauses (a) and (b) were almost verbatim reproductions of clauses (b) and (c) respectively of s.148 of the 1875 Act. The new Codes did not, however, contain any prohibition of the nature embodied in the last part of s.148 of the 1875 Act but, according to s.2 of the 1882 Code, the repeal of the 1875 Act did not result in the restoration of any "jurisdiction or form of procedure not existing or followed" on the date of re-enactment of the new Code. In 1923 the provision was materially amended in respect of two matters. The power was now conferred on "Any High Court", which expression replaced in the provision the three named High Courts and, in clause (a) (corresponding to clause (b) of s.148), the expression "appellate criminal jurisdiction" was substituted for the expression "ordinary civil jurisdiction" that occurred in the clause in the 1898 Code. It is also to be noted that the chapter containing s.491 was headed "Directions of the nature of a habeas corpus".

5.57 The important point to be considered is whether or not s.82 of the 1872 Code and s.148 of the 1875 Act were ultra vires, although a

full bench of the Madras High Court in 1922 and the Bombay High Court also in 1926 held that, irrespective of the provisions of s.491 of the Code, the courts had jurisdiction to issue writs of habeas corpus under common law.[27] Later, in 1939, another full bench of the Madras High Court held, in DISTRICT MAGISTRATE v M. MAPPILLAI,[28] that the earlier decision was not good law as the attention of the court in that case was not drawn to the 1872 Code and the subsequent enactments.[29] However, before their Lordships the vires of the 1875 Act was specifically challenged, albeit unsuccessfully. The decision was upheld by the Privy Council in MATTHEN v DISTRICT MAGISTRATE.[30] The challenge to the vires was grounded on one of the limitations prescribed by s.22 of the Indian Councils Act 1861 as to enacting any law in derogation of the "unwritten laws or Constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown". The Madras High Court held that the abolition of the right to the writ was not such a matter which affected allegiance.[31]

5.58 A passage from the judgment of the Privy Council in BUGGA v EMPEROR[32] was quoted in the above decision. In the case before the Privy Council an Ordinance which was enacted on the occasion of promulgation of martial law in the Punjab was challenged as ultra vires s.65(2) of the 1915-19 Constitution[33] on the grounds that it deprived the British subjects in India of the right to be tried in the ordinary course by the established courts of law and thereby it "affected the unwritten laws or constitution whereon the allegiance" of the subjects to the Crown depended. The Privy Council held that the ordinary Indian courts were themselves of statutory origin and as such there was no question of an unwritten law or constitution being affected. Their Lordships, however, proceeded further to observe:[34]

> The sub-section does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the Crown as by a transfer or qualification of the allegiance or a modification of the obligations thereby imposed.

5.59 In their decision the Privy Council quoted with approval the opinion of Phear, J., when interpreting the parallel provisions of s.43 of the 1833 Act.[35] In AMEER KHAN, Phear, J., rejected the argument that Bengal Regulation 3 of 1818 was ultra vires because it affected the Queen's prerogative.[36] However, his Lordship proceeded to construe the limitation prescribed by s.43 and observed as follows (also quoted by the Privy Council):[37]

> . . . in my judgment the words "whereon may depend etc." do not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found allegiance of the subject.

Phear, J., did not say anything about the right to habeas corpus but Markby, J., observed that "It is not in any way necessary in this case to consider whether an Act which affected the right of a party to a writ of habeas corpus would or would not be valid. I express no opinion that it would not be so. . ."[38]

5.60 The Madras High Court also held that the decision in the ELEKO case[39] was inapplicable because the common law right to the writ still existed there. It was also held that the penultimate proviso to s.43 of the Indian Councils Act did not restrict the power of the Indian legislature so as to affect its right to abolish the common law writ and referred to the decision of the Privy Council in EMPRESS v BURAH.[40] It has to be noted that the Privy Council in that case had merely held that the Act challenged there was a piece of conditional legislation and that it was not void on the ground that it purported to delegate legislative power. It was also held as follows:[41]

> The Indian legislature has powers expressly limited by the Acts of Imperial Parliament which created it. . . but when acting within these limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question. . . [emphasis added]

5.61 The Madras High Court also referred to the decision of Rankin, C. J. in GIRINDRA NATH (supra).[42] It is true that Rankin, C.J., squarely faced and categorically decided, in the affirmative, the question whether the Indian legislature could abolish the common law writ of habeas corpus. His Lordship observed that the question had been avoided in the past but the Indian legislature's power to do so had been doubted.[43] It was held that under s.9 of the Indian High Courts Act 1861 and also under the Letters Patent of 1865 (vide clauses 44 and 38 in particular) the power and jurisdiction of the High Court was subjected to the legislative powers of the Governor General in Council. Rankin, C.J., also relied on the decision in BURAH (supra) to hold that the particular limitation of s.22 of the Indian Councils Act (not to legislate in derogation of "any provision of any act passed in the present Parliament") did not alter the position that the doubts thrown upon the Indian legislature's power to modify the exercise by the High Courts of the powers previously possessed by the Supreme Courts were unfounded.[44]

5.62 It remains now to state that the Privy Council, while affirming the decision of the Madras High Court, merely endorsed the reasons given by the Madras High Court and gave in its decision in MATTHEN (supra) its tacit approval to the dictum of Rankin, C.J. Even in its decision in SHIBNATH BANERJI (supra) the Privy Council did not re-examine the matter afresh in a wider context. We suggest the following reasons for arguing that the right of a British subject to the writ of habeas corpus at common law was not, and could not be, taken away, either in 1872 or in

1875, although in the cases discussed above, it had been held to the contrary.

(a) In all the cases discussed above the matter has been dealt with from the viewpoint of "power and jurisdiction" of the courts and no notice is taken of the fact that the right, which originated as a procedural right at common law had, in fact, become a "constitutional right" of the subject, liable only to "suspension" possibly only for the defence of the realm, according to the convention and practice of the British Parliament.

(b) Except Rankin, C.J. in GIRINDRA NATH, in other cases the judges do not categorically decide that the right to the writ could be abolished by the Indian legislature.

(c) Reliance on BURAH by both the Madras and Calcutta High Courts was unwarranted and misplaced and added nothing to their authority. On the other hand, in BURAH it was held that Indian legislature must act within the prescribed "limits" and that its powers were of the "same nature" and not of a different nature from that of the British Parliament. The latter, by convention and practice, having limited its power to mere "suspension" of the writ, it did not intend to confer power of a different nature, albeit with a larger ambit, on the Indian legislature.

(d) The challenge to the vires of the relevant provisions of the 1872 Code and 1875 Act could be grounded on one or more of the other limitations prescribed by s.22 of the Indian Councils Act 1861. We quote below the relevant provisions and also propose to mark them with numbers for convenience of treatment.

"Provided always, that the said Governor General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act:

(i) . . . [not relevant]

(ii) or any of the provisions of the Government of India Act 1858. . .

(iii) to (v) . . . [not relevant]

(vi) or which may affect the authority of Parliament, or . . . or any part of the unwritten laws or constitution of the United Kingdom. . ., whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories."

[emphasis added]

5.63 We have already seen that between 1858 and 1872 (before the enactment of the 1872 Code) each of the Supreme Courts in India possessed

de jure and general authority to issue habeas corpus which could be treated as a part of the existing law in 1858. By s.64 of the 1858 Act the existing law ("All Acts and provisions now in force under Charters or otherwise") were continued; this provision could not be "in any way affected" by any subsequent law enacted by the Indian legislature in view of the limitation on its powers marked as (ii) above. The intention of s.64 was not only to preserve the status quo but also to extend the protection available to Englishmen under the existing laws generally to all subjects on the assumption of "direct government". We have already seen that there was express prohibition in the early Charters against the making of laws "repugnant to laws, statutes and customs of the realm" and later a more direct and effective control was exercised to protect the ancient liberties of Englishmen by requiring that all laws made in India should be laid before Parliament after the scheme of the Regulating Act failed under which the English judges of the King's Courts in India could perform the task.

5.64 We next submit that the first two sub-clauses of the limitation marked as (vi) above (disjoined by "or") also achieved the same purpose to a great extent. First it is necessary to note the wide ambit of the first sub-clause. It is submitted that the common law right to the writ could be abolished (albeit doubtfully) only by Parliament. Any law which resulted in the abolition of the writ definitely derogated from ("affected") the authority of Parliament. The second sub-clause has been, we submit, narrowly construed in BUGGA and AMEER KHAN. The Privy Council had in fact adopted Phear J.'s opinion and the latter in turn had arrived at his conclusions by rejecting the theory of allegiance on the ground that in Forsyth's Constitutional Law it was not stated as a principle of domestic law. Unfortunately, it appears that Blackstone,

who is generally credited with its origin, was not cited.[45] It is submitted that Blackstone's theory of allegiance, albeit subsequent to the decision in the CALVIN case,[46] was not unknown to the legislators in England and as such there was no warrant for construing the second sub-clause narrowly so as to exclude the operation of the theory.

5.65 Lastly, we submit that the abolition of the writ also, in a way, affected the "sovereignty" (penultimate sub-clause of limitation) (vi) of the Crown. We have already referred earlier to the fact that the writ at common law was directly related to the command of the Sovereign: it was not any ordinary prerogative but "high" prerogative of the Crown.[47] It may also be appropriately pointed out in this connection that the governing expression "in any way" of the main body of the proviso ought to be given due importance; so also to the word "affect". In BUGGA the Privy Council did not do so, instead importing the concept of "directness" and confining the application of the limitation "only to laws which directly affect the allegiance".

(b) The nature of the statutory right

5.66 Thus, we see that mainly as a result of judicial interpretation, the second phase of development of the right to the writ in India during colonial rule in fact ended in the virtual extinction of the right because of its replacement by a statutory right which enabled a person to apply to a High Court for "directions of the nature of a habeas corpus". At common law, habeas corpus was known as a writ of right[48] but under s.491 of the Criminal Procedure Code the order was patently discretionary - "If thinks fit". The subject now also lost the ancillary rights associated with the common law writ in respect of successive applications and appeals.[49] The High Court could now frame rules to regulate the procedure for the exercise of the right by the subject.

5.67 The ethos of liberty associated with the common law right was not reflected in the statutory right. At Common Law the person who had the custody of the applicant had to discharge the burden of showing his legal authority for the custody. In view of the discretionary nature of the remedy the applicant was evidently required now to make out a prima facie case to invoke the jurisdiction of the court. On the other hand, despite the fact that the English Habeas Corpus Act 1816 was inapplicable in India,[51] the court could apparently inquire into the truth of the return in view of the fact that there was a duty placed on the court to determine whether or not a person was "illegally or improperly" detained. Indeed, in JITENDRA NATH v CHIEF SECRETARY[52] the court construed the word "improperly" to hold that, "The courts can and in a proper case must determine the question whether there has been such fraud and abuse" referring to "fraud as an Act or an abuse of the powers given by the legislature".

(2) Independence and Habeas Corpus in India, Pakistan and Bangladesh

5.68 After independence the existing law was continued in India and Pakistan and also in Bangladesh when the latter became an independent state in 1971. The statutory right under s.491 of the Code of Criminal Procedure is thus available in Pakistan and Bangladesh and was in India until 1973 when the new Code adopted there did not contain a similar provision: it was stated that the parallel right available under the Constitution rendered unnecessary the incorporation of a similar provision.[53] In fact in all the three successive Constitutions of Pakistan and also in that of Bangladesh an identical provision was made although it was not modelled always and everywhere on the Indian provision.

5.69 In India, Art. 32(1) provided that the right to move the Supreme Court for the enforcement of the fundamental rights was "guaranteed" and by virtue of clause (4) it could "not be suspended except as provided otherwise by the Constitution". Clause (2) empowered the Supreme Court to

"issue directions or orders or writs, including writs in the nature of habeas corpus" and other named writs. It has, however, been held that the principle of res judicata apply in writ proceedings.[54] There was therefore no right to make successive applications as could be done at common law. The scope of Art. 32 was curtailed in 1976 by the insertion of Art.32-A which provided that the "Supreme Court shall not consider the constitutional validity of any state law in any proceeding under that article (32) unless the constitutional validity of any Central law is also in issue in such proceedings".[55]

5.70 In Pakistan the first Constitution of 1956 reproduced verbatim in Art.22 the Indian provision. In the Constitutions enacted in 1962 and 1973 the Pakistan Supreme Court lost the power to issue writs which was provided by Art. 22 in 1956. In Bangladesh, Art.44 (1) of the Constitution (as originally enacted) provided that, "The right to move the Supreme Court [in 1976 the "High Court"] in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part, is guaranteed". It is, however, to be noted that there were no separate High Courts in Bangladesh as in India and Pakistan[56] and that until 1976 the Supreme Court itself sat in two divisions - the High Court Division and the Appellate Division and under Art. 102(1) the power was conferred on the High Court Division [on the "High Court" in 1976]. There was no express prohibition against "suspension" of the right as provided in India and also in Pakistan in 1956.

5.71 In India, under Art. 226 every High Court could also, albeit within the territorial limits of its jurisdiction, similarly issue a writ "in the nature of habeas corpus". While the Supreme Court could issue writs under Art. 32 only for the enforcement of fundamental rights, under Art. 226 (1) writs could be issued, originally, also "for any other purpose". In 1976 the provision was re-cast and was saddled with a provision similar to Art.32-A. By Art. 226-A the High Court was now forbidden to consider

the "constitutional validity of any Central law". The new Art. 226(1) now replaced the term "for any other purpose" by sub-clauses (b) and (c) which are quoted below:

> (b) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or
>
> (c) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (b) where such illegality has resulted in substantial failure of justice.

Under new clause (3) no petition in respect of cases covered by the above two sub-clauses could be entertained if "any other remedy" was provided under "any other law". There were also restrictions provided in new clause (4) on the passing of "interim orders". Although it was doubtful if the new sub-clauses materially affected the scope of the right under the old Art. 226, for a writ of habeas corpus would be particularly directed towards enforcement of the right to personal liberty, the new clause (4) in a somewhat direct way restricted the scope of the right. It may be recalled in this connection that under English law bail could be granted by way of an "interim order" in a habeas corpus application. The new Art.226-A obviously curtailed the scope of the remedy more directly and materially.

5.72 It is also necessary to note that Art.226 came to be expressly subjected to the new Art.131-A (also inserted in 1976) besides Art.226-A. Although "exclusive jurisdiction" was conferred on the Supreme Court in "all questions relating to the constitutional validity of any Central law", without finally disposing of the case itself the Supreme Court could, in a matter which was pending earlier before a High Court, return the case to the latter with its decision on the relevant point, for the final disposal of the case. In the final analysis it cannot possibly be said that the conferment of exclusive jurisdiction in respect of Central laws adversely affected the right to personal liberty. The constitutional right to the

"writ in the nature of habeas corpus" was in many respects different from the common law right, although it was definitely of a more secure and mandatory character than the patently discretionary statutory right that was available under s.491 of the Criminal Procedure Code. Both rights, however, in one respect differed materially from the common law right. Unlike common law, there could be an appeal in both cases, against an order of discharge. The new provisions of Arts. 226-A and 131-A remedied this situation to a great extent by restricting the number and scope of such appeals. A decision in a single case by the Supreme Court in favour of the prisoner would inure to the benefit of all prisoners held in different states under the impugned Central law.

5.73 In another important aspect the "constitutional right" differed in a very interesting way from the statutory right as well as the common law right. The two last-mentioned rights could not be "suspended" by an executive order but under Art.359 the President could make an order to "suspend" the right for the period during which a "Proclamation of Emergency", also made by him, was in operation. It may be noted in this connection that Art. 226 did not contain any provision similar to Art.32(4). However, this aspect of the matter will be examined in greater detail in discussing the latest decision of the Supreme Court in what is popularly called the Habeas Corpus Case.[57]

5.74 In Pakistan, Art. 170 of the First Constitution of 1956 reproduced verbatim the Indian provisions of Art.226(1) as originally enacted in 1949. Earlier, in 1954, the Constituent Assembly of Pakistan, acting as the Central legislature, had amended the Government of India Act 1935 by inserting therein s.223-A to empower the High Courts to issue "writs in the nature of", among others, habeas corpus. There was not and there could not be also any reference then to "fundamental rights", as the 1935 Act did not contain any Bill of Rights. Reference may be made now to the

relevant provisions of the subsequent Constitutions. Art. 98(2)(b)(i) of the 1962 Constitution and Art.199(1)(b)(i) of the 1973 Constitution were almost similarly worded. The last-mentioned provision is quoted:

> Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law -
>
> (b) on the application of any person, make an order -
>
> (i) directing that a person in custody within the territorial jurisdiction of the court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; [emphasis added]

The Pakistan Courts, as we shall see, attached great importance to the expressions underlined in the above extract and assumed powers wider than those exercised by the Indian courts despite the fact that the Indian Constitution, unlike Pakistan's, expressly named habeas corpus albeit in qualified terms ("in the nature of").[58] Art.199 also provided (vide clause (1)(c) and clause (2)) that the High Court could issue such "directions" as might be "appropriate for the enforcement of any of the Fundamental Rights" and that the "right to move a High Court" for such purpose "shall not be abridged". By clause (4) the right to pass an "interim order" was restricted.

5.75 The article was amended and it is necessary to take notice of the new clauses (3A) and (4A).[59] It was provided by clause (3A) that the court should not make an order under clause (1) prohibiting the making of an order for the detention of a person and that it should not grant bail to a person detained under any law made for "preventive detention". By clause (4A) the restrictions contemplated on "interim orders" were further tightened by limiting the operation of such orders in certain cases to sixty days. Part X of the Constitution (1973) contained "Emergency Provisions" of which the main article, 232, was amended in 1975.[60] Under Art.233(2), which was in pari materia with the Indian Art. 359(1), the right to move

any court during "emergency" for the enforcement of fundamental rights could be "suspended" by the President. It may be noted in this connection that during the third Martial Law regime despite the provision that the "Constitution shall remain in abeyance", the Lahore High Court ordered the release of a prisoner under s.491 of the Code of Criminal Procedure by holding that the court had merely lost the power and jurisdiction "specifically relatable" to Art.199.[61] However, unlike India, the question whether the right to personal liberty existed outside the Constitution, is res integra in Pakistan.[62]

5.76 In Bangladesh Art. 102(2)(b)(i) reproduced almost verbatim the provision of Art.199(1)(b)(i) of the Pakistan Constitution; however, there was no provision here parallel to clause (1)(c) and clause (2) of Art.199. Clause (4) of Art. 102 imposed restrictions on passing of "interim orders" similar to, but not exactly the same as its Pakistani counterpart. By an amendment in 1973, Part IXA was inserted in the Bangladesh Constitution, which was captioned "Emergency Provisions".[63] Art. 141-C of this Part corresponded to the Indian Art. 359 and empowered the President to "suspend" the right to move any court for the enforcement of fundamental rights. In 1975 the existing provisions of Arts. 44 and 102 were replaced by new provisions.[64] By the new Art.44 provision was made for the establishment of a "Constitutional court or tribunal or commission" for the enforcement of fundamental rights. The new Art.102 effected no change in so far as habeas corpus was concerned. The position remained essentially unaltered when the Constitution was further amended during the military rule.[65]

(3) Habeas Corpus in Ceylon (Sri Lanka)

5.77 Unlike in India, the British acquired territorial sovereignty in Ceylon by conquest, displacing the Dutch in 1796, and the Company's overlordship there lasted for less than a decade as Ceylon became a Crown Colony in 1802. Even so, there was no general introduction of English law

there. The first Governor, Frederick North, had received Royal Instructions as well as Instructions from the Court of Directors of the East India Company to the effect that justice should be administered according to "the laws and institutions that subsisted under the Dutch government".[66] He had accordingly made what came to be popularly called "North Proclamations" in 1799, and the first Royal Charter of Justice issued in 1801 merely confirmed the principles and objects stated in them.[67] As a result the "residuary law" in Ceylon today is not Common Law but Roman-Dutch Law.[68] There was a piecemeal introduction of English Law, the best example of which is to be found in the Civil Law Ordinance enacted "to introduce into Ceylon the law of England in certain cases".[69]

5.78 A Supreme Court was established under the Charter of 1801, but under Art.82 power was given to the court to issue "Mandates in the nature of writs" of certiorari and mandamus, but not habeas corpus. Nevertheless, possibly following the Indian precedent, the court, as has been observed, in fact issued writs of habeas corpus;[70] it was formally empowered to do so for the first time in 1830 by an Order in Council dated 11th November and then in a different way by the Royal Charter of Justice of 1833 (vide s.49).[71] The jurisdiction by the 1830 Order was formally conferred at the suggestion of Colebrooke (one of His Majesty's Commissioners of Enquiry) made in April 1830. He reported that the court did not have jurisdiction under any of the Charters of 1801, 1810 and 1811 and that it was necessary to create such jurisdiction to avoid confrontation between the executive and the judiciary similar to one of Bombay. He had recommended that the provision made in certain regulations promulgated by the Governor to arrest and detain any person in custody should be disallowed which was accepted and in the 1830 Order it was further stated that, "it shall be competent to His Majesty's Supreme Court at Ceylon or to any Judge of that court to issue writs of Habeas Corpus or Mandates in the nature of such writs as fully and effectually and

under such and the like circumstances as by the Law of England writs of Habeas Corpus can or may be issued by any one of His Majesty's Supreme Courts of Records at Westminster".[72] But it was provided that "such rules of practice and proceeding as the local circumstances of the said island may require" had to be framed by the Ceylon Supreme Court. The Order was to remain in force until 1834 and was in fact superseded in 1833 by the Royal Charter of Justice in which the incidental provision of the Order was became a regular provision but it/differently stated in the following terms:[73]

> And we. . . ordain and appoint that the said Supreme Court or any judge thereof. . . shall be and is hereby authorised to grant and issue mandates in the nature of writs of habeas corpus. . . to bring up the body of any person who shall be imprisoned within any part of the said island. . . and to discharge. . . or otherwise deal with such person according to law.

5.79 Thus it is doubtful if the common law right to the writ survives (even if it was at all introduced) in Ceylon and it has been rightly observed that the present law relating to habeas corpus in Ceylon is to be found in s.45 of the Courts Ordinance, Cap.6 of 1956 (originally s.49 of Ordinance No. 1 of 1889).[74] In this connection the following points are noteworthy:

(a) The common law of England was not received in Ceylon as the general law and Roman-Dutch law still continues there as the "residuary law".

(b) The judges of the Supreme Court were not generally empowered to exercise the powers and jurisdiction of the judges of the King's Bench in England, as was done in India and Africa.[75]

(c) Even in the Charter of 1833, the power was conferred to issue "mandates in the nature of a writ of habeas corpus" and as such in its very origin it was a statutory right which was confirmed in the same terms by the use of the same language in s.45 of the Courts Ordinance, 1889.

(d) The present Supreme Court was apparently not a true successor of the Supreme Court established in 1801 or that which functioned under the Charter of 1833 for the 1889 Ordinance appears to have altered its jurisdiction in so far as its power to grant habeas corpus was concerned, as the same Ordinance purported to codify the provision in s.49, as has been rightly held in the case of THOMAS PERERA.[76]

(e) Criminal law in Ceylon was codified on the lines of the Indian Codes but the Ceylon Criminal Procedure Code did not contain any provision parallel to the Indian s.491; instead, clauses (a) and (b) of s.491 were reproduced in s.49 of the 1889 Ordinance itself.

5.80 We may now quote the relevant provisions of the said s.45 of Cap.6:

> The Supreme Court or any judge thereof whether at Colombo or elsewhere shall be and is hereby authorised to grant and issue mandates in the nature of writs of habeas corpus to bring up before such court or judge -
>
> (a) the body of any person to be dealt with according to law;
>
> (b) the body of any person illegally or improperly detained in public or private custody and to discharge or remand any person so brought up or otherwise deal with such person according to law. [emphasis added]

The proviso to the section, as amended by s.2 of Act No. 3 of 1964 authorised the prisoner to be brought before either a District Magistrate, or a Court of Requests or a Magistrate's Court and after an inquiry by the Court a report to be submitted on the cause of the detention to the Supreme Court or the judge thereof who had given direction under the proviso. The Statute (cap.6) was silent on the common law rights of appeal and successive applications but under s.49 rules could be made in these matters by the Supreme Court on the basis that common law right to the writ was not introduced or that it was abolished. However, it is not correct to say that the scope of s.45 was not wider than English law in any respect although it was so held in LIYANE ARATCHIE.[77] It is submitted

that due importance has to be attached to the word "improperly" occurring in cl. (b) of s.45 manifesting the new aspect of the statutory writ of habeas corpus based apparently on the concept borrowed from the Indian Criminal Procedure Code.

5.81 It is to be noted that there was no specific provision on habeas corpus in the Ceylon (Constitution) Order in Council 1947 under which full internal self-government was introduced in Ceylon. The position remained unaltered under the Ceylon (Independence) Order in Council 1947 and the Ceylon Independence Act. Even in the Republican Constitution of Sri Lanka enacted in 1972, s.121(1) merely provided that the Supreme Court should continue to exercise the power to issue "mandates in the nature of writs" available "under the existing law". Under s.54 a "Constitutional Court" was established but its jurisdiction was strictly limited to the consideration only of the constitutional validity of any Bill and for the submission of its decision thereon to the Speaker of the National State Assembly.

## III. Independence and personal liberty

### (1) Some provisions of the Constitutions of the Indian sub-continent

#### (A) A General View : Bills of Rights vis-a-vis judicial review

5.82 The Indian Constitution (1949) and the four successive Constitutions of Pakistan (1956, 1962, 1972 and 1973) which were generally modelled on it, as also the Bangladesh Constitution (1972), as originally enacted, conformed to one common pattern in so far as the basic features of the institutional structure of the state vis-a-vis personal liberty was concerned. The Constitutions not only provided for justiciable Bills of Rights but also envisaged a political order with a western-type (multi-party) democracy.[1] The Republican Constitution of Sri Lanka (1972) on the other hand, differs from this group in one important respect: there the scope of judicial review was curtailed by a two-fold limitation, manifested on the one hand in the provision of a Constitutional Court and

on the other hand in a non-justiciable Bill of Rights.[2] Furthermore it did not provide for a "constitutional right" of habeas corpus. As for the latter, there were, as we have seen, historic reasons.[3] On the other hand, the provision for debilitated judicial power in Sri Lanka possibly reflected the popular reaction against what appears to have been regarded as an infraction of Ceylonese sovereignty vested in its legislature as a result of some of the decisions of the London-based Privy Council.[4]

5.83 Unlike Ceylon, in India constitutional autochthony did not result in the curtailment of the right of judicial review. Nevertheless in India too the founding fathers sought to impart a special bias to the traditional ideas of western democracy. In laying the edifice of the proposed constitutional framework, Pandit Jawaharlal Nehru moved a resolution on the 13th December 1946 in the Constituent Assembly on the "aims and objects" and observed that the resolution was impregnated with the content not of simple democracy but of "economic democracy".[5] In paragraph (5) of the resolution it was inter alia stated that there should be "guaranteed and secured to all people of India, justice, social, economic, political; equality of status, of opportunity and before the law".

5.84 Unfortunately, the judiciary in Republican India failed to take note of the special emphasis on "economic justice" which was sought to be infused into the philosophy of the Republican Constitution by the founding fathers and, in upholding the "Rule of Law" according to the western notions of democracy, the judiciary became embroiled in an unseemly controversy with the legislature on account of the protection it afforded to property rights. As a result the Constitution was amended within a year and, by the newly-inserted Art.31-B and Ninth Schedule, blanket protection was provided against judicial challenge to the enactments included in the Schedule.[6] There was an apparent enlargement of the purport of the constitutional amendments enacted between 1971 and 1976. In the Ninth Schedule, which was meant to contain laws exclusively dealing with property

rights, came to be included laws impinging upon the right to personal liberty. It has, however, to be conceded that, whether in 1967 in GOLAKNATH[8] or in 1973 in KESHAVANANDA,[9] it was the vires of an enactment connected with agrarian reform that the court was directly concerned with, but in the end the Supreme Court in both decisions made important pronouncements on the scope of the provisions relating to the amendment of the Constitution. As a result, Parliament was provoked to assert its supremacy and by adding clause (4) to Art.368 of the Constitution, the court's power to adjudge the validity of any amendment of the Constitution was taken away in 1976.[10] Whether this step seriously impaired the powers of judicial review enjoyed by Indian courts we shall have occasion to examine.[11]

5.85 In Pakistan the founding fathers expressly stated that "the independence of judiciary shall be fully secured". It was so provided in express terms in the "Objective Resolution" which the Pakistan Constituent Assembly had passed on 7th March 1949.[12] It was stated in the opening paragraph that sovereignty vested in "God Almighty", which He had "delegated to the State of Pakistan through its people" to be held and exercised in "sacred trust". The "Objective Resolution" was incorporated into the preamble of the first Constitution enacted in March 1956 and reproduced in the 1962 Constitution, albeit in a diminished form, but in the 1973 Constitution it reappeared in its extended version. The Pakistan judiciary took the "Objective Resolution" seriously and described it in such terms as "a supra-constitutional document", "transcendental part of the Constitution" in ASMA JILANI[13] although Chief Justice Hamoodoor Rahman in ZIA-UR-RAHMAN[14] was not prepared to place it "on a higher pedestal than the Constitution itself". The Indian Constitution also contains a preamble but it speaks inter alia expressly not of independence of the judiciary but of "Justice, social, economic and political" while the short preamble of the Constitution of Sri Lanka does not make even an oblique reference to "justice"; in Bangladesh reference was made not only to

"justice" but also to the "rule of law". In any case the preamble in any other country does not appear to have attracted much attention.

5.86 Apart from the case of Sri Lanka which does not have a justiciable Bill of Rights, in all other cases there is a "supremacy clause" in each of the Constitutions which provide a strong handle for judicial review.[15] In Pakistan not only the 1962 Constitution which did not originally contain a justiciable Bill of Rights, but even the 1973 Constitution, contained the following provision:[16]

> (1) To enjoy the protection of law and to be treated in accordance with law is the alienable right of every citizen, wherever he may be, and of every other person for the time being in Pakistan.
>
> (2) In particular -
>
> (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
>
> (b). . . (c). . .

The provision is reproduced almost verbatim in Art.31 of the Bangladesh Constitution. In defending the individual's right to personal liberty the Pakistan judiciary invoked the above provisions with great imagination and courage. The "supremacy clause" in each Constitution, however, reproduced the Indian provision which contemplated that only those laws which were "inconsistent" with the provisions of the fundamental rights should be void to the extent of the inconsistency, while in Bangladesh there is an additional provision (Art. 7(2)) which makes laws void which are inconsistent with the Constitution. These provisions in Bangladesh and Pakistan definitely buttressed the Rule of Law about which specific provision was also made by reproducing the Indian Art. 14 which guaranteed "equality before the law" and also "equal protection of law" to all persons (to citizens only in Pakistan and Bangladesh).[17]

5.87 However, in all cases, any inconsistency afflicted the "existing law" also. Although the scope of this provision was limited by the Supreme Court, by evolving the doctrine of eclipse,[18] it did not,

apparently, unlike the provision in Malaysia,[19] embody the presumption of constitutionality. The Indian Parliament curtailed the scope of judicial review in virtue of the supremacy clause in 1971 by adding clause (4) to Art.13 to provide that the provisions of the article should not apply to amendment of the Constitution.[20] Thus, in India it was sought to be made clear that although the supremacy clause was (elsewhere also) posited in the "Part" containing "Fundamental Rights", even these rights could be validly abrogated by an amendment of the Constitution and a successful judicial challenge to such an exercise was impossible.[21]

5.88 Among some other general features of the Constitutions of the Indian sub-continent mention must be made of the provisions which the founding fathers in India considered to be a "non-justiciable" Bill of Rights.[22] In India these are called "Directive Principles of State Policy" (also in Pakistan in 1956; in 1973, "Principles of Policy") and are placed after the "Fundamental Rights", in a separate "Part" ("Chapter" in Pakistan);[23] in Bangladesh and Sri Lanka they preceded the "Fundamental Rights" and were called respectively "Fundamental Principles of State Policy" and "Principles of State Policy".[24] To which category (justiciable or non-justiciable), one may ask, belonged the "Fundamental Duties" inserted in the Indian Constitution in 1976 as Part IVA, of which Art.51-A(a) provided, inter alia that it shall be the duty of every citizen "to abide by the Constitution and respect its ideals and institutions" ?[25] In Pakistan there is a similar provision, albeit in a modified form, which in 1973 makes "obedience to the Constitution and law" (in 1962, only "law") the "basic obligation of every citizen".[26] These provisions are noteworthy, but the Indian phraseology, as well as the additional Indian provision (clause (b) of Art. 51-A) which impose "duty" in express terms "to safeguard public property and to abjure violence", deserve greater attention. Unlike the "directive principles" which are expressly made non-justiciable, the "fundamental duties" can possibly be regarded as exceptions to the justiciable

"fundamental rights", so that an individual who has taken part in an "unconstitutional" political agitation either by resorting to "violent" methods or by denouncing constitutional "institutions" can possibly forfeit his right to enforce his "fundamental rights". In other words it can possibly be argued that Part III (fundamental rights) has to be read subject to Part IVA (fundamental duties).

5.89 It is not possible to predict the judicial approach in the matter but support for the proposition is to be found in the legislative background. In Pakistan not only were the two Martial Law regimes which preceded the two Constitutions patently unconstitutional, but they were, in turn, preceded by violent political demonstrations and unconstitutional activities.[27] In India too the Prime Minister accused the opposition parties of adopting what they themselves admitted to be "unconstitutional means" in a speech made in Parliament on July 22, 1975.[28] She spoke of their "disruptive challenge" and of the need to "uphold the sanctity of the Constitution and of Parliament". She observed that, "Political liberty and political rights can exist only so long as political order remains" and that "every right that the State concedes to the individual imposes obligation on him," while referring categorically to the "violent agitation" that was being carried on in different parts of the country. Even if the Indian legislative background is ignored, the Indian and Pakistan courts could both seek guidance in interpreting statutes from Art.6(1) of the International Covenant on Civil and Political Rights of 1966, which has entered force in 1976 and now has a claim to rank equally with the domestic law.[29]

5.90 The Bills of Rights of Commonwealth Asian States, comprising the Indian sub-continent as well as Malaysia and Singapore, justiciable as well as in Sri-Lanka, non-justiciable, differed in scheme and structure from those of Commonwealth African states in that, unlike the latter, they do not follow the European Convention on Human Rights to

guarantee "the classical freedoms"; instead they follow the scheme adopted in the Indian Constitution.[30] Even in the unitary states (Bangladesh, Sri Lanka and Singapore) the Bills of Rights include freedom of movement and residence (unlike the European Convention), following the federal Constitutions of India and Pakistan.[31] Indeed, in India and Pakistan, unlike Africa, the incorporation of Bills of Rights in independence Constitutions was but the fulfilment of a long-cherished national aspiration[32] and not a work of colonial masters discharging their obligation under the European Convention.[33] However, it is necessary to explain the genesis of one particular provision by emphasising that the Bangladesh Constitution and also the 1973 Pakistan Constitution, in prohibiting torture were apparently inspired not by the European Convention but by a sincere desire to prevent the recurrence of the unpleasant events of the past.[34]

(B) Personal Liberty, Preventive Detention and Emergencies

5.91 In India, the several "rights to freedom" are grouped into two parts.[35] One group, which includes the right to move freely and to reside and settle in any part of India, was covered by Art. 19(1), with express derogations ("reasonable restriction") enumerated in respect of those rights in sub-clauses (2) to (6) of the article. In respect of freedom of movement derogation is allowed in the "public interest" everywhere except in Sri Lanka, where s.18(2) provides a multiple-ground common clause for derogation from all "fundamental rights and freedoms".

5.92 Arts. 20 to 22 are those which deal solely with personal liberty in the Indian Constitution. Sub-clauses (3)(b) to (7) of Art.22 dealt specifically with "preventive detention", while the other provisions of this group re-affirm the various common law protections, including the right to be informed of the grounds of arrest, the right against self-incrimination and the protection against double jeopardy. Art. 21 in particular deserves to be quoted:

> No person shall be deprived of his life or personal liberty except according to procedure established by law. [emphasis added]

In GOPALAN[36] the Supreme Court construed the underlined words to exclude the concept of "due process"which had in fact found place in the original draft, although several members strongly pleaded to retain the same.[37] In Bangladesh (Art.32) and in Pakistan (Art.5(2) in 1956 and Art.9 in 1973) the word "procedure" is omitted by using the phraseology "save in accordance with law" intending perhaps to make a deliberate departure from the Indian provision, although the change was noted with greater care in Malaysia.[38] In Sri Lanka, Art.18(1) (b) is to the same effect but it speaks of "security" in addition to "life" and "liberty" and, on the other hand, Sri Lanka, unlike Pakistan and Bangladesh does not follow India in re-affirming the other common law protections indicated earlier. In Bangladesh Art.43(a), following the fourth amendment of the American Constitution, also guarantees to the citizen the right "to be secure in his home against entry, search and seizure", the course which the founding fathers in India refused to follow.[39]

5.93 It is true that the provision for preventive detention contained in the Constitutions of Commonwealth Asia are unique in one respect. Everywhere, even in Sri Lanka (where the Constitution does not contain express provision either authorising or prohibiting such measures), preventive detention is permitted as a "peacetime" measure. How these provisions found a place in the Indian Constitution therefore deserves investigation. The provision did not appear in the first draft of the Constitution. After the Constituent Assembly had debated and settled the legislative competence of the Union and the States (adopting the scheme of the 1935 colonial Constitution then in force), it became necessary, said Dr. Ambedkar (the Chairman of the Drafting Committee), to provide for "limitations" on those powers. Despite the plausible explanation, the proposal of the Drafting Committee (figuring as clause 15-A) was hotly

debated, with members expressing two opposite views with great force and sincerity. Life and liberty, according to some, were the most cherished freedoms and, as the provision made serious encroachments on them, the proposal should not be accepted. Others referred to the widespread subversive activities then current in different parts of the country and pleaded for strong measures to protect the "security of the state".[40]

5.94 It is, however, difficult to say whether the acceptance of the proposal came as a result of the practical explanation of Dr. Ambedkar or because of the force of the last-mentioned arguments. Whatever may have been the reason, it cannot be denied that the fact that "preventive detention" was an existing provision under the colonial Constitution definitely had some bearing on the decision to retain it.[41] Six years later the first Indian Prime Minister, Pandit Jawaharlal Nehru, told Michael Brecher that he did not like the Preventive Detention Act, in reply to his question whether such a measure had a place in a democratic state except in time of national emergency. In the whole of India, there were then only 150 persons held under the Act, of whom only ten were "political people" and the rest were the "gangsters and goondas" operating in big cities, said the Prime Minister. There were "plenty of political opponents" said he, but only those who indulged in "violence" were put in prison.[42]

5.95 It is necessary to quote at length the Indian provision, cls.(4) to (7) of Art.22 which has not only acted as a general model for similar provisions in the Constitutions of Asian states of the Commonwealth but has been the source of a "jurisprudence of preventive detention" in India which has been described as "an odd but inevitable juridical phenomenon".[43]

> (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period. . . that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention. . . beyond the maximum period prescribed by. . . Parliament under sub-cl.(b) of cl.(7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-cls.(a) and (b) of cl.(7).

(5) When any person is detained. . . the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in c.(5) shall require the authority. . . to disclose facts which such authority considers to be against public interest to disclose.

(7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months. . . without obtaining the opinion of an Advisory Board. . .;

(b) the maximum period for which any person may be detained in any class or classes of cases be detained under any law . . .; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-cl.(a) of cl.(4). [emphasis added]

5.96 It is to be noted that although the Indian Supreme Court has overruled its earlier decision that cls.(4) to (7) made up a "complete code" of preventive detention by accepting the minority view in GOPALAN,[44] it has still to arrive at a consensus on two broad aspects of norms of construction which, in our opinion, are of paramount importance. Firstly, it is necessary, we submit, to accept the position that, whether or not one subscribes to the view that the Indian Constitution is a "goal-oriented" or "dynamic" document,[45] one has to concede that some of the "fundamental rights" are in fact pre-existing rights which are not "conferred" for the first time by the Constitution but are merely "guaranteed" in the provisions of Part III.[46] Secondly, on a priori

considerations, even for a dynamic interpretation, it is necessary to read as a whole and harmonise (if and where necessary) the relevant provisions of the Constitution on any particular aspect not merely generally but to carry this process down to the several "Parts", "Chapters" and "Articles" and the "clauses" and "sub-clauses" thereof so that the dynamics of the process are able to acquire vitality and also credibility by attaching to, rather than divorcing from, the hard core of the basic values of perennial importance common to mankind including the Indian society. In this view of the matter the several clauses and sub-clauses of Art.22 ought to be read together to ascertain the true intent and purport of the provision. We submit that by reading the provision in the broad perspective along with the legislative lists and the preamble and by taking note of its own special setting in Part III, it can be easily seen that the dominant idea underlying the provision is that of using it as a "limitation" on a drastic peacetime law and therefore it is not permissible to read any particular part (clause or sub-clause) of it as an "enabling" provision and some other part of it as an "exception", using common law terminology. Unfortunately there was an apparent lack of consensus among the judges on this point but there was nevertheless a general recognition of the fact that the Constitution sought to control the power of preventive detention by vesting exclusive legislative competence under cl.(7) in Parliament in respect of a "time-limit" and by providing certain mandatory safeguards in the other clauses.

5.97 It is true that the Indian Supreme Court has gradually moved towards the position which the Pakistan court had established at a very early stage in so far as ambit of subjective satisfaction of the detaining authority is concerned.[47] But as we shall see neither court appear to have attached importance to the fact that the Constitution itself had vested the "ultimate" power in the Advisory Board by providing that it was the

"opinion" of the Board that had to eventually prevail.[48] Indeed, in India an additional provision was to be found in cl.(7) dealing obviously with special "cases" and "circumstances" but it is submitted that the clause ought not to be read as an "exception" but its true intent and purport ought to be identified. It is submitted that exclusive legislative competence was vested in Parliament not merely for the reason that such matters as were likely to cause serious infractions of the right to personal liberty ought to be dealt with at a higher level but also for the reason that in a federal polity it was necessary to achieve uniformity in such matters.[49] On this view it is submitted that not only the "maximum period" ought to be prescribed by Parliament but also the essentials of the procedure to be followed by the Advisory Board. However, we concede that the validity of this proposition remains to be tested as arguments on these lines have not been placed before courts in India. On the other hand, at least the minority opinion of the Supreme Court has accepted the position that the cls.(4) and (7) ought to be read together to hold that the constitution has itself laid down the "maximum period" of three months as a general provision and that if Parliament does not make any law to "prescribe" the maximum period in no case can detention exceed three months.[50]

5.98 In Pakistan, in 1956. clauses (3), (4) and (5) of Art. 7 of the Constitution reproduced the safeguards embodied in clauses (3) to (6) of Art.22 of the Indian Constitution with one significant change, in that the Advisory Board had to be constituted with persons appointed by the Chief Justice of the Supreme Court (in the case of a person detained under a Central Act) and by the Chief Justice of the High Court for the province in the case of detention under a Provincial Act. There was no provision parallel to clause (7) of Art.22 of the Indian Constitution. The provisions enacted in 1973, (later amended in respect to time-scale), however, took a different form. They were posited in clauses (4) to (9) of Art.10:

clause (4), as originally enacted, is quoted below in extenso:

> No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan, or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding one month unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of one month, unless the Review Board has reviewed his case and reported, before the expiration of each period of three months that there is, in its opinion, sufficient case for such detention.

The provision as respects the "Review Board" (Explanation I) now laid down the common qualification of the Chairman and the members, namely, a person who is or has been a Supreme Court or High Court Judge, to be appointed, as before, by the appropriate Chief Justice.

5.99 In the new clause (5) corresponding to clause (5) of the 1956 provision, a time-limit of "one week" was provided for communicating "grounds". Clauses (6) to (8) were entirely new:

> (6) The authority. . . shall furnish to the. . . Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government. . . to the effect that it is not in the public interest to furnish any documents, is produced.
>
> (7) Within a period of twenty-four months commencing on the day of his first detention. . . no person shall be detained in pursuance of any such order for more than. . . eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:
>
> Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from the enemy.
>
> (8) The appropriate Review Board shall determine the place of detention. . . and fix a reasonable subsistence allowance for his family.

The provisions of Pakistan's 1973 Constitution apparently circumscribed to a great extent the power to make laws for preventive detention, by providing many wholesome limitations in explicit terms, in which the Indian Constitution was signally deficient. Unfortunately the provision in clause

(6) enabling "any" document to be withheld on the mere ipse dixit of the executive detracted from the effectiveness of the safeguard of a hearing and also of the new provision of an automatic periodic review contemplated under clause (4). It is also to be noted that nowhere in Commonwealth Asia was there any constitutional protection against detention incommunicado.[51]

5.100 It is, however, surprising that the Bangladesh Constitution, which did not originally contain any express provision on preventive detention, opted later for the Indian model.[52] In 1973 the existing Art.33 was substituted by a new one and provision for preventive detention was posited in clauses (4) to (6), of which clause (5) reproduced the provisions of the two Indian clauses (5) and (6) in respect of communication of "grounds". Clause (4), although corresponding to the Indian clause, authorised detention for six months instead of three months and the procedure for an "inquiry" under clause (4) by the Advisory Board, according to clause (6), could be made by law. The same amending Act also, for the first time, introduced Part IX A ("Emergency Provisions") into the Constitution. The new provisions, Arts. 141A to 141C also followed the Indian model (as in 1973), reproducing with minor changes in respect of time-limits the provisions of Indian Arts. 352, 358 and 359 respectively with an additional requirement that the proclamation of emergency "shall require for its validity the countersignature of the Prime Minister". It may be noted that in India and Pakistan also, as in Bangladesh, the Constitution contemplates the "proclamation" to be made by the President.

5.101 Part XVIII of the Indian Constitution contains the "Emergency Provisions". Although Republican India has been involved in three major wars, first with China in 1962 and then with Pakistan in 1965 and 1971, the provisions came to be amended for the first time in 1975, and then again in 1976 when the country was not threatened with any such event.[53] Before discussing the provisions as amended, it may be useful to note that the

events that led to the situation in 1975 were purely political. On June 12, 1975 the Allahabad High Court had set aside the election of the Prime Minister, Mrs Indira Gandhi.[54] This gave a fillip to the nation-wide civil disobedience movement planned by the opposition parties under the leadership of Mr. J.P. Narayan who had earlier given calls to the army and the police to rebel against the government.[55] On June 25, 1975, the President made the "proclamation" under Art.352(1) that "a grave emergency exists whereby the security of India is threatened by internal disturbance".[56] The Constitution (Thirty-eighth) Amendment Act 1975 was enacted on 1st August, 1975, amending retrospectively (among others) Arts. 352, 356, 359 and 360. The ruling Congress Party appointed the "Swaran Singh Committee" to suggest further amendments to the Constitution. Following the report of the Committee the Constitution (Forty-second Amendment) Act 1976 was enacted on 18th December 1976, amending various provisions including those of Arts. 352, 353, 356, 357, 358 and 359 of Part XVIII. It has, however, to be noted that the opposition disapproved of this venture and in fact, except for a few, all members of the opposition parties were rounded up and held in preventive detention after the proclamation was made.[57]

5.102 Under Art. 352(1) the President can make a "Proclamation" if he is "satisfied" that a "grave emergency" exists whereby the "security" of the whole or any part of India is threatened "whether by war or external aggression or internal disturbance" but such events, according to clause (3), need not actually take place; an "imminent danger" thereof is sufficient for the exercise of the power. The proclamation has to be placed before Parliament and unless approved within two months it will cease to be operative. The important effect of the amendments was that by the newly inserted clauses (4) and (5) the President was empowered to issue successive proclamations on different grounds and judicial challenge to the "satisfaction" of the President or to the "validity" of his "declaration" as well as to the "continued operation" thereof was expressly barred by

using such expressions as "final and conclusive" and "shall not be questioned in any court on any ground" and even "neither the Supreme Court nor any other Court shall have jurisdiction to entertain any question on any ground".

5.103 Art.358 provides for special derogation during an emergency so that laws could be made in derogation of Art.19. The provision for "suspension of the enforcement of the rights conferred by Part III during emergencies" is to be found in Art.359. The President is empowered to "declare" by an "order" that "the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and also all pending court proceedings in respect thereof "shall remain suspended" during an emergency or for such period as may be specified in the order. This particular provision, which figured as clause 280 in the Indian Draft Constitution, was perhaps the most hotly debated provision and the founding fathers were presented with two opposite choices, either to delete it in toto or to enable suspension of fundamental rights (especially suspension of habeas corpus) to be effected not by the executive but by Parliament.[58] Again, as in the case of the provision of preventive detention, the choice in favour of retaining it was dictated by the subversive activities then continuing but the power was subjected to Parliamentary supervision. Thus, clause (3) of Art.359 provides that "as soon as" an order under clause (1) is made, it "shall" be laid before Parliament.

5.104 The new clause (1-A) which was inserted in Art.359 retrospectively in August 1975 (after the proclamation of emergency was made earlier that year in June) has brought about a major change in the structure of the emergency provisions of the Constitution. It enables the "State" (Parliament as well as State legislatures and also the President) to make temporary laws in derogation of those rights, the enforcement of which is suspended under cl.(1), to have effect so long as the order under the said

clause is in operation; the provision covered an "executive action" also. The provision in fact enlarged the ambit of Art. 358 under which the provision of derogation is restricted to Art.19 and the automatic suspension does not extend to the right of personal liberty guaranteed in Arts.20 to 22 or even to Art.14 guaranteeing the right of equality. It is to be noted in this connection that under Art.123 the President can legislate (when Parliament is not in session) by promulgating "Ordinances" if he is "satisfied" that "immediate action" is necessary. The amending Act of 1975 added a new clause (4) in Art. 123 to provide that the "satisfaction" of the President shall be "final and conclusive and shall not be questioned in any court on any ground". As a result, we submit, it became possible in Republican India to rule by means of decrees and also to enact comprehensive "Emergency Codes" in derogation of the whole of Part III (Fundamental Rights).[59] The pernicious aspect of cl.(1-A) was apparently reflected in the fact that it covered "any executive action" also and the effect of the temporary laws and also executive actions was expressly saved "as respects things done or omitted to be done".

5.105 In Pakistan, Art.191(1) in 1956 and Art.232(1) in 1973, reproduced in substance the Indian Art. 352(1) but on each occasion there was a proviso to clause (2) which expressly denied the power to "suspend either in whole or in part the operation of any of the provisions of the Constitution relating to High Courts". It is to be noted, however, that clause (2) did not correspond to the Indian Art. 358 but to Art.353 under which, as in Pakistan (under clause (2) of Arts. 191 and 232 of 1956 and 1973 respectively), the legislative as well as executive power of the Centre could prevail on certain conditions over that of the region during an emergency. It was therefore difficult to argue that the proviso in any way detracted from the force of the provision for "suspension of the right to move the court for the enforcement of fundamental rights", which was similar in terms to the Indian Art.359(1).[60] In Pakistan also, as in India, the

proclamation, as well as the suspension order made by the President, were both subjected to Parliamentary control.[61] In 1973 clause (6) of Art.232 authorised Parliament to make law to extend its life by a year during an emergency.[62]

5.106 In Sri Lanka in the 1972 Constitution, Chapter XVI contains the relevant provisions, captioned "Public Security", encapsulated wholly and solely within s.134. Sub-s.(1) provides that the Public Security Ordinance[63] shall be deemed to be a law enacted by the National State Assembly, while sub-s.(2) contemplates that the President "shall" declare a "state of emergency" upon the Prime Minister "advising" him of the "existence or the imminence of a state of public emergency" and that, during such period, he "shall act on the advice of the Prime Minister in all matters legally required or authorised to be done by the President in relation to a state of emergency". We propose to deal with the Ordinance in the appropriate context but in the present context it is necessary to refer to the constitutional limitations on legislative power contained in ss.44 and 45. The "legislative power" of Parliament includes the power to repeal or amend the Constitution even to enacting a new Constitution, but the Constitution cannot be "suspended" either wholly or in part. Although s.45 expressly prohibits "delegation of principal law-making power", there is an exception provided in clause (4) in the following terms:

> The National State Assembly may. . . delegate to the President the power to make, in accordance with the law for the time being relating to public security and for the duration of a state of emergency, emergency regulations 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. . . overriding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution.

It may be noted that, under s.52, a law "inconsistent" with the Constitution can be passed by the majority required for the amendment of the Constitution and such law is required to be "interpreted as amending the

[relevant] provisions of the Constitution".

5.107 It is therefore apparent that the Constitution of Sri Lanka, of all the Constitutions of the Indian sub-continent, maintains the primacy of Parliament even during an emergency, though it contains no justiciable Bill of Rights, in contrast with the position envisaged in the other Constitutions which concede a large measure of freedom to the executive during emergency. We have also noted that of the other three Constitutions, Pakistan's is the most progressive in that it provides many wholesome checks on the legislature and through it on the executive, in so far as measures for preventive detention are concerned. We may now turn to examine some of the measures enacted in the different states.

(2) Some "preventive detention" laws

(A) India

(a) "PDA" and "MISA"

5.108 There are twenty-two states (besides the nine "Union territories") now forming the Union of India, including the territories of the pre-independence "Native States" which have ceased to exist. Although the Constitution empowered the States also to make laws on "preventive detention", the Union's power encompassed all aspects of the subject.[64] It is evidently not possible to cover the whole gamut of the law on the subject enacted, whether by Parliament or by the State legislatures, or the subsidiary legislation made by the various authorities, in this study, and therefore we propose to deal only with some central legislations of topical importance. In 1971 Parliament passed the Maintenance of Internal Security Act (hereinafter called MISA) which has been amended from time to time but is still the main legislative provision on the subject.[65] Before that the Preventive Detention Act of 1950 (hereinafter called PDA) held the field.[66] The Preventive Detention Bill was passed on February 15, 1950, within one month of India becoming a Republic.[67] The measure as enacted was to have lapsed on 1st April 1951. Even so, it was bitterly opposed

as a majority of the legislators who formed the vanguard of the freedom movement had fresh and vivid memories of their own sufferings in detention under colonial rule. Its stout defence by Sardar Vallabhbhai Patel (Home Minister) and the latter's charismatic personality eventually carried the day. He spoke as follows:[68]

> The majority of detainees are communists. Our fight is not with communists or those who believe in the theory of communism but with those whose avowed object is to create disruption, dislocation and tamper with communications, to suborn loyalty and make it impossible for normal government based on law to function. Obviously we cannot deal with these people in terms of ordinary law. . . When the law is flouted and offences are committed there is the criminal law which is put in force. But where the very basis of law is sought to be undermined and attempts are made to create a state of affairs in which. . . men would not be men and law would not be law. . .

In 1952 the same Home Minister was able to secure a new life for the Act up to 1957 in the teeth of vehement opposition, by citing statistics to prove that the Act was sparingly used and asserting that "expression of political opinion was never a ground for detention."[69]

5.109 Section 3(1) of MISA, which re-enacted in substantially unaltered form s.3(1) of PDA, is quoted below <u>in extenso</u>:

> The Central Government of the State Government may -
>
> (a) <u>if satisfied</u> with respect to any person (including a foreigner) that <u>with a view to preventing</u> him from acting in any manner prejudicial to -
>  (i) the defence of India, the relations of India with foreign powers, <u>or</u> the security of India, <u>or</u>
>  (ii) the security of the State or the maintenance of public order, <u>or</u>
>  (iii) the maintenance of supplies and services essential to the community, or
>
> (b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.
>
> [emphasis added]

By sub-s.(2) it was provided that the power to make a detention order in respect of sub-clauses (ii) and (iii) of sub-s.(1) could also be exercised by district magistrates, additional district magistrates (wherever so empowered) and the Commissioners of Police (wherever appointed).[70] Such

officers were, however, required to report the fact "forthwith" to the appropriate state government, together with the "grounds" and other "particulars" having a bearing on the matter, according to sub-s.(3), which provided that "no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved".[71] The proviso to the sub-section indicated the circumstances under which such detentions could be for twenty-two (instead of twelve) days.[72] Under sub-s.(4) the state government was required, whether it had "made or approved" any order, to report the fact together with "grounds" and "particulars" to the central government.

5.110. Under s.5 (corresponding to s.4, PDA) the appropriate government was authorised to specify by a "general or special order" the place of detention and also "conditions including conditions as to maintenance, discipline and punishment for breaches of discipline". It was provided in s.6 (corresponding to s.5, PDA) that "no detention order shall be invalid or inoperative merely by reason" that either the person concerned or the place of detention was outside the "territorial limits" of the authority passing the order. On the other hand the important "constitutional safeguard" was provided in s.8 which is quoted below:

> (1) When a person is detained. . . the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate government.
>
> (2) Nothing in sub-s.(1) shall require the authority to disclose facts which it considers to be against the public interest to disclose. [emphasis added]

It may be noted that under the corresponding s.7 of PDA the grounds had to be communicated strictly within five days. It neither contained the expression "ordinarily" nor the provision of "exceptional circumstances" and "fifteen days". However, it is submitted that the expressions under-

lined in the above extract provided a scope for judicial review so that in appropriate cases the courts could grant relief by resorting to strict compliance with the provisions and also by holding that non-compliance with any particular mandate thereof was fatal as the provision apparently reproduced a constitutional guarantee (Art.22(5)). It is to be noted that the Constitution speaks of "a representation" but the authority to whom it is to be made is not specified. It could be said that the section contemplated representations to the appropriate government particularly for instant relief in such cases as of mistaken identity and that another representation in terms of the Constitution for detailed inquiry was not excluded.

5.111 The provision for an "Advisory Board" contemplated under Art. 22(4)(a) was made in s.9 which corresponded to s.8 of PDA. Whether such Board was constituted by the Central or State government each Board was to have a Chairman and two members, all to be appointed by the appropriate government, all possessing the constitutional qualification. Although the Constitution did not specify the appointing authority, if the Act had specified the Chief Justice, as in Pakistan, it would perhaps have better secured the independence of the Board, as the Constitution permitted appointment of persons other than sitting judges of the High Court and the government was likely to feel disposed to appoint such persons rather than the sitting judges.[73]

5.112 The Board's jurisdiction and procedure were dealt with in ss.10 and 11 (re-enacting ss.9 and 10 of PDA) by providing for reference to it by the government of the "grounds" and the "representation, if any", within thirty days and for the report by the Board to the government within ten weeks from the date of detention. The "proceedings" and the "report" of the Board (except its "opinion" as to whether or not there was sufficient cause for the detention) were to be "confidential"; there could be a personal hearing but no legal representation before the Board, although the latter could call for "information" from "any person" including the

government before submitting its report. Following the constitutional mandate, s.12 (s.11 PDA) required the government to abide by the report.

5.113 Apparently, the Constitution having vested in the Board the final or ultimate jurisdiction for the exercise of the power of preventive detention, it was but natural for the courts to attach the utmost importance to their role and function, albeit the ultimate "opinion" of the Board, according to the Constitution (and according to the Acts the primary "satisfaction" of the executive also) was to be subjective. Thus, the courts could apparently only ensure that the detainee had a proper hearing before the Board, although the Constitution did not expressly specify the scope of the hearing and only required the "grounds" to be communicated and the "earliest opportunity" to be given for making "a representation", leaving the "procedure" for the "inquiry" to be provided by law. It was possible to contend that the constitutional sanction of subjective satisfaction being limited to the acts of the Advisory Board, the "primary" satisfaction of the executive did not deserve equal status. The position in this respect was the same in both India and Pakistan. While courts in Pakistan exercised a larger measure of judicial review from the beginning (albeit without expressly noting this distinction between the two "satisfactions") the Indian courts were slow to extend the scope of their power.[74]

5.114 Under PDA (vide s.11) as well as under MISA (vide s.13) the maximum period of detention was prescribed - twelve months from the date of detention. There was, however, a "temporary" amendment of this provision in 1971 (in MISA) when the words "or until the expiry of the Defence and Internal Security of India Act 1971, whichever is later", were inserted and given retrospective effect. It has to be noted that the "temporary" amendment also affected s.3(2) of MISA by enlarging the powers of the subordinate authorities mentioned therein by extending their jurisdiction to matters covered by sub-clause (i) of the sub-section.[75] It was, however, the first-mentioned amendment which demanded greater

attention and was confronted with a judicial challenge, albeit unsuccessfully.[76] Of course the provision for prolonged (now almost indefinite) detention was sought to be counterveiled by enabling the earlier revocation or modification or even "temporary release" of detainees under ss.14 and 15 (ss.13 and 14, PDA). However, the authority to make a fresh detention order in the case of revocation was expressly reserved under either Act. Provision was also made in both Acts to debar legal proceedings "for anything in good faith done or intended to be done in pursuance" of the Acts.[77]

5.115 In 1975 a new provision (not in PDA) was inserted in MISA as ss.16A and 18[78]. The two sections were complementary and apparently derived authority from the retrospectively introduced cl.(1-A) of Art.359 of the Constitution. The vires of only the statutory (not Constitutional) amendment was challenged.[79] According to s.18 "No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any." By sub-s.(1) of s.16A it was provided that "Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of the section shall have effect during the period of operation" of the two proclamations of emergency (of 1971 and 1975) specified therein. The provisions of s.16A contained draconian measures under which all normal constitutional safeguards (particularly of Art.22) were swept away and replaced by a "declaration" made either under sub-s.(2) or (2A) or (3) of the section by the appropriate government or even by an officer (acting under s.3(2)) to the effect that the detention was "necessary for dealing effectively with the emergency". The provisions of sub-ss. 3 and 4 of s.3 (dealing with interim detention and report) were amended and it was provided (by sub-ss.(6)(i) and (7)(ii)) that the provisions of ss.8 to 12 of the Act (dealing with the communication of grounds and the hearing before, and opinion of, the Advisory Board) would not apply to cases where such a declaration was made.

5.116 The new provision (s.16A), which we may describe as an "Emergency Code of Preventive Detention", provided for new forms of safeguards termed as "review", "consideration" and "re-consideration" by the executive itself, as contemplated under sub-ss.(2) to (5). The case of a person detained after 25th June 1975 (the second emergency), but before the commencement of the new code was to be "reviewed"; that of one detained after its commencement was to be"considered", in either case by the appropriate government, within fifteen days, and then "reconsidered" by it periodically every four months. In this connection the more draconian provisions of sub-ss.(5) and (9) may be quoted:

> (5) In making any review, consideration or re-consideration under sub-s.(2), sub-s.(3) or sub-s.(4), the appropriate government or the officer may act on the basis of the information and materials in its possession or his possession without communicating or disclosing any such information or materials to the person concerned or affording him any opportunity of making any representation against the making under sub-s.(2), or the making or confirming under sub-s.(3), . . . of the declaration in respect of him.
>
> (9) Notwithstanding anything contained in any other law or any rule having the force of law -
>
> (a) the grounds on which an order of detention is made under sub-s.(1) of s.3 against any person in respect of whom a declaration is made under sub-s.(2) or sub-s.(3) and any information or materials on which such grounds or declaration . . . are based, shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this Act, no one shall communicate or disclose any such ground, information or material or any document containing such. . .
>
> (b) no person against whom an order of detention is made . . . shall be entitled to the communication or disclosure of any such ground. . . as is referred to in clause (a) or the production to him of any document containing such. . .
>
> [emphasis added]

5.117 It is to be noted that unlike certain provisions of the Act (MISA) which were "temporarily amended" in virtue of the provisions s.6(6) of the Defence and Internal Security Act, 1971, ss.16A and 18 came in virtue

of the amendments made in the parent Act itself (MISA) by certain Ordinances enacted by the President under Art. 123. The Ordinances neither referred to the fact that a declaration of emergency and an order under Art. 359(1) were in operation nor did they specify the life of the new provisions. Although the validity of the relevant Constitution (Amendment) Acts (amending inter alia Art. 359) could not be challenged and were indeed not challenged in the HABEAS CORPUS case (infra) on the other hand an indefinite life for the provisions of s.16A which were patently ultra vires Art.22(7) could not be supported on the strength of Art. 359(1-A). It is submitted that the expression "cease to operate" of cl.(1-A) of Art.359, limiting the life of laws made and executive actions taken during the operation of the Order under cl.(1), contemplate merely an enabling provision.

(b) "COFEPOSA"

5.118 Although The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act was passed in 1974[80] (popularly called COFEPOSA and referred hereinafter as such) it not only anticipated, but also came to be substantially affected by, the powerful wave of the "emergency amendments" of 1975 so as to form a part of the new "Emergency Code". It is necessary to quote the preamble in extenso which purports to explain in detail the rationale of the draconian measure:

> Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State;
>
> And whereas having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude are clandestinely organised and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith;
>
> [emphasis added]

It must be noted that although entry 3, List III authorised a law for preventive detention to be made for "security of a State", (not "the State") there was no power of such detention in respect of either "violation of foreign exchange regulations" or "smuggling activities" even under entry 9 of List I and the Act could therefore be challenged as void for want of legislative competence.

5.119 By s.3(1) the Central and State governments, as well as the officers specified therein can make a detention order against any person if "satisfied" that it is necessary to do so "with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from

(i) smuggling goods, or
(ii) abetting the smuggling of goods, or
(iii) engaging in transporting or concealing or keeping smuggled goods, or
(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods.

[emphasis added]

Apparently, of the two types of prejudicial activities, the power in respect of smuggling was much circumscribed. Although the expression "in any manner" also figured in PDA and MISA (in s.3(1) in either case), the criteria here ("conservation or augmentation of foreign exchange") was more nebulous than those indicated in PDA and MISA. The expressions (underlined within brackets) were likely to be read and used conjunctively, eiusdem generis by the executive, in view of their economic context, unlike their counterparts in PDA and MISA. A "ground" given under PDA or MISA, if recited in such terms as "security of the state or the maintenance of public order", could be easily challenged as vague. A similar challenge under COFEPOSA in relation to "foreign exchange" could be easier than that in respect of "smuggling" although it was possible here also to impute vagueness to the joint use of the two terms. Sub-s.(3) of

s.3 of COFEPOSA corresponded to s.8(1) MISA, except that it did not expressly provide for "a representation" and the provision could therefore be challenged on that ground despite the provision made for "Advisory Board" in s.8 (discussed below).

5.120 In this connection reference may be made to s.5A (inserted in 1975) which is as follows:[81]

> Where a person has been detained in pursuance of an order . . . under sub-s.(1) of s.3 which has been made on two or more grounds, such order. . . shall be deemed to have been made separately on each of such grounds and accordingly -
>
> (a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are -
> (i) vague
> (ii) non-existent,
> (iii) not relevant,
> (iv) not connected or not proximately connected with such person, or
> (v) invalid for any other reason whatsoever,
>
> and it is not therefore possible to hold that the government or officer making such order would have been satisfied as provided in sub-s.(1) of s.3 with reference to the remaining ground or grounds. . .
>
> (b) the government or officer. . . shall be deemed to have made the order. . . after being satisfied. . . with reference to the remaining ground or grounds.

The new "deeming" provision was meant to preclude any possible judicial challenge to a detention order by specifically mentioning not only "vagueness" but other grounds also on which the Indian courts usually granted relief. Obviously it was intended to secure the position obtaining in England under the laws relating to the "defence of the realm",[82] - a position against which the Indian Constitution had made provision in Art.22 which the Indian courts, as we shall see, secured more firmly by attaching special significance to such expressions as "grounds" and "facts", and to the provision for an "Advisory Board". As in England, a stereotyped order in the form provided by the Act could now supply a full and complete answer to a judicial challenge whether or not in fact there was

a "real" satisfaction in any particular case.[83]

5.121 Under s.8 provision was made for the constitution of "advisory boards" and for the procedure for "inquiry" by the Board and for its "opinion" in terms of "sub-clause (a) of clause (4) and sub-clause (c) of clause (7) of article 22 of the Constitution", on lines similar to PDA and MISA. But provision was also made for detaining persons (on the ground of "smuggling" only) longer than three months without obtaining the opinion of the Board in s.9, which was apparently the precursor of s.16A of MISA, although s.9 did not (like s.16A) totally block out "reference" to the Board; the inexorable time-limit of three months was relaxed with an alternative provision for "review" by the appropriate government. The maximum period of detention in cases not covered by s.9 was fixed at two years by s.10. There was also provision in COFEPOSA (in ss.11 and 12) for revocation and temporary release as in MISA. In s.12A (inserted in 1975) "special provision for dealing with emergency" was made on the lines of s.16A of MISA, prohibiting disclosure of "grounds" and introducing the provision of "consideration", "review", "reconsideration" following a similar "declaration" as was contemplated under MISA.[84]

5.122 We thus see that in the republican era out of the three principal enactments, PDA, MISA and COFEPOSA, only PDA represented "peacetime" measures and that by amendments made in 1975 in the other two Acts an attempt was made to establish that preventive detention measures could be more stringent during an emergency. There was no doubt that the judiciary could not question the wisdom of the political judgment of the rulers in declaring an emergency, but it was certainly not powerless to say whether the "Emergency Code" was violative of the Constitution. Apparently the new "Code" equalled if it did not surpass in severity in some respects, the measures enacted by the colonial rulers in curtailing personal liberty, whether under the Bengal Regulation or the Rowlatt Act, or even the more recent provisions of the 1939 Defence of India Act and Rules, which we have

discussed earlier.[85] However, in so far as COFEPOSA was concerned, the measures being directed towards ensuring "economic justice" they upheld and gave life to the spirit of the Constitution to strengthen the foundations of "economic democracy" in the country as laid down by the founding fathers. It could be expected that in 1975 the courts would have grown wiser after their earlier unsuccessful confrontations with Parliament and that they would act in such a way in interpreting the provisions of COFEPOSA as not to defeat its object. How the courts actually behaved in this matter will be examined in the context of the general judicial response to preventive detention law, but first we may turn to examine some of the laws of the other states of the sub-continent.

(B) Pakistan and Bangladesh

5.123 It is necessary to point out at the outset that the role of preventive detention laws in these two states was not as pronounced as that in India as in both countries the "regulations" of the martial law regimes played a paramount role, which we propose to discuss separately.[86] The Constitutions of both states permitted the enactment of peacetime law for preventive detention, as in India, but, unlike the Indian law, The Security of Pakistan Act (hereinafter referred to as SPA) was enacted as a temporary measure in 1952, before the Constitution. Its application was continued although it was amended later from time to time.[87] In Bangladesh the East Pakistan Public Safety Ordinance of 1958 (hereinafter referred to as PSO) enacted by the erstwhile rulers was adopted as a Bangladesh law.[88] The parallel provisions of the two enactments, in so far as they are relevant for our purpose, may be quoted. The SPA provided, in s.3(1):

> The Central Government, if satisfied with respect to any particular person, that, with a view to preventing him from acting in any manner prejudicial to the defence or the external affairs or the security of Pakistan. . . or to the maintenance of supplies and services essential to the community, or for the maintenance of public order, it is necessary so to do, he may make an order -
>
> (b) directing that he be detained;

Under the PSO, s.17(1) empowered the Provincial Government, if "satisfied" with respect to any person that "with a view to preventing him" from doing any "prejudicial act" it is necessary so to do, to make an order directing that he be detained. It is necessary, however, to quote material portions of s.41 of PSO, although they had no parallel in SPA but were apparently inspired by the provisions of r.129, framed under the Defence of India Act 1939.

> (1) Any police officer not below the rank of Sub-Inspector or . . . may arrest without warrant any person whom he reasonably suspects of having done, or of doing, or of being about to do, a prejudicial act.

Under sub-s.(2) the fact had to be reported "forthwith" to the Provincial government and "pending receipt" of their order the person arrested could be committed to "such custody as the Provincial government may, by general or special order, specify". However, proviso (ii) limited the duration of the "temporary custody" to two months, under government orders and according to proviso (iii), thirty days, without their order. It may be noted that "prejudicial act" was defined to include a wide range of activities such as acts endangering public safety or public order, the illegal possession of arms and also hoarding and smuggling.

5.124 Sub-s.(7) of s.3 of SPA provided that such order would remain in force for the period, if any, specified in the order, otherwise until it was revoked. By an amendment, ss.3A, 3B and 3C corresponding respectively to ss.14, 3A and 5 of the Indian PDA were introduced to provide inter alia for temporary release of the detainees.[89] Under s.5 "Advisory Boards" were to be constituted, each with two persons (sitting, retired or potential High Court judges) appointed by the Central government. The provision for the communication of grounds and for representation was contained in s.6, which corresponded with s.7 of the Indian PDA but differed materially from the latter in certain respects. It provided for a time-limit of 15 days (originally one month)

and made it a "duty" of the detaining authority to inform the detainee of his right to make "representation" without specifying (as in India) that it could only be made to the government.[90] The reference to the Board could be made within three months according to s.7, which was in other respects substantially similar to s.9 of PDA. The procedure for inquiry by the Board prescribed in s.8 was similar to the Indian provision (s.10, PDA) except that originally, according to sub-s.(4), the opinion of the Board was not binding but the proviso to the sub-section contemplated a six-monthly automatic "review". Later, the Board was also involved in the "review" and a second proviso was added with another salutary provision in the following terms:[91]

> Provided further that no fresh order. . . shall be made against any person to take effect immediately on his release from detention. . . unless such fresh order has been previously approved by the Advisory Board.

The same Amendment Act also inserted another unparalleled provision in new sub-s.(2A), which required the Advisory Board to specify in its report the "classification of the person against whom the order is made for the purpose of the rules regulating his detention in jail", if the Board should hold that there was sufficient cause for his detention.

5.125 In 1959 an Ordinance was passed by President Ayub Khan, who was then the Chief Martial Law Administrator also, providing that ss.5, 7 and 8 should be "deemed to have been omitted on 10th October 1958", namely the date of the military take-over. It is also to be noted, this was done when the Constitution was suspended, but, even before the Constitution, it was provided in the Act in s.9 that in matters concerning the defence, external affairs or security of Pakistan, there could be detention up to one year without obtaining the opinion of the Advisory Board.[92]

5.126 In PSO in relation to the detention order passed under s.17(1) there were parallel provisions in ss.19, 19A to 19D for communication of grounds, representation and inquiry by an Advisory Board to be constituted,

in this case with a sitting High Court Judge and another senior officer in the service of Pakistan to be nominated by the Governor. Here also there was an additional provision for a three-monthly automatic review by the government and the Board and the result of the review was to be communicated (also under SPA) to the detainee. Following (anticipating, in Bangladesh) the constitutional mandate, the opinion of the Board was given a binding effect. The provisions of PSO apparently provided greater protection except perhaps in one respect. There was no time-limit for the communication of grounds: they had to be communicated "as soon as practicable", albeit in conformity with the constitutional requirement as the Constitution also did not prescribe any time-limit in the matter. Reference in this connection may be made to the West Pakistan Maintenance of Public Order 1960 under which a shorter time-limit of two months for detention without the opinion of the Board was provided. Apparently the provision was not ultra vires but the court rightly held detention in a particular case for six months under the Ordinance (even with the Board's opinion) to be illegal.[93]

5.126-A. Special notice has to be taken of a significant aspect of the provisions of the Pakistan law which (in sub-clauses (c) to (h) of s.3(1) of SPA) contemplated other types of restrictions besides detention. In this respect Pakistan followed the other states of the New Commonwealth.[93a] In India, neither PDA, nor MISA, nor COFEPOSA, contained such provision. By positing alternative types of restraints in the same enactment which was sought to be used as an "emergency measure", although enacted as a peacetime law, the authority was provided with a ready option to impose less rigorous type of restraint, depending upon facts and circumstances of the case. It is true that the Criminal Procedure Code of 1898 (common to both states) contained certain provisions (in ss.107 and 144 contemplating furnishing of security and other restrictions to prevent "breach of the peace") but for obvious reasons they could not prove equally effective substitutes.

(C) Sri Lanka

5.127 In India the 1975 amendment of MISA and COFEPOSA made up a sort of "Emergency Code" by invoking the declaration of emergency made under the Constitution not only in 1975 but also in 1971, both of which have since been continuing until 1977. In Pakistan and Bangladesh martial law regulations made up such a "Code" but in Sri Lanka (like India) the "state of emergency" declared under the Constitution continued in force from 1971 to 1977, during which resort was had not only to the Public Security Ordinance but additional provisions were also made. A special "Commission" was set-up for the trial of political prisoners and the Emergency (Miscellaneous Provisions and Powers) Regulations were enacted, of which there was widespread use, especially of Arts.19(c) and 20(2) of Regulation No. 12 of 1974, under which the police could detain any person up to 15 days.[94] However, before proceeding to examine the provisions of the Ordinance in some detail, as it was enacted (in 1947) as a permanent measure, we may usefully refer to a general provision. In 1972 the Interpretation Ordinance was amended to provide that the power of the court to issue mandates in the nature of habeas corpus could be considered to be unaffected by any statutory provision which prohibited orders being "called in question in any court".[95] The provision enabled the courts to ignore and override a specific provision in another law to the effect that s.45 of the Courts Ordinance (which dealt with habeas corpus) shall not apply in regard to any person detained under any emergency regulation.[96]

5.128 The Public Security Ordinance was a pre-independence enactment which was modelled on the Emergency Powers Order in Council 1939. Under s.2 the Governor General (later the President) could issue a "proclamation" to bring into operation Part II of the Ordinance if and when he was of the "opinion" that it was "expedient to do so in the interests of public security and the preservation of public order and for the maintenance of supplies and services essential to the community" but he was also to be satisfied of the "existence or imminence of a state of public emergency".

The fulfilment of the last mentioned requirement, according to s.3, "could not be called in question in any court". Under Part II, "regulations" could be made by him upon the recommendation of the Prime Minister or other authorised Minister as might "appear to him to be necessary or expedient in the interest of public security and preservation of public order and the suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential to the community" to provide for among other things, detention of persons according to sub-s.(2)(a). However, s.8 provided that "No emergency regulation and no order, rule or direction made or given thereunder shall be called in question in any court". This provision explains the reason why there is no case-law on preventive detention in Sri Lanka where, although under the Republican Constitution of 1972 judicial review of legislative provision was curtailed, it ought to have been possible, nevertheless, to challenge but for the provision of s.8, detention orders in individual cases. It is however submitted that it was possible to construe s.8 as not precluding judicial challenge grounded either on malice in law or malice in fact.[96a]

5.129 The Ordinance was amended in 1959 when a new Part, namely Part III, was added to it to give "special powers" to the Prime Minister during emergency.[97] The new Part contained, inter alia, s.12, of which relevant portions may be quoted:

> (1) Where circumstances endangering the public security in any area have arisen or are imminent and the Prime Minister is of the opinion that the police are inadequate to deal with such situation in that area, he may, by order published in the gazette, call out all or any of the members. . . of the armed forces for the maintenance of public order in that area.
>
> (2) . . . they shall have powers including those of search and arrest conferred on the police.
>
> (7) . . . they shall remain so called out until the expiry or rescission of that order.

It is to be noted, however, that despite the fact that the use of military for an undefined period - and that too to be made dependent on the uncontrolled discretion of a single functionary - was per se offensive, the power of the armed forces was significantly restricted within a narrow compass and it was not extended particularly to make detentions. Under s.20 it was provided that persons arrested by the military shall be deemed to be in the custody of the police but under the ordinary law the police also had no power to make detention. Some provision for "curfew" was also contemplated under s.16 but the Ordinance significantly did not provide for "preventive detention" and such measures had therefore to be provided under the temporary "emergency regulations" as indicated above.

IV. The Judicial Response

(1) Some important decisions of the colonial era

5.130 In re AMEER KHAN,[1] also known as the WAHIBI case, the prisoner challenged his detention under Bengal Regulation 3 of 1818.[2] He was a British Indian subject resident in Calcutta, who was arrested at his residence on 18th July 1869 and detained in the Alipur jail outside Calcutta. An application for habeas corpus was made on 1st August 1870. The prisoner complained that he was neither supplied with the copy of the warrant under which he was arrested nor was he allowed the inspection thereof and he was not informed even of the nature of the charge on which he was arrested. The case was argued at great length and various contentions were raised on either side apparently involving two main issues: - (1) whether the court had the jurisdiction to issue habeas corpus in the instant case, as the prisoner was an Indian subject and he was detained outside Calcutta; (2) whether the detention was legal.

5.131 On the first point the court decided in favour of the petitioner but held that the court would not issue a futile writ as such writ could

not operate against the "warrant in writing of the Governor General", in view of the provisions of the 1780 Act.[3] The jurisdiction to issue the writ but for the particular circumstances of the case was founded upon English statute as well as common law relating to habeas corpus. Reliance was placed on the various provisions of the 1772 Act and the 1774 Charter of the Supreme Court which, according to the court, were to be so construed "as would enable the court to issue a writ which the law gives to the subject as a matter of right", and reference in this connection was made to the decision in Re COZA ZACHRIAH.[4] The court did not merely rely on the fourth clause of the 1774 Charter as stated in GIRINDRA NATH (supra), in which the correctness of the decision has been doubted without taking note of the fact that on appeal, as we have seen, the decision on the point of jurisdiction was not expressly reversed, even if not so endorsed.[5]

5.132 On the second point, the first court mainly considered the vires of the Regulation and held that it differed from the Habeas Corpus Suspension Acts passed by the British Parliament in that it was, unlike those Acts, a permanent measure. It was held that, "the principles which justify the temporary suspension of Habeas Corpus Acts in England justify the Indian legislature in entrusting to the Governor General an exceptional power of placing individuals under personal restraint when, for the security of the British dominions from foreign hostility, and from internal commotion, such a course might appear necessary to the Governor General." Thus the court came to hold that the Regulation was "not repugnant to the laws of the realm" in terms of s.36 of the 1772 Act.[6] It appears that the court accepted the position that after the assumption of direct government by the Crown the discrimination in the matter of protection of the British laws relating to personal liberty disappeared in virtue of the Queen's Proclamation of 1858,[7] as contended by the

prisoner against the Attorney General's opposition. It is true that the Regulation was enacted in 1818 to be applied only to the Indian subjects and in this respect, as we have seen, the 1780 Act supplied the implied authority.[8] Therefore, the Regulation could possibly be upheld on the authority of the Parliamentary enactment and not, it is submitted, on the general authority of Indian legislation, as held by the court. On the same ground the court could also reject the challenge based on the theory of allegiance (evolved by Blackstone from Magna Carta), which was later embodied in the 1834 Act in express terms.[9]

5.133 On appeal the court also considered whether the detention was legal in terms of s.2 of the Regulation.[10] The court held that the detention was not illegal even if the prisoner was illegally arrested and that it was not necessary that the warrant should be in the hands of the officer who is to have the custody of the prisoner before the custody commences. In the instant case after the prisoner had been arrested and held in custody, the warrant for his custody was issued. The court held that the warrant was not of arrest but of commitment, which was equal to conviction by virtue of the Regulation, and the prior detention of the person concerned was presupposed. This interpretation was warranted, according to the court, to give effect to the intention of the legislature which had provided that the warrant "shall be sufficient authority for the detention". In dealing with the nature of the power the court held that "the legislature intended that it should be placed beyond all question and for that purpose declared that legality of imprisonment should depend upon the legality and sufficiency of the imprisonment alone". On the vires of the Regulation the judges in appeal adopted a different approach and held that the force of the Regulation now depended upon the effect of the later Acts of 1850 and 1858, whatever might have been the position in 1818. It was also held that indefinite detention contemplated under the Regulation did not affect the royal prerogative in that the court had

entertained the complaint but on inquiry found the "conviction and commitment" to be ex facie good, thus anticipating the approach of the English courts displayed in the wartime cases.[11]

5.134 We may now examine some of the leading decisions under the colonial emergency laws enacted in India during the Second World War.[12] In KESHAV TALPADE v EMPEROR[13] the Indian Federal Court declared r.26, framed under the Defence of India Act 1939, ultra vires s.2(2)(x) of the parent Act, which provided a refreshing contrast to the approach of the English courts. The prisoner was detained ("until further orders") in pursuance of an order passed by the government of Bombay under r.26, read with r.129(4), on receipt of a report from the Commissioner of Police, Bombay, that he was arrested and committed to jail custody by the police, under sub-rr. (1) and (2) of r.129.[14] In the order it was recited that it was necessary to detain him with a view to preventing him "from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order and the efficient prosecution of the war." The Chief Justice, Sir Maurice Gwyer, held that although the rule authorised detention for the purposes stated in the order, para (x) of s.2(2) of the parent Act authorised rules to be made for detention of persons "reasonably suspected" of the specified activities and not of any person, as contemplated under the rule. His Lordship held:[15]

> It may be that the Government has only made detention orders in the case of persons who are reasonably suspected in the manner required by para (x), but that is immaterial; the question is not what the government have in fact done under the rule but what the rule authorises them to do. . .

The decision in the HALLIDAY case[16] was held inapplicable on the ground that due effect had to be given to the specific provision of para (x) by stating that "if para (x) were not in the Act at all, perhaps different considerations might apply."

5.135 The decision had two more important aspects. It was held

that the bar of s.16(1) of the Act[17] did not operate as the order was a "nullity", having been made by virtue of an invalid rule. In referring to the recital in the order his Lordship observed:[18]

> If a detaining authority gives four reasons. . . without distinguishing between them, and any two or three of the reasons are held to be bad, it can never be certain to what extent the bad reasons operated on the mind of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them. We confess that an order in the terms of that under which the appellant. . . has been detained fills us with uneasiness. . . [it] reads like a mere mechanical recital of the language of r.26. . .

The above extract shows how the Indian courts, not only in this case, but also in the subsequent cases, in the republican era as well, made vigorous efforts to restrict the ambit of the English "subjective satisfaction theory".[19]

5.136 In EMPEROR v SHIBNATH BANERJI,[20] however, the Privy Council overruled the decision and held that r.26 was not invalid. Their Lordships held that the function of sub-s.(2) of s.2 of the parent Act was merely an illustrative one and that the rule-making power was in fact conferred by sub-s (1); that the general language of sub-s.(1) amply justified the terms of r.26. It is submitted that their Lordships attached undue importance to the expression "without prejudice to the generality of the powers conferred by sub-s.(1)" in that in so far as "illustrated powers" contemplated under sub-s.(2) were concerned there could be no doubt that those powers were to be exercised in the manner prescribed by the legislature and Chief Justice Gwyer had rightly held that there would have been a scope for a different interpretation if para (x), which defined the relevant "illustrated power", had not been there. But, it could be said that sub-s.(2) contained a special provision and ought to prevail over sub-s.(1) according to the maxim generalia specialibus non derogant. Both these aspects were ignored by the Privy Council. The Privy Council was called upon to pronounce upon the vires of the rule and the correctness of the Federal Court's

decision, in view of the fact that the prisoner in the instant case challenged the Ordinance which was enacted by the Governor General to nullify the effect of the Federal Court's decision.[21] Thus, after holding the rule to be valid their Lordships observed that they were "relieved" from any consideration of the impugned Ordinance.[22]

5.137 In the above case the prisoner had been detained under an order passed by the Additional Home Secretary to the Government of Bengal under r.26 and on an application for habeas corpus he was directed to be released by the Calcutta High Court,[23] against which decision the Crown had appealed to the Federal Court.[24] Varadachariar and Zafrulla Khan, J.J. of the Federal Court, had inter alia, held that the provisions of r.26 had not been complied with either in letter or spirit in that the Governor was not "personally" satisfied and that the stereotyped form of the order showed that there was no real satisfaction, although their Lordships also held that the "sufficiency of the material or the reasonableness of the grounds" were not justiciable; Spens, C.J., disagreed on the facts in so far as the first part of the decision was concerned. The Privy Council held that the power to make the order could be validly delegated under the ordinary rules of business framed under s.59 of the 1935 Constitution but endorsed (albeit in a restricted way) the requirement of real satisfaction laid down by the majority by stating that in the case of a detention order made under r.26 following an arrest (under r.129) the satisfaction (of the Provincial government) (under r.26) was dehors the recommendation of the police. It was also held that although there was a presumption of regularity attached to official acts, the jurisdiction of the courts "to investigate the validity" of any order was not affected by s.16 of the Act.

5.138 In EMPEROR v VIMALABAI DESHPANDE[25] the Privy Council upheld the decision of the Nagpur High Court[26] that if an arrest by the police under sub-r.(1) of r.129 was invalid it would taint the validity of the

order of the Provincial government passed under sub-r.(4). Their Lordships held that the ambit of the power contemplated under r.129 was not enlarged under sub-r. (4) and that the only substantive power conferred thereunder was restricted to the temporary custody of any person arrested on "reasonable suspicion" as to his activities. If there was no reasonable ground of suspicion, the government could not make any order under sub-r.(4). Their Lordships also pointed out the difference between the two provisions - rr.26 and 129 - by indicating that when an arrest was made by a police officer the burden was upon him, and not the prisoner, to prove that there was reasonable suspicion against the latter. Their Lordships also added that even when an order was passed under r.26 the government had to be "satisfied" and that mere suspicion was not enough, although the expression was not qualified by any such adverb as "reasonably" or "honestly". In the High Court the decision in the LIVERSIDGE case[27] was referred to but it was labelled as a "very special case, decided on very special grounds". The Court also noted that the decision had come under severe criticism both in England and America and took care to reproduce the relevant extracts from the opinions of the distinguished jurists. The Privy Council also held the case inapplicable on facts. The High Court also made reference to the provisions of ss.14 and 15 to say that the Act did not alter the rights or liberties of the subject except as expressly provided thereunder by prohibiting interference with ordinary lives and vocations of those proceeded under the Act. Their Lordships of the Nagpur High Court held that the "conditions" prescribed by the two sections were "express", "restrictive" and "fundamental" and the Act and the rules must be construed in the light of those conditions.

(2) Some important decisions of the republican era

(A) India

(a) The Gopalan Case

5.139 The decision in A.K. GOPALAN v STATE OF MADRAS[28] has been compared with the renowned DARNEL case,[29] rightly so because of their historic importance. India became a republic on 26th January 1950 and the republican Parliament passed the Preventive Detention Act within a month. The prisoner, a prominent communist leader, was already in detention in Madras, and on 1st March 1950 was served with an order made under s.3(1) of the Act. He applied to the Supreme Court for habeas corpus on 20th March under Art. 32 of the Constitution, contending that the Act contravened the provisions of Arts. 13, 19 and 21 and that the provisions of the Act did not accord with Art. 22 and also that the order was mala fide. Unfortunately, as has been pointed out, the habeas corpus aspect was not brought to the forefront in the case.[30] The opinion was handed down on 19th May 1950.

5.140 The Act as a whole was held to be intra vires the Constitution with the exception of s.14, the invalidity of which was held not to affect the main provisions of the Act. Fazl Ali and Mahajan, J.J. further held that s.12 was also ultra vires as it did not conform to the relevant provisions of the Constitution. By s.12 it was provided that in certain cases a person could be detained for more than three months (but not exceeding one year) without obtaining the opinion of the Advisory Board whereas s.14 made it an offence to disclose among others the "grounds" of detention and forbade the courts from either allowing evidence to be given before it or of requiring to be produced before it, the forbidden matters including the "grounds". As a result of the decision, s.14 was first omitted and later the offensive provisions of s.12 also.[31] While Fazl Ali, J., held s.12 violative of both Arts.22(7) and 19(5), Mahajan, J., held the same to be ultra vires Art.22(7) only. The court unanimously

accepted the prisoner's contention that s.14 contravened the provisions of Arts.22(5) and 32 but while Fazl Ali and Mahajan, J.J., allowed the application, the other judges comprising the majority dismissed the same holding that the invalidity of s.14 did not affect the prisoner's detention.

5.141 The judges interpreted variously the provisions of Arts. 13, 19, 20 and 22 of the Constitution but briefly it may be stated that Kania, C.J., and also Mukherjea and Das J.J., held that Art. 19 had no application to a law dealing with either preventive or punitive detention as its direct object. Mahajan, J., went so far as to accept the position canvassed by the Attorney General that Art. 22 was a self-contained Code in respect of preventive detention by holding that it was subject to neither Art. 13(2) nor Art. 19(5)[32] and that it embodied the safeguard contemplated under Art.21.[33] His Lordship held that both Arts. 19(5) and 22(7) were enabling provisions and that therefore, as one could not be regarded as a safeguard against the other, Art. 13(2) had no scope to operate. It is to be noted that although Mahajan, J. observed that in interpreting the provisions he attached importance to "the solemn words of the declaration contained in the preamble to the Constitution", while describing the fundamental rights as "one of the greatest charters of liberty",[34] his approach in the matter bore strong impress of his view that "benefit of reasonable doubt" had to be given to legislative action and that the subject of preventive detention was dealt with in the chapter on fundamental rights "because of the conditions prevailing in the newly born Republic."[35]

5.142 We may now discuss at some length the more powerful dissent of Sir Fazl Ali whose views have eventually come to prevail.[36] The basic soundness of his approach is reflected in the following passage:[37]

> I am aware that both in England and in America and also in many other countries, there has been a re-orientation of the old notions of individual freedom which is gradually

> yielding to social control in many matters. I also realize that those who run the State have very onerous responsibilities, and it is not correct to say that emergent conditions have altogether disappeared from this country. . . That a person should be deprived of his personal liberty without a trial is a serious matter, but the needs of society may demand it and the individual may often have to yield to those needs. Still the balance between the maintenance of individual rights and public good can be struck only if the person who is deprived of his liberty is allowed a fair chance to establish his innocence and I do not see how the establishment of an appropriate machinery giving him such a chance can be an impediment to good and just government.
>
> [emphasis added]

Indeed his Lordship projected into bold relief matters of transcendental value to mankind essential for the existence of a free society such as the one envisaged under the Indian Constitution. As we have already seen, the concern for protection of personal liberty and the need for a just balance equally occupied the minds of the founding fathers.[38] Some other judges also referred (as Sir Fazl Ali had done) to the Report of the Drafting Committee and to the debates of the Constituent Assembly, but obviously they could not gather the real intention of the founding fathers.[39]

5.143 The crux of his Lordship's judgment was to be found in his decision on three important points. In the first place, it was held that the freedom of movement guaranteed under Art.19(1)(d) embraced what his Lordship called the "juristic concept" of personal liberty, referring to numerous authorities including the decision in BIRD v JONES.[40] Although it is possible to support his Lordship's broad proposition that Art.19 did not stand alone in isolation (as the court has subsequently held)[41] and that the term "restriction" used in clause (5) embraced cases of "deprivation", it is submitted that in so far as freedom of movement was concerned the qualifying expression of clause (d), namely, "throughout the territory of India" was a patent manifestation of the important element of the federal structure of the new state. This aspect was perhaps not properly emphasized before his Lordship. Secondly, although his

Lordship rightly, in common with the other judges, held that the expression "procedure established by law" did not embrace the American due process doctrine, the term "law" according to his Lordship did not merely mean enacted law as held by the other judges: it meant the "established law" or "law of the land" in which he included the principle that none shall be condemned unheard, based not only on the British system of law but being "deeply rooted in the ancient history" of India and manifested in the "panchayat system from the earliest times."[42]

5.144 The decision on the second point was indeed equally bold and imaginative as on the first and, although it had much to commend it, the definition of "law" suggested by his Lordship did have an aura of vagueness about it which posed a larger question, namely, whether a written Constitution which represented the "grundnorm" of a state, a priori postulated the codification of all superior norms. The other judges (the majority) avoided a direct answer to the question which we shall examine. We may first deal with the decision of Sir Fazl Ali on the third and important point, namely, the interpretation of Art.22(7)(a). His Lordship held that sub-cl. (a) should be considered as an "exception" to the general "rule" embodied in cl.(4)(a) which required detention beyond three months to depend on the opinion of the advisory board. If the requirement is to be dispensed with the class or classes of cases as well as the circumstances must be of a special nature; the conjunction "and" of sub-cl.(a) cannot be read disjunctively as contended by the State. It was also held that the term "prescribe" implied selection which involved a "mental effort", more than a mere "mechanical process". A mere reproduction of the entries in the legislative lists would not be a compliance with the provisions of sub-cl.(a) which was of a "protective" nature postulating "some element of exceptional gravity or menace" to meet which an "extreme type of legislation" was contemplated thereunder.[43] The twofold limitation and its object and purpose were spelled out in the following terms:[44]

> The Act must prescribe (1) "class or classes of cases" which are to have reference to the persons against whom the law is to operate and their activities and movements and (2) "circumstances" which would bring into prominence the conditions and the backgrounds against which dangerous activities should call for special measures . . .[thus] the sphere of the law will be confined only to a special type of case - it will be less vague, less open to abuse and enable those who have to administer it to determine objectively when a condition has arisen to justify the use of the power. . . [emphasis added]

5.145 While examining the provisions of the Act his Lordship held s.12 ultra vires Art.22(7)(a) as it did not specify the "circumstances" and because even in respect of the "class of cases" there was no proper "selection" but an arbitrary reproduction of the legislative entries. His Lordship also held that the provision was "unreasonable". On the other hand the provisions of s.3 (which did not exclude the opinion of an advisory board) was held not to be unreasonable merely because it provided for the arrest and the initial detention on the "so-called subjective satisfaction". The reason being that the said satisfaction could eventually be tested by a suitable machinery through which grounds of detention could be examined and the detainee's representation considered in relation thereto.[45]

5.146 As the other judges held that Art.19 was inapplicable, as freedom of movement did not include the concept of personal liberty, they found no scope for the test of reasonableness contemplated thereunder but approached the matter from different angles. Kania, C.J., dealt with the challenge to s.3 on the ground of vagueness. The provision was not invalid for the reason that it provided for a "subjective test". The very purpose of preventive detention was not only to prevent an individual from acting in a particular way but also from achieving a particular object and the said test was based "on the cumulative effect of different actions". However, "preventive detention action must be taken on good suspicion", added his Lordship.[46] Sastri, J., endorsed these views and also dealt with and

rejected the challenge to the section based on the concept of "due process" which, according to the prisoner, did not permit the government to detain any person on its mere "satisfaction".[47]

5.147 Indeed the Constitution expressly provided legislative power to make laws on "preventive detention", only it did not define the term. Mukherjea, J., dealt with this aspect and referred to the parallel provision of the 1935 Constitution and, in tracing the origin of the expression, also adverted to the English wartime legislation and case law. His Lordship termed these measures as an "unwholesome encroachment upon the liberty of the people" and also said that it was unfortunate that they formed an "integral part" of the Constitution. Unfortunately his Lordship proceeded further to hold that the court was not to "explore the reasons".[48] As a result, his Lordship felt content to say that the term signified "precautionary measures" and that "the justification of such detention is suspicion or reasonable probability," relying on certain observations made in HALLIDAY and LIVERSIDGE.[49] This approach apparently betrayed his Lordship's reluctance to take note of the fact that Art. 22 was incorporated precisely for this purpose - for the purpose of resolving the dilemma that the English judges faced and relieving the Indian courts from the burden of those decisions by imposing "constitutional limitations" on the enactment of such measures.

5.148 While interpreting clause (7)(a) of the article to test the vires of s.12, his Lordship held that "the sub-cl.(a) of the article lays down a purely enabling provision and Parliament, if it so chooses, may pass any legislation in terms of the same".[50] Thus the court overlooked the over-riding concept of "limitation" that informed the essential character of the article as a whole and came to hold that both class or classes of cases and circumstances need not be specified. However, his Lordship took particular care to emphasize the "supreme importance" of the safeguard of clause (5) which was applicable to "all cases" (meaning possibly cls.4(a)

and 7(a)) according to his Lordship.[51] Accordingly, s.14 was held ultra vires Arts 22(5) and 32 which his Lordship rightly held, were inter-related.

5.149 Although Das, J., spoke of "constitutional limitations", his approach was also equally cautious. He qualified the power of the courts to examine the legislative actions with respect to such limitations by observing that the courts in India had to operate in a "restricted field", unlike the American judiciary where the Constitution established the "absolute supremacy" of the courts; the position of Indian courts was "somewhere in between the courts in England and the United States".[52] His Lordship held that s.14 infringed the detainee's "substantive right" under Art.22(5) as well as his "right to constitutional remedies" under Art.32 and therefore it was void under Art.13(2).[53] On the other hand, as sub-cl.(a) of Art.22 was an "enabling provision", s.12 was not ultra vires for not prescribing both, class of cases and circumstances.[54] In considering the vires of s.12, Kania, C.J. attempted to look at the object of sub-cl.(a) of Art.22(7) and held that it was a mere "classification" which can be done by either "grouping the activities of the people or by specifying the objectives to be attained or avoided".[55] The Chief Justice was also of the view that Cl.(5) of Art.22 provided the real safeguard and therefore only s.14 was ultra vires.[56] Sastri, J., also in holding s.14 ultra vires, spoke in similar terms but attached equal importance to Art.32.[57] In dealing with the vires of s.12 he similarly followed the test of "classification" propounded by the Chief Justice.[58]

5.150 We thus find that the general approach of the court in the above case was one of judicial caution and that the provisions of cl.(5) and sub-cl.(a) of cl.(7) of Art.22 received particular attention of the court in the interpretation of the provisions of the Preventive Detention Act 1950. The court also appeared to be conscious of the importance of

the provisions of Art. 32 although the matter was apparently not argued from the viewpoint of Art. 32 as the detention had not gone beyond three months and the prisoner had no complaint about the "grounds".[59] The later development in the substantial volume of preventive detention jurisprudence dealt particularly with the last-mentioned aspect which we proceed to examine now. It must be conceded that despite the judicial caution the massive judgment was not entirely lacking in imagination in that reference to the Constituent Assembly Debates and even to the provision of Constitutions of other States was made liberally by some judges although generally the court adhered to the English common law rules of interpretation.

(b) Some other decisions of general importance : two categories

5.151 The High Courts at Calcutta, Nagpur and Patna had already considered the vires of the Preventive Detention Act when the matter was being heard in the Supreme Court in the GOPALAN case and the views expressed by those courts were duly considered by their Lordships of the Supreme Court. In fact detention orders passed under the Act have been challenged in applications made under Art. 226 of the Constitution over the years in all High Courts (now 18 in all) and as a result a formidable body of case-law deciding many interesting points of law has grown up, but it is not possible to deal in this study even with all the decisions of the Supreme Court which are to have, according to Art. 142, binding force throughout the country.

5.152 It is to be noted that the Indian Constitution did not expressly sanction the power of preventive detention to be exercised on a "subjective satisfaction".[60] Indeed, the Constitution merely provided for power to make laws for "preventive detention" without defining the term and on the other hand it also provided for a twofold limitation to which such laws must conform - to the entries 9 and 3 of legislative Lists I and III respectively and of Part III (Fundamental Rights). The courts were therefore obliged to restrict the ambit of the so-called "subjective

satisfaction" provisions of PDA and MISA embodied in each case in s.3(1), signified by the use of the expression "satisfied". In fact the constitutional limitations expressly contemplated such a course with the object of making a deliberate departure from the position obtaining in English law as expounded in the majority opinion in LIVERSIDGE. It is not unlikely that in doing so the constitution-makers took a cue from the minority view of Lord Atkin to which the use of expressions "grounds" in clause (5) and "facts" in clause (6) can be easily traced.[61] It is also to be noted that it was not unnatural for the founding fathers to attach more importance to the views of the Indian Federal Court and Nagpur High Court in KESHAV TALPADE[62] and VIMLABAI DESPANDE[63], respectively, rejecting the majority opinion in LIVERSIDGE.

5.153 In GOPALAN, as we have seen, despite the lack of a general consensus all judges equally attached importance to cl.(5) of Art.22 which contemplated communication of "grounds" to the detainee and also opportunity to be given to him for making "representation". Following this lead the Indian courts applied two broad tests - of vagueness and irrelevance of "grounds" and of "mala fide" exercise of power. We propose to follow the same scheme in our discussions but it must be pointed out that the courts did not attach importance to the fact that the Constitution had enabled laws to be made under which, according to cl.(4) of Art.22, subjective satisfaction of the "Advisory Board" only could be provided. Indeed, even Fazl Ali, J., in GOPALAN did not amplify the scope, ambit and effect of what we have called the "constitutional subjective satisfaction"[64] provided in cl.(4) although he had noted this fact.[65]

(i) Some leading decisions on "satisfaction" vis-a-vis "grounds"

5.154 In STATE OF BOMBAY v ATMARAM[66] the leading judgment was delivered by Kania, C.J., with whom Fazl Ali, Mukherjea and Ayyar, J.J. agreed whereas Sastri, J. and Das, J. delivered separate but concurring judgments allowing the appeal by the State against the judgment of the

Bombay High Court issuing habeas corpus. The "grounds" of detention supplied to the detainee (an "active trade unionist") recited that - "you are engaged and are likely to be engaged in promoting acts of sabotage on railway and railway property in Greater Bombay".

5.155 In his application in the High Court the petitioner asserted that he was not present in Bombay during the relevant period. The State denied this by addressing a communication to the petitioner. The High Court considered the communication as furnishing additional grounds and held that this was not permissible under Art.22(5). Kania, C.J., in the Supreme Court, explained the scope of the clause (5) and held that it contemplated two types of rights - the right of the "grounds" being communicated and the right of making representation with the ancillary right of being furnished with "particulars" or "facts". His Lordship pointed out the distinction between "grounds" and "facts" to say that while "new" or "additional" or "supplementary" grounds could not be furnished, there could be a communication of facts, subsequent to that of grounds, to enable the right of making representation to be effectively exercised, although, as his Lordship admitted, clause (5) did not in terms say that "the grounds as well as details of facts on which they are based must be furnished or furnished at one time".[67] Possibly following this early and wholesome judicial activism by the Indian Supreme Court, the parallel constitutional provisions elsewhere in the Commonwealth were made more explicit in this respect.[68] Indeed, the decision made explicit what followed by necessary implication from the language of clauses (5) and (6) which his Lordship analysed with great care, particularly that of clause (5) by attaching due importance to the expressions "and" and "as soon as may be". Although his Lordship did not refer to the opinion of Lord Atkin in LIVERSIDGE, we have already submitted that the Indian constitutional provision purported to adopt his opinion and the decision of Kania, C.J. established this position more securely by spelling out the implications

of clause (5) of Art. 22.

5.156 His Lordship also laid down the twin test of justiciability of the "grounds" and "facts" by tracing a connection between the two rights contemplated by clause (5). The court could see whether the "grounds" supplied had a "rational connection with the ends mentioned in s.3 of the Act" and whether the grounds were "sufficient to enable the detenu to make a representation".[69] In other words "grounds" must not be either irrelevant or vague. Thus, although it was not said in so many words, the courts could examine facts not to test the subjective satisfaction but to see if the right of representation could be effectively exercised. Sastri, J., contested the position, relying on the decision in HALLIDAY[70] and observed as follows:[71]

> . . . I am unable to agree with what appears to be the major premise of the argument, namely, that clause (5) contemplates an inquiry where the person detained is to be formally charged with specific acts or omissions of a culpable nature and called upon to answer them.

His Lordship further held that on the face of clause (6) it was not incumbent on the government "to communicate particulars which a court of law consider[ed] necessary to enable the person detained to make a representation"; the combined effect of clauses (5) and (6) was that only such particulars were to be communicated as the authority, and not the court, considered sufficient.[72] Das, J., more explicitly held that clause (5) did not in terms contemplate "a second communication of particulars"[73] and that a satisfaction founded on vague grounds was "quite valid" if the vagueness was not proof of bad faith.[74] According to his Lordship the "irrelevancy" of the grounds would be a "cogent proof of bad faith" so as to invalidate the order.[75]

5.157 Within the first half of 1951 three more important decisions on "grounds" were handed down by the Supreme Court. In TARPADA DE,[76] which was decided the same day as ATMARAM (supra), Sastri and Das, J.J., in dismissing (in concurrence with the majority) the appeal by the detainee

against Calcutta High Court's judgment refusing habeas corpus, did not add to the reasons which we have already indicated, Kania, C.J., speaking for the majority, held that the mere description of the second communication as "supplementary grounds" did not make them so; one has to look at the contents.[77] His Lordship also made the distinction between a "vague" and an "irrelevant" ground clearer, saying explicitly that, "the sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the court, but only from that point of view".[78] In UJAGAR SINGH[79] the Supreme Court issued habeas corpus under Art.32 holding that "the petitioners were given only vague grounds which were not particularised or made specific so as to afford them the earliest opportunity of making representations" and that there was "inexcusable delay in acquainting them with particulars" in view of the fact that there was a time-lag of four months between the two communications which was not explained.

5.158 In RAMSINGH[80] the majority speaking through Sastri, J. (Kania, C.J. and Das, J. agreeing) dismissed the application under Art.32 while Mahajan, J., and Bose, J., by separate judgments allowed the same. The test of justiciability of the "second" right propounded by the majority in ATMARAM was put under severe strain in this case partly because Sastri, J., was projecting (albeit unwittingly) his own views (which he had expressed in ATMARAM in opposition to those of Kania, C.J., who had spoken for the majority) but mainly because the test itself was inherently weak. The test of justiciability had been stated in terms of "vagueness" which was defined in the following terms which Sastri, J., also quoted:[81]

> If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague. [emphasis added]

Sastri, J., read this passage with another observation of Kania, C.J., that "a wide latitude is left to the authorities in the matter of disclosure" under clause (6) of Art. 22, which really related to "facts" and not "grounds". Against this backdrop the observation (also of Kania, C.J., quoted by Sastri, J.) that the "second" communication of "particulars" ("facts") must be "sufficient to enable the detained person to make a representation which, on being considered, may give relief to the detained person", appeared pale. As a result the majority, speaking through Sastri, J., did not find it difficult to reject the petitioner's contention that it was incumbent on the authority to communicate to him at least the gist of the offending passages of his alleged speech which was said to have prejudiced the maintenance of public order in Delhi. It is submitted that the use of the "ground" (underlined in the above extract) unaccompanied by "facts" or "particulars", and the omission to relate the understanding to that of a "reasonable man" detracted from the efficacy of the test. In fact Mahajan, J., in his dissent, in the instant case, spoke of the "reasonable man".[82] Bose, J. on the other hand, missed the importance of the point by postulating a choice between the understanding of the detainee and of the authority respectively.[83] Obviously, the courts could more effectively exercise the power of judicial review if the understanding was related to that of a reasonable man than any other person.

5.159 It is, however, interesting to note that later, in RAM KRISHAN,[84] Sastri (now Chief Justice), delivering the unanimous opinion of the court, held the impugned ground to be vague as it could not be interpreted by a "layman" without legal aid which was denied to him.[85] In this case it was also held that the detention order as a whole falls to the ground even if one only of the several grounds is vague, rejecting the argument of the state based on the test of "prejudice" inasmuch as "constitutional requirement must be satisfied with respect to each of the grounds".[86]

It is to be noted that although his Lordship did not take care to clarify the terminological confusion as to "grounds" and "facts" the use of the term "constitutional requirement" was meant to apply to both. The application under Art. 32 for habeas corpus was allowed.

5.160 In SHIBBAN LAL[87] the detention order was made on two grounds but, the Advisory Board having upheld the order on one of the grounds, the detaining authority confirmed the order on that ground and revoked the detention on the other ground. This was held to be apparently illegal in that the original or initial satisfaction was itself vitiated in view of the fact that the detaining authority's action was tantamount to admitting that "one of the grounds upon which the original order of detention was passed [was] unsubstantiated or non-existent and [could] not be made a ground of detention". The Supreme Court proceeded further to state:[88]

> The question is, whether in such circumstances the original order . . . can be allowed to stand. The answer. . . can only be in the negative. The detaining authorities gave here two grounds. . . We can neither decide whether these grounds are good or bad, nor can we attempt to assess in what manner and to what extent each of these grounds operated on the mind of the appropriate authority and contributed to creation of the satisfaction on the basis of which the detention order was made. To say that the other ground, which still remains, is quite sufficient to sustain the order, would be to substitute an objective judicial test for the subjective decision of the executive . . . which is against the legislative policy underlying the statute. . .

It was held that on the receipt of the opinion of the Advisory Board the detaining authority had to either confirm or revoke the order in whole and that it was not precluded by such revocation from passing a fresh order, under the Act.

5.161 In the above case, although the court referred to the constitutional right under Art.22(5), the decision was apparently based on the contravention of the provisions of the Act (s.11, PDA). In later cases, in dealing generally with the scope of the constitutional right in

respect of "grounds" and "facts", the court observed in THAKUR PRASAD[89] that the obligation of the government to furnish grounds which are not vague cannot be taken to mean that they must furnish "every meticulous detail". In DWARKA DAS[90] although the court reiterated that if some of the several grounds be "non-existent or irrelevant" the very exercise of the power to deprive an individual of his liberty was bad, it was also observed that the order would not be vitiated merely because some ground or reason of a "comparatively unessential nature" was defective; the court had to be satisfied that the subjective satisfaction might reasonably have been affected. This view found an echo in PURANLAL LAKHANPAL[91] in which it was held that although there was an obligation on the state to furnish precise and specific grounds it had also the duty (to the exclusion of others) under clause (6) to consider whether the disclosure of any "fact" would be against public interest.

5.162 In NARESH CHANDRA[92] the Supreme Court dismissed the appeal by the detainee against Calcutta High Court's refusal to issue habeas corpus and also his application under Art. 32. In this case the court not only cleared the terminological confusion which appeared in the judgment of the High Court but also laid down in clear and precise terms the procedure to be observed by the authorities according to ss. 3 to 7 of the Act.[93] It was observed that the detainee had to be furnished with a copy of the order containing - (1) recitals in terms of one or more of the sub-cls. (a) and (b) of s.3(1), which could be called a "preamble"; (2) the grounds contemplated by s.7, namely, the conclusions of facts which led to the passing of the order; and it was also held that, if the grounds did not contain the necessary "particulars", the detainee could ask for "further particulars of facts". The Chief Justice pointed out that the High Court had wrongly taken the "preamble" as "grounds". The court referred to the decisions in ATMARAM and DWARKADAS (both supra) and on the

merits upheld the High Court's decision that the grounds were neither "vague" nor "irrelevant". It is interesting to note that their Lordships' construction of the statutory provisions was aimed at buttressing the constitutional right by insisting on "facts" or "particulars" to be furnished in the "first" communication itself so that the "second" communication contemplated under cls. (5) and (6) of Art.22 in ATMARAM became a new right of asking for "further particulars of facts".

5.163 In HARIBANDHU DAS[94] the Supreme Court allowed the detainee's appeal and quashed the detention order. In this case the State Government had "revoked" the detention order passed by the District Magistrate during the pendency of the writ petition in the High Court and made a "fresh" order. It was held that the first order was bad as it was not followed up by furnishing, within five days, to the detainee, "grounds" in the language which he could understand which amounted to denial of opportunity of making representation. The matter supplied to the detainee consisted of fourteen pages typed in English. The court also rejected the contention that the amended provision of s.13(2) merely affirmed the existing law declared in SHIBBANLAL (supra). It was held that no fresh order could be made without "fresh facts" and the term "revocation" included cancellation of orders, invalid as well as valid; it did not mean "otherwise valid and operative". The amended provision was as follows:

> The revocation. . . shall not bar the making of a fresh. . . order. . . in any case where fresh facts have arisen after the date of revocation. . .

(ii) Some leading decisions on "satisfaction" vis-a-vis "mala fide"

5.164 Although the detention order in TARAPADA DE (supra) was challenged on the ground of mala fide also only Das, J., categorically dealt with it and held on facts that the mere fact that a large number of detention orders were made "overnight" did not per se indicate bad faith on the part of the authorities as it was found that the authorities had applied their

minds to the cases of each of the several detainees. It is to be noted that the point of mala fide had already received the particular attention of the court in ASHUTOSH LAHIRI.[95] It was contended by the detainee that the use of the power of preventive detention to secure the purposes of s.144 of the Criminal Procedure Code was per se a male fide exercise of power. It was held that although the facts and circumstances of the case roused some suspicion, Das, J., (Kania, C.J., Fazl Ali and Sastri, J.J., concurring) held that, "Suspicion, however, is not proof and I am not convinced that the act of the District Magistrate was actuated by any improper or indirect motive". Mukjerjea, J., in his separate (albeit concurring) judgment, held that, "There could be no better proof of mala fides on the part of the executive authorities than a use of the extraordinary provisions contained in the (Preventive Detention) Act for purposes for which ordinary law is quite sufficient". It is true that if the object of the impugned order was to prevent the detainee from attending a particular meeting of a communal organization to ensure that no breach of the peace took place, an order under s.144 of the Criminal Procedure Code forbidding him appropriately from doing so would have served the purpose.

5.165 In UJAGAR SINGH (supra) also the plea of mala fide was raised. It was grounded on a reference in the order to past activities; the court rightly rejected the plea, saying that, "It is largely from prior events showing the tendencies or inclinations of the man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order". This was reiterated in PURANLAL LAKHANPAL (supra) where the court added that the relevant consideration in such matters was whether the detention was for "ulterior purposes or purposes other than those mentioned in the order". In NARANJAN SINGH[96] the plea appears to have been founded on the non-compliance of the provisions of the Act itself in respect of a "fresh" order. The court held that where an earlier order was defective merely

on formal grounds, the "fresh" order based on the same ground was not per se malafide. The court observed that s.13 itself permitted such a course and the plea was bound to fail even if the court should insist on strict compliance; in an application for habeas corpus the court was concerned with the legality of the detention at the time of the return and not on earlier events. As we have seen, Parliament was quick to see the injustice of the provision and amended s.13.[97]

5.166 In THAKUR PRASAD (supra) there was an important obiter dictum that, where the grounds on which a detention order was based were also the subject matter of a criminal prosecution, the detention may amount to an abuse of statutory powers but the order was not necessarily mala fide on that score.[98] The question of mala fide had to be decided on the facts and circumstances of each case. This rule was further embellished in MAKHAN SINGH[99] where the court held the plea must be made by proper pleadings at the trial stage to enable the respondent to meet the case and the plea cannot be stated for the first time in the application in the Supreme Court for special leave to appeal.

5.167 An important observation was made by the Supreme Court in RAMESWAR SHAW[100] to the effect that although s.3(1)(a) of the Act contemplated subjective satisfaction, cases might arise where the detainee might ground his challenge on mala fide which plea he could support with facts to show inter alia that the grounds served could not possibly or rationally support the conclusions drawn against him by the detaining authority. The "reasonableness or propriety" of the subjective satisfaction thus became justiciable only in this incidental manner which could not otherwise be questioned in courts.

(c) Some important decisions on "MISA" and "COFEPOSA"

5.168 A larger bench of seven judges of the Supreme Court overruled the decision in GOPALAN (supra) in so far as it was concerned with the interpretation of Art.22(7)(a) and the court unanimously, speaking

through Shelat, Acting C.J., held s.17A of MISA *ultra vires* Art.22(7)(a) of the Constitution, in SAMBHU NATH.[101] In fact the court approved the minority view in GOPALAN holding that matters involving right of personal liberty provide a good ground for the court to review its own decision under Art.137. Relying on the decision in the COOPER case (popularly called Bank Nationalisation Case)[102] the *vires* of some other provisions (ss.3 and 8 to 12) was also challenged. Although the court decided to leave the matter open it referred to the minority view of Fazl Ali, J., in GOPALAN and observed as follows:[103]

> In Gopalan. . . the majority had held that Art.22 was a self-contained Code and therefore a law of preventive detention did not have to satisfy the requirements of Arts. 19, 14 and 21. . . in (1970) 3 SCR 530 (Cooper's case) the aforesaid premise of the majority in Gopalan was disapproved and therefore it no longer holds the field. Though Cooper's case. . . dealt with the inter-relationship of Art.19 and Art.31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan. . . to be incorrect.

Later, in HARADHAN SAHA (*infra*) the court categorically decided against the detainee the point left open in the above case but without referring at all to the above decision, notwithstanding the important observation made therein, as quoted above. It is to be noted that s.17A, as also the amended s.13, came by way of "temporary amendment"[104] but the *vires* of s.13, about which the court did not make any observation in the above case, was left open to be decided finally in FAGU SHAW (*infra*).

5.169 However, we may quote below the provision struck down in the decision under examination:

> s.17A (1) Notwithstanding anything contained in the foregoing provisions. . . during the period of. . . emergency. . . any person in respect of whom an order of detention has been made. . . may be detained without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding two years. . . in any of the classes of cases or under any of the following circumstances, namely:
>
> (a) where such person has been detained with a view to preventing him from acting in any manner prejudicial to the defence of India, relations of India with foreign powers or the security of India; or

> (b) . . . prejudicial to the security of the State or the maintenance of public order.
>
> [emphasis added]

The first challenge, which was grounded on the use of the words "may be detained" (underlined in the above extract), by which, it was claimed, an unguided discretion was vested in the detaining authority, was rejected. It was held that "the combined effect of the non-obstante clause in the commencement of s.17A(1) and the qualifying words "save otherwise provided in this Act" in s.10 ruled out the possibility of the provision producing any discrimination so as to infringe Art.14.

5.170 The contention that the provision was inconsistent with Art.22(7)(a) was considered at length and was upheld on virtually the same reasons as had prevailed with the minority in GOPALAN. It was held that clause (7)(a) of Art. 22 was to be read as an exception to cl.(4)(a) and the law enacted under cl.(7)(a) must prescribe both "the circumstances" as well as the "class or classes of cases".[105] Referring obviously to the provisions of cls. (a) and (b) of s.17A(1) of the Act it was held as follows:[106]

> The subjects or heads set out in the legislative entries were intended to delineate the bounds within which the legislatures can pass detention law. The purpose of these entries and cl.(7)(a) are distinct; that of the entries to lay down the topics in respect of which legislation can be made and that of cl.(7)(a) to distinguish the ordinary from the exceptional to which only the salutary safeguard provided by s.(4)(a) would not apply. Mere repetition of the subjects or topics of legislation would not mean prescribing either the circumstances or the class or classes of cases. . . the presumption would be that such a drastic law would apply to exceptional circumstances and exceptional activities expressly and in precise terms prescribed.

Earlier the court referred to concern for "internal and external security of the country following the partition" and rightly observed that "the constitution-makers accepted preventive detention as a necessary evil to be tolerated in a constitutional scheme which, otherwise, guaranteed personal liberty in well-accepted form" and accordingly the court appeared to view, quite appropriately, the various provisions of the Constitution as

so many limitations.[107]

5.171 In FAGU SHAW[108] the vires of the "temporarily amended" s.13 of MISA was challenged, albeit unsuccessfully. The material parts of the provision may be quoted:

> The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under s.12 shall be twelve months from the date of detention or the expiry of the Defence of India Act, 1971, which ever is later: [emphasis added]

The portion underlined in the above extract was added by the "temporary amendment". The challenge involved interpretation of the proviso to cl.(4) and sub-cl.(b) of cl.(7) of Art.22 of the Constitution for a decision mainly on two points: (1) whether in any law providing for preventive detention it was obligatory for the legislature to fix the "maximum" period; and (2) whether the amended provision did in fact fix the "maximum". The case was heard by five judges. The majority opinion was delivered by Mathew, J., with whom Ray, (now C.J.) and Chandrachud, J., agreed and although both of them were parties to the unanimous opinion delivered in SAMBHU NATH (supra) the opinion of the majority now was based on what it called a "dispassionate interpretation" of the constitutional provision. It was held that the contention postulated an "obligation [which] could only arise from an invisible radiation proceeding from a vague and speculative concept of personal liberty".[109]

5.172 The majority decision was based on three main considerations. Firstly, it relied (inappropriately, as we shall see) on GOPALAN (supra), KRISHNAN[110] and ASOK DEY.[111] Secondly, it held that the legislative lists contemplated "plenary power" to pass preventive detention laws and the power to fix the period of detention vested in both Parliament and State legislatures "as ancillary to that power or as inseparable part of it" and that it was not obligatory on Parliament to fix the maximum period either under the proviso to cl.(4) or under cl.(7)(b).[112] It was also held that,

whether a law providing detention for "any period" would be violative of Art.19 was a "different matter". Similarly, it was held that whether the power to fix a "maximum" period under cl.(7)(b) was an independent power or a power traceable to the legislative entries "did not arise in this case". However, his Lordship proceeded to hold that a law made under cl.(7)(b) had "no sanctity" as a detention law passed by Parliament fixing longer period "would sub silento repeal the law made under Art.22(7)(b)."[113] The majority decided the second point also against the detainee. It was held that the "maximum period" need not be fixed in terms of years, months and days and that it could be, as in s.13, fixed in terms of an event. It was also held that only because the duration of the period depended upon the volition of the President did not mean that Parliament had delegated its function to the President. His Lordship further observed that during the currency of the proclamation of emergency the vires of s.13 could not be tested with reference to Art.19 and that in any case the section was not ultra vires Art.14, in that it had fixed a maximum period and the detaining authority was given the discretion to fix the period of detention in any particular case after considering all relevant facts and circumstances.

5.173 Of the other two judges, Alagiriswami, J., disagreed with the majority opinion on only one point. His Lordship held that, "the concept of a maximum period runs through the whole of Article 22(4) and (7)" and that "an harmonious construction of the whole of Articles 22(4) and 22(7) would. . . necessitate that Parliament should provide a maximum period of detention not merely in respect of laws relating to preventive detention made by State Legislatures but also its own laws".[114] His Lordship gave cogent reasons for this saying, "while Parliament and State Legislatures make laws it is the executive that makes orders of detention and if no maximum period of detention is specified by law it would be open to the executive to keep persons in detention indefinitely."[115] His Lordship categorically held that "maximum period" must be laid down by Parliament

in all cases of detentions, namely, both with and without obtaining the opinion of the Advisory Board. His Lordship also observed that his view was supported by Constituent Assembly Debates to which Bhagwati, J., had referred in his separate dissent. In fact Bhagwati, J., also answered the question which his Lordship did not decide, namely, what would be the position in case Parliament chose not to prescribe any "maximum period".

5.174 The infirmity of the majority opinion manifested in its misplaced and inappropriate reliance on earlier decisions was established with great care and precision by Alagiriswami, J., to which fact Bhagwati, J., in turn, referred in his judgment. We may also deal with those decisions first. It was rightly pointed out that except Kania, C.J., the other judges in GOPALAN (supra) did not deal with sub-cl. (b) of cl.(7) of Art.22 and even Kania, C.J., did not give specific reasons for his terse obiter that the right to detain indefinitely sprang from cl.(7) itself. We would like only to point out the minority judges in FAGU SHAW could also have stressed that what Kania, C.J. observed was obiter as in GOPALAN the provision of sub-cl.(a) and not (b) came up for consideration. Similarly, in KRISHNAN, of the majority only Mahajan, J., (Das, J., agreeing) dealt with the point but even he did not give any compelling reasons except stating (indeed erroneously) that the point was "concluded by the majority decision in Gopalan" and relied on the general reason given by Kania, C.J., that sub-cl.(b) was "permissive" which could be traced to the general contention made in that case (albeit rejected) that the word "may" of the main cl.(7) ought to read as "must".[116] Indeed, Bhagwati, J., did refer to Bose, J.'s lone dissent in KRISHNAN as "strong and powerful" and observed that the same view had found favour with him.[117] It is, however, important to point out that Bose, J., rightly observed on an interpretation of Art.22 as a whole that, "a fundamental right regarding the length of detention was intended to be conferred" and that, "it would be pointless to make the provision about three months and place it in the chapter on Fundamental Rights if

that were not so."[118] As regards the decision in ASOKE DEY it was rightly pointed out by Alagiriswami, J., that the court was there mainly concerned with the interpretation of a state law and with the legislative competence of the state rather than with the broader aspect of Art.22 as a whole; there the only contention was that "may" in the main cl.(7) ought to be read as "shall" only as respect sub-cls.(b) and (c), which was rejected.[119]

5.175 Bhagwati, J., we submit, adopted the right approach when he observed:

> We must remember that it is a Constitution we are expounding - a Constitution which gives us a democratic republican form of government and which recognises the right of personal liberty as the most prized posession of an individual. . . Shall we not respond freely and fearlessly to the intention of the founding fathers and interpret the constitutional provision in the broad and liberal spirit in which they conceived it instead of adopting a rather mechanical and literal construction which defeats their intention ?

Indeed, a Constitution could not be equated with an ordinary legislative instrument requiring what the majority euphemistically called a "dispassionate" or, as Bhagwati, J., called it, "mechanical and literal" construction. Indeed, in this matter, English courts could not obviously offer any real guidance for they had never been concerned with the interpretation of a Republican Constitution. His Lordship therefore rightly turned to American precedents for authority for looking into Constituent Assembly Debates. It is, however, necessary to make a comment on this point. The Supreme Court in India very early, in GOPALAN, recognised the desirability of following the American rule of limiting what Krishna Iyer, J., twentythree years later, called the "rule of exclusion",[121] in respect of legislative proceedings in general. Bhagwati, J., relied on the dictum of Krishna Iyer J., which, according to his Lordship took notice of the "change in the methodology of interpretation".[122] We submit that in so far as the Indian Supreme Court was concerned it had already adopted the new or the "changed" norm of interpretation by referring to the ConstituentAssembly Debates in GOPALAN.

5.176 His Lordship quoted extensively from the Debates to demonstrate that the Constitution-makers deliberately and consciously contemplated a compulsory maximum on the period of preventive detention. As we have already pointed out earlier[123] the provision was debated at great length and his Lordship took care to quote Dr. Ambedkar (Drafting Committee Chairman) when he pleaded for acceptance of the redrafted provision by categorically referring to the various safeguards of which the relevant portion we would also like to quote:[124]

> Thirdly, in every case, whether it is a case which is required to be placed before the judicial board or not, Parliament shall prescribe the maximum period of detention so that no person who is detained under any law relating to preventive detention can be detained indefinitely. There shall always be a maximum period of detention which Parliament is required to prescribe by law.

However, his Lordship proceeded further to show that the language of the relevant provision was "not so intractable" that it could not be interpreted so as "to effectuate" the intention of the Constitution-makers.[125] It was held that the proviso to sub-cl.(a) of cl.(4) of Art.22 was not used in the "traditional orthodox sense" but was intended to enact a "substantive provision" and that the proviso and the main provision of sub cl.(a) ought to be read as "one single enactment".[126] Finally his Lordship categorically held that, "There can be no detention for a period longer than three months unless the maximum period of detention is prescribed by Parliament under c.(7), sub-cl.(b)."[127] We have already submitted earlier that this view, albeit on certain other reasons also, has much to commend itself as the correct position in law.[128]

5.177 A few months later came the decision in HARADHAN SAHA.[129] Ray, C.J., delivered the unanimous opinion of the court - again with a bench of five judges with Mathew and Alagiriswami, J.J., but without Bhagwati, J. Possibly the facts of the case dictated a different approach to conform to the philosophy of the Constitution as it was alleged in the "grounds" that the petitioner was involved in the hoarding and smuggling

of foodstuff. The vires of the Act (MISA) was again challenged with reference more particularly to Art.14, as also Arts.19 and 21. The unanimous decision in SAMBHU NATH of seven judges, including Ray, J. (as he then was) was totally left out of consideration and the court observed, contrary to the decision in SAMBHU NATH, that the ratio of the COOPER case was to be confined to the inter-relation of Arts. 19 and 31.[130] However, later in the judgment the court observed that "even if" Art.19 was examined in regards to preventive detention, it did not increase the "content of reasonableness" of the safeguards and that the procedure prescribed in the Act provided for fair consideration of the "representation".[131] The only reason given was - "The power of preventive detention was qualitatively different from punitive detention . . . [ - a] precautionary power exercised in reasonable anticipation."[132] On the same reasons the challenge grounded on Art.14 was also rejected[133] and without elaborate discussion and detailed examination of the provisions it proceeded to lay down certain "broad principles" emanating from certain "recent" decisions (given by three judges in each case) and in that view of the matter it over-ruled a decision of two judges in BIRAM CHAND.[134]

5.178 In BIRAM CHAND, Goswami, J., speaking for the court, simply rehearsed the "well-settled" principles that the "grounds" of detention must be "clear" and "definite" and proceeded to add:[135]

> to enable the detenu to make an effective representation to the government to induce the authorities to take a view in his favour. He must therefore have a real and effective opportunity to make his representation to establish his innocence. Being faced with a criminal prosecution which is pending against him all through, we are clearly of the view that the detenu has not got a proper and reasonable opportunity in accordance with law to make an effective representation against the impugned order. . .
>
> [emphasis added]

His Lordship also observed that a "ground" of preventive detention could also be a "subject-matter of prosecution" but there could not be two parallel proceedings; the authority had to make a choice.[136] The District

Magistrate in the instant case was "influenced by the existence of criminal prosecution" and in that view of the matter the court held that, "the scope of the inquiry in the case of preventive detention based upon subjective satisfaction being necessarily narrow and limited, the scrutiny of the court has to be even stricter than in a normal case of punitive trial."[137]

5.179 It was indeed settled as early as in ATMARAM (supra) that whether the "grounds" afforded reasonable opportunity to the detainee to make an effective representation was a justiciable issue and whether "reasonable and proper" opportunity was given in a particular case depended upon the facts and circumstances of each case. Thus, it was not possible to say that the decision in BIRAM CHAND was wrong on facts either. The use of the word "innocence" by Goswami, J., did not mean that he was oblivious of the distinction between a punitive and preventive detention. On the other hand his Lordship rightly pointed out the proper role of superior courts in cases of preventive detention as the detainee, unlike an accused in a criminal prosecution, could not claim a presumption of innocence but had to "establish his innocence". It was indeed a negation of the rule of law embodied in Art.14 to start and continue two parallel proceedings, in respect of the same "ground". It is true that the rule of double jeopardy did not strictly apply in such a case, but he was entitled to exercise to the fullest possible extent his statutary right of silence arising from the presumption of innocence in the criminal proceeding as well as the constitutional right of making effective representation in a proceeding under the preventive detention law but obviously the two rights could not be simultaneously exercised as one militated against the other. One was based on the presumption of innocence and the other on presumption of guilt. If he took a definite stand and made out a positive case in a "detention case", as he was obliged to do to make an effective representation, he was likely to be prejudiced in his defence in the

criminal case. Thus, in law also it was not possible to say that the view advocated by Goswami, J., was patently erroneous. Ray, C.J., in HARADHAN SAHA, obviously stated the law too broadly (and therefore inaccurately, by ignoring the importance of the constitutional safeguard of "effective representation") by categorically stating as a principle of law that a detention order could be validly passed during the pendency of a criminal prosecution and that only in one case could it not be passed, namely, when the person concerned was actually in prison and there was no likelihood of his early release. Although no reason was given for the last-mentioned dictum his Lordship possibly meant that in such a case it was physically impossible for the person concerned to be involved in any prejudicial activity.

5.180 It is however interesting to note that although Ray, C.J., had stressed the distinction between preventive and punitive detention to the advantage of the executive and Goswami, J., to that of the individual, in HARADHAN SAHA and BIRAM CHAND, and the decision in the latter case was overruled, it is the view of Goswami, J., that appears to have found favour with most of the judges in the later decisions. The view of Goswami, J., tended to curtail the scope of the subjective satisfaction of the executive by stressing the need of subjecting it to a "stricter scrutiny". In KHUDIRAM DAS[138] it was held that the subjective satisfaction of the detaining authority was "not wholly immune from judicial reviewability" and after illustrating at some length the various circumstances in which the courts would interfere, Bhagwati, J., speaking for the court, concluded by saying that, "The truth is that in a government under the law, there is no such thing as unreviewable discretion."[139] In a later decision, SADHU RAY,[140] Krishna Iyer, J., speaking for the court, observed that, "the executive conclusion regarding futuristic prejudicial activities of the detenu and its nexus with his past conduct is acceptable but not invulnerable" and that, "the court can lift the

verbal veil to discover the true face."[141] The Indian court's approach has thus come very close to Pakistan's, and possibly the courts in India will soon be disposed to review the detention orders in all cases except when challenged on the ground of sufficiency of materials. Thus it may not perhaps go so far as to require the executive to produce all materials to test the subjective satisfaction as the Pakistan courts do.[142]

5.181 We propose to examine later another important decision of "Ray Court"[143] in what has popularly come to be known as the HABEAS CORPUS case, but we may first examine the judicial response to COFEPOSA. In BHANUDAS,[144] Ray, C.J. concurred with the judgment delivered by J. Singh, J. while Beg, J., delivered a separate (albeit concurring) opinion. The matter arose out of an appeal by the Union of India against the decisions of Bombay and Karnataka High Courts directing certain facilities to be given to the detainees. The approach of the court was amply reflected in the following passage in (Singh, J's opinion) which the court rightly observed:[145]

> The avowed object of the Act as manifest from the preamble being the conservation and augmentation of foreign exchange and the prevention of smuggling activities of considerable magnitude secretly organised and carried on which have a baneful effect on the national economy and gravely undermine the security of the state, it is essential that the contact of the detenus with the outside world would be reduced to the minimum. [emphasis added]

However, as we have already seen that the use of the expression "security of the State" in the preamble itself was merely indicative of the desperate attempt made to preempt any possible challenge grounded on legislative competence but surprisingly in the instant case the opportunity to make such a challenge was not availed.

5.182 It is to be noted that the importance of this decision for the purpose of our study lies in the fact that it presents a strong contrast to the situation obtaining in Pakistan where the courts could and did inquire into the legality not only of the "authority" but also of the

"manner" of the detention.[146] Indeed, as held by Singh, J., the Presidential Orders made under Art. 359(1), suspending the right to move the court for the enforcement of the fundamental rights guaranteed under Arts. 14, 21, 22 and 19, purported to impose "blanket bans on any and every judicial enquiry or investigation". Beg, J., however, in dealing with the merits of the several cases in a general way, observed that the grievances in respect of conditions of detention (which included those concerning medical treatment and food) could not be considered by the High Courts under Art. 226.[147] It is true that, as his Lordship observed, directions given by High Courts could not be enforced during the emergency and the court had rightly set aside the decisions of the Bombay and Karnataka High Courts. However, it is to be noted that despite the verbal difference in the constitutional provisions, although in India the courts (unlike their Pakistan counterparts) did not have specific powers to inquire into an "unlawful manner" of detention, the general and wide language of Art. 226 did not restrict their jurisdiction in such a manner as to make them totally powerless in this respect.

5.183 Indeed, the jurisdiction was limited and in the instant case Beg, J., himself proceeded to examine the contention of the detainees in respect of only the validity of the rules regulating the conditions of detention. It was contended that the conditions of detention could not be "either so made or administered as to amount to punitive detention". Beg, J. held:[148]

> Although preventive detention which is constitutionally sanctioned in this country, and punitive detention may be qualitatively different and may be regulated by entirely different procedures and may have very different immediate objectives, yet, if we closely examine the total effects and ultimate social purposes of detention, whether preventive or punitive, it seems to me, speaking entirely for myself, that the theoretical distinctions become less obvious. . . detention of a person by the State or its officers must necessarily be a deprivation. . . Again, "preventive" detention, like punitive. . . may have some therapeutic or reformative purposes behind them. . .
>
> [emphasis added]

Proceeding further his Lordship referred to the decisions in HALLIDAY and LIVERSIDGE to say that "the principle that the doctrine of State necessity is not available to a State against its own citizens becomes inapplicable during an emergency" and to relate it to the maxim salus populi suprema lex.[149]

5.184 Speaking in the same vein Singh, J., held that "the doctrine of legality and vires" which were "sacrosanct in times of peace" had no relevance in regard to a legislative or an executive measure taken in times of emergency and that the "rule of law during emergency" was nothing else than what was contained in Chapter XVIII of the Constitution which was the "positive and transcendental law".[150] While there could be no quarrel with the last-mentioned proposition, it conflicted with the other proposition which was based on the doctrine of necessity in that necessity was neither positive law nor was it an inflexible doctrine as his Lordship, and even Beg, J., attempted to project by referring inappropriately to the English wartime cases. It is to be noted that Singh, J., also inappropriately, referred to observations made in an earlier decision of the court which was concerned with wartime legislation.[151] As we have already seen, the doctrine of necessity did not envisage a complete negation of judicial review even in times of war and the emergency provisions of the Constitution (Chapter XVIII) even in the amended form did not deny the validity of the basic principles of the ordinary concept of the Rule of Law. It is submitted that even in the instant case the vires of the parent Act itself, namely, COFEPOSA, was open to challenge on the ground of legislative incompetence, as already pointed out. It is also submitted that rules regulating conditions of detention ought to receive what we have called a "humanitarian interpretation" in view of the particular fact that the 1966 International Covenant on Civil and Political Rights having entered force, compliance with Art. 7 thereof was necessary.[152]

5.185 In ABDUL KADER,[153] a full bench of the Madras High Court did test the vires of the Act with reference to legislative competence but from another aspect, namely, the extra-territorial operation of the Act, and rightly negatived the challenge on that ground. The High Court also rightly held that the so-called "blanket ban" was not total and that "any legal right conferred on a person by legislation other than the fundamental right referred to in the Presidential Order" could be enforced in a court of law. The court held that it could entertain the application in the exercise of its revisional jurisdiction under the Criminal Procedure Code against an order by the Magistrate passed under the Code in respect of the property of the petitioner, in accordance with s.7 of the Act. Indeed, Singh, J., in BHANUDAS had also held that the prisoners in that case were not enforcing the provisions of the statutory rules regulating the conditions of detention but they were challenging the rules.

(d) The Habeas Corpus Case

5.186 The decision in A.D.M., JABALPUR v SHIVAKANT SUKLA[154] came to be popularly known as the Habeas Corpus Case but unfortunately no arguments appear to have been advanced on the footing of cl.(4) of Art.32 which specifically dealt with the "suspension" of the "right guaranteed by this Article".[155] The attention of the court was directed almost solely towards Art.21 and the decision proceeded on the basis that Art.21 was the "sole repository" of the "right to personal liberty" and, the Presidential Order made under Art. 359(1) having suspended the "right to move the court for the enforcement of the right conferred" by Art. 21, the application for habeas corpus was not maintainable. It is to be noted that the word "conferred" used in Art.359(1) in relation to Part III was read literally, and in isolation, divorced from the factual background and the legislative history. It is true that Part III dealt with certain new rights and the term "conferred" could have been appropriately

used in relation to those rights but the converse could not be true and merely because of the use of the word, the factual position that Part III included certain pre-existing rights also could not be ignored. This was the crux of the matter and deserved to be set out in the forefront but the matter appears to have been placed before the Supreme Court from a different angle and, for this reason perhaps, the court remained pre-occupied mainly with the "sole repository" theory advanced by the Attorney-General. The fact that Art. 32,which dealt with the "right to the constitutional remedy" of habeas corpus, was not suspended by the Presidential Order was unfortunately relegated to the background.

5.187 Several appeals by the State were consolidated and heard together in the above case. The State had taken a preliminary objection in the different High Courts in applications for habeas corpus against detention orders passed under MISA. Although nine High Courts had rejected the objection and had held that the Presidential Order under Art.359(1) did not affect the maintainability of the petitions, the appeals in the above case were against decisions of six High Courts. The High Courts had held that the court could examine whether a detention order was in accordance with those particular provisions of the Act which constituted the conditions-precedent to the exercise of the powers under the Act and also whether the order was made mala fide or was made on the basis of relevant materials by which the detaining authority could have been satisfied that the order was necessary. It is necessary to mention in this connection that the Supreme Court had earlier dealt with a similar objection in several decisions.

5.188 In the instant case the matter was heard by a bench of five judges led by Ray, C.J., and each of them delivered separate judgments, all concurring, except the one by Khanna, J. In the earlier case of MAKHAN SINGH[156] the matter was heard by seven judges. The majority (six judges) had held in that case that the vires of the statutory provisions (the Defence of India Act and Rules in that case) could not be challenged

in an application for habeas corpus in view of the Presidential Order made under Art. 359(1). It is to be noted that the Order in that case was qualified. Although the right to move the court for the enforcement of rights under Arts. 21 and 22 was suspended, as in this case, it was upon the condition that, "if such person has been deprived of any such rights under the Defence of India Ordinance 1962". However, the majority also held that both under Art. 226 and s.491(1)(b) of the Criminal Procedure Code it was open to the applicant to contend that the detention was illegal for the violation of the mandatory provisions of the Act[157] and that the order was made mala fide[158] as such pleas would be "outside the scope of Art.359(1)." If the law suffered from the vice of excessive delegation, such a plea could also be entertained on the same ground.[159] In fact the court did examine, but rejected, the contention that certain provisions of the Act and the Rules suffered from such vice. However, their Lordships said that they would not express any opinion whether the petitioner could also challenge the detention order as void to secure his release if his contention was accepted.[160]

5.189 In his dissent in MAKHAN SINGH, Subba Row, J., (as he then was) held that s.491 did not contemplate any right to move a court by any party. "The court can exercise the statutory power whenever it thinks fit if the fact of alleged detention is brought to its notice," his Lordship said. The section contemplated a "discretionary jurisdiction conceived as a check on the arbitrary action" and there was neither any obligation on the High Court to give relief nor was there any right created in favour of a detained person to move the court for the enforcement of his fundamental right.[161] His Lordship also held that Art.359 expressly dealt with "the constitutional right to move a court and a constitutional enforcement of that right" and that the expression "right to move. . . etc" referred to the right under Arts. 32 and 226.[162] Unfortunately his Lordship did not proceed further to examine the scope and intent or purport of cl.(4) of

Art.32 to determine its relation to the said expression.

5.190 In a later case, RAM MANOHAR,[163] (also under the same statutory provision) the Supreme Court allowed an application under Art.32 (despite the same Presidential Order) on the ground that the detaining authority had confused "public order" with "law and order" and that the order was bad as the power of detention was only for the purpose of maintenance of "public order". Hidayatullah, J., (as he then was) held that the Presidential Order had merely shut out inquiry as to non-compliance with other laws and not with the Defence of India Act and the Rules. The Order did not say that a person who was proceeded against in breach of the said provisions could not complain that the action taken was a colourable one.[164] Sarkar, J., held that Arts. 21 and 22 gave people "a certain personal liberty" and that there was nothing in the order which deprived the detainee of his right to move the court under Art.32 which was one of the fundamental rights and could not be taken away "except by the methods provided in the Constitution, one of which was by an order under Art.359."[165] Although his Lordship did not deal with cl.(4) in particular he had at least gone as far as holding that the Order under Art.359 must expressly mention Art.32 if the "right to move the court" was to be suspended. In MOHAN CHOWDHURY,[166] Sinha, C.J., however, gave a different interpretation of the Presidential Order and held that the court's power under Art. 32 had not been suspended although the petitioner had no locus standi as his right to move the court had been suspended.

5.191 It is thus clear that the several High Courts which had rejected the preliminary objection were within their right to act upon and follow the earlier decisions of the Supreme Court under which the plea for a total ouster of the jurisdiction of the courts by a Presidential Order under Art.359(1) had been rejected. Indeed, the decision in MAKHAN SINGH posed a formidable challenge to the plea of blanket ban advanced by the State and Bhagwati, J., took great pains and care to distinguish the

decision on two broad points, namely, that the relevant observations made in that case ought to be read as obiter and that the Presidential Order in that case was, unlike the present order, a "conditional order".[167] Ray, C.J., also came to a similar conclusion (albeit without detailed analysis) and held that, "the decision in MAKHAN SINGH's case and subsequent cases following it have no application to the present case where the suspension is not hedged with any condition of enforcement of any right under Articles 21 and 22".[168] Beg, J. (as he then was), who dealt with the case from different angles and wrote an elaborate and well-considered judgment, was quick to point out the weaker aspect of MAKHAN SINGH in that it had left the final point of enforceability undecided and that the other observations were "hypothetical".[169] Chandrachud, J., however, saw the strength of the decision but observed that, "no judgment can be read as if it is a statute". His Lordship summarised the "conclusions" of the decision and observed that, "these conclusions owe their justification to the peculiar wording of the Presidential Order which was issued in that case".[170] On the other hand, although Khanna, J., in his lone dissent, arrived at substantially the same conclusions as in MAKHAN SINGH, and referred to it and also to RAM MANOHAR's case, he did not take particular care to deal with the majority's objection to accept that decision as conclusive, and was content to say that, "the observations made in those cases which were not linked with the phraseology of the earlier Presidential Orders" can be relied upon.[171]

5.192 It is submitted that the basic point in all cases was whether Art.359(1) contemplated a Presidential Order (conditional or otherwise) by which a blanket ban on judicial review could at all be imposed. All seven judges unequivocally answered the question in MAKHAN SINGH in the negative. There was also another aspect of the matter which Subba Row, J. (as he then was), dealt with in his dissent in that case and Sarkar, J., in RAM MANOHAR and Sinha, C.J. in MOHAN CHOWDHURY. It was in respect of the

power and jurisdiction of the court and not the right of the individual. The judges in the instant case overlooked this particular aspect. Perhaps they found another new dimension which was sought to be added in the instant case more interesting and tempting to deal with. In fact Bhagwati, J., explored the new dimension in considerable detail but it also allured Beg, J., who, in dealing with the contention that the situation resulting from the Presidential Order under Art. 359(1) could be equated to a declaration of martial law, held that, although there was no specific provision in the Constitution, Art. 34 recognised "the possibility of martial law". However, his Lordship held that a "take-over" by military courts was "outside the provisions of Art. 359(1)". On the other hand he referred to the President's powers as the Supreme Commander of the Armed Forces under Art.53(2), which was inappropriate because the article itself said that "the exercise thereof shall be regulated by law".[172]

5.193 Bhagwati, J., based his conclusions mainly on an article written by Prof. P.K. Tripathi which we have already discussed earlier and we have noticed the infirmity of the views expressed by the learned author.[173] His Lordship unfortunately accepted as valid the so-called doctrine of martial law and relied on the decision in the ALLEN case which we have already examined to discredit the doctrine.[174] His Lordship also examined the American decisions and surprisingly came to the conclusion that, "there can be no two opinions that during martial law the courts cannot and should not have power to examine the legality of the action of the military authorities or the Executive on any ground whatsoever, including the ground of mala fide" and proceeded to hold that such a situation could be brought about by a Presidential Order under Art.359(1)[175]. As we have seen, Beg, J., did not subscribe to this view and he even rightly doubted if martial law was a "law" at all.[176]

5.194 However, the judges forming the majority generally followed the lead of Ray, C.J., who observed: "The heart of the matter is whether

Art.21 is the sole repository of the right to personal liberty. If the answer to that question be in the affirmative the Presidential Order will be a bar".[177] Relying on the decision in KHARAK SINGH[178] his Lordship held that, "Personal liberty in Art.21 includes all varieties of right which go to make personal liberty other than those in Art.19(1)(d)"[179] and added that "if any right existed before the commencement of the Constitution and the same right with its same content is conferred by Part III as a fundamental right the source of that right is in Part III and not in any pre-existing right."[180] His Lordship appeared to overlook and indeed did not say a single word about the intent, purpose and underlying concept of a Bill of Rights. The purpose of a Bill of Rights is not to introduce a legal fiction by "conferring" what already exists; it is meant to impart a new and superior character to certain rights, whether new or old. The dominant feature of the new character is inviolability. If the common law right to personal liberty became merged in the right contemplated under Art.21 then it could only be upgraded and not degraded. At Common Law personal liberty was protected by the writ of habeas corpus which could be taken away (to be more precise only "suspended") only by legislation whereas the right under Art.21 could be taken away ("suspended") by an executive order. This was the basic position which could not be ignored but the other judges also, like Ray, C.J., ignored it, although some of them attempted to explain variously but inadequately (unlike Sastri, J., in GOPALAN) the basic theory of the Bill of Rights.[181]

5.195 In their separate opinions in the massive judgment the judges examined from different angles the various contentions of the parties but as it is not possible to deal with each aspect within a short compass we may confine further examination of the majority opinion to the views expressed on the habeas corpus aspect, to which we have referred in the last paragraph. Indeed, the actual decision in the case was, inter alia, as follows:[182]

> Order by Majority:
> In view of the Presidential Order dated June 27, 1975, no person has any locus standi to move any writ petition under Art.226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations.

It is interesting to note that the resulting position is comparable to one obtaining under the so-called doctrine of martial law although the court had refuted the suggestion by the respondents to this effect. It is also to be noted that although the court placed a large measure of reliance on the English wartime cases the decision in the instant case proceeded far beyond what was warranted by the ratio of those cases.[183] To be more precise we can say that the majority had put the clock back by 300 years by arriving at the same decision as in the DARNEL case by following the test of necessity laid down in the ancient SHIPMONEY case.[184]

5.196 Ray, C.J., dealt with the habeas corpus aspect in a casual and cavalier manner by stating that after 1923 there was no common law right to the writ in India (relying on the decisions in GIRINDRA NATH and SHIBNATH BANNERJEE [supra]) and that "the statutory right to personal liberty" embodied in s.491 of the Criminal Procedure Code was abrogated when the section was repealed, finally ending with the observation that:

> Even if that section existed today it could not be exercised as a separate right distinct from the fundamental right, the enforcement of which is suspended by the Presidential Order.[185]

Similarly, although his Lordship took notice of the practice in England of passing the "Habeas Corpus Suspension Acts", he did not proceed further to relate this to the legal history and constitutional development of either colonial or republican India but hurriedly came to the terse conclusion that "Liberty is confined and controlled by law, whether common law or statute". Indeed, it sounded like a politician's cant and his Lordship, quoting Burke, added that it was "a regulated freedom".[186] We submit that this could not be said to be the correct legal approach to trace the

precise nature and content of the common law right to personal liberty that remained posited in the legal and constitutional system of the pre-republican era.

5.197 Beg, J., deviated still further and limited his inquiry to the "power to issue writs of habeas corpus and other powers of High Courts under Art.226 of the Constitution" and, unlike Ray, C.J., ignored the historical perspective in toto.[187] Chandrachud, J., followed the approach of Ray, C.J., and referred to the English as well as American practice of suspension of habeas corpus but did not deal with the pre-republican constitutional position of the writ in India.[188] The approach of Bhagwati, J., was closer to Chandrachud, J., although his Lordship took a more general view of the English statutes of liberty, including Magna Carta.[189]

5.198 We may now turn to the illuminating dissent of Khanna, J., concentrating on its more significant aspects. Perhaps the most important and most illuminating observation of his Lordship was that, "The Presidential Order cannot put the detenu in a worse position than that in which he would be if Art.21 were repealed". His Lordship explained this saying:

> It cannot be disputed that if Art.21 were repealed, a detenu would not be barred from obtaining relief under a statute in case there is a violation of statutory provisions [and that] likewise, in the event of repeal of Art.21, a detenu can rightly claim in a court of law that he cannot be deprived of his life or personal liberty without the authority of law.[190]

There could not be any stronger argument to expose the hollowness of the "sole repository" theory. Proceeding further his Lordship observed:[191]

> . . . a Presidential Order under Art.359(1) cannot have the effect of suspending the right to enforce rights flowing from statutes, nor can it bar access to courts of persons seeking redress on the score of contravention of statutory provisions. . .Statutory provisions cannot be treated as mere pious exhortations. . . which may be abjured or disobeyed with impunity. Nor is compliance with statutory provisions optional or at the sufferance of the official concerned. It is the presence of legal sanctions which distinguishes positive law from other systems of rules and norms. . .

Earlier, his Lordship rightly held that, on the "plain language" of Art. 359(1), the President had no power "to suspend the right to move any court for the enforcement of rights which [were] not fundamental rights conferred by Part III of the Constitution".[192] This was indeed a fitting answer to the theory of "conferment", attributing literal meaning to the word "conferred".

5.199 His Lordship's interpretation of Art.21 from another aspect, which was first noticed in GOPALAN (supra), also deserves attention. In connection with the theory of coexistence in Art.21 of "substantive power" and "procedural safeguard" first recognised in GOPALAN, his Lordship observed:[193]

> The close bond which is there between the existence of substantive power of depriving a person of his life of personal liberty and the procedure for the exercise of that power, if the right contained in Art.21 were in operation, would not necessarily hold good if that right were suspended because the removal of compulsion about the prescription of procedure for the exercise of the substantive power would not do away with the compulsion regarding the existence of that power.

Accordingly, a judicial challenge grounded on non-existence of substantive power could not be excluded.

5.200 The importance of the dissent was also reflected in taking note of the growing judicial tradition of what we may call the "international-dimension" of the new norms of construction. It was rightly held that when two constructions of municipal law were possible, the courts should lean in favour of one which would be in harmony with the international law or the treaty obligations.[194] Reference was made to the observation to this effect made by Sikri, C.J., in KESAVANANDA BHARATI,[195] in which his Lordship had relied on the provisions of Art. 51 of the Constitution embodying the "directive principle" that "the state shall endeavour to foster respect for international law and treaty obligations". Indeed, the judiciary was as much a part of the "state" as the executive or the legislature was. Reliance was also placed on a

similar observation made by Lord Denning in COROCRAFT LTD v PAN AMERICAN AIRWAYS.[196] Accordingly, his Lordship held that the Presidential Order under Art. 359(1) ought to be so construed as not to conflict with Arts. 8 and 9 of the Universal Declaration of Human Rights.[197] It was rightly pointed out that acceptance of the "sole repository" theory would mean that the executive officers would be able to wield "more or less despotic powers" as they would not be answerable to any court.[198]

5.201 It is, however, necessary to indicate also the weaker point of the dissent in that it tried to establish the primacy of the "rule of law" as a supra-constitutional principle.[199] Although Ray, C.J., went so far as to say that the rule of law was "not identical with a free society",[200] which perhaps will not be acceptable to many jurists, his Lordship, however, rightly held that "the emergency provisions in Part XVIII are by themselves the rule of law during times of emergency."[201] The real issue was the interpretation of these provisions for which it was not only necessary to adopt the "test of necessity" but it was equally necessary to accept, as we have already submitted, that the true "test of necessity" did not negate judicial review.[202]

5.202 The weakness of the decision as a whole, as we have said in the beginning, was that it did not construe the effect of cl.(4) of Art. 32 which, according to us, is the only provision enabling the right to habeas corpus to be "suspended". As Sarkar, J., had pointed out that one of the methods was expressly to suspend the right under Art.32(4) by the Presidential Order under Art.359(1).[203] The other method, we submit, is to enact specific legislation, as in England, to suspend the right. It is unfortunate that the court, without independent inquiry, relying on earlier decisions, held that the common law right to habeas corpus did not exist, which, as we have seen, was not the true position.[204]

5.203 It is unfortunate that in adjudging the vires of ss.16A and 18 of MISA the court was probably swayed by the consideration that the

Presidential Order under Art.359(1-A) in respect of Art.19 was in operation although the judges had given different reasons, brief as well as detailed, for their respective decisions which we do not propose to examine. Ray, C.J., and also Chandrachud, J., held that s.18 did not suffer from the vice of excessive delegation, while Beg, J. held that the section was added by way of abundant caution[205] and in respect of s.16A(9) it was held by the majority that the provision was not ultra vires Art.226 in that it contained a rule of evidence and it did not affect the court's jurisdiction.[206] On the other hand, even the majority judges with the single exception of Ray, C.J., took care to state exceptions to the blanket ban to judicial review during emergency. Beg, J., held that a "patently illegal detention" which was not by the State or on its behalf, could be challenged to secure releaseeven during emergency.[207] Chandrachud, J. held that the court might grant relief if the order was ex facie bad, namely, when it was passed by an unauthorised official or when it bore no signature or when it was passed for a purpose not contemplated by s.3(1) of the Act.[208] Bhagwati, J., held that the Presidential Order would have no operation if the detainee was relying on a provision of law to enforce his legal right and not to deny legal authority in the matter of detention.[209]

(B) Pakistan and Bangladesh

5.204 As we have already seen, the constitutional provisions in Pakistan, made in 1962 and 1973, in particular, postulated a larger measure of judicial autonomy and it could therefore be reasonably expected that the courts in Pakistan would be disposed to carve out a larger area of interference in so far as infractions of the right to personal liberty was concerned.[210] It is for this reason that we propose to examine some of the leading decisions, albeit briefly, while conceding that in Pakistan also there was a large volume of case-law on preventive detention. However, it is to be noted that there appears to have been greater use in Pakistan of Provincial as well as of temporary statutes,

rather than of SPA, the counterpart of Indian PDA. This fact did not affect the tone or tenor of judicial response in as much as the material provision in all statutes followed the scheme of the early law, SPA, and enabled detention orders to be made on the subjective satisfaction of the executive. We have already noted that the specific provisions as respect preventive detention in the successive Constitutions of Pakistan broadly corresponded to the Indian provision in so far as the "ultimate satisfaction" theory reflected in the twin safeguard of communication of "grounds" to the detainee and hearing of "representation" by the "Advisory Board" was concerned.[211]

5.205 In an early case, GHULAM MUHAMMAD v STATE,[212] under the first Constitution of 1956, the Lahore High Court quashed the detention order holding the same to be void ab initio as a different ground and not the ground on which the order was really passed was communicated to the detainee. The court looked into the record and found that the Chief Minister had ordered detention on the ground that the detainee was likely to create trouble in the district on the occasion of the visit of the Chinese Prime Minister but in the "ground" communicated to him it was stated that he had been fomenting agrarian trouble in the district between landlords and tenants. The delay of about two weeks in supplying the ground was also held to be fatal and it was held that the ground should be served along with the detention order so that the right of representation could be effectively exercised. However, the Supreme Court's decision in a later case, ABDUL AZIZ v WEST PAKISTAN,[213] also under the first Constitution, appears to have taken a different view of the constitutional safeguards, which was deceptively unrepresentative of the later trend. It was held that the Constitution did not make it obligatory to insert in a preventive detention law a provision for reference to an advisory board. No doubt, the detention order was quashed for non-compliance with the constitutional provisions but the law itself was not declared ultra vires, ignoring the

position that the constitutional mandate was equally binding on the executive as well as the legislature.

5.206 We may now examine four leading decisions under the 1962 Constitution with its "due process clause" provided in Art. 2 - a provision which the 1956 Constitution had avoided following India's example where the founding fathers had deliberated at length in 1949 on the advisability of opting for a similar provision.[214] In ROWSHAN BIJAYA SHAUKAT ALI KHAN,[215] the High Court had allowed the application for habeas corpus against which the Provincial government appealed to the Supreme Court and tried unsuccessfully to support the detention order passed by them under s.17 of the East Pakistan Public Safety Ordinance.[216] The detention order was preceded by the arrest of the detainee by a Police Officer under s.41 of the Ordinance.[217] The High Court had held, inter alia, that the detention in temporary custody pursuant to the arrest was bad in law as no material was placed before the court to show that the condition regarding reasonableness of suspicion contemplated under s.41 was duly fulfilled and that the detention order passed under s.17 merely extended the temporary detention which was itself illegal. It was also held that the "grounds" furnished to the detainee were too vague and indefinite. The High Court also held s.41 to be void on two alternative grounds: if it was to be considered as a law providing for preventive detention, it did not provide for (contrary to the constitutional requirement) the "grounds" to be furnished; if it was not such a law it did not fulfil the other constitutional requirement of "being informed of the reasons of arrest" and of "being produced before a Magistrate". On the last-mentioned point the judges in the Supreme Court were not unanimous.

5.207 Hamoodur Rahman, J. (as he then was) agreed with the High Court and rightly held that the basic principle underlying the incorporation of the Bill of Rights was that it was a mandate against both executive and legislature and held, referring to the provisions of Arts. 133 and 98,

that it would be a failure on the part of the court to enforce the Constitution in the exercise of the power of judicial review conferred on it if it did not declare void an inconsistent provision.[219] Cornelius, C.J., however, observed that the two provisions (ss.17 and 41 of the Ordinance) were parallel to rr.26 and 129 of the Defence of India Rules and held that they could be so interpreted as to pronounce them intra vires.[220] S.A. Rahman, J., (Fazl-e-Akbar, J., agreeing) relied on the decision in VIMLABAI DESHPANDE (supra) to strike down the detention order and at the same time he also expressed his preference for the second alternative of the High Court's interpretation of s.41.[221] His Lordship held the decision in LIVERSIDGE to be inapplicable in the matter of interpretation of "the peacetime measure".[222] Although the majority decision appeared to turn eventually on facts in the instant case, the new trend of the judicial approach could be easily perceived.

5.208 The new trend established itself more clearly and firmly in GHULAM JILANI.[223] In this case, Cornelius, C.J., observed:[224]

> The ascertainment of reasonable grounds is essentially a judicial or at least a quasi-judicial function. It is too late in the day to rely, as the High Court has done, on the dictum in the English case of LIVERSIDGE for the purpose of investing the detaining authority with complete power to be judge of its own satisfaction. Public power is now exercised in Pakistan under the Constitution of 1962, of which Art. 2 requires that every citizen shall be dealt with strictly in accordance with law. If then r.32 owes its vires to s.3 (2)(x), it must follow that by the use of the words "reasonable grounds" clause (x) has unmistakably imported into this rule, controlling the exercise of public power, the requirement that to gain the protection of the rule for its action thereunder, the authority should be prepared to satisfy the courts, to which the subject is entitled to have resort for the determination of the question whether he has been treated in accordance with law, that it has acted on reasonable grounds.

5.209 In the instant case, detention orders were passed under r.32 of the Defence of Pakistan Rules framed under s.3(2)(x) of the Defence of Pakistan Ordinance 1965, which enabled rules to be made for detention of persons whom the detaining authority suspected "on grounds appearing to such authority to be reasonable" of, inter alia, having acted

or being about to act in a prejudicial manner. His Lordship observed:[225]

> Reading clause (x) according to the tenor of its language, and bearing in mind that it makes legal provision for restraint upon personal liberty which is a fundamental right of citizens in Pakistan, the conclusion that appears unavoidable is that to gain protection for any action thereunder, the existence of reasonable grounds is essential and a mere declaration of satisfaction is not sufficient. [emphasis added]

It is to be noted that r.32 did not in terms refer to "reasonable grounds" but merely required the detaining authority to be "satisfied" in relation to the person concerned that it was necessary to detain him for preventing him from acting in a prejudicial manner, but the court held:[226]

> There must be in the mind of the detaining authority a belief that the person in question is either about to act or is likely to act in the aforesaid manner; only so can the word "satisfied" be construed. Preventive action is called for only by imminent and real necessity, under this rule. Such satisfaction, as has been said above, would be within the power of the rule-making authority to prescribe under s.3(2)(x) . . . even under the earlier words, viz., "suspects, on grounds appearing to such authority to be reasonable" of being about to act to the prejudice of public order. But if "satisfaction" may, for securing protection to empowered authorities be deemed to be included within the meaning of "suspicion", the other condition must also be deemed to apply, viz., the requirement of reasonable grounds for satisfaction. (emphasis added)

Proceeding further his Lordship held that it was not permissible to differentiate between protection for action on "suspicion" and action on "satisfaction" according to s.3(2)(x) of the Ordinance.

5.210 The extensive quotations in the foregoing paragraphs demonstrate the imaginative approach of the court in that similar provisions in the 1939 Defence legislation were differently interpreted by the Privy Council in SHIBNATH BANNERJI, VIMLABAI DESHPANDE and KESHAV TALPADE (all supra) to which his Lordship referred, but he observed as follows:[227]

> In the conditions existing under the Government of India Act 1935, a conclusion such as that reached by the Judicial Committee in SHIBATH BANERJI's case was tenable. It was a period in which the control by the courts of the exercise of public power by the authorities was at a minimum. The Central Government of India . . . was not an independent government. . . It was not conceivable that in relation to

> a law of such critical importance as the defence of India. . . there could be any scope for the intervention of the courts. . . Under the Constitution of Pakistan a wholly different state of affairs prevail. Power is expressly given by Art.98 to the superior courts to probe into the exercise of public power by executive authorities . . . The judicial power is reduced to a nullity if laws are so worded or so interpreted that the executive authorities may use this freedom to make themselves judges of their own "satisfaction" for imposing restraints on the enjoyment of the fundamental rights of citizens. Art.2 of the Constitution could be deprived of all its contents through this process and the courts would cease to be guardians of the nation's liberties.
>
> [emphasis added]

The above extract contains the justification of the judicial activism of the Pakistan Courts. Whether the Indian Courts would have taken a similar course if there was a similar "due process clause" (Art. 2) in the Indian Constitution, it is difficult to say but in the instant case, unlike the Indian courts the Pakistan court "reviewed the factual position" after going into "the evidence on record" and gave relief in deserving cases.[228]

5.211 In ABDUL BAQI BALUCH,[229] the court explained the above decision by saying that the trend of the recent decisions in England as well as in Pakistan has been to limit the decision in LIVERSIDGE to the interpretation of Reg.18B as a special war measure; that in GHULAM JILANI the court merely stated the conventional view that was accepted even in England until the decision in LIVERSIDGE. In the instant case the Supreme Court allowed the appeal and remitted the case to the High Court to examine the materials placed before it to test the reasonableness of the grounds of detention. The court also amplified the distinction between the two expressions "being satisfied" and "suspecting upon reasonable grounds" and observed that the former connoted a state of mind bordering on conviction induced by the existence of facts which have removed the doubts and therefore a duty of more onerous nature was cast on the person charged with being "satisfied" to "satisfy" the court that he had acted in such a manner.[230]

5.212 After the decision in GHULAM JILANI (supra), sub-cl.(x) of s.3(2) of the Defence of Pakistan Ordinance 1965 was amended and the words "suspects on ground appearing to such authority to be reasonable" were replaced by the words "of the opinion" and an "explanation" was added stating that "the sufficiency of the grounds on which such opinion as aforesaid is based shall be determined by the authority forming such opinion". The High Court having decided against the government the preliminary objection raised by it against the jurisdiction of the court to entertain the application in BEGUM AGHA ABDUL KARIM SHORISH KASHMIRI,[231] the Supreme Court was called upon to decide the point in appeal by the Government. The appeal was dismissed. The court held that the amendment was "an exercise in futility" and that it was an "incident of the power of judicial review" granted to the court under Art.98 to determine whether there were grounds upon which a reasonable person would have formed the "opinion" and that this position could not be altered by any language that might be used in a "sub-constitutional legislation".

5.213 The court not only pointed out the difference in language on the one hand between Art.226 of the Indian Constitution and Art.170 of the 1956 Pakistan Constitution, which was closely parallel to it, and the new Art.98 of the 1962 Pakistan Constitution but also, on the other hand, between the sub-clauses (a) and (b) of Art.98 itself. It was also observed that the expressions "without lawful authority" and "in an unlawful manner" of sub-cl.(b) "were not merely tautologous". All matters which fall within the scope of judicial review apart from questions of vires were covered by the expression "unlawful manner". It was also held that the scope of inquiry under Art.98(2)(b) was not in any way fettered by the procedure of a writ of habeas corpus, as the law enjoined upon the courts the duty to satisfy themselves that the detention was in any manner contrary to law. The court also observed that the expression "in an unlawful manner" was used deliberately in Art.98(2)(b) to give meaning

and content to Art. 2, which was as comprehensive as the American "due process" clause.

5.214 In Bangladesh, in the single available reported decision, HABIBUR RAHMAN v GOVT. OF BANGLADESH,[232] the court relied on the decisions of the Pakistan Supreme Court which we have discussed above. Indeed, the same provisions (ss. 17 and 41) which had been interpreted in ROWSHAN BIJAYA SHAUKAT ALI KHAN (supra) and which were adopted by the Bangladesh Government, were used by them in the instant case. It was held that the "temporary custody" order under s.41 was not in accordance with law and mala fide in that it was based on the statement of a detainee who was himself implicated in prejudicial activity. The final detention order under s.17 was also held to be bad because it carried the recital "the government is satisfied" but did not indicate the person who was actually satisfied. As the government was an "abstract entity" it could not be "satisfied" within the meaning of s.17; somebody must actually have the satisfaction. The court had to satisfy itself that the detention order was passed by somebody who was duly authorised in that duty but no such authority was shown in the instant case. As we have seen, not only the statutory provision but the relevant constitutional provisions in Bangladesh were the same as that of Pakistan. That apart, it was natural for the judiciary of Bangladesh to maintain the continuity of the judicial tradition as it had formed a part of the Pakistan judiciary for a long time.

Conclusion

5.215 This short comparative study of the judicial approach in India, Pakistan and Bangladesh to matters concerning personal liberty leaves no doubt about the fact that although the judges in these three states shared a common background in so far as legal training and professional experience was concerned, which had a common colonial base, the approach of the Indian judges differed from that of their colleagues in the other two states. The judges in India failed to develop a common consensus in

the matter owing possibly to the fact that they belonged to a society manifesting a wider spectrum of social, political and economic views, which were coloured in the case of each individual judge by his educational and environmental background.[233] In Pakistan, a wholesome tradition was established in this respect at an early stage. It is apparently due to this reason that, unlike their Indian colleagues, they could see the English wartime cases in the proper perspective and they rightly discarded their relevance to the contemporary situation in clear and unambiguous terms. In doing so they were merely adhering to the British Indian judges who had also, as we have seen, refused to accept the authority of those cases.[234] Unfortunately, in Republican India, Bose, J., who was a party to the decision in VIMLABAI DESHMUKH (supra) found himself in a minority in KRISHNAN (supra). On the other hand even the belated change in trend in India is noteworthy. Indeed, the decision of the Ray Court[235] in the HABEAS CORPUS case was an exception as was the declaration of emergency itself.[236] Even in that case, with the exception of Ray, C.J., all the judges of the majority also made a desperate attempt to retain an area, however small, for judicial scrutiny. Generally, like their Pakistan colleagues they have come to hold, "in a government under the law there is no such thing as unreviewable discretion."[237]

# Chapter 6

# EMERGENCY PROVISIONS UNDER LEGISLATION: SOUTHEAST ASIA

## I. Personal Liberty and Colonial Rule

### (1) Constitutional developments in the region: an outline

6.1 Although the British influence in the Malayan peninsula in Southeast Asia dates back to 1786 when the island of Penang was ceded to the East India Company by the ruler of Kedah, the starting point of constitutional development was the constitution in 1826 of the "Straits Settlements" with Singapore, Malacca and Penang, as part of the government of Bengal.[1] Until 1867, when the "Settlements" were converted into a separate colony, the legislature of British India held its sway over the territory. In the remaining part of the peninsula British influence was limited to giving "protection" to the native states - first to those of Perak, Selangor, Pahang and Negri Sembilan, which were knit together into a loose federation in 1895. In 1909 this set-up, known as the Federated Malaya States, was provided with a legislature. The same year four other states, Kedah, Kelantan, Perlis and Trengganu, accepted British protection and were joined in 1914 by Johore, but this group remained unfederated. During the second world war this constitutional trilogy was swept away by the Japanese occupation of the peninsula between 1942 and 1945.

6.2 In 1946 when the Malayan Union was founded embracing the whole of the peninsula (except Singapore which was made a separate colony) the native states lost much of their independence as a result of the centralisation of power. The Malayan population became apprehensive of British designs and raised a demand for self-government which produced the Federation of Malaya in 1948, albeit with the same constituent states, but with a liberal Constitution. In 1955 the Federation had its first legislature with elected majority. This was followed by full independence

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on August 31, 1957 ("Merdeka Day") with a new Constitution. The colony of Singapore also had a legislative assembly with elected majority in 1955 but it did not get internal self-government until 1959. To complete the story of constitutional development, it may be added that Singapore joined the Federation along with the two Borneo states of Sabah and Sarawak on August 31, 1963 ("Malaysia Day"), but announced its withdrawal on August 9, 1965. By s.6(1) of the Singapore Independence Act, notwithstanding the secession, some portions of the Constitution of Malaysia were "continued in force", mutatis mutandis, in Singapore.[2]

(2) Politics, "Jungle War" and Terrorism

6.3 Since 1965 Malaysia and Singapore have been separate political entities and members of the Commonwealth but it cannot be forgotten that they had both inherited, and still share to a great extent, a common legal system. Their erstwhile political and constitutional unity, their geographical propinquity and, more than that, their shared experience in dealing with the problems of internal security, make it desirable that these common problems of the two states be dealt with together. It may also be added that these problems had a common aspect which, in its early phase, resembled in some respect those of Northern Ireland and Kenya, in particular, with the colonial government pitched against an armed uprising by a body of persons described as "terrorists". This examination may prove to be a useful study in parallels as we propose to discuss in the next chapter the "emergency" during the Mau Mau movement in Kenya.[3]

6.4 The opening of the rubber plantations and the tin mines in different parts of the peninsula by the British entrepreneurs encouraged the immigration of the Chinese and the Indians who were required to man them. In course of time they not only grew in number but also acquired considerable economic influence. By the 1940s, in Singapore the Chinese formed 75% of the population and on the mainland they were 38½% as against 49% Malays

and 11% Indians.[4] In the case of the Chinese, who were the more numerous of the immigrants and who outnumbered the Malays in the peninsula as a whole, the Malayan Communist Party, which was founded in 1920 by the "agents of the Communist Party of China",[5] appears to have generated in them political aspirations. The Malays were generally apolitical. One observer has noted that "they liked the benevolence and paternalism of colonialism."[6] It has also been noted that they were "devout Muslims" and they did not associate with the Party.

6.5 When the war came and the Japanese invaded the peninsula, the Malayan Communist Party offered its co-operation to the British government. In the newly started Institute in Singapore the British trained the Chinese as guerrillas to fight the advancing Japanese from inside the jungles covering almost 80% of the total area of the peninsula. The guerrilla force eventually came to be made up of 7000 men and acquired the name of the Malayan People's Anti-Japanese Army (MPAJA), although their leadership and control vested in the Communist Party.[7] The party, however, made no secret of its plans and as early as 1943 they declared their objective - "Drive the Japanese fascist out of Malaya and establish the Malaya Republic."[8] So, when the war was over they devised a 3-phase strategy to give it a practical shape. The last two phases, contemplating withdrawal of British authority first from the rural area and then from the entire country, were never reached but crippled the economy. The Communist guerrillas started carrying out raids on the rubber plantations and the tin mines, operating from inside the jungles from the early part of 1948. They also struck at isolated police stations and villages and conducted a general terrorist campaign.[9] In 1951 the British High Commissioner was ambushed and killed.

6.6 The success in the "jungle war" achieved by the British administration was mainly due to efficient military operation and to a large number of other practical measures adopted by them, such as an

"independence amnesty" and "starve-them-out-strategy"[10] which their successors continued. It will be considered later whether some at least of the measures adopted did not exceed the legal authority granted. Indeed, it has been observed that, "No government in the world had such sweeping powers even in wartime."[11] Thus emergency laws were enacted on a massive scale during the first five years, representing what has been termed as an "important contribution to the art of counter-insurgency."[12] Provision was made for compulsory national registration and identity cards to isolate the faceless terrorist. Similarly "re-settlement" was provided for the Chinese "squatter community" living on the jungle fringe to deprive the guerrillas of their support. But it is impossible here to view the entire spectrum.

(3) The Law: Restraints and Habeas Corpus

(A) Personal liberty and some ordinary and semi-emergency laws

6.7 If a chronological order is to be followed, one has to say that an old law, totally unrelated to the "emergency", continued in use even after the independence, purporting to maintain "public order" by restricting the movement of persons.[13] This was the Restricted Residence Enactment, 1935, cap. 39 of the Laws of the Federated Malay States, which was extended to the Federation of Malaya by Ordinance No. 4 of 1948. Another Ordinance, No. 13 of 1948, amended it and introduced into it the provision of "police supervision" by s.2A. The "Enactment" was in fact meant "to provide for the making and enforcing of orders regarding residence in and exclusion from certain parts of the state". But s.2 provided the Executive with such draconian powers that it could serve effectively the problems of "security". Its material portion ran thus:

> Whenever it shall appear to [the State Chief Minister] on such information and after such inquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district. . . or should be prohibited from entering into any particular district,

he could order that person's arrest and detention. Although "further

inquiries" were contemplated before a "restricted residence order" for life or any particular term could be made, the power of arrest and detention was not conditioned by any definite objective criteria. The Minister was made the sole judge of what he considered to be "reasonable grounds" for making the order.

6.8 The Public Order Ordinance, No. 14 of 1947, of the Malayan Union, made under s.85 of the Malayan Union Order-in-Council 1946, appeared to be the first law that dealt with certain security measures. It made an offence of such activities as the wearing of uniforms, organising or belonging to a quasi-military organization and illegal drilling. It was in a sense a preventive and anticipatory measure and was eventually followed up in July 1948 by Ordinance No. 10 of 1948 (The Emergency Regulations Ordinance) but it has to be mentioned that with the rise in the tempo of the "jungle war" an increased military intervention was called for and the provisions of the Criminal Procedure Codes had to be amended, to which we may first refer.

6.9 The Amendment substituted provisions in the Codes of the States as well as the Settlements (chapters VIII in all cases), relating to "unlawful assemblies", by which the common law concept of the army acting in aid of civil power was superseded to a great extent.[14] The new s.87 in the States Codes and s.97 in the Settlements Codes, using common language, empowered a Commanding Officer of the Armed Forces, under certain circumstances, acting independently, to disperse an unlawful assembly and to arrest and confine any person forming part thereof. Similarly, s.88 in the States Codes, and s.98 in the Settlements Codes, afforded protection to such officers against prosecution for acts done in "good faith" and further provided that any act done in obedience to Military Law shall not amount to an offence.

(B) Restraints on personal liberty under "emergency" legislation

(a) The Emergency Regulations Ordinance 1948

6.10 The important point about the emergency legislation of the peninsula may be noted first. In Africa, as we shall see, regulations were made by the Governors in the different territories under the Emergency Powers Order in Council 1939 but in the peninsula the power and jurisdiction of the Crown was, as we have seen, of a different nature. The 1939 Order was applicable only in the Straits Settlement. However, in the peninsula, the High Commissioner had wider legislative and administrative powers. It was stated in 1957 that, "in some respects he acted purely as a representative of His Majesty"[15] and that, ". . . the foundation of the present system. . . depends on his overriding powers".[16] Indeed, this position was reflected in the relevant constitutional provisions.[16a] We quote below the relevant extracts:

> The Federation of Malaya Order in Council 1948 (S.I.1948 No.108)
>
> s.6 - The High Commissioner is hereby empowered and commanded to do all things belonging to his office in accordance with this Order, the Federation Agreement. . .
>
> The Federation of Malaya Agreement 1948
>
> cl. 8 - The Rulers undertake to accept the advice of the High Commissioner in all matters connected with the government of the Federation. . .
>
> (by clause 5 matters relating to Muslim religion and culture were expressly excepted).

6.11 By s.3 the High Commissioner in Council was empowered to declare an emergency whenever it appeared to him that an occasion of emergency or public danger had arisen or that action had been "taken or [was] immediately threatened by a body of persons" calculated to deprive the community or a substantial portion of it of the essentials of life.[17] During the currency of the emergency s.4(1) empowered the High Commissioner inter alia, to make regulations "whatsoever" which he considered "desirable in the public interest" and to prescribe penalties including the death penalty for offences against such regulations. Sub-s. (2) specified certain matters, without prejudice to the general power conferred by sub-s.(1), in respect of which regulations could be made. They included:

(b) arrest, detention, exclusion and deportation;

(c) restriction of the movement of persons, curfew;

(m) conferring upon himself and upon other public officers or other persons such additional powers as he may consider necessary including powers to make, issue or give orders, rules. . . in respect of any matter or thing;

(p) modification, amendment, supersession or suspension of all or any of the provisions of any written law;

(t) entry into and search of premises. . . and search and interrogation of persons;

(v) any other matter in respect of which it is in the opinion of the High Commissioner desirable in the public interest that regulations should be made. [emphasis added]

6.12 By sub-s.(3) it was provided that the regulations relating to "detention" could be made subject to two safeguards, a time-limit of two years and a "periodic review" of the case of each individual under detention. Although sub-s.(4) made the life of all regulations co-extensive with the emergency, the ambiguous rider ("unless the High Commissioner otherwise directs") could possibly be so construed as to make detentions indefinite. By s.5(1) every regulation and every notification was to have effect "notwithstanding anything inconsistent therewith contained in any other written law."

6.13 The provisions quoted above demonstrate amply the width of the powers assumed and render unnecessary comments. Suffice it is to say that the greatest vice of the Ordinance was to be found in s.4 in the extent of delegation and in the enumeration of the wide range of matters, epitomised in such expressions as "any other matter" (sub.s.(2)(v)) and "other persons" (sub.s.(2)(m)), etc., the only limitation being provided by the requirement of "public interest". Legislation like this was only possible because of the wide powers conceded to the Governors in the colonies who, in the absence of a "representative" legislature combined in himself both executive and legislative functions but in the peninsula, as we have seen, the High Commissioner was expressly invested with wide powers by the constitutional documents.

6.14 Nevertheless, the provisions of s.4(2)(p) and s.5(1) were open to constitutional challenge in that they contained the expression "any written law", embracing the applicable Acts of the British Parliament. One was entitled, however, to ask if the Regulations could also prevail against common law. In Northern Ireland, we have seen, the Special Powers Act retained the primacy of common law.[18] It is not possible to say that the same position was sought to be maintained in the peninsula. On the other hand, it was perhaps considered unnecessary to include a reference to common law as the criminal law in the entire peninsula was codified on the Indian model and there was little scope for the common law to operate in criminal cases. However, it could be said that vesting of such extensive executive and legislative powers in a single functionary acting through such institutions as the "Federal War Council" and the "War Executive Committee" at State and District levels respectively, evidently contemplating a dominant role for the military likened the situation to one that obtained under such notion of "Martial Law" which, as we have seen, was negated by common law.[19]

6.15 In Singapore, the parallel legislation, the Emergency Regulations Ordinance, No. 17 of 1948, had to be enacted possibly for the reason that the 1939 Order could be invoked only in 1956 when the Order was made applicable to "Singapore", among others, by deleting the word "Straits Settlements". However, s.4 of the Ordinance, it appears, followed more closely the phraseology of s.6(1) of the 1939 Order in that it conferred power to make regulations for "the defence of the colony, public safety, maintenance of public order and maintaining services essential to the life of the community". It cannot however be definitely said that its object was to cut down the scope of the judicial review of the regulations since its counterpart in the Federation provided the bare requirement of "public interest". Instead of leaving it to the judiciary to spell out the definition of the term conforming to common law notions, in the colony

this risk was possibly sought to be avoided. Nevertheless, it has to be conceded that in both cases, the provisions of the Ordinances themselves being unchallengeable for reasons stated earlier, they provided for new constitutional norms and a general limitation on the power of the judiciary, in the two territories, albeit not of the same amplitude. In Singapore, there was no provision parallel to clause (v) of s.4(2) of the Ordinance of the Federation but in so far as provision relating to "detention" was concerned, sub-s. (3) of s.4 in both cases used the same language.

(b) The Emergency Regulations 1948

6.16 The Regulations not only made provisions of various natures but were also subjected to copious amendments during the course of the first five years of the emergency - a process for which Kenya, as we shall see, provided a close parallel. It must however be pointed out that in 1951 the entire body of the original and amended regulations of 1948 were repealed and re-enacted, with certain modifications and a few new provisions, in the Emergency Regulations 1951, but in this study we propose to refer mainly to the original regulations. In Singapore also similar regulations were framed with minor verbal changes and we do not consider it worthwhile to discuss these separately.

(i) Detention

6.17 We propose to discuss in this study not all but only the important provisions of the 1948 Regulations of the Federation. The provision for "detention" was made in Reg.17, of which clause (1) is quoted below :

> The Chief Secretary may by order under his hand direct that any person named in such order shall be detained for any period not exceeding one year in such place of detention as may be specified by the Chief Secretary in the order. [emphasis added]

Apparently the provision contained a three-fold limitation of which only one was of rather vital importance in that it limited the duration of the detention which was raised from one to two years in 1949 by Amendment No.12.

The requirement as to the place of detention could also provide a handle for judicial intervention in that a detainee could secure his release in case no place was specified in the order and also when he was detained at a place other than the one specified in the order. Similarly on the ground of mistaken identity also a detainee could successfully move the court. But what was most significant about the regulation was that it was a pure and simple executive fiat. In the Commonwealth the only parallel for such a provision, as we shall see, was to be found in the decrees passed by the military governments.[20] In all cases, everywhere else in the Commonwealth, the power of preventive detention was circumscribed by two basic conditions: the provisions specified the object or purpose which was sought to be achieved by detaining the person concerned and the bona-fide use of the power was ensured by specifying another positive requirement, namely, the "satisfaction" of the detaining authority about the purpose. It may be recalled that s.4(1) of the Ordinance contemplated regulations being made in the "public interest". The executive possibly took it for granted that the judiciary would not hold the omission of the requirement to be fatal and would uphold the <u>vires</u> of the regulation by reading into it the requirement adopting the new norms of interpretation evolved in the English wartime cases.[21]

6.18 A two-tier forum was provided to dispose of "objections" against orders made under clause (1). The Advisory Committee, whose Chairman was to be a person who held or had held a judicial office, and which was appointed by the High Commissioner, considered the objection and made "recommendation" to a Commission, which was also appointed by the High Commissioner and whose Chairman was also to be similarly qualified. The power of passing final orders was vested in the Commission which could either reject the same or vary the period of detention or order that the detention should cease. Direct representation to the Commission and hearing any person by the Commission was expressly barred. The

Commission could, in its discretion "require any person to supply any information in his possession relating to any objection which [was] being considered by the Commission".

6.19 The Emergency Regulation (Detention Order) Rules 1948 framed under clause (4) spelt out in some detail the procedure for the hearing of objections. Rule 3 made it "obligatory" that the detainee should be informed of his "right to lodge an objection" in the prescribed form "as soon as practicable" after his arrival at the place of detention. Form I of the Schedule prescribing the objection required "grounds" to be stated, among other particulars. On the other hand, a reference to the grounds of detention appeared only in Form II which prescribed the notice for the hearing of the objection, in the following terms:

> The grounds for the making of the detention order against you were that you were suspected of having recently acted or being likely to act in a manner prejudicial to public safety and good order.

This shows how illusory was the safeguard. Rule 5 empowered the Advisory Committee to allow legal representation but it was doubtful if in the course of the oral hearing the detainee could insist on the facts and other particulars relating to the grounds of detention being supplied to him to supplement his objection.[22] The proceeding before the Committee was to be in camera. In the absence of such other ideal safeguards as time-limits in the procedure and the vesting of explicit co-ordinate authority in the executive, to grant instant relief, there was every likelihood of hardship being caused in genuine cases, such as of mistaken identity.

6.20 Reg.17B made provision for suspension of the detention order on conditions. Reg.17C empowered the executive to order any person to leave the Federation if he was not a citizen or a British subject born in the Federation or in the Colony. These provisions also did not provide adequate opportunities of making representation, which we do not propose to discuss in detail. Concentrating on Reg.17 itself we submit that a two-

tier forum presided over by a judicially trained person although a novelty, did not mitigate the rigours of the provision, in view of the fact that the order could peremptorily deprive a person of his liberty for a period of two years as Reg.17 reduced the right to "periodic review" contemplated by s.4(3) to one of making a single "objection".[23]

6.21 In Singapore, the provisions of some of the regulations made under the relevant Ordinance were later re-enacted in The Preservation of Public Safety Ordinance, No. 25 of 1955, albeit for another purpose, for the security of Malaya. The provision relating to "detention" was as follows:

> s.3(1) If the Governor in Council is satisfied with respect to any person that, with a view to preventing that person from acting in a manner prejudicial to the security of Malaya or the maintenance of public order therein or the maintenance therein of essential services, it is necessary so to do, the Chief Secretary shall by order under his hand make an order (a) directing that such person shall be detained for any period not exceeding two years. . .

The order could also restrict his place of residence, employment or other activities, impose a "curfew" on him, require him to notify his movements and also prohibit him from leaving the island of Singapore. By s.4 a detention order could be suspended on conditions. A right of appeal was provided by s.5 to a Tribunal constituted under s.6 with two High Court judges and a District judge. According to s.7 the Tribunal could revoke, amend or confirm the order. Provision for periodic review, every six months, was made vide ss.8 and 9. Although the safeguards were made more realistic by providing, among others, that the order had to be passed on the satisfaction of the highest executive body and also indicated the object or purpose, such as, the security of Malaya etc., under s.11 the detaining authority could withhold information and as a result the detainee's right to prosecute his "appeal" could be seriously affected. The extra-territorial extent of the regulation was significant and could, it is submitted, provide grounds for a judicial challenge.

(ii) Detention "pending decision"

6.22 Reg. 23 empowered any police officer of or above the rank of a Corporal, and Reg. 27 empowered any member of His Majesty's Forces of or above the rank of a Warrant Officer, to arrest any person suspected of the commission of an offence against the Regulations or of being a person ordered to be detained under Reg.17; neither Regulation required that the suspicion had to be reasonable. But more serious was Reg.23A, as follows:

> (1) Any police officer may without warrant arrest any person in respect of whom he has reason to believe that there are grounds which would justify his detention under Reg.17. Any such person may be detained for a period not exceeding 14 days pending the decision whether order under Reg.17 should be made.
>
> (2) Any person detained under powers conferred by this regulation shall be deemed to be in lawful custody. . .
>
> [emphasis added]

If the two clauses are read with Reg.17(1) it at once becomes clear that it conferred a power of indiscriminate arrest and detention on the police officer for no grounds are spelled out in any manner in Reg.17(1); even so, the judiciary was not likely to declare it ultra vires for obvious reasons and the power was liable to be misused for investigation pending the interim detention. Possibly such a course was deliberately provided by this regulation, as Reg.17(1) did not contemplate that the detaining authority must be in possession of the required information at the time of making the order. Reg.23A which was inserted by an amendment, was clearly aimed at facilitating the effective exercise of the powers of detention under Reg.17. Thus, in effect, an arrest and detention by a police officer became the basis of the order passed eventually by the Chief Secretary who was not required to state the ground or facts on which the order was passed. This was the total effect and the real mischief of the provisions relating to "detention".

(iii) Interrogation

6.23 The power of interrogation was conferred by Reg.24 but Reg.23A appears to have rendered it otiose to a great extent. The power could be exercised on two grounds, namely, when a police officer wanted to be satisfied either as to the identity of a person or as to the purpose of his being in the place where he was found. He could be arrested and detained pending enquiries if the police officer suspected that he had acted or was about to act in a manner prejudicial to the "public safety or the maintenance of public order." The requirement of "public interest" which was likely to be interpolated into Regs. 17(1) and 24 was certainly of wider ambit than those underlined. Such detention could be for a period of 24 hours only unless it was extended for an additional period of 14 days by the officer in charge of a police district who had to forthwith report the circumstances to his superior. In clause (3) was to be found a protection similar to one provided in clause (2) of Reg. 23A. There could be thus no action for false imprisonment against either the police or the army as this power was also conferred on "any member" of the armed forces by Reg. 27 by which they were also empowered along with the police officer to exercise the powers to stop and search any individual or vehicle and to seize offensive evidence or weapon found on them or any premises conferred under Regulations 21 and 22.

6.24 The scheme of these important regulations thus followed closely that of Northern Ireland regulations made under the Special Powers Act which, however, as we have seen, expressly saved common law in the proviso to s.1(1).[24] On this account possibly the Army Field Instructions there insisted on suspicion being properly grounded before action could be taken against a suspect who did not stop to answer as required by Reg. 7 there. That notwithstanding, fatal shots were fired there at unarmed persons.[25] In the peninsula, unlike Northern Ireland, the regulation did not impose a "duty" to stop but as Harry Miller observes the "operational

order" authorised such a course which resulted, at one time, in a "mass killing".[26]

(c) Special Trial Procedure and "Terrorism"

6.25 A few other parallels with certain aspects of the situation in Northern Ireland are to be found reflected in the procedure for trial of offences, which was dealt with by Regulations 33, 34 and 35, in particular. Statements made to a police officer which were generally inadmissible under the Criminal Procedure Code were made admissible in evidence. The court could hold a trial in camera "in the interest of justice" or for "public safety" or "security". It could also prohibit publication of the names etc. of the witnesses to prevent their identification. The Emergency (Criminal Trials) Regulations 1948 were more comprehensive. Under Reg.7, the Public Prosecutor could certify "any case" and "any offence" to be triable under the "emergency procedure" which dispensed with the ordinary "preliminary enquiry" and made "jury trial" discretionary, besides providing that "bail shall not be granted."

6.26 As we have seen, the term "terrorism" was defined in Northern Ireland for the first time in the Detention of Terrorists Order 1972 but terrorism was not made an offence despite recommendations made to that effect by the Gardiner Committee in 1975.[27] The new Regulation 6D inserted in 1950 by Amendment No.12 made possession of a "terrorist document" an offence in the peninsula and defined the term "terrorist" with an additional clause stating that "terrorism shall have a corresponding meaning". The definition as we shall see, was retained in the Internal Security Act 1960[28] but in the present context it has to be noted that Regulations 4, 5, 6 and 6A created offences which could be said to have covered a large part of terrorist activities. Carrying or possessing or being in control of unlicensed firearm, ammunition and explosive were made punishable with death; failure to report to the police about such persons and consorting with persons engaged in such activities

and with persons harbouring them were punishable with imprisonment for ten years.

6.27 However, in the Malayan context, Reg. 4C also inserted by an amendment in 1950, was more significant. To demand, collect or receive supplies in circumstances which raised the presumption of public safety or maintenance of public order being prejudiced was made an offence, the scope of which was further widened in s.59 of the 1960 Act.[29] But the provision of collective punishment, also introduced in the same year, vide Reg.17DA (2), was indeed so pernicious that after independence it could have no justification and was discarded.[30]

(C) Habeas Corpus in Malaysia and Singapore

(a) Pre-independence provisions

(i) Right under Common Law and English statutes

6.28 The right to the writ of habeas corpus was available in England, as we have seen, at common law as well as under the Habeas Corpus Acts, to any person who was "unlawfully" detained.[31] When the remedy became available in the peninsula has, therefore, to be determined with reference to the date of reception there of the English common law and the relevant statutes. However, it has to be remembered that the English courts also had the power to issue writs of habeas corpus "into all parts of the dominions of the crown"[32] and that this position was obviously related to the constitutional status of each territory on a particular date. In this respect the position of Singapore was the least complicated of all in that its colonial status remained essentially unaltered between 1826 and 1955. On the other hand, Penang and Malacca which, along with Singapore, comprised the colony of Straits Settlements, had become, we might recall, part of, first, the Malayan Union in 1946 and then, of the Federation of Malaya, in 1948 and the Federation, it has been asserted, remained a "protectorate" until attainment of independence in 1957.[33] Whether the constitutional change had any effect on the existing law in

force in those territories was indeed of great relevance in so far as the position obtaining there between 1946 and 1957 was concerned but we do not propose to discuss this minor issue. The major issue which relates to the position obtaining generally in the native states of the peninsula during colonial rule obviously demands greater attention.

6.29 In dealing first with the position obtaining during colonial rule in Singapore and also that obtaining in Penang and Malacca until 1946, we refer to a decision of the Privy Council, given in 1875, in CHEAH NEO v ONG CHENG NEO.[34] Their Lordships referred to the Royal Charters of 1807, 1826 and 1855 and also to Ordinance No. 5 of 1868 which constituted the first "Supreme Court" in the colony of Straits Settlements and observed:

> . . . the Charters referred to, if they are to be regarded as having introduced the law of England into the colony, contained in the words "as far as circumstances will admit", the same qualification. In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local conditions of England, and which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of England may be introduced into it.

In the judgment their Lordships had dealt earlier with the question of constitutional status of the ceded and settled colonies and finally they held that the position in Penang, which was under their consideration in the instant case, would be the same in any event which they indicated in the above passage. Indeed, Sheridan has pointed out that the question whether Penang, Malacca and Singapore were settled or ceded colonies was of little legal significance. The crux of the matter was that the general law of England, as obtained there in 1826, was introduced into the colony of Straits Settlements.[35]

6.30 It follows from the dictum of the Privy Council quoted above that the right to the writ of habeas corpus under common law and also under the relevant English statutes could be exercised in the territories comprising the colony of Straits Settlements from 1826 onwards. It has to be noted however that the right under common law also included the ancillary rights

which we have dealt with earlier in some detail.[36] In this connection notice may be taken of the fact that the powers and jurisdiction of the "Supreme Court" remained essentially unaltered and the subsequent legislation did not interfere with its jurisdiction to issue habeas corpus. In Ordinance No. 30 of 1907 which re-enacted the Courts Ordinance of 1878 it was stated that the court should have jurisdiction in civil matters "as formerly exercised in England by the High Court of Chancery, the Court of Queen's Bench" etc. and in criminal matters, as exercised in England "by Her Majesty's High Court of Justice and the several judges thereof."[37]

6.31 It is also necessary to refer to the fact that in virtue of the jurisdiction exercised by the Crown in these territories the superior courts of England acquired a contemporaneous authority to issue writs into these territories and therefore the right could be exercised by British subjects resident there even before the Supreme Court was established there in 1868 which eventually provided them with a local forum.[38] In this respect the position in the nine native states was not much different. We have seen that the nine native states had obtained British "protection" between the years 1895 and 1914 although five of them remained outside the framework of the "Federated Malay States", constituted in 1895. Depending on the extent and nature of "protection" obtained by each state, the right to the writ could be enforced at the superior courts of England.[39]

6.32 The position obtaining in the native states in respect of introduction of English law is far from clear. Indeed, it is stated that, "in some areas, it was difficult to tell what law, if any, applied."[40] However, some guidance can be obtained from one enactment of the Federated Malay States. In s.2(1) of the Civil Law Enactment 1937 it was thus stated:

> . . . The Common Law of England, and the rules of Equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by statute, shall be in force. . .

This provision was repealed and replaced in 1956 by the Civil Law Ordinance of the Federation which was further amended by Ordinance No.41 of 1956. Unfortunately even in these enactments only the "Common Law of England" was mentioned. It has therefore been rightly observed that it was doubtful if the whole body of English law, including the statutes, was ever introduced into these territories.[41] Apparently the English Habeas Corpus Acts did not proprio vigore apply and even if the right to habeas corpus could be exercised under common law it appears that there was no forum similar to the "Supreme Court" of the Straits Settlements where the right could be enforced. In fact there was an institution called "Supreme Court" in the Federated Malay States but its powers and jurisdiction were not the same as those of the "Supreme Court" of the Straits Settlements. It consisted of a "Court of Appeal" and a "Court of a Judge" and although the latter was invested with "original criminal jurisdiction", it was specifically limited to the trial of offences.[42]

(ii) Right under the Criminal Procedure Codes

6.33 The Straits Settlements and the Federated Malay States each had a separate Code, but since 1947, after the formation of the Malayan Union, the position has changed. Now Singapore has a separate code;[43] all other states of the peninsula have a common code.[44] The provisions of the Singapore Code may be examined first.

6.34 In Singapore (also in Penang and Malacca until 1946) the Code provided two types of remedies. It can also be suggested that at least in so far as the right under the English statutes was concerned it was replaced by one provided under the code.[45] The relevant chapter of the Code was captioned "Habeas Corpus and Directions in the nature of Habeas Corpus". [emphasis added] The provisions of the two sections which embodied the two different types of remedies are quoted below:[46]

s.317 - Any person -

(a) who is detained in any prison within the limits of Singapore or on a warrant of extradition under any law for the time being in force in Singapore relating to extradition or fugitive offenders; or

(b) who is alleged to be illegally or improperly detained in public or private custody within such limits; or

(c) who claims to be brought before the court to be dealt with according to law,

may apply to the High Court for a writ of habeas corpus. [emphasis added]

s.325 - The High Court may, whenever it thinks fit, order that a prisoner detained in any prison situate within the limits of Singapore shall be -
(a) admitted to bail; or
(b) brought before a court-martial; or
(c) removed from one custody to another for the purpose of trial or for any other purpose which the court deems proper.

The procedure for making application for the writ of habeas corpus and for the disposal of the application by the court was prescribed by ss.318 and 319 but the provisions mentioned nothing about the ancillary rights available under common law. Two arguments may be advanced to support the proposition that those rights were not abrogated: first, the High Court was a successor of the "Supreme Court"; second, the rights were available at common law which had become a part of the procedure of the Supreme Court whereas the provision in question neither dealt with the general procedure of the High Court nor did it deal with the common law right to the writ itself.

6.35 In the rest of the peninsula the relevant chapter of the Code was captioned "Directions of the nature of a habeas corpus" and the main provision was in the following terms:[47]

s.365 - The Court of a Judge may whenever it thinks fit direct -

(i) that any person who
(a) is detained in any prison within the limits of the Federated Malay States on a warrant of extradition whether under the Extradition Enactment or the Fugitive Offenders Enactment; or

(b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federated Malay States,

be set at liberty. [emphasis added]

Apparently, although the provision did not, in term, refer to the writ of habeas corpus, it embodied its gist. As we have already noted, it was doubtful if the English Habeas Corpus Acts were at any time made applicable

in these territories. Besides, as we have seen, they did not also have a "Supreme Court" similar to that of the Straits Settlements and therefore, as already observed, the right to the writ of habeas corpus could not be exercised at a local forum in these territories. It can therefore be safely suggested that the entire law relating to habeas corpus was codified in these territories which was reflected in the provisions of the Code. This proposition is supported by the fact that the succeeding sections, 366 to 374, laid down the procedure in elaborate detail: even a right of appeal was specifically provided in s.374.

6.36 However, one common point of great importance to be noted about the right of habeas corpus generally in Singapore and Malaysia is that in both cases the ambit of the right was widened: a person could succeed even if he failed to make a case of "illegal" detention; an "improper" detention could even be challenged. In England, only a person who was "unlawfully" detained could apply for habeas corpus. It cannot be gainsaid that the word "illegally" used in both Codes corresponded to the English provision, namely, "unlawfully" but the use of the word "improperly", in addition, in both the Codes, definitely signified an improvement for the concept of "impropriety" was, undisputedly, wider than that of "illegality". Thus we submit that although the provisions of Regulations 23A and 24 contemplated that the detentions thereunder (after arrest) should be treated as "lawful", they could very well be "improper" and could therefore be challenged. However, it must be noted that the use of the word "improper" in the habeas corpus provision of the Criminal Procedure Codes of the Commonwealth generally owe their origin to the Indian Code.[48]

(b) Post-independence provisions

6.37 The provision of habeas corpus, though not in terms but in substance, was embodied in the Constitutions of the two states. Art 5(2) of the Constitution of Malaysia, which was applicable in Singapore also by virtue of s. 6(1) of the Singapore Independence Act 1965, is quoted:

> Where a complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
> [emphasis added]

The use of the expression "or any judges" could possibly suggest retention of the common law right of successive application in view of the fact that by Art. 162 the "existing laws" were continued in force and the last-mentioned term was defined in Art.160 to include "common law". However, in Singapore, although s.13 of the 1965 Independence Act similarly continued in force the "existing laws", the term was defined to mean "written law".

6.38 Reference has also to be made to another provision. In Malaysia, the Courts of Judicature Act 1964 reiterated that the High Court shall have power to issue "writs in the nature of habeas corpus" for the enforcement of the rights conferred by Part II of the Constitution or for any other purpose. However, the rule-making powers of the courts was stated in s.16(a) of the Act in very wide terms, as follows:

> for regulating and prescribing the procedure. . . and the practice to be followed in any High Court. . . in all cases and matters whatsoever . . . and any matters incidental to or relating to any such procedure or practice. . .
> [emphasis added]

It is not proposed to discuss here the question whether the court could by rules, abrogate the common law ancillary rights of the writ as the matter has been discussed at some length in another context. This controversy does not affect the position in independent Singapore where the Criminal Procedure Code provides for the writ, in terms.

6.39 It is also important to note that although the Constitution of Malaysia was modelled generally on the Indian Constitution, in the latter the remedy of habeas corpus was named although it was qualified by the expression "in the nature of". The pre-constitutional legal history of the territories comprising independent Malaysia, discussed above, supply the answer to the question why the constitutional draftsmen in Malaysia departed

from the Indian provision in this respect. As we have seen, the right to the writ of habeas corpus was not entrenched in the legal system firmly and equally, in all parts of Malaysia. This had an important bearing, as we shall see, on the approach of the judiciary in matters concerning personal liberty.

II. Personal Liberty and Independence

(1) Constitutional Provisions

6.40 The important provision was Art.5 of the Malaysian Constitution which dealt with "liberty of the person" and subsumed the protection afforded by habeas corpus in clause (2), which we have already quoted.[48a] The remaining clauses are quoted below but we may point out that Part II of the Malaysian Constitution, which included Arts. 5 to 12 (adopted in Singapore) and was headed "Fundamental Liberties", was not specially entrenched, unlike Part III of the Indian Constitution.[49]

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty four hours . . . be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.
>
> (5) Clauses (3) and (4) do not apply to an enemy alien.
>
> [emphasis added]

6.41 Notice has also to be taken of Art.8(1) which stated that "All persons are equal before the law and entitled to the equal protection of the law" and of the first two clauses of Art.9 which are quoted below:

> (1) No citizen shall be banished or excluded from the Federation.
>
> (2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.
>
> [emphasis added]

It is also necessary to quote Art.4 (not adopted in Singapore) in its material part to show how the scope of judicial review was restricted by the Constitution in Malaysia:

> (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of inconsistency, be void.
>
> (2) The validity of any law shall not be questioned on the ground that - (a) it imposes restriction on the right mentioned in Art 9(2) but does not relate to the matters mentioned therein; or
>
> (b) . . .
>
> (3) The validity of any law. . . shall not be questioned. . . except in proceedings for a declaration that the law is invalid. . .
>
> (4) Proceedings for a declaration that a law is invalid. . . shall not be commenced without the leave of a judge of the Federal Court. . .
>
> [emphasis added]

6.42 In Part XII, "Temporary and transitional provisions" were made and by Art.162 of this Part it was sought to extend, in a sense, the operation of Art.4 to the existing (pre-Merdeka) laws which were continued as effective, subject to such "modification" as might be necessary "for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution." Clause (4) of the article conferred the power to do so on the Executive head of the federation. A similar power was conferred by clause (6) on "any court or tribunal applying the provisions of any existing law". However, it may be noted that the use of the expression "may" in both clauses create an illusion that the power was discretionary. Indeed, Sheridan rightly suggests that the power conferred by clause (6) could not be discretionary.[50]

6.43 It will not be disputed that the interpretation of the provisions of a Constitution demands a different approach; they are not to be narrowly construed. Reading Art. 162 as a whole against the background of Art.4, the intention of the framers of the Constitution appears to suggest that the provision was mandatory, and not directory. The case-law, which we shall soon discuss, also supports this view with the exception of a stray

authority.[51] Support for this view may also be derived from the fact that Singapore did not adopt this article, evidently for the reason that Art.4 was not adopted by it. In Malaysia Art.4 appears to have given recognition to the principle of presumption of constitutionality as a universal rule to be applied to the existing as well as to the future laws. Art. 162 was required to buttress the principle by making-up a grid together with Art.4. Commentators appear to have missed this aspect.

6.44 "Special powers against subversion and Emergency Powers" was the heading given to Part XI, with Arts. 149 to 151, which was adopted in Singapore in toto.[52] The material part of Art.149, as amended in 1960, deserves to be quoted:

> (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
>
> (d) to procure the alteration, otherwise than by lawful means of anything by law established; or
>
> (e) which is prejudicial to the security of the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10. . .

It may be noted that the words underlined in the above extract were borrowed from the Emergency Regulations Ordinance 1948.[53]

6.45 The executive head of the Federation (the Yangi di-Pertuan Agong) could issue a "Proclamation of Emergency" under Art.150(1) when he was "satisfied" that a "grave emergency" existed whereby "the security or economic life" of the Federation was threatened "whether by war or external aggression or internal disturbance". Clause (2) of the article empowered him to promulgate ordinances if immediate action was required and Parliament was not sitting. Parliament could, however, "annul" under clause (3) the Proclamations and also the Ordinances when it met after being summoned "as soon as might be practicable". It may be pointed out that

clause (3) in its original and unamended form corresponded in one respect to the Indian provision in that unless approved by Parliament the Proclamation (and Ordinances also in Malaysia) ceased automatically to have effect after two months. The most important provision, however, was to be found in clause (6) which provided that such Ordinances shall not be invalid "on the ground of any inconsistency with the provisions of Part II". Even clause (7) was equally important in that it extended the life of such Ordinance for another six months after the emergency ceased. That apart, even this six months time-limit was saddled with a vague exception "except as to things done or omitted to be done before the expiration of that period". Could it possibly mean that the executive could pass an order of preventive detention at any time, up to six months after the emergency had ceased, contemplating detention even beyond this time-limit ?

6.46 Art. 151 required the following safeguards to be provided in any law made for "preventive detention" under Part XI:

> (1) (a) the authority [ordering detention] . . . shall, as soon as may be, inform him of the grounds for his detention and, subject to clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall be detained. . . for a period exceeding three months unless an advisory board constituted as mentioned in clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong.
>
> (2) An advisory board. . . shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong from among persons who are or have been judges of the Federal Court or are qualified to be judges of the Federal Court, and two other members, who shall be appointed. . . after consultation with the Chief Justice. . .
>
> (3) This article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.
>
> [emphasis added]

6.47 Two distinctive features of the protection of the hearing of representations by the independent advisory board immediately arrest our attention. In the first place such hearing was limited to citizens only. Secondly, detention beyond three months was made dependable on the

satisfaction of the executive head of the Federation, possibly to pre-empt challenges on the ground of mala fide. But the Head of State, being required to act on the advice of the 'Cabinet' (vide Art.40), this exercise was of a doubtful validity. Nevertheless, this consideration appears generally to have prevailed with the courts, as we shall see. With another exception, namely, clause 1(a) which required "allegations of facts" in addition to the "grounds" to be supplied to the detainee, the safeguards generally corresponded to those provided in the Indian Constitution. The use of the expression "national interest" in clause (3) is also noteworthy in that it replaced the concept of "public interest" embodied in the 1948 Emergency Ordinance.

6.48 We may now take note of a special feature of the Singapore Constitution. In Part IVA we find the provision of "Presidential Council" which appears to have been inspired by the provision made in 1958 in the Constitution of Kenya, where it was later repealed. Among the different "particular functions" of the Council it was required to give its opinion on any Bill or subsidiary legislation that it considered to be inconsistent with the "fundamental liberties" of the subject, vide Art.81J. It was however robbed of its effectiveness by Amendment Act No.40 of 1970 which provided, vide Art.81K(7), that the provision was not to apply to a Bill which was certified by the Prime Minister as one "which affects the defence or the security of Singapore or which relates to public safety, peace or good order in Singapore".

(2) Some Emergency Laws

(A) The Internal Security Act 1960

(a) A General View

6.49 The Emergency Regulations Ordinance 1948 was continued in force until 31st July 1960 (by virtue of Art.163 of the Constitution) when the emergency was terminated. The government of Malaysia then decided to enact a permanent measure. We have already seen that in 1960 art.149 of the Constitution was amended and that the new clause (1) had used the

phraseology borrowed from the 1948 Ordinance. The preamble of the 1960 Act, enacted thereafter, which we propose to discuss now, thus contained the prescribed recital to invoke the protection of art.149 to pre-empt judicial challenge. The Act was also applicable in Singapore. In s.2 of the Act, it was stated that a "terrorist" means any person who -

(a) by use of any firearm, explosive or ammunition acts in a manner prejudicial to the public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order; or

(b) carries or has in his possession or under his control any firearm, ammunition or explosive without lawful authority therefor; or

(c) demands, collects or receives any supplies for the use of any person who intends or is about to act or has recently acted in a manner prejudicial to public safety or maintenance of public order. [emphasis added]

The exhaustive definition ("means") surprisingly extended the ordinary concept of "terrorism" which we found defined, albeit in an inclusive manner, in the Detention of Terrorists (Northern Ireland) Order 1972.[54] The definition generally carried the legacy of the Emergency Regulations of 1948.[55] By ss. 3, 5 and 6 association with "quasi-military organisations", the wearing of the uniform of such association and illegal drilling were made offences.

6.50 Part II (ss.47 to 71) of the Act contained "Special provisions relating to security areas". When, in the opinion of the executive head of the Federation it was necessary for suppressing "organised violence against person or property" he could "proclaim" any area as "security area". Within this area, the Minister could, for "public safety", declare different areas as "danger area" and "controlled area", imposing restrictions therein of different degrees on entry and residence in such areas. In the "danger area" the army could take measures "dangerous and fatal to human life", without incurring any liability for compensation, vide s.48(4) and (5). Indeed, the situation resembled a state of "Martial Law". A similar provision was not made in Northern Ireland, perhaps for the additional reason that the guerrilla warfare there was of urban and not

rural type, or "jungle war" as in the peninsula. Power of arrest in the security area was conferred by s.64 additionally on a "guard, watchman and any person generally authorised by the Chief Police Officer".

6.51 In this Part, chapter III (ss.57 to 63) prescribed the offences and punishments. Persons carrying arms and those who consorted with such persons faced the death penalty. The offence prescribed in s.59 reflected the effective role of the "starve-them-out strategy" and of the extended definition of terrorist. Life imprisonment was prescribed for any person, within or without the security area, who demanded, collected or received any supplies from any other person in circumstances which raised a presumption that such supplies were intended for the use of any "terrorist". Any person who was similarly found in possession of any supply or provided any supply either directly or indirectly also faced life imprisonment. Sub-s.(4) provided that it shall not be necessary to specify either the person from whom any supplies were demanded, collected or received or the person for whom it was intended. This special rule of evidence made any reasonable defence impossible.[56]

(b) "Detentions" and Interrogation

6.52 The power of interim detention pending enquiries and interrogation was posited in s.73(1) under which any police officer could arrest without warrant "any person in respect of whom he [had] reason to believe that there [were] grounds which would justify his detention under s.8 and that he [had] acted or [was] about to act or [was] likely to act in any manner prejudicial to the security of Malaya or any part thereof". The provision was modelled on Reg.23A of 1948. Similarly, sub-s.(2) and the remaining provisions of the section generally followed the scheme of Reg.24 with one notable change that the maximum period of such detention was now raised to 28 days from 14 days provided in the regulations. The provisions of s.73 were apparently more drastic being devoid of any safeguard and contravened Art.5 of the Constitution but Art.149 saved it.

6.53 We now come to the "Powers of Preventive Detention" which were provided in Part I, in chapter II (ss.8 to 21). The material parts of s.8 are set out below:

> (1) If the Yang di-Peruan Agong is satisfied with respect to any person that, with a view to preventing that person from acting in a manner prejudicial to the security of Malaya or any part thereof, it is necessary so to do, the Minister shall make an order -
>
> (a) directing that such person be detained for any period not exceeding two years;
>
> (2) Every person detained in pursuance of an order made under paragraph (a) of sub-s.(1) shall be detained in such place as the Minister may direct and in accordance with instructions issued by the Minister and the rules made under sub-s.(3).
>
> [emphasis added]

Paragraph (b) of sub-s.(1) provided an alternative to detention. It envisaged the imposition of a variety of other restrictions affecting his activities and movements, including prohibiting him from addressing public meetings or from holding office in any organisation or from taking part in any political activities. He could be prohibited from being out of doors between certain hours and could be required to notify his movements in the specified manner. Execution of a "bond" in respect of any order made under this paragraph was also contemplated. By virtue of s.47 the bond could be enforced in accordance with the provisions of the Criminal Prevention Code but there was also a penal provision in s.45 which made it an offence to contravene any provision of Part I or any order or direction made thereunder.

6.54 s.9 referred to Art.151 of the Constitution and reproduced the safeguards mentioned therein. By s.10 the Minister was empowered to suspend the operation of the detention order on conditions which corresponded to the restrictions contemplated in paragraph (b) of s.8(1) and also to the requirement of execution of a "bond", contemplated thereunder. The suspension order could be revoked either in the "public interest" or for non-observance of any condition. s.11 dealt with representations against

detention orders. The service of the order "as soon as may be after the making thereof" could possibly be construed to mean service at the time of the arrest made for the purpose of detention. Within fourteen days the Minister was required to furnish the detainee with not only the "grounds" and the "allegations of fact", but such other "particulars" which he might consider necessary to enable the detainee to make representations to the advisory board. Rules could be made dealing with representations and the procedure of advisory boards.

6.55 It is important to note that while Art.151(1)(a) merely mentioned "making representations against the order", sub-s.(2)(a) of s.11 refers to "his right to make representations to an Advisory Board". It is submitted that the "representations" contemplated by the Constitution did not exclude the co-ordinate jurisdiction of either the Minister or of the Yang di-Petuan Agong: the facts that the word was used in the plural and that the authority was unspecified support this view. In so far as sub.s.(2)(a) sought to curtail the right, it was, we submit, ultra vires Art.151(1)(a). It may be noted that being a post-Merdeka law, the courts could not invoke Art.162(6) and that the protection of Art.149(1) was confined to challenges grounded on Arts. 5, 9 and 10; the rule-making power conferred on the Minister by clause (3) of the section, did not also affect the position in that the rules could not travel beyond the Act.

6.56 The advisory board's duty was twofold. Under s.12(1) it was required to consider representations and submit its recommendations to the Yang di-Pertuan Agong within three months while s.13(2) contemplated its recommendations on review, once in every six months, of the orders passed under ss.8 and 10, being submitted to the Minister. The decision of the Yang di-Pertuan Agong under s.12(2) was, subject to s.13, "final", and it was stated that it "shall not be questioned in any court". This privilege was not extended to the Minister's order pursuant to the recommendations made under s.13(2). It has, however, to be noted that the decision of the

Yang di-Pertuan Agong was to be on the advice of the Council of Ministers, according to the Constitution. That apart, the finality attached to his decision was as respects the substance or merits and it did not affect, we submit, the power of the courts to see whether the procedual safeguards provided by the constitution and the statutewere complied with. The Minister's order under s.13(2) could possibly be challenged on the merits also as it was no longer based on the original satisfaction of Yang di-Pertuan Agong, which had lost its force with the expiry of three months.

6.57 Notice may also be taken of the relevant provisions of the Internal Security (Detained Persons Advisory Board) Rules 1964 made under s.11(3) of the 1960 Act. While the provisions of rules 3 and 5 of the 1948 Rules[57] were retained in almost unaltered form, the new r.6 provided a more liberal procedure in respect of the "review" contemplated under s.13 of the Act. Legal representation in such cases was to be as of right, and not to depend on the discretion of the Board. In addition, the Board could also require the detainee to be produced before them. The new rule definitely buttressed the distinction made in the Act between the two stages of hearing before the Board but it was difficult to understand the importance attached to the statutory right of "review" in preference to the constitutional right of "representations". In a strange contrast stood the new Emergency (Criminal Trials) Regulations 1964. Although the provision respecting the right of the Public Prosecutor to certify a case for trial under the regulations by dispensing with the jury and assessors was retained following the 1948 Regulation,[58] paragraph 7 now authorised bail to be refused in such cases unless the offence was not one which was punishable with death or life imprisonment or the accused was a woman or a person under 16 years of age.

(B) The Emergency (Essential Powers) Act 1964

6.58 In 1963 when Sabah and Sarawak, of the Borneo Islands joined the Federation to form Malaysia, the new state was "confronted" with

hostilities from Indonesia as the latter had its own designs on those territories. An emergency was proclaimed under Art.150 of the Constitution which was followed by the enactment of the Emergency (Essential Powers) Act 1964 by which power to make regulations was conferred on the Yang di-Pertuan Agong for "securing public safety, the defence of the federation, the maintenance of public order and of supplies and services essential to the life of the community". We proceed now to examine, albeit within a narrow compass, this Act and the few regulations made thereunder.

6.59 The scheme of delegation of power followed generally that of the 1948 Ordinance in the use of such expressions as "whatsoever" and "any matter" and also in the enumeration of the specific matters in s.2(2);[59] clause (a) deserves to be quoted:

> make provision for the apprehension, trial and punishment of persons offending against the regulations and for the detention of persons whose detention <u>appears to the Minister for Home Affairs</u> to be expedient in the interest of the public safety or the defence of the Federation;
>
> [emphasis added]

The provision was apparently a departure from the 1960 Act which required the satisfaction of the Yang di-Pertuan Agong. Art. 150(6) having barred challenges grounded on the contravention of the provisions of Part II of the Constitution, this provision, as well as the other matters as respects new offences, new penalties and special procedure of trials etc. were saved. This was reflected in s.4 of the Act which embodied the non-obstante clause.

6.60 Pursuant to the Act, The Emergency (Internal Security and Detention Order) Regulations 1964 were made. By paragraph 2(a) the first five lines in s.8(1) of the 1960 Act were replaced by the following provision:

> If the Yang di-Pertuan Agong is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services, it is necessary so to do, the Minister shall make an order -

By paragraph 2(b) two new sub-sections were inserted, one of which was as follows:

> (1A) The Yang di-Pertuan Agong may direct that the period of any order made under sub-s.(1) be extended for a further period or periods not exceeding two years at a time.
>
> [emphasis added]

Sections 11 and 12 of the 1960 Act were made inapplicable to a direction given under s.8(1A) by paragraph 3 of the Regulations. Sub-s.(1) of s.13 of the Act was replaced by paragraph 4. The new provision contemplated "review" by the advisory board at an interval of not more than 12 months. By paragraph 6(2) the operation of the Prevention of Public Safety Ordinance 1955 of Singapore was suspended during the currency of the regulations.

(C) The Emergency (Public Order and Prevention of Crime) Ordinance 1969

6.61 Even after the Indonesian confrontation had subsided, the troubles were not over. Certain elements in the Chinese section of the population continued to sympathise with the movement sponsored by the Malayan Communist Party which was reflected in the aftermath of the racial disturbances that took place in the Federal capital in May 1969. The occasion had called for the promulgation of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 by the Yang di-Pertuan Agong under Art.150(2) of the Malaysian Constitution, following the dissolution of Parliament in March 1969. The Party, now working clandestinely was attempting to take advantage of the situation as several hundred people, mainly Chinese, had been killed during the riots and the fact that virtually all the policemen and soldiers controlling the situation were Malays, had embittered the feelings of the Chinese.[60]

6.62 In contrast with the measures discussed so far we find that in this Ordinance, the two powers of detention, that of the police officer pending enquiries and that of the Minister, were subjected to a new requirement - that of "public order" and "suppression of crimes involving violence". By s.3(3)(c) the maximum period of detention

following arrest and interrogation by a police officer was now further raised to 30 days. The scope of the power was also enlarged in s.3(1) and (2): in sub-s.(1) instead of a twofold requirement as contemplated in s.73(1) of the 1960 Act, the power could now be exercised on the satisfaction of a single requirement corresponding to clause (a) of s.73(1); in sub-s.(2) the new requirement indicated above was stated in the alternative and only one of them was subjected to the criterion of reasonableness of belief. In the Minister's substantive power of preventive detention provided in s.4(1) a significant change was introduced by inserting in s.5 a new sub-s.(2A) by an amending Ordinance, No.13 of 1969. It ran as follows:

> Notwithstanding the provisions of Art.151(1)(b) of the Constitution, a citizen detained in pursuance of an order made under s.4(1) may be detained, without any representation made by him under Art.151(1)(a) of the Constitution having been considered, and without recommendations having been made thereon, by an advisory board constituted for the purpose of that Article, for a period of three months commencing immediately after the sixtieth day following the date of his arrest under s.3;

6.63 It is interesting to note that the new provision purported to link-up the Minister's power with that of the police officer's, while reducing the ambit of the safeguard as respects the time-limit. The link-up was expected, possibly, to accord recognition to the factual position prevailing since the 1948 Regulations, as indicated earlier.[61] Nevertheless, the new dimension added to the police officer's power, as pointed out in the preceding paragraph, was bound to reduce further the scope of the safeguards generally, even if such an effect was not deliberately intended. By s.7 the provision relating to "review" was altered to scale down the protections a step further. It could now be made "from time to time" and "at the discretion of the Chairman" of the Advisory Board.

III. The judicial response to emergency legislation

6.64 We have seen that the legacy of the emergency legislation of the colonial period was carried over not only in particular emergency laws of the independence era but even in the constitutional provisions. It has also been noted that some of the emergency provisions, enacted before as well as after independence, were open to challenge. Prior to independence such challenge could generally be made in habeas corpus proceedings but, as we have seen, the right to the writ itself could not be enforced in all courts in the peninsula.[62] After independence, the scope of challenge was restricted by the special procedure provided in article 4 of the Constitution; in addition the remedy of habeas corpus was not named in the Constitution apparently maintaining the pre-independence position.[62a] Nevertheless, the scope of judicial review under the Constitution in matters appertaining to emergency laws came to be considered in a number of cases which we propose to examine in some detail. But, it is necessary to point out that in so far as the colonial period was concerned the position was the same as that which obtained in Northern Ireland or even in Africa, as we shall see; the reason however was perhaps different, namely, the right to the writ of habeas corpus in all colonial territories of South-east Asia was not firmly and equally entrenched everywhere.

6.65 The scope of judicial review under the Constitution came to be considered generally in Malaysia in an early case, CHIA KHIN SZE v MENTERI BESAR, SELANGOR.[63] The applicant was arrested and detained under an order of the Mentri Besar (the State Chief Minister) passed under s.2 of the Restricted Residence Enactment 1935, pending "further inquiries".[64] He applied for a writ of mandamus directing the authorities to allow him to be represented by a counsel and to call witnesses at the inquiry, relying on Art.5 of the Constitution. It was inter alia held that Art.4 did not make void pre-Merdeka law on the ground of inconsistency with the constitutional provision and as such the impugned provision was valid and it prevailed against Art.5. It was further held that Art.5(3)

was merely declaratory of pre-existing position and applied only to criminal proceedings under the Code. The court appeared to have overlooked the fact that Art.162(6) was complementary to Art.4 and relief could be granted without invalidating the law. The decision has been criticised but this aspect appears to have been viewed in a different perspective.[65]

6.66 After ten years, in AMINAH v SUPERINTENDENT OF PRISONS,[66] the decision in the above case was considered but dissented from. This was an application for habeas corpus by the wife of a person similarly detained, on the ground that the detainee was not informed of the ground of his arrest as required by Art.5(3). The court relied on Art.162(6) and "applied" the Enactment not in the original but in the "modified" form by reading into it the requirements of Art.5(3), categorically holding that the impugned provision was not void for the absence thereof. It was also held that Art.5 applied to all types of arrest under any law in force in the country. On the facts it was found that the provision was complied with and the application was therefore dismissed.

6.67 In ASSA SINGH v MENTRI BESAR, JOHORE,[67] the Federal Court was required to answer, on a reference made to it the question as to whether the Enactment was ultra vires the Constitution. The matter arose out of an application for habeas corpus by a person arrested and detained under the Enactment on the ground that he was not informed of the "grounds" of his arrest and detention. It was contended that the Enactment was violative of Arts.5(1), (2), (4) and 9(2). On behalf of the state reliance was placed mainly on Arts.4(2) and 162(6). Suffien and Gill, F.J.J., categorically held that the Enactment was a law relating to "public order" and accordingly Art.9(2) was not violated.[68] Their Lordships also held that the provisions of Art.5(2) and (3) ought to be read into the Enactment. It is true that in the Federal List of legislative competence (List I), item No. 3, "internal security" was mentioned as including "(a) public order" and "(c) restriction of residence" but their Lordships did not spell out the reason for holding the impugned law as

one relating to "public order". The preamble of the Act did not give such a hint. Their Lordships appear to have been influenced by the factual position.[69]

6.68 Raja Azlan Shah J. also referred to Art.162(6) but following what was apparently the Doctrine of Eclipse evolved by the Indian Supreme Court, held that pre-Merdeka laws were not void ab initio and if any provision was "eclipsed", the shadow had to be removed by the courts using Art.162(6).[70] It may be pointed out that the difference in the Indian and the Malaysian situation was that the Constitution in Malaysia did not grant this power (of invalidation) to the courts. In India, although the courts could invalidate the pre-Constitution laws, they could not strike down any pre-Constitution executive act done pursuant to those laws.[71]

6.69 In dealing with Art.162(6) it is necessary to mention the decision of the Privy Council in SURENDIER SINGH KANDA v FEDERATION OF MALAYA[72] although the case arose out of a matter relating to public services. The short dictum of Lord Denning deserves to be quoted:[72a]

> In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. [emphasis added]

6.70 The leading case in the peninsula on preventive detention was KARAM SINGH v MENETRI HAL EHWAL DALAM NEGERI.[73] The matter had come up in appeal before the Federal Court and arose out of an unsuccessful application for habeas corpus by the detainee. The grounds for detaining the appellant were stated in the order passed under s.8(1)(a) of the Internal Security Act 1960, as follows:

> With a view to preventing/him/from acting in any manner prejudicial to the security of Malaysia/the maintenance of public order therein/in the maintenance of essential services therein.

In his affidavit, the Minister however stated that the decision of the Cabinet was to prevent the appellant from acting in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance

of public order or essential services therein. On the other hand, the "grounds" served on him simply mentioned that since 1957 he had consistently acted in a manner prejudicial to the security of Malaysia. In this state of affairs it was contended by the appellant that the order showed the casual and cavalier attitude of the authorities, constituting mala fides. Reliance was placed on the decisions of the Indian courts. It was also contended that the allegations of facts supplied were vague, insufficient and irrelevant which hampered the appellant in the exercise of his right to make representations.

6.71 In dealing with the first-mentioned contention Azmi, L.P., accepted the minority view expressed by Dayal, J., of the Indian Supreme Court in RAM MANOHAR[74] and also relied on a dictum of Humphreys, J. in Ex p. LEES.[75] His Lordship held that the defect in the order was one of form only and that the court knew as a fact that the question whether the appellant should be detained or not was decided by the Cabinet after considering all the facts and evidence against the detainee.[76] Earlier in the judgment it was noticed that there were certain allegations of fact which were withheld from the appellant as permitted by Art.151(3) but they were considered by the Cabinet as well as by the advisory board.[77] The instances of past activities were considered to be "relevant" and it was held that the "subjective satisfaction of the detaining authority" was not tainted on that ground. The second contention was disposed of by referring to the judgment of Suffian, F.J. but as a tailpiece his Lordship also cited two passages from the LIVERSIDGE case,[78] in which limited scope for judicial interference was indicated.

6.72 We propose to discuss now the lengthy judgment of Suffian, F.J., but in making a short comment on the opinion of Lord President Azmi we submit that his Lordship does not seem to have attached sufficient importance to the difference in the provisions of the laws and the Constitutions of the three countries, the United Kingdom, India and Malaysia. We will presently see that Suffian, F.J., on the other hand,

took great pains to notice the difference between the Indian and the Malaysian provisions but did not, unfortunately, extend the same zeal to the United Kingdom, despite the fact that his Lordship followed the English decisions. However, it has to be said that the theory of "subjective satisfaction", first expounded in the English wartime cases, was applied in its full force by Lord President Azmi in a more prominent fashion, which was reflected in his unqualified reliance on the general principle of restricted judicial review advocated in the LIVERSIDGE case.

6.73 In discussing the Indian cases, Suffian, F.J., was careful to set out in his judgment the relevant constitutional and statutory provisions and also extracts from a few decisions. Having first observed that the judgments were of great persuasive value, as the Indian Constitution was the model for the Malaysian Constitution, his Lordship eventually held that the Indian precedents should not be followed in the preventive detention cases.[79] Before proceeding to deal with the difference noted by his Lordship between the parallel provisions of the two countries, it will be appropriate to quote one of the extracts cited by his Lordship.[80] In SADANANDAN v STATE OF KERALA[81] Gajendragadkar, C.J. of the Indian Supreme Court had observed as follows:

> . . . the freedom of Indian citizens cannot be taken away without existence of the justifying necessity specified by the rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded.
> [emphasis added]

By "specified rules of necessity" in India and Malaysia the provisions of the written Constitutions were super-imposed on the statutory requirements which was not the case in the United Kingdom but Malaysia had in addition the "continuous use of unfettered powers" through the 1948 Emergency Regulations. This extract thus had a message of the utmost relevance which was lost sight of.

6.74 It is therefore not strange to note that his Lordship immediately

proceeded to follow the decision in Ex p. LEES and then referred to the decision in LIVERSIDGE. Unfortunately no mention was made in the judgment of the later decision of the House of Lords in GREENE,[82] although the challenge in that case was also grounded in the use of alternatives as happened in the instant case and in Ex p. LEES. We have already submitted that the English wartime cases ought to be read together for a true evaluation of their import which, as we have seen, was to be found in the ad hoc norm of interpretation inspired by the doctrine of necessity.[83] We have also seen that in GREENE the House of Lords adopted the cast-iron test of Humphreys, J. of the Divisional court,[84] namely, non-specification of any particular form for the order. The House of Lords applied the more flexible test of "prejudice".[85] Later in the judgment, Suffian, F.J., also speaks of prejudice, but in a different context, in respect of the right of representation.[86] The central issue in both cases, LEES and GREENE, on the other hand, was the subjective satisfaction of the Minister. In fact in the English cases, much importance was not attached to the right of making representation. This distinctive feature of the English cases also deserved special notice in view of the constitutional guarantee of the right in India and Malaysia.

6.75 In dealing with the Indian cases and the Indian provisions the points of difference were rightly stated when his Lordship observed that Indian courts insisted on strict compliance with the law for two main reasons. The detention orders under different statutes were made by civil servants and Art.21 of the Constitution (corresponding to Art.5 of Malaysia) spoke of "procedure" which was not to be found in the Malaysian provision.[87] In Malaysia the power of detention was given to the Head of State but the fact that he acted on Cabinet advice did not warrant the English analogy of ministerial responsibility to be invoked, as the advice given could not possibly be questioned. Further, the position ought to have been considered in the context of clauses (a) and (b) of Art.151 and

s.12(2) of the Act. Thus, reliance on LIVERSIDGE was, we submit, inappropriate.[88] As suggested earlier, vesting of power in the Head of State was possibly intended to pre-empt challenges grounded on mala fides in the ordinary sense and not in the special sense, as contended in the instant case.[89]

6.76 Proceeding further his Lordship reiterated the difference more vigorously and added that in Malaysia the detainee was entitled to two additional safeguards, namely, to be informed of the "allegations of fact" (which was constitutional), and "other particulars"(which was statutory).[90] The fact that the last-mentioned safeguard was patently discretionary was, however, ignored. Similarly, the dissent of Sastri, J., of the Indian Supreme Court in ATMARAM[91] which his Lordship accepted,[92] besides other cases, held that "necessary particulars" had to be supplied to the detainee. Thus the supposed difference between the two positions became immaterial. The appeal of the dissent of Sastri, J., was found in the fact that it expressly followed the line adopted in HALLIDAY.[93]

6.77 An illuminating feature of his Lordship's judgment was, however, to be found in the distinction drawn between what he called "purposes" and "grounds".[94] This exercise made easier the task of rejecting challenges based on irrelevancy of "grounds" and "allegations of fact" as the constitutional protection extended to these two terms only. In fact his Lordship held that the "so-called" discrepancy between the order and the grounds did not invalidate the order.[95] Arts. 5 and 151 as well as s.9 of the Internal Security Act all used the term "ground". By the term "purposes" his Lordship meant such expressions as "security", "public order" etc. used in s.8(1)(a) of the Act, which we have preferred to describe as the conditions or requirements for the exercise of the power. The Indian courts called them the "objects" of the statute but by insisting on a nexus between the "objects" and the "grounds" they extended the scope of the constitutional guarantee legitimately for "grounds", we submit, in criminal

law, are made up of both factual and legal elements. When an accused is to be informed of the grounds of his arrest he is required to be told that he has committed a particular theft, or any other offence, as the case may be. However, in the case of preventive detention, any challenge based on vagueness or irrelevancy could not be treated on the same footing in respect of both "grounds" and "allegations of fact" in view of the subjective nature of the decision of the detaining authority, unlike an ordinary criminal case, as an offence is judged by objective criteria. The distinction between these two terms was indeed properly drawn.[96]

6.78 It was, accordingly, rightly held that the "vagueness, insufficiency or irrelevance of the allegations of fact supplied do not relate back to the order of detention."[97] Indeed, they did not touch the question as to whether the satisfaction was real, for we have already seen that even in the English wartime cases the scope of inquiry by the court up to this point was generally admitted, although an affidavit by the Minister was held to be conclusive of the matter. But his Lordship's decision, following those cases, that the discrepancy between the "grounds" and "purposes" ought to be considered as one of form only was, we submit, violative of the spirit as well as the letter of Art.151 of the Constitution. Power to make a detention order was circumscribed by the Article which postulated, a priori, judicial review of the exercise of the power. The Constitution undoubtedly clamped restrictions on the judicial review of legislation vide Art.4 generally and Part XI especially but it was not contemplated, we submit, that the restrictions should extend to the executive acts also. The scope of protection under the Malaysian Constitution in this respect was almost the same as the Indian. The material difference between the relevant provisions of the two Constitutions was in respect of the ultimate and not the primary exercise of the power of detention: in Malaysia the ultimate power rested with the Executive (the Yang di-Pertuan Agong) under Art.151(1)(b), but in India, with the Advisory Board,

under Art.22(4)(b). However, the courts in the peninsula viewed this difference in another perspective which resulted in the two stages being projected as one single process.

6.79 Ignorance of this aspect of the matter figured more prominently in the judgment of Ong, C.J., which was reflected in his following observations:[98]

> English courts take a more realistic view of things, while Indian judges, for whom I have the highest respect, impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers.

The other important reason which he gave for preferring the English decisions was "compactness" in either case, meaning perhaps the geographical area which was factually correct but had little relevance, in our submission. His reference to the social structure was, however, we submit, patently inapposite in that the multi-racial character of the society even factually corresponded more to the Indian than to the English society of those days (1917 and 1939). In his short judgment his Lordship simply referred to the LIVERSIDGE case and another English decision and also to the legacy of the 1948 Regulations to dispose of the matter.

6.80 Of the other two judges, Gill, F.J. spoke almost in the same vein save his significant reference to Lord Atkinson's observations in respect of "preventive justice" in HALLIDAY.[99] Ali, F.J., however, dealt with the matter at greater length. Though he relied on the English decisions, he examined the Indian authorities also and eventually expressed his agreement with the minority views expressed in the Indian cases.[100] Unfortunately he too took a narrow view of Art.151(1)(a) by giving primacy over it to the provisions of s.8(1)(a) of the Act.[101] The fact that the statute provided for two functionaries to act conjointly could not provide a valid derogation, we submit, from the constitutional protection. It was not for this reason, as his Lordship appears to suggest, that the order should embody a recital of the "objects" indicated in the statute. The recital was important, as we have submitted earlier, to enable the courts to see

if the executive had acted within the scope of the power conferred on it, which was the purport of Art.151(1)(a).[102]

6.81 It is true that the emergency legislation in the peninsula followed a tough line all through and the 1960 Act, by using the expression "satisfied" adopted the scheme of the 1939 Defence Regulations of the United Kingdom deliberately on the expectation that the Malaysian courts would follow the English wartime decisions. Unfortunately this expectation was founded on a wrong premise for, as we have submitted earlier,[103] the constitutional protection provided in the Indian Constitution was based on the minority view expressed by Lord Atkin in LIVERSIDGE and in this respect the Malaysian provisions were on the same footing. Secondly, it has also been shown that even in England Lord Atkin's minority view has now come to prevail.[104] These two important considerations were totally overlooked by the Malaysian Federal Court in the above case and unfortunately, as we shall presently see, the Singapore courts also generally followed the same line. To this mischief the minority view in the Indian decisions definitely contributed a great deal but that position has to be examined in the appropriate context. Most probably the "realities" of terrorism in Malaysia as in Northern Ireland, had imperceptibly influenced the judiciary; the Indian situation, fortunately, did not call for such an approach. As we have seen the Malayan Communist Party was associated with "terrorism" and in the instant case it was alleged that the appellant was a member of the Party.

6.82 It is interesting to note that in an earlier Singapore case, Re: CHOO JEE JENG,[105] under the Preservation of Public Safety Ordinance 1955, a similar view was expressed relying on the decision in LIVERSIDGE. Indeed, in the preceding paragraph we had anticipated such a course in respect of the emergency laws of the peninsula as a whole. The Chief Secretary in his affidavit in the instant case had stated that the facts of the case were placed before the Governor who had considered the matter

and was satisfied that the detention of the prisoner was necessary. The court rejected the prisoner's contention that the affidavit showed no ground on which the satisfaction was based. It was held that the grounds having been supplied to the prisoner, on his own admission, he had failed to show that there were no grounds and the court was not bound to draw an inference against the detaining authority. The decision, however, had one important aspect in that it infused a meaningful content into the scope of the "appeal" provided under s.5, after having observed that the "subjective test" had handicapped the court in granting the writ of habeas corpus. It appears to have suggested that the Tribunal could go into facts in the appeal. The challenge to the vires grounded on the extra-territorial operation of the Ordinance manifested in s.3(1), also failed. The court referred to the legislative powers conferred on the Governor by s.52 of the Singapore Order-in-Council 1955 and observed:[106]

> s.3(1) provides for public security and aims at stamping out activities prejudicial to public safety carried on in the Federation of Malaya and the Colony by a subversive organisation operating in both territories. . . it is for peace, order and good government. . .

6.83 A post-independence decision of a Singapore court however provides a refreshing contrast. In LIM HOCK SIEW and others v MINISTER OF INTERIOR AND DEFENCE,[107] the court allowed the application for habeas corpus by six detainees. They were originally detained under the same 1955 Ordinance but subsequently orders were passed under s.8(1A) of the Internal Security Act 1960. The orders were signed by the Permanent Secretary to the Ministry and were in the following terms:

> Whereas the President is satisfied. . . Now therefore in the exercise of powers conferred on me under s.8(1A). . . be detained. . . the Minister hereby directs. . . be detained . . . for a further period of two years. [emphasis added]

It was held as follows:[108]

> The five orders or directions complained of in this application were ex facie not made under the hand of the President nor were they in compliance with s.34 of the Interpretation Act.

> They were not even signed by a Minister. On the face of the five orders the Minister specifically purports to exercise the power conferred by s.8(1A) and as I have stated above no powers are conferred on the Minister by s.8(1A). . .

Earlier in the judgment the court held that power to continue detention under s.8(1A) of the Act was conferred on the President only and that even under s.8(1)(a) the making of the order of detention was "merely performance of an administrative function in compliance with the executive decision of the President". Relying on the GREENE case the court observed that habeas corpus will issue when an order which is produced as a justification for the detention of a person is bad on its face.

6.84 It was also contended by the prisoners that the orders were motivated by bad faith on the part of the Government as the prisoners belonged to the opposition party. In rejecting the contention the court observed[109]

> . . . [the applicant] must not only show that the courts are entitled to enquire into the good faith or otherwise of the President. . . but assuming the courts are so entitled, he must also allege and prove that the President and not some one else had acted mala fide in directing that he be detained. . .

The observation that the mala fide of the authority could be a justiciable issue is another refreshingly novel aspect of the case which, however, appears to overlook the fact that under the Constitution the President was bound to act on the advice of the Cabinet. However, by using the expression "the President and not some one else", the court appears to follow the statutory provision literally to maintain the logic and continuity of its decision on the first point. In the instant case the contention of mala fide being based on malice of fact, namely in the ordinary sense of the word, the observation was significant in that it purported to defeat the object of Art.151.[110] The issue in this form does not appear to have been raised in the other cases.

6.85 The Malaysian court relied on this decision in SOO KUA v PUBLIC PROSECUTOR.[111] The appellant in this case was convicted of breach

of the condition of the "restriction order" which was originally passed under s.8(1)(b) but later extended under s.8(1A) of the Act. The order was expressed in terms identical to those of the order passed in the Singapore case ("the Minister hereby directs"). It was held that, although Art.5 had to be read in the context of Art.149(1), that did not "imply that there should not be any strict adherence and due compliance with the provisions of the Internal Security Act."[112] A "direction" from the Yang di-Pertuan Agong was a "pre-requisite" but there was nothing in the order to that effect. Nor did the prosecution evidence prove the fact. In the order it was stated that it was made by the Minister "in the exercise of the powers conferred on him under s.8(1A) of the Act."[113] The insistence on "strict" adherence which apparently emenated from a fresh appraisal of the true intent and purport of the relevant provisions of the Constitutions was indeed significant in that it corresponded to the Indian view.

6.86 However, in a later Singapore case, the decision in the KARAM SINGH case (supra) was extensively discussed and the principle based on the non-applicability of the Indian decisions was carried further - a step which has been rightly criticised.[114] This was the case of LEE MAU SENG.[115] The application for habeas corpus by the prisoner was rejected. He was arrested and held in police custody for 21 days before the order of detention under s.8(1)(a) of the 1960 Act was served on him. He was refused consultation with his lawyer while in police custody. In the "grounds of detention" he was charged with directing the paper he managed in such a way as amounted to "glamourising communism" and "stirring up communalistic and chauvinistic sentiments over Chinese language, education and culture" but in the order the "purposes" were stated in the alternative, as was done in KARAM SINGH, in which a plea of "mala fide" was similarly founded. The additional contention in this case was violation of Art.5(3) resulting from the denial of legal counsel. This was upheld but it was

observed that habeas corpus was not the appropriate remedy. On the scope of s.74 (s.73 in Malaysia), the court observed:

> It is disturbing to hear a submission. . . that the legislature by enacting s.74. . . must have intended to deprive a person of a fundamental liberty, namely, right to consult a lawyer, so as to enable a police officer acting under preventive detention powers to better carry out inquiries. . . for detention under s.8. . .

Indeed, the provision did envisage the factual position indicated by the court which we have pointed out earlier.[116] The limited safeguard of Art. 5(3) conceded by the court, as proved by the decision in the instant case, could not effectively check its far-reaching consequences.

6.87 In dealing with the second contention the court relied on the decisions in KARAM SINGH and Ex p. LEES to hold that the recital in the order strictly followed the language of s.8(1) and that the Act did not prescribe any particular form for the order. An additional important distinction in the Indian constitutional provision was found in the fact that the decision of the advisory board was binding on the government in India but not in Malaysia. The right of making representations being guaranteed in both cases, it is not understood how, if the Singapore court had followed the Indian court and insisted on ensuring that the detainee was able to exercise this right effectively, it would be "wholly inconsistent with the scheme of the Act", as the court held.[117] On the other hand it is difficult to agree with the opinion that in India the courts held "vagueness" of the ground to be fatal by applying common law principles of natural justice.[118] In fact the learned commentator has himself conceded that the term "law" of Art.21 was construed to mean "enacted law" and to exclude common law.[119] The Indian courts realised the position that it was the duty of the courts to lay down norms which could ensure effective exercise of the constitutional right in the absence of specific statutory norms. A similar exercise by the courts in either Singapore or Malaysia would not have run counter to either statutory or

constitutional provisions.

6.88 The important point which does not appear to have been noticed so far in any quarter is that in both India and the peninsula, unlike England under the wartime regulations, the Constitutions provided for a two-stage process for preventive detention. In so far as the exercise of the primary power of detention was concerned there was little difference between the two Constitutions, but by putting a narrow construction on Art.151(1)(b) the courts in the peninsula came to ignore the two separate stages of the process.[120] The exercise of this power was, a priori, liable to be tested by the doctrine of ultra vires. This was what the Indian courts did but the courts in Singapore, as in the instant case and those in Malaysia, as in KARAM SINGH, were hesitant to do so, by distinguishing what they called "purposes" from "grounds" and at the same time ignoring the important nexus between the two, and also, as we shall see, by constricting the ambit and scope of Art.151(1)(b).

6.89 In WEE TOON LIP and others v MINISTER FOR HOME AFFAIRS, SINGAPORE,[121] four persons applied for habeas corpus on the grounds that they had been held in detention continuously for over nine years and for the last few months they had been detained at the central police lock-up under abnormal and punitive conditions, which was alleged to be "improper" and to have resulted in the "greatest abuse of power". The court held that the power to detain, the place of detention and the manner thereof were all provided in the Act. The prisoners had failed to prove the violation of any provision of the Act. It was also held that lack of good faith ("improper") was not a justiciable issue, relying on LEE MAU SENG (supra). The challenge to the "satisfaction" of the President in making orders for extended detention under s.8(1A) also failed. The court held that the fact that the impugned orders were passed after cancelling the earlier order did not vitiate his "satisfaction.

6.90 A case of detention under the Emergency (Public Order and

Prevention of Crime) Ordinance 1969[122] came before a High Court in Malaysia in YEAP HOCK SENG v MINISTER FOR HOME AFFAIRS,[123] in an application for habeas corpus by four persons. The prisoners were originally charged with murder in ordinary criminal proceedings. After their discharge they were immediately apprehended and were detained for two years under the Ordinance. In the order it was alleged that they had taken part in criminal activities as members of a group of fishermen who were engaged in such activities. The court held that the burden of proving lawful detention was on the respondent and was discharged by the production of the order, and that it was for the detainee to show that the power under the Ordinance was exercised mala fide. Reliance was placed on the Indian cases in which it was held that the mere existence of suspicious circumstances was no proof of mala fide; nor was the fact that there were criminal proceedings pending. It was held that the "object and ambit" of the Ordinance was such, and the "purposes" specified in s.4(1) thereof was so "wide", that the right to claim trial or the protection of ordinary law in preference to preventive detention was "negated". Mere circumvention of the ordinary process of law did not constitute mala fide. One of the encouraging aspects of the decision was that it upheld the right to apply for habeas corpus notwithstanding the right to make representation and the pendency thereof.

6.91 In TAN BOON LIAT,[124] another case under the Ordinance, the scope of Art.151(1)(b) came to be considered against the background of KARAM SINGH (supra). The prisoner, in his application for habeas corpus, contended that the provisions of the Article having been violated for non-submission, within three months, of the recommendation by the Advisory Board, the detention had become unlawful. In rejecting the contention the court held that on the date of the application the valid detention order was in force and therefore the detention was legal notwithstanding the late submission of the recommendation. s.6(1) of the Ordinance, corresponding to s.12(1)

of the 1960 Act, provided that the Board "shall within three months" consider the representation and make recommendation thereon. This provision appears to have been held as directory, being "procedural". It was observed that from the "principles inspiring the judgment" in KARAM SINGH, the "substantive rights" of a detained person, under ss. 4, 5 and 6 of the Ordinance could be "distilled". The right claimed was not considered as one of the "substantive" rights, which were listed in the judgment. The court observed:[125]

> . . . If these rights have been accorded to the detenu and subsequent to this on the direction of the Yang di-Pertuan Agong the detention order is confirmed and ratified then the detention is legal and no mischief has been done to s.6. . . or Art. 151. . .

6.92 The same question was agitated before another High Court in Malaysia in SUBRAMANIAM v MENTRI HAL EHWAL DELEM NEGERI.[126] It was held that the courts should interfere only in those cases when any "real and substantive right guaranteed by the Constitution" was infringed. The court must not be blinded by "legal niceties" lest their approach to the issue becomes "unrealistic". It was held, we submit erroneously, that the right conferred under s.6(1) was wider in ambit than that conferred by Art.151(1)(b). Following the line adopted in TAN BOON LAIT (supra), which was expressly referred to, it was held that the Article merely guaranteed consideration of representation and submission of recommendation thereon and that it did not lay down any time limit as in s.6(1). As in the other case, no importance was attached to the words "unless" and "three months" occurring in the Article. The court failed to appreciate the consequences or mischief that was bound to follow if the Article was so construed as to exclude the requirement of time-limit. This is reflected in the following observation:[127]

> . . . mere non-compliance with the directory provision, so long as the advisory board considers the representation and makes its recommendation, should not, I think, render unlawful a detention legally made. [emphasis added]

The court appears to have overlooked the fact that such a course would render the protection of the Article hollow and illusory. It was possible to

postpone, if such course was followed, the "consideration" and "recommendation" until the last day of the detention.

6.93 Apparently, the logical conclusion that followed from the last two decisions was that any challenge grounded on the violation of Art.151(1)(b) was liable to fail for it would always be open to the State to contend that the possibility of the right being given effect to existed until the last day of the detention. Another important consequence that followed from the two decisions was that the role of the Yang di-Pertuan Agong became a subsidiary one. He was to merely "confirm and ratify" the Minister's order. This was violative of the spirit of Art.151. The Article, as we have already submitted, circumscribed the power of the Minister in two ways: in clause (a) the permissible "objects" or "purposes" were specified and in clause 1(b) the requirement of time-limit acted as a check on his powers. The Article vested the "ultimate" power of detention in the Yang di-Pertuan Agong but the decisions projected the "primary" power of the Minister as the "ultimate" power. No doubt clause 1(b) which in its original form corresponded verbatim to Art.22(4)(a) of the Indian Constitution, was amended, the effect of the amendment, we submit, was misconstrued. It merely transferred the "ultimate" power from the hands of the Advisory Board to the Yang di-Pertuan Agong; it did not abolish the two stages to vest plenary powers in the "authority" contemplated under any "law or Ordinance". This position was in fact recognised in the new sub-s.(2A) of s.5 of the 1969 Ordinance which extended, but did not abolish, the constitutional time-limit of three months.[128]

6.94 In PUBLIC PROSECUTOR v MUSA,[129] the court allowed an appeal against acquittal and ordered retrial of the charge of contravention of a "restriction order" passed under s.8(1)(b) of the 1960 Act. It was held that the trial court had wrongly treated a person under preventive detention as an offender and a "restriction order" as a punishment for the same offence. The accused in this case was in "detention" under an order

passed under s.8 (1)(a) of the Act when the order under clause (b) was passed and he was released despite his refusal to execute the "bond". Unfortunately it does not clearly emerge from the facts stated in the judgment as to whether the impugned order was passed on the expiry or during the currency of the order of detention. In the latter case the contention that the order was invalid, as the Minister had become functus officio after passing the order under clause (a), ought to prevail, for the provisions of s.10 for suspending such order on conditions would otherwise become otiose. A subsequent "restriction order" cannot relate back to the situation obtaining at the date of the passing of the "detention order" on which the "satisfaction" of the Minister was based. The court of course held that the passing of an order under clause (b) would require "fresh satisfaction".

6.75 A brief reference may be made now to the Privy Council decision in PUBLIC PROSECUTOR v OIE HEE KOI etc.,[130] in which the decision in a group of appeals from the Malaysian Federal Court on the question of the extension of the protection of the Geneva Convention to the persons taking part in the "Indonesian Confrontation" was challenged. The accused persons were Malaysian Chinese who had been convicted of various charges under the provisions of the 1960 Act and had been sentenced to death. The Federal Court had, in OOI HEE KOI and OOI WAN YUI v PUBLIC PROSECUTOR,[131] upheld the contention of two of the accused that they were entitled to be treated as Prisoners-of-War in accordance with Art.4 of the Geneva Convention. In the Privy Council the contention was rejected. It was held that the protection did not extend to nationals or to those who "owed a duty of allegiance" to the detaining power. In the context of the development that has since taken place in this particular field of International law, which we have already discussed,[132] it is submitted that the decision is not now likely to be considered as good law.

Conclusion

6.96 Having analysed at some length the relevant provisions of the different enactments and of the Constitutions and also the case-law of the two States, we are now in a position to say that although, at present, terrorism is probably not so much a live issue there as it is in Northern Ireland or as it was there itself between 1948 and 1960 or 1963, the judicial approach in the peninsula is still marked by an unsparing anxiety for the "internal security" of what has been described as "an insecurely based multi-racial State."[133] On the other hand we have also found that the provisions of the emergency laws in the peninsula were, with minor exceptions, almost similar in extent and scope to those of Northern Ireland. But they were possibly not enforced there in such a perverted and invidious manner as to give rise to complaints of gross and serious violations of different aspects of the right of personal liberty, as happened in Northern Ireland. Notice has however to be taken of the difference in the factual situation obtaining in the two territories appertaining mainly to the type of the guerilla activities and to the nature of the political problems.

6.97 Another aspect of constitutional development vis-a-vis judicial approach to problems of personal liberty in the peninsula has to be adequately emphasized. The two states have followed the Indian example and have provided for preventive detention as a peacetime or permanent measure by amending the Constitution which, albeit, was not "autochthonous" in the true sense. This is an exception to the general position obtaining in the New Commonwealth: in Africa, as we shall see, the "autochthonous" Constitutions generally maintained the position obtaining under the Independence Constitutions and preventive detention is provided, following the English example, as an"emergency" measure. Notwithstanding the difference in the constitutional position the judicial approach in the two states is strongly influenced by the English wartime cases and as a result the constitutional provisions have been narrowly construed. It is to be

noted that even in the case where the petitioner was successful (LIM HOCK SIEW), the rationale was provided by an English wartime case. On the other hand, the legislature in Malaysia appears to have followed the Indian Parliament, albeit with one significant difference. In India, although Art. 359 of the Constitution was amended in 1975, the constitutional remedy of habeas corpus was not expressly excluded. It is true that the majority decision of the Indian Supreme Court in the HABEAS CORPUS case (supra) did not recognise this fact and held to the contrary, albeit on the basis of the existing unamended provisions. In Malaysia, the constitutional amendment of 1976, however, expressly denied the constitutional remedy (the protection of art. 5) to political detainees.[134] With its tradition of judicial restraint the Malaysian court was likely to follow the majority decision of the Indian Supreme Court in interpreting the new provision although such an opportunity does not appear to have arisen so far. Malaysia, like India, is committed to "neo-liberal" democratic tradition but the "value-process" apparently operated there at all levels in a more bizarre fashion owing possibly to the precarious racial balance. In Pakistan and Bangladesh the society was more homogeneous and there the "value-process" therefore operated more satisfactorily.[135]

# Chapter 7

## EMERGENCY PROVISIONS UNDER LEGISLATION: AFRICA

### I. Personal Liberty and Colonial Rule

#### (1) The Colonial 'Constitutionalism'

7.1 Whether it was a 'colony' or a 'protectorate' or a mixture of the two, the constitutional status of a British possession in Africa was no guide to the search for 'constitutionalism' in any particular territory. Everywhere, as has been suggested, 'rule by decrees was a constitutional possibility',[1] which continued until independence. This possibility apparently sprang from what has been termed as 'two great principles of subordination' - of the legislature to the executive in the colony and of the colonial government to the imperial government - which are, it has been asserted, "inherent in the modern British tradition of colonial government."[2]

7.2 It may sound strange that even small islands in the Caribbean have had a long and continuous history of representative government by virtue of which they enjoyed immunity from the legislative authority of the British Crown.[3] On the other hand, in not a single African possession (except Southern Rhodesia) was there any 'representative legislature'[4] within the meaning of the Colonial Laws Validity Act which could, by virtue of s.5 of the Act, alter its own "constitution, power and procedure". Of course, s.2 would even then have ensured the continued supremacy of the Imperial Parliament and, therefore, on the attainment of independence it had to be provided that the Act would cease to apply to the territory. In the last resort, therefore, the British subjects in the dependencies could depend only on the good sense of the law-makers at Westminster. This position was definitely altered when the British Settlements Acts of 1887 and 1945 and the Foreign Jurisdiction Acts 1890 and 1913 were enacted. The administrators at Whitehall obtained a greater say thereunder and it is a notorious

fact that the expediency of the colonial policy came to prevail over all other considerations. Needless to say that to entrench and perpetuate colonial rule was the main plank of the policy which could hardly ensure personal freedom for the subject in the dependencies.

7.3. However, it has to be mentioned that by the Orders in Council made under the enactments referred to above, the rules of English Common Law and the Statutes of "general application" were introduced into East Africa; in the Central and West African colonies the same result was achieved by local statutes. Besides, 'Supreme Courts' or 'High Courts' were set up, with powers and jurisdiction similar to those exercised by the 'High Court of Justice' in England. These measures could have been expected to firmly establish the 'Rule of Law' as in England, but events took another turn. What transpired in reality has been aptly described in the following words:[5]

> The laws themselves assert vigorously and emphatically the executive supremacy giving vast discretionary, even arbitrary, powers to officials. The courts play a minimal role in the constitutional system, there being few limitations on the exercise of power.

7.4 We would not, however, remain satisfied by blaming only the laws enacted in the dependencies for the peculiar brand of constitutionalism that developed in colonial Africa. It is to be noticed that although in the beginning both legislative and executive functions were combined in the person of the Governor, when a legislature was established, the formula, as applied elsewhere, contemplated that it had to make laws for the "peace, order and good government" of the territory. An arbitrary and despotic government could not be a "good government" in the best traditions of British justice. Unfortunately the formula came to be regarded as a term of art[6] and the result was that it merely buttressed the colonial policy indicated earlier. It was conveniently forgotten that judicial review of subsidiary legislation and executive action has always been a part of British justice; that the

judges in England wielded considerable power to control the exercise of discretionary power by interpreting statutes impinging upon the liberty of the person in a manner consonant with the common law presumption of inviolability of the liberty of the subject.

7.5. It is true that the judiciary as well as the legal profession in Africa was almost wholly expatriate but in India as we have seen, the early British judges and lawyers alike displayed a different temper so that long before independence, although their number had dwindled to a negligible few, the tradition of judicial review was firmly established.[7] In East and Central Africa, in territories of white settlement, the settlers' influence might well have contributed to the course of development but even in West Africa, rather surprisingly, we find the development of administrative law not reaching an advanced stage. It is therefore difficult to understand the reasons for the different judicial approach that was found to prevail in Africa. Could it be the lack of opportunity or the stance of "civilising" the continent ?[8]

7.6 The British generally adopted 'Indirect Rule' in Africa although there were local variations;[9] this was wholly unlike the Indian situation. The system evidently provided less opportunity for a direct confrontation between the individual and the central administration. This not only made litigation scanty but people, by habit, less litigious. Otherwise, too, the Africans were perhaps inherently less litigious, as the traditional legal system which, unlike the Indian, was not only not superseded but formally allowed a parallel role, discouraged litigation.[10] Different reasons, however, have to be attributed to the period of the Mau Mau movement in Kenya which, as we shall see, resembled the situation in Northern Ireland.[11] Reasons applicable in the case of Northern Ireland would therefore apply in the case of Kenya also.[12] Whatever may be the reasons, however, we shall soon see that the case-law in Africa, with the exception perhaps of Zambia, not only in the colonial period but

even in that of the independence era, is signally deficient in bulk and also, generally, in legal exposition, in proportion to the population, the territorial expanse and the degree of arbitrary powers, conceded in law and exercised in fact. This judicial inactivity, we submit, represents one of the glaring aspects of the colonial constitutionalism and its legacy, in Africa.

7.7 The attempt to adopt the stance of "legality" was yet another aspect of the process, albeit as well-known and tested a method used in the peninsula of Malaya and also in Northern Ireland to attain 'legitimacy' while governing without consensus. This argument, we have already shown, applied with greater strength to the situation in Africa.[13] It was a common feature of colonial constitutions that the Governor's enormous direct and indirect powers of veto, disallowance, reservation and legislation remained undiminished until independence. However, the scope of the power came to be considered as insufficient to meet 'emergency' situations - situations in which laws could be made in derogation of fundamental principles of British justice embodied in the provisions of the Magna Carta and habeas corpus which forbade such measures as detention without trial. As we have seen, the British Parliament had enacted special measures during the two world wars.[14] For the dependencies a similar process was followed and the Emergency Powers Order in Council 1939 and the Emergency Powers (Colonial Defence) Order in Council 1939 were enacted which we shall soon examine. But what stood out as the most significant strain of the African brand of the colonial constitutionalism was the introduction of the concept of 'deportation' infused with a political bias as an element of constitutional power in East and Central Africa; and everywhere, including West Africa, deportation was provided for in local statutes as well, in a variety of forms. This we propose to examine first.

(2) "Deportation" Laws

7.8 The earliest 'constituent' document to introduce the concept of "deportation" was perhaps the Africa Order in Council, 1889, which applied to "the continent of Africa" (art.4). Part XIII (arts 102-3), captioned "Deportation and Removal" contemplated "deportation forthwith" on the orders of the court of any person to any of the prescribed African possessions or other parts of the dominions in default of furnishing security, when a person was "either convicted of any offence" or charged with such conduct as was "likely to produce or excite breach of the peace". The only check besides its judicial exercise appeared in the form of a subsequent report to the Secretary of State. Later, the requirement of "breach of the peace" acquired a positively political colour and came to be stated in 1902 in the British Central Africa Order in Council,[15] the East Africa Order in Council,[16] the Uganda Order in Council,[17] and in 1920 in the Tanganyika Order in Council,[18] as follows (hereinafter called the "constitutional formula"):

> . . . any person is conducting himself so as to be dangerous to peace and good order. . . or [is] exciting enmity between the people. . . and His Majesty or is intriguing against His Majesty's power and authority. . .

7.9 In the regulations made under s.52 of the East Africa Order in Council, 1897, by the Commissioner and Consul General, art. 77 stated the requirement in more or less similar terms.[19] Instead of being deported the person could only be "removed to or interned in" any place within the limits of the Protectorate. In all cases now the power came to be vested in the executive head. In Northern Rhodesia, however, the Proclamation No.12 of 1915, qualified the power in that it could be exercised on the "recommendation" of the High Court, vide s.13(3). In Tanganyika, the chapter was captioned "Deportation of political offender". In Northern Rhodesia the caption envisaged deportation "in cases of dangerous conduct"; elsewhere the 1889 caption was retained.[20] In all cases the provision of report to the Secretary of State was also retained.

7.10 The power in all cases could be exercised subjectively ("if he thinks fit") but it was saddled with a condition-precedent: "Where it is shown by evidence on oath to the satisfaction. . ."[21] It was, indeed, an important safeguard as the order was expressly made non-appealable, although reviewable suo motu, everywhere. In Northern Rhodesia, the interposition of the judiciary reduced further the possibility of arbitrary exercise of the power. Another noteworthy common safeguard was absence of express provision of delegation. Nevertheless, the real mischief of the power lay in the fact that the provision postulated, as a necessary incident, interim custody, which could be of indefinite duration. The law, everywhere, was silent on this aspect. Indirectly, therefore, detention without trial was provided for in the constituent document with the avowed object of achieving "legality".

7.11 The lasting effect of the above exercise was apparent: the power was constitutionally entrenched in the colonial legal systems of the different territories as a permanent "emergency" measure long before the birth in England of the concept of "emergency" during the second world war.[22] The right of the state to deport and also, possibly, to intern, an alien, has been recognised in customary international law but use of such power against its own citizens has been permissible only in those situations which, in the modern context, are described as "time of war or public emergency threatening the life of the nation;"[23] the doctrine of necessity too, as we have seen, embraced similar principles.[24] However, as we come to discuss some other measures of a similar nature, including those concerning aliens and "semi-aliens", it will become apparent that the colonial administration was attuned to a perpetual state of emergency.

7.12 The permanent local statutes which belonged to the same genus generally repeated the provisions of the enactments discussed above but

provided, instead, intra-territorial "deportation".[25] These statutes specifically provided for detention (interim custody) of the deportee which, in the case of Tanganyika, was more explicitly stated: "in custody or in prison until a fit opportunity for his deportation occurs."[26] The person charged with the execution of the order could possibly claim indemnity but it was doubtful if the provision effectively precluded judicial challenge to the detention.[27] In Kenya, although the Governor in Council (elsewhere the Governor) was invested with the power, there was judicial interposition similar to the Northern Rhodesian provision,[28] with another additional safeguard of the rule of audi alterem partem (ss.2 and 3): however, it lacked express provision for suo motu review, as provided in Tanganyika (s.8). Kenyan provision also contemplated deportation for an "unlimited" period while the other statutes were silent on this point.

7.13 In the absence of any reported decision it is difficult to hazard a conjecture on the probable judicial approach in the matter of interpretation of the provisions discussed above; the tradition unfortunately, as we have seen, pointed to a negative approach.[29] However, the several questions of general importance that the judiciary in Africa was likely to face may be indicated, namely -

(a) Whether to read the rule, audi alterem partem, into the provisions of the territories other than Kenya ?

(b) To what extent was judicial review excluded by the use of the expression implying subjective satisfaction, reading the provision as a whole ?

(c) What was the effect of: (i) the period of deportation being either unspecified or being provided for "unlimited" period ? (ii) the absence of safeguards (besides judicial interposition in one case) on the choice of rules of interpretation ? (iii) the unspecified period of interim custody ?

7.14 In another, earlier local statute of the Gold Coast,[30] which provided for extra-territorial "deportation", a problem of a different nature appears to have been tackled. It was enacted during the first world war. Probably it was meant to supplement the provisions of the Defence of the Gold Coast Ordinance.[31] The formula in this case therefore differed. Providing assistance to, or communicating with, the enemy was treated as the objectionable activity: the Governor's power was plenary; neither appeal, nor review was provided for and even the requirement of a subsequent report to the Secretary of State was not to be found. In Southern Nigeria, the Criminal Code contained the "deportation" provision.[32] Although the Northern Rhodesian Penal Code also contained similar provisions, unlike Nigeria it did not specifically provide that a citizen could not be deported extra-territorially.[33] The provision containing the preventive sanction, in either case, incorporated the "constitutional formula" adopted in the constituent documents of East and Central Africa.[34]

7.15 We may now look at the laws relating to aliens and persons who could be called semi-aliens. The latter were described as "immigrant British subjects" in the Gold Coast[35] as well as in Kenya.[36] Another Gold Coast law dealt with "aliens", which was defined in the inclusive sense.[37] All these laws contemplated extra-territorial deportation which was, as conceded, unexceptionable.[38] It was the inclusive definition in one case and an artificial (deeming) definition in the other case that was objectionable in that the distinction between a citizen and a non-citizen was almost blurred. This position possibly resulted from the presence of "British protected persons" in the different territories whose anomalous status has prompted us to classify such persons as semi-aliens. A person could be brought within the mischief of the law as and when the Secretary of State desired.[39] While absence of procedural safeguards in the case of an alien could not be objected to there was nothing much to be said against those provided in the other case. The measures in all

cases were of a hybrid variety providing two alternative sanctions - preventive as well as punitive, similar to those of the Southern Nigerian Criminal Code. In the former case also judicial interposition was provided although in Kenya the judicial inquiry contemplated could be in camera.[40] Kenya, however, provided an alternative of "restriction order" which could be supplemented by a "security order".[41] These were apparently lenient measures. An alien could be deported for "public good" (not defined) but in the case of "immigrant British subject", the court's "recommendation" after inquiry was sufficient. The order in all cases was non-appealable.

7.16 We thus find that the concept first introduced in the form of a penal sanction later gained prominence more as a preventive sanction. It has to be admitted that the sanction was not unknown to the traditional legal systems of Africa.[42] However, the sanction was generally applied only against deposed Chiefs[43] and witches,[44] in a preventive sense. In a few other cases it was used as a punitive sanction in certain areas.[45] In all cases it was intra-territorial in the modern sense. It is difficult to say that the African societies everywhere, in general, could have found the preventive sanction and that of the extra-territorial type, acceptable against an ordinary individual but the colonial rulers appear to have taken it for granted. There is no other convincing hypothesis which can explain the introduction of this extraordinary concept in the colonial legal system of Africa, for the operation possibly had no parallel. It was an ill-conceived experiment which neither benefited the colonial common law (common features of the colonial legal systems of the dependencies) nor contributed to the development of any wholesome trend in the African Common Law of the future.

7.17 Between 1957 and 1964, the Gold Coast, Nigeria, Tanganyika, Uganda, Kenya, Nyasaland and Northern Rhodesia attained their independence in that order. Each state except Gold Coast and Tanganyika was given a

justiciable Bill of Rights in its Independence Constitution, in more or less similar terms, as we shall soon see.[46] Freedom of movement was guaranteed, in each case subject to restrictions "reasonably justifiable in a democratic society"[47] in the interest of, inter alia, defence, public safety, public order. The validity of the colonial statutes which remained in force were therefore open to challenge and the courts could decide if they were saved by the derogation clause. It is interesting to note the colonial legacy being carried over in the Independence Constitution of Nigeria in Art. 27(4), which specifically saved laws providing for the deportation of Chiefs. Reasons are not far to seek. It was in tune with the traditional legal system in the first place and secondly the Privy Council, in the two ELEKO cases,[48] did not decide whether the order passed by the Governor under the Deposed Chiefs Removal Ordinance 1917 could be upheld on the merits; in other words, whether the English Common Law rules had abrogated the rules of the traditional legal system in this respect.

7.18 It is indeed strange that the validity of the deportation laws, those which are still extant, has not been challenged even where it is possible to do so. This position supports our earlier observations on the traditions of judicial review in Africa.[49] Another aspect of the colonial legacy is to be found in the enactment by independent Ghana, of the Deportation Act, No. 14 of 1957, to provide for extra-territorial deportation of a person whose presence is "declared" by the Governor General to be "not conducive to the public good".[50] The burden of proof lies on the person who claims exemption as a citizen.[51] Deportation under the Act was challenged in BALOGUN v EDUSI[52] but the legislature, by enacting ad hominem legislation,[53] robbed the court of the opportunity to pronounce upon the validity of the Act as well as of the action taken thereunder. In Kenya and Zambia and, in a restricted sense, in Malawi (because of the new constitution) the opportunity still exists. In

Nigeria and Uganda, where the military rules have not suspended the Constitutional Bill of Rights, a judicial challenge cannot be ruled out, notwithstanding the inherent limitations of the "New Grundnorm".

(3) Emergency Laws and Preventive Detention

(A) A General View

7.19 We have seen that the term 'preventive detention' was used in certain enactments of England[54] and Africa[55] dealing with the control of recidivism. Even so, the term is also used throughout the "New Commonwealth" to mean detentions without trial or, in other words, detentions with a political complexion. It is in the latter sense that the term is used in this part of the study. Early examples of laws expressly providing restraints of such nature are to be found in the two enactments of Nyasaland[56] and Gold Coast.[57] The latter measure was enacted during the first world war and the provisions themselves speak of a "state of war", "imminent danger" and "great emergency" and of their applicability to "aliens" only,[58] (unlike the Defence of the Realms Acts of 1914). The Governor in Council could invest any person with powers of "arrest", "detention" and "search".[59] Any person "suspected to have assisted the enemy" could be arrested without warrant by a District Commissioner or a European Officer of the Police Force and detained "until the Governor's directions are obtained."[60] The Governor could also, by order in writing, for the same reasons, direct arrest and also detention and the continuation thereof "for such period as he shall think necessary."[61] In either case, the power was exercisable subject to regulations made by the Governor in Council. By an amendment in 1935 the writ of habeas corpus was expressly suspended in respect of such orders and also of deportation.[62] In view of its restricted application to aliens the absence of safeguards is understandable but the validity of the amendment is, nevertheless, challengeable as ultra vires. At common law even an alien had the right to habeas corpus. In 1935 Ghana (Gold Coast) did not have a "representative legislature" to abrogate this right.

7.20 The Nyasaland law, on the other hand, was applicable to a "native". The power of "detention" was exercisable by a District Commissioner who had to report "forthwith" his action, with the grounds therefor, to the Governor.[63] Provision for a final order by the Governor contemplated two forms of detention: detention for such period as he considered necessary "in the interests of peace, order and good government", either within or without the district in which the detainee "ordinarily resided".[64] The District Commissioner's exercise of power was, however, provided according to the "constitutional formula" of deportation.[65] In the same way, the Governor was to report "forthwith" to the Secretary of State and his order was made non-appealable but reviewable by him, suo motu.[66] The Governor in Council was given the rule-making power but it is doubtful if by rules effective provision for review by independent tribunal could be made which was necessary in view of the indefinite detention and the person affected being a subject and not an alien. In fact the vires of the Ordinance itself was open to challenge.[67] Rules were in fact made which provided only for the conditions of detention.[68] The wives, children and "followers" of detainees could be permitted to remain with, or have access to, such "politically detained natives". Provision for the supply of food and for medical supervision was also contemplated. Prohibition against detention in a "prison or lock-up" was possibly provided as a safeguard against police torture.

(B) The Emergency Powers Order in Council 1939

7.21 The Emergency Powers Order in Council 1939 was made under the British Settlements Act 1887 and the Foreign Jurisdiction Act 1890 and was amended from time to time, but we are concerned with amendments made up to 1956. The recital in the preamble was noteworthy: "Whereas it is expedient to make other provision than that now existing for security in time of emergency of the colonies and protectorates mentioned in Part I of the schedule. . ." which included the territories under discussion.

The Emergency Powers (Colonial Defence) Order in Council 1939, made under s.4(1) of the Emergency Powers (Defence) Act 1939 was also made applicable to them and extended to them the Act with adaptations, modifications and exceptions. The parent Act itself being a temporary statute this Order also had a limited effect in the dependencies although it was invoked in Gold Coast[69] and in Nigeria[70] as well. Regulations were framed by the respective Governors for the restriction of movement of suspected persons[71] and also for detention orders[72] which followed Reg.18B of the United Kingdom,[73] in terms. A discussion of these regulations is, therefore, redundant.

7.22 On the other hand, the captioned Order(hereinafter referred to as the 1939 Order ) was of a permanent nature and therefore merits greater attention. It had become "part of the law" of each territory and in the Independence Constitutions specific provision had to be made to discontinue its effect. By the new s.3 of the Order, which was replaced in 1956 by a modified provision, the declaration of a "public emergency" in a part, as well as the whole of the territory was contemplated, on the mere "satisfaction" of the Governor. S.6(1), which became operative when the declaration was made, deserves to be quoted:

> The Governor may make such Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.

Sub-s.(2) illustrated the matters which could be provided for by the regulations. Clauses (a) and (d) were as follows:

> (a) . . . for the detention of persons and for the deportation and exclusion of persons from the territory;
>
> (d) . . . for amending any law, for suspending the operation of any law and for applying any law with or without modification;

The latter provision was further fortified by s.8 which contemplated that any regulation and any order or rule made thereunder shall have effect

notwithstanding its inconsistency with "any law". Whether an Order in such terms could be made under British Settlements Act and the Foreign Jurisdiction Act does not appear to have been questioned so far but the vires of the Order was challenged on the grounds of non-compliance with s.1(1) of the Rules Publication Act 1893 in Ex.p. MWENYA (infra).

(4) Emergency during Mau Mau Movement in Kenya

(A) A General View

7.23 On 21st October, 1952, an emergency was declared in Kenya which was to continue until 1960. During this period, a large number of regulations were made and amended from time to time, under the provisions of s.6 of the 1939 Order. The process was similar to the one that obtained in the peninsula of Malaya.[74] It was a matter of curious coincidence that not only were the events in the two dependencies almost contemporaneous but the nature of the emergency was also in some respects the same. The reasons and the background were, however, different although, as we shall see, almost similar legal means and measures were adopted in the two territories notwithstanding the fact that there was a much larger human involvement in Kenya which was of an entirely different type. This distinctive feature has to be explained first in some detail.

7.24 The various interpretations of the Mau Mau movement, which has been subjected to detailed study, may be briefly summarised first: "a religion";[75] "a form of millenarism";[76] "a self-conscious return to tribalism. . . based on synthetic paganism";[77] "a wholly tribal manifestation aimed at tribal domination, not a national movement";[78] "a pseudo-religious cult. . . of the golden age";[79] and finally "politico-agrarian. . . directed against European rule and white-settler occupancy of alienated African lands".[80] The last-mentioned, we submit, has to be preferred to the others as it has evidentiary support in the Mau Mau oath which expressly referred to the European as "our enemy" and

spoke of "our soil" and "people of Africa".[81] The rituals of the oath ceremony appear to have attracted greater attention of the observers who have given a contrary interpretation. A total denial of the fact that the movement had a nationalistic outlook will, therefore, be unrealistic.

7.25 For a proper appreciation of the scope and extent of the legal measures that we shall examine it is necessary to take an account of the salient features of the events that marked the period of the emergency which spanned over a period of nearly eight years. The Mau Mau was proclaimed to be an "unlawful society" under s.69 of the Penal Code which contemplated a declaration to be made by the Governor in Council stating that the society was "dangerous to the good government of the colony" if it was formed for purposes, inter alia, of "subversion" of, and of "levying war" on, the government. To be a member of such a society or to allow its meeting to be held in one's house was an offence punishable by three years' imprisonment. Another provision of the Penal Code which similarly played an important role, supplementing vigorously the emergency laws was to be found in s.61 which was a more serious offence punishable with ten years' imprisonment. It made offences inter alia, of taking, administering and being present at the administration of an oath. By s.63 it was provided that compulsion was not to be a defence unless within five days of either taking the oath (or, if prevented by physical force or sickness, after the termination of such force or sickness) it is reported to the police. The reported cases of the period were undoubtedly few but they indicated, as we shall see, that these provisions were extensively used. This was one of the distinctive features of the situation in Kenya for which neither Northern Ireland nor Malaya offered any exact parallel.

7.26 In May 1951 the Kenya African Union had submitted a memorandum to the Secretary of State for the Colonies suggesting certain changes in the constitutional set-up which included appointment of an African member to the Executive Council and an increase in African representation in the

Legislative Council from four to twelve besides pressing for the repeal of certain discriminatory laws and the abolition of the Native Authority Ordinance under which the local Chiefs and the District Commissioners could prohibit people from holding meetings. In a "top secret" letter to the Minister in July 1952 the Police Chief of Kenya spoke of "revolt" and of the possible failure of the police similar to that of "Ireland and Palestine".[82] It is against this background that the Governor declared an emergency and made the Emergency Regulations 1952[83] which, as already indicated, were, from time to time, revised and also amended, substituted and supplemented in various ways. We propose to examine a few of the Regulations only to point out similarities with, and also deviations from, the regulations of the Malayan peninsula and Northern Ireland. It may be stated at once that everywhere the armed forces had been conceded an important role in arrest and "interrogation".

7.27 Some words must be said about the activities of the "rebels" that were sought to be tackled with the help of the emergency measures and also about the consequences that ensued from the enforcement of those measures. Leakey observes that the Mau Mau activities were directed towards "terrorising" the European settlers - "incessant raids upon European-owned farms. . . maiming of valuable livestock, burning of grain stores . . . in some cases wanton massacre of the European occupants."[84] Kariuki, on the other hand, contends that the raids were primarily aimed at procuring arms and ammunition.[85] It is a notorious fact that the European settlers in Kenya were a vital force to be reckoned with and the law had to be therefore vigorously enforced. During the emergency 78,000 persons were detained without trial and in the "Operation Anvil" alone, carried out in Nairobi in April 1954, the number detained went as high as 35,000.[86] The situation was made even more pernicious by the ill-treatment of certain detainees which necessitated official inquiries being held.[87] In Hola detention camp eleven persons died of such ill-treatment.

7.28 Coming now to the measures themselves, we find that while they followed more closely the scheme of the Malayan regulations, the 1952 Emergency Regulations of Kenya made up a more complete code, possibly profiting from the Malayan experience. The provision requiring an "identity card" to be carried by every male African aged sixteen and produced on demand by any police officer or member of the armed forces was made a part of the code, in Reg.16B(6). At first it was applicable to the members of Kikuyu tribes only. Later, other tribes, Meru or Embu, were added,[88] and by further amendment it was made applicable to "any notified tribe".[89] The argument noticed earlier that Mau Mau was a tribal and not a national movement is belied by this fact.

7.29 As in the Malayan peninsula,[90] there was a provision for collective punishment in Reg.4A but it was more stringent. If it appeared to any District Officer that any of the specified offences, which included those relating to "unlawful oath" and "unlawful society", was committed in any area and the inhabitants thereof failed to take reasonable steps to prevent the same or if they were members of "unlawful society" or consorted with or harboured any such member, he could impose punishment on them. The occupation of a dwelling house could be prohibited and the closure of shops could be ordered for up to 14 days. Cattle could be seized and sold and proceeds thereof applied for payment of compensation for any injury to either person or property suffered on account of the offence committed. Later, the imposition of fines was also provided for, which could be realised by the seizure and sale of moveables.[91]

7.30 The Malayan "starve-them-out" provision (Reg.4C)[92] took another form in Kenya. While Reg. 8F contained a similar provision, Reg.11 additionally empowered the authorities to order any person "to perform for such remuneration. . . such duties or carry out such works as may be necessary or expedient for securing the continuance of any necessary service."

In Kenya the Regulations dealt with "terrorism" more effectively by making it an offence[93] and in addition providing that "acting as a terrorist" was also an offence.[94] In the latter case a person had to be "found or captured or otherwise taken into custody in circumstances which raised a reasonable presumption that he intended to act as a terrorist." The offences relating to firearms (possessing, carrying etc. vide Reg. 8) was amended from time to time to ensure maximum convictions. The provisions relating to "special areas" (Reg.22B) were however less elaborate than those of Malaya. In such areas, as in Malaya, "reasonable force" extending to the use of "lethal weapons" could be used to effect arrest, to overcome resistance to arrest, to prevent escape and rescue. The separately made Emergency (Criminal Trials) Regulations 1952, following the Malayan counterpart, provided for "emergency procedure" to meet mainly the problem of intimidation of witnesses. In all these provisions was reflected a determined effort to fight "terrorism" through extraordinary legal measures. To what extent this was checked by the unabrogated common law rules we shall soon see.

(B) Arrest, Interrogation and Detention

7.31 In all the three territories an almost similar pattern was followed but the use of the power of interrogation in both Northern Ireland and Kenya assumed greater importance. In either case interrogation continued during detention giving rise to serious complaints of ill-treatment and torture. In Kenya it was euphemistically called "screening" and justification for it was thus stated: ". . . the intention behind the policy was reformist and not punitive. . . to accelerate release by breaking the spell of Mau Mau oath. . ."[95] and that in considering the evidence of ill-treatment due weight has to be given to attempts made to deal "fairly and intelligently with an unprecedented situation."[96] The threshold interrogation by the use of the power of stopping and questioning which involved the "shoot-at-sight" policy also appeared to produce similar results in Kenya.[97]

7.32 The general power of arrest without warrant was conferred by Reg.28(1) additionally on a member of Tribal Police Force and headman appointed under the Native Authority Ordinance. It could be exercised against a person who "was guilty or was suspected of being guilty" of an offence against the regulations and also against one who acted "to endanger public safety". Apart from omission of the requirement of reasonableness, the expression "public safety" being undefined there was every likelihood of the power being misused in view of the further fact that report to and production before the Magistrate was to be "as soon as practicable" and not within any fixed period of time (vide sub-clause (2) ).

7.33 Reg. 2 was originally headed "Detention Orders" and it provided comprehensively for arrest and detention "pending decision" while the power to stop and question was posited in Reg. 3. It was amended from time to time and in 1955 it was given a new heading "Detention Orders and Power to detain suspected persons" while making substantial changes in the power of arrest for detention "pending inquiries and decision."[98] Under the new clause (6) of Reg.2, "any authorised officer" could arrest pending inquiries and decision any person "reasonably suspected" of having acted or of being about to or likely to act in a manner prejudicial to public safety etc. and detain him up to 28 days but for "continued detention" beyond 24 hours he had to obtain authorisation in writing from the prescribed authority. Custody during such detention was expressly made "lawful" and a police station was also named for this purpose, besides any place "generally or specially" authorised. In this respect the provision of Reg.3 was similar but detention could normally be for 24 hours which could be extended up to 7 days by a Magistrate or a superior police officer.

7.34 The power to pass a detention order (for an unlimited period) originally vested in the Governor only, to be passed "if satisfied", for

"maintaining public order" and representation in writing could also be made to him (Reg.2). He had powers to revoke, vary or suspend on conditions, such orders. In 1954 the general power of delegation provided in Reg.32 was amended by deleting the exception in respect of Reg.2.[99] We are told that the power was, in fact, delegated first to the Provincial Commissioner and then to the District Commissioner.[100] By an amendment in 1953 provision was made enabling "objections" to be made, additionally, to an Advisory Committee but the Governor was not obliged to accept the Committee's recommendations.[101] Nevertheless, in 1954 the status of the Committee was raised by providing that a person qualified to be a judge of the Supreme Court should be its Chairman and it was he who was required to inform the objector "the grounds" as well as "the particulars". By the Emergency (Amendment)(No.3) Regulation 1953 the new provision, Reg.2A, introduced "Restriction Orders", but there was no right of making either "representations" or "objections" in such cases, except that these were reviewable sua motu. The Governor, and later the Chief Secretary also, for "maintaining public order" required any person "not to be in any specified place" except by a "written permit" and also to notify his movements in the specified manner. Forcible removal was also contemplated and disobedience with the order was made an offence.

7.35 The provision apparently conformed substantially to the usual pattern and, notwithstanding the absence of more salutary safeguards such as automatic periodic review and time-scaled procedure for disposal of the "representations" and "objections", these could be effectively resorted to by the detainees but the factual position was entirely different.[102] There was apparently no possibility of any successful judicial challenge to either the law or the order passed thereunder, on account not only of the judicial approach in this matter exhibited in the case-law of other dependencies but also of the undeveloped tradition of judicial review in Kenya and of the widely defined power. However, the special dimension of the problem in

Kenya, which resembled that of Northern Ireland in this respect, cannot be underrated. It was the problem of "legitimacy". We are told that in Kenya too the "authority of the Kenya Government was rejected" and also that the Mau Mau had set up its own courts.[103] It is not surprising therefore that we do not find a single reported decision in which any detention was challenged despite its use on a colossal scale.[104]

7.36 A separate set of Regulations[105] were made to provide for incidental matters in connection with such detention. It made the Prisons Ordinance (cap. 78) applicable to "detention camps" and "special detention camps" and also made special provisions for maintaining discipline in camps which included corporal punishment, besides solitary confinement and reduced diet etc. The "hard core" detainees could be segregated and could be made to work "to assist the process of rehabilitation" which was not to be "penal or oppressive."[106] Monthly visits by a "Committee of Inspection" were also contemplated to hear complaints and make "remarks and recommendations."[107] These measures could not unfortunately prevent the Hola incident and to what extent the concept of "legality" was used to justify even extra-legal measures was proved by the fact that although it was found that the detainees met their deaths as a result of "considerable beating" with batons the action, it was held, was protected by these Regulations and the Prisons Ordinance.[108]

7.37 If it is accepted that "Mau Mau" had a nationalistic outlook, that it was a freedom movement and that a civil war[109] took place in Kenya between 1953 and 1960, the prosecution of the Mau Mau detainees for criminal offences and the subjection of them to ill-treatment was open to similar objections in international law as in the cases of Northern Ireland and Malaya.[110] Nevertheless, the common law protection proved effective in the few cases that came before the courts in Kenya, which we propose to examine now.

7.38 The common law approach of the presumption of innocence and strict compliance with procedure dominated the cases - (1) KARIUKI v R,[111]

PHILIP MUIGA v R,[112] and SIMON NJEROGE v R.[113] In all three cases convictions were set aside. In the first case the Magistrate had acquitted the accused of the charge of administration of unlawful oath but had convicted him of being a member of an unlawful society under s.71(a). The Supreme Court held that the evidence was not relevant to the offence for which he was convicted. In the third case also the conviction under s.71(a) was set aside on the ground that the evidence of an accomplice could not be the basis for any conviction. In the second case conviction for the same offence was set aside on the ground of defective particulars being given in the charge. On a more or less similar ground of 'duplex' charge a conviction was set aside in CHERERE v R,[114] in which the Trial Court held that "the accused either actually administered the oath or at least was present at and played an important part in its administration." It was held that the accused was prejudiced and that it was an "elementary principle" of the Criminal Procedure Code that the accused must be informed precisely with what he was charged.

7.39 In two cases, MWANGI v R[115] and GITHINJI v R,[116] the offence involved was possession of a home-made gun contrary to the Emergency Regulations. In the first case, although conviction was set aside on the ground that the objectionable article was not proved to be a "lethal barrelled weapon", the court made important observations on what it called "irregularities by the police" and "unsatisfactory aspects of the case". The police had not cautioned the accused before questioning, as required by the English Judges' Rules which were adopted in Kenya. The arrest was unlawful for not following the common law rule stated in the CHRISTIE case requiring that the person arrested be informed of the reasons for his arrest. The court observed that the rule was not abrogated by the Emergency Regulations. It was also observed that a "trial within a trial" must be held when the voluntariness of a statement was at issue. The accused had stated that he was beaten by the police and

was made to put his thumb-print on a piece of paper. However, in the second case the conviction was upheld on other evidence, disregarding the statement made to a "screening team" but the following observations were made:[117]

> From this case and others that have come to our notice it seems that it may be a common practice when a person is arrested in the commission of a terrorist offence, or on suspicion of such offence, for the police to hand him over to the custody of one of these teams, where, if accounts given are true, he is subjected to a "softening up" process with the object of obtaining information from him . . . What legal powers of detention these teams have or under whose authority they act we do not know. . . Such methods are a negation of the rule of law which it is the duty of this court to uphold. . .

7.40 In the same vein in NJUGUNA v R[118] the court observed: ". . . awfulness of the crime is irrelevant to the standard of proof. . . the implication of this case is, police in Kenya is trying to become a law unto itself. . ."[119] and in repelling the contention that "protective custody" was to guard against reprisals by terrorists, ". . . [there is] no lawful authority in Kenya for detention by the police of potential witnesses. . ."[120] Conviction for murder by the domestic servants of an elderly European was set aside by the court, upon holding that the confessions having been alleged to have been extracted by torture, the trial court need only consider that the story of torture was "reasonably true". That not having been done, the letter as well as the spirit of the Judges' Rules had been violated.

7.41 After the emergency ended a few more measures, envisaging what Holland calls "semi-emergency powers",[121] were enacted in Kenya "to cope with post-emergency period of declining tension".[122] One was the Detained and Restricted Persons (Special Provisions) Ordinance 1959 which empowered the Governor to make regulations for detention or restriction of persons against whom either a detention order or a restriction order was in force under the Emergency Regulations immediately prior to the enactment of the Ordinance. The power could also be used

against persons "outside the Colony" whom it was considered "necessary to control" in case they entered the Colony. This measure was temporary and does not merit detailed examination but the Preservation of Public Security Ordinance (No. 2 of 1960) is still in force, albeit in a modified form, in the Republic of Kenya. We propose to examine it, with other pre-existing laws continuing as post-independence provisions, in the appropriate context.

(5) Emergency in Nyasaland

7.42 It was rightly said - "Africa has, since the days of Mau Mau, become a key continent in the area of world politics and the dominant factor in Africa is the swift rise of African nationalism."[123] The emergency in Nyasaland was declared in March 1959 under the 1939 Order. The background was provided by the refusal to heed the protests against the Federation with Southern Rhodesia into which Nyasaland and Northern Rhodesia were forced in 1953. From the middle of 1958 the Nyasaland African Congress "suffered frustration" and stepped up its agitation as "the government had made it clear that African majority was not coming soon."[124] The Emergency Regulations 1959 of Nyasaland,[125] made under the 1939 Order, not only provided similar powers of arrest, interrogation and detention but contained many other provisions similar to those of Kenya's Emergency Regulations of 1952, which were meant to deal with "terrorism". Nyasaland also had, among other provisions, a separate set of Emergency (Criminal Trials) Regulations.[126] We propose to discuss, therefore, in short, only the distinctive features of the parallel provisions and their implementation in Nyasaland.[127]

7.43 Following the Kenyan pattern two types of orders were contemplated: "detention orders", to be made by the Governor under Reg.24, and "control orders" which were equivalent to "restriction orders", to be made by an Administrative Officer under Reg.25. A safeguard, the hearing of objections by the Advisory Committee, was provided in respect of

"detention orders" only, but it was expressly stated that the proceedings of the Committee would be in camera and that the procedure should be governed by such directions as the Governor might issue in writing. The provision in respect of "representation" was replaced by an automatic bi-annual periodic review by the Governor. The power which appeared to be abused most was, however, contained in clause (7) of Reg.24. It was apparently much wider than its Kenyan counterpart, Reg.2(6)(b) and (c), which contemplated in clear terms an interim detention pending decision on detention order. In Nyasaland, any authorised officer, which term included a Grade II Police Inspector, could arrest a person and make a "detention order" against him for 28 days if "he had reason to believe that there [were] grounds which would justify his detention". The Devlin Report records that the order was renewed in many cases[128] and that a large number of arrests and detentions were made under it.[129]

7.44. Reg. 26, which provided the power to stop and question, reproduced the provisions of its Kenyan counterpart but in Nyasaland it was used extensively, in conjunction with the power of search under Reg.46, to impose collective punishment in "special areas", contemplated under Reg.11.[130] The Nyasaland African Congress having been declared as "unlawful society" under s.70 of the Penal Code, Reg.46 was also used, it has been observed, to "round up" its members.[131] It does not, however, appear clear how Reg. 48 actually operated, although the possibility of incalculable mischief being caused by it cannot be overlooked. It provided that "any power" conferred upon "any officer" could be exercised by "any other officer acting by his directions". Apparently this did not touch Reg. 24 which, in the essence of the provision for delegation, remain, vested in the Governor, unlike the position in Kenya.

7.45 The dominant role of the Armed Forces was reflected in Reg.51, the effect of which too, like that of Reg.48, does not figure either in Holland's study[132] or in the Devlin Report.[133] Any member of the armed

forces could perform "any or all of the duties and functions of a police officer" when directed by his Commanding Officer. How far the rider, "at the request of or at the concurrence of the Police Chief", was effective, is doubtful. Apparently it indicated the army acting "in aid of civil power", following the common law rule. A similar doubt could be expressed also in respect of the power under Reg. 11(3), which reproduced the Kenyan Reg.22B(3).[134] How far the expression "reasonably necessary" could check the power to use force (expressly provided "with lethal weapons") to effect arrest, overcome resistance and prevent escape or rescue is anybody's guess in view of the interposition of the armed forces. It is difficult to deny the fact that the common law powers in these matters were apparently extended by this provision, although the Devlin Report as well as Holland appear to express a contrary view.[135]

7.46 The cumulative effect of the Emergency Regulations as they operated in Nyasaland villages could be best summed up in the words of the Devlin Report: "They were punitive expeditions intended to make it plain that siding with Congress led to very unpleasant consequences". The factual situation has been described thus: First an area would be declared as a "special area" under Reg. 11, a search would then take place under Reg.46 and persons would be detained pending inquiries under Reg.26.[137] It amply demonstrated the position that to achieve a perfect "legality" in the face of the "realities" of a political situation was merely an exercise in futility, particularly when there was an interposition of the armed forces. The Devlin Report asserted that "the Army regarded it as a military operation to subdue trouble makers in some areas," and that the "illegalities were expressly or impliedly authorised from the top."[138]

(6) Emergency Regulations of Northern Rhodesia

7.47 In Northern Rhodesia, the Emergency Powers Ordinance, No.9 of 1927, provided for what we have called "civil emergency" in the Kenyan context, in

terms almost similar to that of the Kenyan provision. There was however one material difference. In Kenya the law envisaged a "state of emergency" in situations arising, inter alia, from "interference with the supply and distribution of food, water, fuel or light or with the means of locomotion". In Northern Rhodesia, instead, the situation, inter alia, ought to be such as to be "likely to endanger public safety". This notwithstanding, first in 1956 and then in 1958, an emergency was declared under the 1939 Order. In 1959, however, the Ordinance was invoked and the Safeguard of Elections and Public Safety Regulations were framed thereunder. As the name indicated, the purpose was limited: principally, the provision for "restriction orders" made therein was used, in respect of the leaders of Zambia National Congress, to "safeguard" the elections.

7.48 The emergency declared in 1958 was in respect of the railway system and the regulations provided for "restriction orders" only (Reg.8). The Governor, "if satisfied", could pass such order against any person arrested under Reg.5 "for protecting the railways of the territory or the safety of any person using such railways". Arrest could be made, among others, by any member of the armed forces. However, clause (2) of Reg.5 provided for interim detention "pending decision" up to 28 days with the written consent of the Chief Secretary; up to 14 days any police officer of the rank of Superintendent or above could provide authority. Clause (3) made a certificate by the Chief Secretary "conclusive evidence of the legality of such detention", to exclude, possibly, actions for false imprisonment. For, arrest could be made on "reasonable suspicion" and not on subjective satisfaction and the detention which followed arrest was also, a priori, saddled with this requirement, which was buttressed by the expression "reason to believe" which occurred in clause (2). The restriction order, however, was without any safeguard of any nature, even of time limit.

7.49 The Emergency Regulations 1956, however, provided for both

"detention orders" and "restriction orders". Although the power to pass such orders was vested in the Governor, Reg. 47 provided for delegation in wide terms, as follows:

> The Governor may. . . either generally or specially, depute any person or persons either by name or office to exercise all or any of the powers conferred upon the Governor by these Regulations. . .

It was this provision which, along with Reg. 16(1), quoted below, provided the basis for a detention order passed by the Provincial Commissioner against 54 persons being challenged in a habeas corpus proceedings.

> Reg.16(1) Whenever the Governor is satisfied that. . . for maintaining public order it is necessary to exercise control over any person he may make an order. . . directing that such person be detained.

By clause (2) he could vary, revoke and suspend on conditions such order at any time.

7.50 In STEWART v CHIEF SECRETARY[139] it was held that Reg.47 envisaged delegation of "powers" only. On the other hand Reg.16(1) imposed a "duty" on the Governor to be "satisfied". The detention order made by the Provincial Commissioner was held to be ultra vires, as no step was taken to invoke the Governor's "satisfaction". It was held, obiter, that there could be a valid delegation of both the duty of being satisfied and of the power to make a detention order if a proper instrument of delegation was made. In another obiter it was said that under Art. 7 of the 1939 Order such an instrument could be made, but the delegate had to be unambiguously identified or specified. In an action for wrongful arrest and imprisonment the decision was, however, reversed on appeal: ATTORNEY GENERAL v MUNGONI.[140] The Federal Supreme Court appears to have held that "functions" included both "powers" and "duties" and that although Reg.47 spoke of "powers" the word should be read as "functions".[141] It was also held that Reg.16 required all functions prescribed therein to be performed by one and the same person.[142] The Supreme Court, it is submitted, took a narrow view of the matter and ignored the fact that

the liberty of the subject was involved, which required that the statute be strictly construed.

7.51 In Ex p. MWENYA[143] it was, inter alia, contended that the "confinement" under a restriction order passed under the Emergency Regulations against the applicant was of such a nature that it could be challenged in a habeas corpus proceedings. The case had come up in appeal against the decision of the Divisional Court holding the application to be barred by s.1 of the Habeas Corpus Act 1861. The decision on the preliminary point was set aside by the Court of Appeal but, before rehearing of the case, the Governor revoked the impugned order. A restriction order, we have seen, did not contemplate total restraint on the movements of a person as happens in the case of an imprisonment. The difference was not only in respect of the ambit of movement but also in respect of the incidents of the restraint. On the other hand, the common law concept of 'imprisonment' was so wide that if a man was not able to go to "all places at all times" he was said to be imprisoned.[144] The point is res integra. It will be presumptuous on our part to suggest a definite answer to this difficult question.

(7) Emergency Regulations in Other Territories

7.52 The 1954 Regulations of Tanganyika[145] were unique in that they provided for neither "detention orders" nor "restriction orders". Reg. 12 merely provided for general restrictions on movement in any particular area. On the other hand it also provided for the declaration of "special areas" (Reg.3), prohibited the carrying of arms in such areas (Reg.4) and imposed a duty to stop when challenged in such areas (Reg.9). The last-mentioned provision did not, however, entail the pernicious consequence of 'detention' which followed in other African territories like Kenya and Nyasaland.

7.53 In West Africa also, regulations were made under the 1939 Order. These were unique in another sense. Provision was made for "detention" and "removal" but, as we shall see, there was a deliberate attempt to exclude safeguards against them. In the Gold Coast regulations were made in March 1948 which were amended from time to time and finally revoked in October. In 1950 a new set of regulations were made which were virtually a re-enactment of the earlier ones, and carried the same title as well - The Emergency (General) Regulations. A different phraseology as follows, was used in the provision appertaining to "Detention Orders" (Reg. 28 of 1948 and Reg.22 of 1950):

> (1) If the Governor has reasonable cause to believe any person to be concerned in acts. . . in the opinion of the Governor. . . prejudicial to public safety and maintenance of public order. . . [emphasis added]

Clause (5) also deserves to be quoted:

> No action, prosecution or other legal proceedings calling in question the legality of any thing done under or by virtue, or in pursuance of this regulation or any order or direction made or issued thereunder shall be brought, instituted or maintained or shall be entertained by any court at any time.

The cumulative effect of the afore-quoted provisions was to make any judicial challenge a total impossibility. The two sets of underlined expressions made subjective satisfaction fully impervious to review; and Clause (3) which made arrest for detention a "lawful custody"/ clause (5) in a similar way, embodied a modern version of Habeas Corpus Suspension Acts.[146]

7.54 In Nigeria, Regs. 2(1) and 5, respectively, of The Emergency Powers (Detention of Persons) Regulations 1949, reproduced the provisions of the above referred clauses (1) and (3) with minor verbal changes. Reg.4(1), which corresponded to clause (5) of the Gold Coast regulation, however, differed materially in one respect. Proceedings could be instituted with the leave of a Supreme Court Judge in such manner as the Chief Justice might direct, unless prescribed by rules, to ensure that

public safety was not endangered. The absence of the interposition of the armed forces on the one hand and the power to make oral Detention Orders (vide Reg.2(2)), on the other hand, were the other significant features of the Nigerian Regulations which, as we shall see, served as a sort of local legislative precedent so that even the patently offensive features did not lose their appeal in the post-independence era.

7.55 The provision of "Removal orders" (Reg.29 of 1948 and Reg.23 of 1950) in the Gold Coast contemplated apprehension, detention and removal of a person to a place where he is required to be and live; under an order passed by the Governor, "if satisfied. . . for securing the public safety and the maintenance of public order." It also had a similar clause (5) as well. In Reg.10(5) was posited the "Power to detain suspected persons" which corresponded to "detention pending inquiries" provision of Kenya and Nyasaland. The detention could be for 48 hours and continued up to 10 days with the approval of the Police Chief. Apparently the scope of "removal orders" was wider than "restriction orders" and such orders could possibly be challenged in a habeas corpus proceedings if clause (5) had not been there. It has also to be mentioned that in the Gold Coast the interposition of armed forces does not appear to be pervasive and it did not produce such acute problems as it did in Kenya and Nyasaland although they could make arrests as could a police officer and even a Customs Preventive Service Officer. In the Gold Coast, the power to stop and question was not provided which, as we have seen, was likely to create problems and become oppressive. Nevertheless the Gold Coast Regulations, as a whole, infringed the liberty of the subject rather severely. Although the black-out of judicial intervention was lifted in 1950 (by omitting clause 5), a person who was either "detained" or "removed" could look only for a possible redress in the Governor's general power to "revoke or vary" (Reg.23 of 1948) and "to annul" (Reg.30 of 1950) any order made under the Regulations.

II. Personal Liberty and Independence

(1) A General View of the Independence Constitutions

7.56 In each and every one of the African states covered by our study the constitutional framework devised at independence did not last long. Although as "negotiated treaties" resulting from "ad hoc bargaining" they did not reflect, as has been suggested, "popular demands or indigenous political culture"[1] and could not therefore be expected to survive long, their immediate successors, not unusually, appear primarily to be concerned with achieving "autochthony" and in the process securing a republican status for the country.[2] The process however saw Executive Presidents being installed first in Ghana and then in Tanganyika but in neither case did the Independence Constitution contain any Bill of Rights and it is interesting to note that eventually these two countries became one-party states by abandoning yet another and more important institution which they had inherited. Nigeria, on the other hand, retained its constitutional framework which included a Bill of Rights, although it attained independence before, but republican status after, Tanganyika.[3] Each one of the Independence Constitutions of Uganda, Kenya and Malawi also contained a Bill of Rights modelled on the Nigerian provision besides that of Zambia, which attained independence last but with a republican status.[4] Whether the African brand of "predentialism" and also the one-party system (defacto in Kenya), which came to prevail everywhere except Nigeria, represented a genuine appeal to the "indigenous political culture" is a debatable point but the general loss of appeal[5] of the Bill of Rights notwithstanding their reputed "buoyancy"[6] could possibly be attributed, with greater certainty, to colonial acculturation.[7] It is also possible to suggest that in terms of the duty-based traditional legal system which, unlike India, continued to hold sway, albeit less vigorously owing to its modified form, the Bill of Rights was a foreign concept and was less

likely to be accepted in Africa notwithstanding the argument to the contrary based on contemporary international interest in human rights.

7.57 Whatever that may be, the fact that a Bill of Rights was inserted into the 1954 Federal Constitution of Nigeria by an amendment,[9] before and not at independence, indicate that initiative in the matter came from the British Government impelled by the necessity of discharging its international obligations after its accession in 1951 to the European Convention of Human Rights on which the Bills of Rights of the Independence Constitutions were based.

7.58 However, Prof. S.A. de Smith deals exhaustively with the Nigerian situation in particular and suggests that local political rivalry was responsible for the proposal which was eventually approved by the Constitutional Conference in 1958 notwithstanding the findings of the Minorities Commission that "there was little enthusiasm in Nigeria for the entrenchment of fundamental rights as a safeguard".[10] Generally, the Nigerian provision, following the European Convention, embraced the "classical liberal freedoms"[11] but the provisions in either case defined the range of permissible restrictions with a great deal of precision.[12] While there was a specific provision dealing with deprivation of 'personal liberty' there were other noteworthy cognate provisions as well, such as those dealing with deprivation of "life", torture, inhuman or degrading punishment or other treatment and also slavery and forced labour;[13] freedom of movement was also guaranteed along with the right to reside in any part of Nigeria and also not to be "expelled" from or "refused entry" into Nigeria but this provision was applicable in the case of citizens only.[14] Being a federal state and the traditional and the colonial legal systems both permitting "deportation", citizens' right to move freely as well as to reside and remain in the country needed constitutional protection; the other provisions broadly conformed to those of Arts. 2 to 6 of the European Convention which included many such

procedural safeguards as were already available at Common Law. The general pattern of relevant provisions of the Bills of Rights of the other states was the same as the Nigerian although they contained some modifications resulting partly from "special local conditions" and partly from "drafting improvements" on account of which those Bills of Rights have been called "Neo-Nigerian".[15]

7.59 It will be useful however to take note of an important difference in the case of East and Central African states. In these states there were strong minority groups like the white settlers and the Asians with entirely different cultural backgrounds. Evidently, here the situation was different, unlike West Africa, where the ethnic minority groups shared the political and cultural values and aspirations of the majority of ethnic groups notwithstanding the conflict/interests generated by "tribalism", Naturally, the non-African minority groups, especially in Kenya, as has been pointed out, attached greater importance to the Bills of Rights "as safeguards against abuse of power".[16] Notwithstanding the difference in approach that was to be found in the different states it is necessary to stress the importance of certain common features relevant to our study such as the nature and scope of the derogations, especially in the context of "emergency", and of the remedies, in so far as the provisions relating to personal liberty are concerned.

7.60 It may be stated at the outset that the African Independence Constitutions adopted a different technique in dealing with remedies which may be contrasted with the relevant provisions of the Indian Constitution enacted and adopted in 1949. Not only were the remedies named in India but the right to apply to the Supreme Court for the appropriate remedy for the enforcement of the fundamental rights as we have seen, was also guaranteed.[17] The European Convention which was signed in 1950 also provided that for the violation of the rights and freedoms set forth therein, there shall be "an effective remedy before a

national authority" (Art.13), besides other forums envisaged thereunder. During the colonial rule, as we have seen, the "High Courts" and "Supreme Courts" of the different territories were invested with the power to issue the writ of habeas corpus in Africa. As the writ signified the command of the English sovereign the Indian provision used the prefatory expression "in the nature of" to qualify it without limiting the general scope of the Courts' power to issue such "writs", "directions" and "orders" as would be "appropriate" for the enforcement of the rights in any particular case. In Africa no writ was named but the Indian phraseology in respect of the general scope of court's power was nevertheless used.[18] In view of the fact that the African Republican Constitutions retained in unaltered form the enforcement provision and the African Courts generally did not interfere as readily as the Indian courts did, it is possible to suggest that the difference did really have some bearing on the juristic outlooks displayed in the two jurisdictions.

7.61 It is worthwhile however to take note of the emphasis on compliance with "procedure" in depriving a person of his liberty which was common in all three cases - the European Convention as well as the Indian and Nigerian provisions; the "neo-Nigerian" provisions were different and were close in this respect to those of Malaysia and Singapore.[19] Even so, there was one important difference between the Indian and the Nigerian provisions which must be mentioned. In Africa the term "law" was defined to include "an unwritten rule of law"[20] whereas in India, as we have seen, the Supreme Court in the GOPALAN case[21] held that it was the enacted law to which Art.21 referred in the expression, "according to procedure established by law". On the other hand, the Indian and the African Bills of Rights, generally, as well as the European Convention, shared certain substantive as well as procedural rights which could be traced to Common Law.[22] These included - the principles of double

jeopardy, right against self-incrimination, right to be informed of the reasons of arrest, right to a fair trial (including legal representation) and the principles of the maxim Nulla poena sine lege. In the European Convention as well as the African Bills of Rights the right to compensation for unlawful detention was expressly stated and in Africa, additionally, the presumption of innocence; the Indian counterpart lacked these two provisions.

(2) Some Important Provisions of the Bills of Rights

(A) Derogations and Rights of Personal Liberty and Movement

7.62 Derogations, generally, were of two types, for peacetime and emergency, in other words, general and special. Among the different permissible general restrictions to which the right to personal liberty was subjected particular notice has to be taken of the provision embodying the concept of "preventive justice" which did not, however, authorise detention without trial. Restrictions on the liberty of a person are permitted "to such extent as may be reasonably necessary to prevent his committing a criminal offence".[23] The general derogation in the case of freedom of movement is grounded on such considerations as defence, public safety, public order, public morality or public health which have however to be "reasonably justifiable in a democratic society" [emphasis added].[24] In the first case the provision was directly inspired by the European Convention[25] but in the second case indirectly, as the Convention dealt with broad "human rights" and not the narrow "citizen's rights". In the European Convention the expression "necessary in a democratic society" is used but in the context of different rights such as private and family life, thought, conscience and religion, expression, assembly and association. [emphasis added][26]

(B) "Reasonably justifiable in a Democratic Society"

7.63 It is to be noticed that the captioned expression differed from its counterpart in the European Convention. It has been opined that the word "necessary" that occurred in the European Convention had a narrower

connotation and implied an objective test but the expression "reasonably justifiable" imported an exercise of discretion which the judges should be slow to disturb.[27] It is true that the amplitude of judicial review in the two cases could not be the same but at the same time it cannot be said that in Africa it was totally excluded. Indeed, as Elias points out, the expression indicated that courts could "measure" the validity or otherwise of the specified limitations. The court in an independent state may exercise judicial restraint in interfering with the legislative judgment of what was reasonably justifiable in a democratic society but not in the case of an executive judgment. The traditional African society, as we have seen, was generally democratic and it was the undemocratic colonial polity which had superimposed upon it undemocratic traditions by enacting and administering laws in derogation of the English Common Law and making a farce of the "normal judicial process".[28] Indeed, as Read suggests, societies in different parts of the Commonwealth did not share the same values and the judges in different jurisdictions were bound to respond differently in different contexts.[29] Therefore, although the same formula was used in all "Neo-Nigerian" Bills of Rights in the Constitutions issued from Westminster, to expect a uniformity in approach was an idle wish. Still, one general remark could perhaps be made with some certainty. In the context of freedom of movement which could be restrained by peacetime legislation everywhere, the appeal to judicial restraint was likely to take a milder form in that freedom of movement was merely an aspect of personal liberty and in the latter case, no derogation, in similar terms, was permitted in peacetime.

(C) Derogation in Emergency and Preventive Detention

7.64 We have already seen that in the colonial jurisprudence "emergency" was a well-developed concept which did not always correspond either with the Common Law principles of necessity or with that evolved

in the European Convention.[30] The latter permitted derogation "to the extent strictly required by the exigencies of the situation" in time of war or other "public emergency threatening the life of the nation" (Art.15(1)). The derogation provision appended to the pre-independence 1959 Nigerian Bill of Rights envisaged three types of "emergency" situations, namely, war and when there was in force either a proclamation by the Governor General declaring that a "state of public emergency exists" or a resolution passed by at least two-thirds of the members of the Federal Legislature declaring that "democratic institutions in Nigeria are threatened by subversion" and they authorised enactment of law derogating from the Bill of Rights "to such extent as might be reasonably justifiable in order to deal with the situation"; the resolution's life was fixed at two years subject to extension for the same period.[31] The provisions had however undergone changes in the Independence and Republican Constitution.[32] Among others, the Executive's power to declare emergency was substituted by a "simple majority resolution" of the Federal Legislature and derogation from the Bill of Rights during emergency was restricted to specified freedoms which included liberty, but not movement. It must also be pointed out that in other states there was a significant departure from the Nigerian provision in that the Executive was not precluded from declaring emergency elsewhere;[33] in some states a declaration could be made in respect of "semi-emergency" situations as well.[34]

7.65 The special derogation during emergency was further qualified by providing procedural safeguards in respect of both detention as well as restriction of movement. The original 1959 provision was retained substantially intact in Nigeria.[35] Notice has however to be taken of an important alteration. After independence, it was the legislature and not the Executive, as was the case originally, which could decide if the acceptance of the recommendation of the "Tribunal" constituted to determine the continued detention or restriction should be made mandatory. The

provision in this respect resembled that of Malaysia and Singapore which, unlike India, did not expressly make acceptance of the recommendation mandatory.[36] However, Malaysian provision was, as we have pointed out, closer to Indian in that in both cases the ultimate exercise of the power of detention rested with the Advisory Board.[37] The Nigerian safeguard of consideration of the matter by the "tribunal" was not in the nature of a condition-precedent to continued detention. It was stated thus:[38]

> Where a person is detained. . . or [his] movement. . . is restricted. . . [he] shall be entitled to require that his case should be referred within one month of the beginning of. . . detention or restriction and thereafter during that period at intervals of not more than six months to a tribunal. . . [which] may make recommendations concerning the necessity. . . of continuing the detention. . .

7.66 It may be noted that the Nigerian safeguards lacked teeth as there was no constitutional obligation to provide the detainee with the "grounds" of his detention. The judiciary in India, as we have seen, could effectively restrain the Executive from abusing the power of preventive detention by testing the "grounds" which, under the Constitution, the Executive was bound to supply to the detainee. Indeed, the Nigerian provision did not, in term, confer upon the detainee any right of "representation", unlike India.[38] Although the "independence and impartiality" of the Tribunal was ensured by providing it with a Chairman who had to be a lawyer and appointed by the Federal Chief Justice, it was doubtful if the Tribunal could play any effective role not only because its recommendation had no binding effect but because it could not make effective inquiry to support its recommendation in the absence of an effective participation in its processes by the detainee who could merely require his case to be "referred" to it.

7.67 The other "Nigerian-style Bills of Rights" according to de Smith, also provide only "a frail safeguard" for the detainee, namely, periodic review at six-monthly intervals by an impartial advisory tribunal.[39] There was no requirement, as in Nigeria, for a mandatory review within a minimum

period after detention. He however credits the Constitutions of Uganda and Kenya as affording "really significant safeguards". These are: the detainee must be furnished with "grounds" within five days; the fact of detention must be publicly notified within fourteen days; his case is to be reviewed within one month and thereafter at six-monthly intervals by an independent advisory tribunal; he is to be allowed either personal appearance or legal representation before the tribunal; a Minister (in Uganda) is to make a monthly report to the Parliament with details of detention and recommendations.[40] We may add that the position in Zambia and Malawi was not much different.[41] In fact in all these cases even though the recommendation had no binding effect, as in Nigeria, the detainee was, in these cases, unlike Nigeria, given, in terms, a "right of representation," similar to the Indian provision.

## III. Personal Liberty and Republican Governments

### (1) Some Important Features of the Republican Constitutions

7.68 The state of Zambia, as we have already noted, was born with a Republican Constitution of which the relevant provisions have already been noted. The case of Malawi may also be excluded from detailed consideration at this point as the Republican Constitution turned it into a One-party state in 1966. Uganda was unique in another respect. By a constitutional amendment in 1963 it conferred upon itself the status of an "independent sovereign state" with a President replacing the British monarch as the Head of State.[1] Reference, therefore, will have to be made to the relevant provisions of the truly Republican 1967 Constitution but it should be noted that the 1963 amendment did not affect the Bill of Rights which appeared in substantially the same form in the 1967 Constitution.[2] In the Republican Constitutions of Nigeria (1963) and Kenya (1964) also the provisions of the Bills of Rights remained intact, but while in the Ugandan and Nigerian Constitutions these were specially entrenched,[3] in the

Kenyan Republican Constitution the special entrenchment was removed. It is difficult to say how far this change reflected the philosophy of the new constitutional status which is said to have marked the progress of the country from the freedom of "groups" to that of "individuals"[4] although it may be said that the process started at independence when the Bill of Rights replaced the earlier device of protection against discrimination on racial and religious grounds through the "Council of State".[5]

7.69 In the case of Ghana and Tanganyika the absence of Bills of Rights in the Independence Constitutions has been noted. However, in the Republican Constitutions of Ghana (1960) and Tanganyika (1962), as well as that of Malawi (1966), human rights are not ignored. Tanganyika retained the preamble of the Independence Constitution. The Republican Constitution, according to the preamble, was to provide for the government of Tanganyika as a "democratic" society; it also spoke of the rights to life, liberty and security of person, among other rights, as "equal and inalienable rights of all members of the human family" but "subject to respect for the rights and freedoms of others and for the public interest". In Malawi, under the caption "Fundamental Principles of Government", it was stated in s.2(1) (iii) that the government and the people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nation's Universal Declaration of Human Rights and shall adhere to the "Laws of Nations" from which, according to sub-s.(2), there could be derogation by any law when "reasonably required in the interests of defence, public safety, public order or the national economy."

7.70 In the Republican Constitution of Ghana s.13 provided that the President, immediately after assuming office, should make a "solemn declaration before the people" of his "adherence" to certain "fundamental principles" which did not, in term, formulate any Bill of Rights but nevertheless spoke of certain rights, as follows:

> That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

In the form of the declaration it was also stated that "freedom and justice should be honoured and maintained" and that "no person should suffer discrimination on grounds (inter alia) of race, tribe and political belief."[6] (emphasis added). It may be noted that there was no mention, in terms, of personal liberty. By s.55 the President was empowered during his initial period of office, to give directions by legislative instruments in the "national interest" by which any enactment other than the Constitution could be altered. In the Constitution of the second Republic of Ghana, enacted in 1969, not only was there a preamble which asserted, inter alia, "respect for the dignity of the individual", but also a comprehensive Bill of Rights modelled on the 1967 Uganda Constitution; in either case it was asserted that the Constitution shall be the "supreme law" of the land.[8]

7.71 The power to declare that a "state of public emergency exists", in the Constitutions of Uganda (1967) and Ghana (1969), is given to the President "acting in accordance with the advice of the Cabinet" although, as everywhere, the declaration has to be ratified by Parliament within the prescribed period.[9] In either case detailed procedural safeguards are to be found in respect of preventive detention (also 'restriction' in Ghana) during an emergency:[10] "grounds" are to be furnished "as soon as reasonably practicable" but not later than two months, in Uganda, and twenty-four hours, in Ghana, where the "next of kin" has also to be informed within seventy-two hours; a notification in the Gazette has to be made of the fact, within ten days in Ghana and twenty-eight days in Uganda. The provisions, however, differed materially in respect of the constitution of the Review Tribunal and its powers and functions.

7.72 In Uganda the scheme, which was common to the other provisions relating to preventive detention, followed faithfully the Independence Constitution with minor alterations in respect of time-scales as part

of a common pattern that marked the few changes. In Ghana the time-scales were indeed shorter but there were other significant changes. The tribunal was to be constituted with at least three justices of the Supreme Court and presided over either by the Chief Justice himself or by another justice appointed by him, and the same tribunal was not to review any case more than once. The tribunal had the power to order release of the detainee and payment of compensation to him. There was a widespread use of preventive detention during the Nkrumah regime, and though to a lesser extent, during military rule under the National Liberation Council. The provisions accordingly reflected the anxiety of the Constitution makers to provide adequate safeguards against the abuse of power. This found expression in the provision relating to "enforcement" as well.[11] As in India the remedies including habeas corpus were named with a two-tier right of appeal for the "person aggrieved". The residuary clause deserves special attention:

> Art.28(5). The rights, duties, declarations and guarantees relating to the fundamental human rights specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in democracy and intended to secure the freedom and dignity of man.

7.73 After Kenya became a Republic a few important amendments were made to the Constitution in respect of provisions relating to special derogation and emergency.[12] The same amending Act also introduced important changes in a pre-independence enactment, The Preservation of Public Security Act,[13] and incorporated its provisions referentially into the Constitution. There was no provision now for "declaring an emergency",[14] but the President could make an order at any time "to bring into operation" Part III of the Act, wholly or partly, generally or in any part of Kenya, subject, of course, to the usual provision of ratification by the National Assembly;[15] in such event the special derogation provisions became operative.[16] The constitutional safeguards applicable in the case of preventive detention were, however, retained intact.[17]

(2) Some Emergency Laws

(A) The "Preservation of Public Security" Laws

(a) A general view

7.74 In 1960 measures carrying the same title were enacted by the colonial government, which have continued to operate albeit in amended and modified forms, in Kenya, Zambia and Malawi although Zambia has still retained in its Constitution the terminology as well as the concept of "emergency" which disappeared altogether from the Republican Constitution of Malawi and re-appeared in a different form in Kenya. In Zambia and Malawi,[18] the term "public security" has been given inclusive definitions embracing, in common, such ideas as:

> securing the safety of persons and property, maintenance of supplies and services essential to the life of the community and of the administration of justice, prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, concerted defiance of and disobedience to the law and lawful authority.

In Kenya, the term, "preservation of public security" included "unlawful attempts and conspiracies to overthrow the Government or the Constitution" and also, additionally, "the defence of the territory and people of Kenya" for which neither Zambia nor Malawi provided a parallel.[19]

7.75 In Malawi the Minister, and, in both Zambia and Kenya, the President, when satisfied as to the existence of the conditions specified, may bring the relevant provisions of the enactments into operation and make "regulations" for the preservation of public security, but the scheme in all three cases was different. In Kenya and Zambia, different measures could be enacted under different circumstances[20] but in Malawi no such distinction was made.[21] In Kenya regulations providing for "detention of persons" could be made as "Special Public Security Measures" when the President had made an order under s.29 of the Constitution;[22] in Zambia, when a declaration under s.29(1)(b) of the Constitution was in force and he was satisfied that the situation was "grave",[23] whereas in Malawi there was no special requirement. In all cases however, it was expressly provided that such regulations could also provide for payment of

compensation to "persons affected by the regulations"[24] and also for suspending the operation of any law other than the Constitution and (except in Zambia) for amending any such law.[25] In Zambia and Malawi, provision could also be made for the "delegation and transfer of powers and duties conferred and imposed by or under the regulations,"[26] possibly ex abundanti cautela in view of earlier judicial pronouncements,[27] in addition to the usual "incidental and supplementary clause."[28]

7.76 In all cases it was provided that the regulations would prevail against all other laws, except the Constitutions.[29] The power to make regulations was expressly subjected to legislative control in both Kenya and Zambia,[30] but not in Malawi. However, to examine the actual scope and operation of the power it is necessary to examine the relevant provisions of the subsidiary legislations in all three cases.

(b) Kenya

7.77 In Kenya, The Public Security (Detained and Restricted) Persons Regulations 1966 were made by the President under s.4 of the Act. By Reg.3 the Minister was authorised to pass a "restriction order" against any person if he was "satisfied" that it was necessary "for the preservation of public security to exercise control over the residence and movement" of the person and, if "control" was necessary "beyond that afforded by a restriction order", the Minister could pass, under Reg.6, a "detention order". The restricted person could be removed "forthwith" to the specified area but the Minister could vary or revoke the order at any time. The nature of "restrictions" contemplated were set out in Reg.4 and covered a wide range. It could even amount to a "detention" in that a person could be required to "reside in a particular house" and to remain there "during such hours of darkness as may be specified in the order". Similarly, although under Reg.5 the Minister could permit him to temporarily leave the area, he could also direct that during such absence he shall "remain in police or prison custody". It is indeed

enigmatic that such a condition is not specified in the case of the permit which the Minister may issue to a detained person "to leave the place of detention for a fixed period" under Reg.7(1) and it is merely provided that the provisions of Reg.5 shall mutatis mutandis apply in such a case. On the other hand, although a detained person shall be "deemed to be detained in lawful custody" there was no parallel provision in Reg.5.

7.78 The "Review Tribunal" constituted under Reg.8 was to make "recommendations on the cases of restricted persons under s.25 (4) and (5) and on the cases of detained persons under s.27(2) and (3) of the Constitution". It could have six members but it was to be presided over by the member who was appointed by the Chief Justice from among persons qualified to be appointed as a judge of the High Court.[31] The constitutional guarantee of the "right of representation" and appearance and legal representation before the tribunal was reiterated, omitting, however, the time limit for the "review", in express terms. The constitutional guarantee of "specifying in detail the grounds" was also re-stated in Reg.10(1) but in clause (2) it was provided that such "fact, information or document" need not be disclosed as would be likely to be prejudicial to either "preservation of public security" or "public interest". The reservation, it may be noted, was without a parallel constitutional protection, unlike the Indian constitutional provision on which it was apparently based.[32]

7.79 How the recommendation by the Tribunal was to be drawn up was stated but not how it would weigh with the Minister to whom it was to be made. Naturally, it became a merely advisory opinion according to the constitutional provisions at least in so far as it related to a detention order.[33] The position in respect of the restriction order would, however, depend on whether sub-s.(5) of s.81 was to be read subject to sub-s.(3) of s.83 of the 1969 Constitution.[34] The latter laid down that "unless otherwise provided by law" the authority shall not be obliged to accept

the recommendation whereas in the former the position was reversed. Even so, notice has to be taken of the fact that the former dealt with the "general" derogation in respect of freedom of movement while the latter concerned the "special" derogation which, however, applied only to regulations made under Part III, namely in the instant case. Therefore, the list of matters in respect of which regulations could be made did not apply with full effect to Part II, but only mutatis mutandis, with the result that the scope of regulations made under Part II was constricted.[35] This difference appears to have been overlooked by Ghai and MacAuslan who are rather critical of the common list.[36] In this view of the matter it is submitted that, in the case of restriction orders contemplated under regulations made under Part II, the recommendation ought to be construed as having binding force in virtue of s. 81(5) itself.

(c) Zambia

7.80 In Zambia, The Preservation of Public Safety Regulations were made in 1964 under ss.3,5 and 6 of the Preservation of Public Security Ordinance (cap.265), which were amended from time to time.[37] The President could pass a 'restriction order' under Reg.15 against any person if he was "satisfied" that it was necessary for "preserving public security" in the "prescribed area". Unlike Kenya, the restrictions contemplated were few and simple - the restricted person shall or shall not remain within the prescribed area or at any particular place therein and shall notify his movements. Any contravention of the order was an offence but it was also provided that a restricted person could be removed to the appropriate place. A "detention order" could be passed by the President under Reg. 31A if he was "satisfied" that for "preserving public security" it was necessary "to exercise control" over any person. Such a person could then be arrested and detained whether he was within or outside the prescribed area.[38] Although the regulation did not

expressly state so, it was implied, in the omission of the requirement of a "prescribed area", that a detention order could be passed when it was not a case of a local and minor disorder but, as stated in s.3(3) of the Ordinance, when "the situation in Zambia" was "grave".

7.81 Unlike Kenya, in Zambia a detention order could be "suspended" on conditions, the contravention of which was an offence. Also, unlike Kenya, "the place of detention" had to be so declared by the President and the detention had also to be in accordance with such instructions as the President might issue. There was, therefore, more scope for the detention being challenged in Zambia, despite the use of the expression "deemed to be in lawful custody" in both cases. On the other hand, while in Kenya the provision of "28-days detention pending decision" following arrest by any authorised officer of the Mau Mau regulations[39] was not repeated, it was now introduced in Zambia;[40] however, here it was provided that the person could be released if the police officer who arrested him found, on further inquiry, that there were "no grounds which would justify his detention." Similarly the power to stop and question and the provision of interim custody following such event, though discarded in the new Kenyan provision,[41] was introduced in Zambia as "Power to detain suspected persons".[42] Indeed, in Zambia the interposition of "defence forces" was expressly contemplated.[43]

7.82 However, the provision which demands special special attention is Reg.31F. It is applicable to the "prescribed area" declared by the President. An "authorised officer" may establish "rehabilitation centres" in such an area and direct that any person or class of persons be held in such centres. Apparently the regulation contemplates "detention" and "restriction" <u>simpliciter</u>. This is borne out by the provision which makes procedural safeguards granted to "detained" persons, vide sub-regs. (7), (8) and (9) of Reg.31A, applicable, in terms, to persons held under this regulation. As the term "prescribed area" was used in this regulation,

as in Reg.15, to indicate local and minor disorder, the regulation, it is submitted, was ultra vires s.3(3) of the Ordinance;[44] neither the language used nor any other intrinsic evidence suggested that the term was used in two different senses in the two provisions.

7.83 Unlike Kenya, the regulations in Zambia were made a few months before the country attained independence.[45] It is for this reason that some of the regulations such as, 20, 31A(6), 31C and 31F smacked of a colonial flavour. In fact the procedural safeguards, referred to above, were also inserted subsequently, but before independence.[46] A tribunal was contemplated, consisting of a Chairman, qualified to be enrolled as an advocate, appointed by the Chief Justice and such other persons as might be appointed by the President. It was to review cases of persons "lawfully detained" within a month of the detention and thereafter at six-monthly intervals. It had to submit recommendations to the President "concerning the necessity or expediency of continuing" the detention but the latter was not obliged to accept the same. The constitutional safeguards provided at independence were on the same lines and as we have seen,[47] additionally spoke of the right of "representation", albeit confined expressly to the tribunal, unlike the Indian provision. In the amended constitutional provisions the safeguards were extended to a "restricted" person also but its nature was changed as will appear from s.26A(1)(c), quoted below:[48]

> if he so requests at any time during. . . such restriction or detention not earlier than one year. . . his case shall be reviewed by. . . tribunal. . . presided over by a person appointed by the Chief Justice who is or is qualified to be a judge of the High Court.

In clause (d) the "right of representation" was expressly extended to the detaining authority as well, which was an improvement on the Indian provision;[49] the "advisory" nature of the tribunal's recommendation was, however, maintained.[50]

7.84 Some of the important provisions of The Preservation of Public

Security (Detained Persons) Regulations made under s.3 of the Ordinance may also be indicated.[51] A "place of detention" was defined as a place authorised by the President under Reg.33(5) of the principal regulations. A "Committee of Inspection" was contemplated which could visit such places to hear complaints and make recommendations. Provision was also made for regular medical examinations of the detainees and also for their diet, clothing, reading material, facilities for communication and receiving visitors including lawyers. It was also provided that "unreasonable force" shall not be used in dealing with a detained person and more explicitly, he shall not be provoked and also not struck, except in self-defence. The "officer or guard" contravening this regulation could be held as "guilty against discipline" and punished. These wholesome measures were likely to mollify the evil and unpleasant consequences of political detentions. In the first place there was sufficient precaution against any possible use of torture as was likely to happen in such cases. Secondly, the punitive effect of the detention, which caused bitterness and made a physical and mental wreck of a man, was reduced by requiring him to be accorded benevolent treatment attuned to the preventive purpose of the measure. Even so, there was scope for including a specific provision against solitary confinement and also other rigorous measures used against ordinary criminals whether in the normal course or as a "disciplinary" measure under the Prison Rules. However, these provisions appearing as subsidiary legislation and not as mere executive instructions, there was scope for compelling compliance therewith by the authorities through the writ of mandamus.

(d) Malawi

7.85 In Malawi, the Public Security Regulations made under s.3 of the Act (cap.14:02) dealt with "detention orders" and "control orders", under Regs. 3 and 4 respectively. In both cases the only requirement was:

". . . the Minister. . . considers it to be necessary for the preservation of public order so to do. . ." Any member of the armed forces also, besides any administrative officer and police officer, may arrest a person against whom a detention order was passed. There were also some other provisions normally used for the control of terrorism, such as the control of firearms etc., "special areas", offences of consorting with and harbouring "suspected persons", etc.[52] The regulations also contained the usual"28-days detention pending decision" in the case not only of detention orders but also control orders, with the usual "reason to believe" clause.[53] The scope of the "control orders" of Malawi was otherwise similar to that or the "restriction orders" of Zambia. The "special derogation" provisions of the Independence Constitutions of both Malawi and Zambia did not touch the freedom of movement and was subjected to the further qualification - "reasonably justifiable for the purpose of dealing with the situation".[54] In Zambia the "28-days detention" provision was confined to "detention orders" but in Malawi the application of the provision to "control orders" also was apparently open to challenge so long as the Independence Constitution held the field.

7.86 The Minister could vary, revoke and suspend on conditions, any detention order at any time but he was obliged to "review" such order every six months;[55] in the case of control orders although the first review was to take place after six months, the subsequent reviews at quarterly intervals.[56] Apparently the Reg.3 as a whole was ultra vires in that it did not satisfy the constitutional condition-precedent of providing the detainee with the right to have his case reviewed by an "independent and impartial tribunal". Another significantly obnoxious feature compelled the detainee to "perform such work as [might] be required of him from time to time by any person lawfully in authority over him".[57] However, it is submitted that the entire provisions of both Regs. 3 and 4 were open to challenge on the ground that they authorised the exercise of

the Minister's powers with respect to "public order" and not "public security", notwithstanding the fact that the latter term was defined in an inclusive manner in the parent Act. In view of the penal incidents of the provisions, it could be argued, such a definition itself was ultra vires the common law protections embodied in ss.13 and 18 of the Independence Constitution. In fact the 'non-obstante clause embodied in s.5(2) of the Act itself reiterated the supremacy of the constitutional provisions and the "special derogation" clause of the Constitution also did not affect the rights granted under ss.13 and 18.[58]

(B) Some Other Important Laws

(a) Malawi

7.87 A brief reference may be made to another pre-independence law of Malawi which is still in full force - the Restriction and Security Orders Act.[59] It provided for "restriction orders" and "security orders" which could be made by the Minister against a convict and also "undesirable persons".[60] By a restriction order a person could be prohibited from entering or leaving any area without the "consent" of the specified officer. The security order corresponded to the provision for binding over "to keep the peace and to be of good behaviour". An undesirable person was defined to mean -

> a person who is or has been conducting himself so as to be dangerous to peace, good order, good government or public morals, or who is or has been attempting, or conducting himself in a manner calculated, to raise discontent or disaffection. . . or to promote feelings of ill-will and hostility between different races or classes.

The emphasis added in the above extract indicates the political aspects of the power similar to one posited in what we have called "constitutional formula" of the colonial deportation laws.[61] The provision directly impinged upon the freedom of movement and the general derogation, as we have seen, was not only limited to permissible exceptions to such cases as "public safety" and "public morals", but was also required to satisfy the

test of the law of being "reasonably justifiable in a democratic society".[62] Inasmuch as there was provision for a judicial inquiry, prior to the order, it was possible for the person concerned to contend that his activities amounted to nothing more than the pursuit of legitimate political aims allowed in a democratic society.[63] Nevertheless, the report of the Magistrate not being binding on the Minister, the provision could possibly be challenged as ultra vires.

(b) Kenya

7.88 Reference may now be made to the special provision made in the Kenya Independence Order in Council 1963[64] and the subsidiary legislation made thereunder, The North Eastern Province and Contiguous District Regulations 1966.[65] The Governor General, under s.19(1) of the Order, and the President, under s.127 of the 1969 Constitution,[66] could make regulations for "ensuring effective government" in the north-eastern region by which "temporary adaptations, modifications or qualifications of exceptions to the provisions of the Constitution or of any other law" could be made. This special provision was made to deal with the secessionist activities that had been gaining strength in the region for some time.[67] The regulations followed the scheme of some of the most stringent Mau Mau regulations and contemplated interposition of the "security forces" besides constituting "prescribed areas" and "prohibited zones" to restrict freedom of movement in those areas and create offences in respect of specified activities in those areas.[68] The nature of wide and uncanalised powers assumed under the regulations was best reflected in Reg.11 dealing with the power of arrest. Any person, whether found within the prescribed area or not, if "reasonably suspected" of having committed "an offence affecting the preservation of public security in the prescribed area" could be arrested without warrant but there was no precise definition of the offence. He could then be detained up to 28 days pending decision on the question of charge and on the authority of

the Provincial Police Chief the detention could be continued for a further period of 28 days.

7.89 Part VIII (ss.22-31) provided for "Restriction and Detention of Persons" but it was expressly contemplated that many of the provisions of the Public Security (Detained and Restricted) Persons Regulations 1966 shall, mutatis mutandis, apply. However, instead of the Review Tribunal, an "Appeal Tribunal" was constituted and the Minister was required to supply the order and the "statement of grounds" and also "particulars" to enable the detained as well as the restricted person to present his "appeal", within two months. In both cases there was also provision for a six-monthly "review" but in neither case was the Minister obliged to accept the "report" of the Tribunal which was empowered to regulate its own procedure and expressly authorised to conduct proceedings in camera as well as to dispense with the "rules of evidence". Although, neither in the Public Security Regulations nor in these regulations was there a right of legal representation, in both cases there was the right of making "written submissions" and as well of a personal hearing. On the whole, Part VIII provided for better safeguards compared to the other provisions.

(C) The Emergency Powers Acts

7.90 In Ghana, Nigeria, Uganda and Zambia laws with the captioned title, in common, were also enacted, in each case, almost immediately after independence.[69] In Nigeria, there was, in addition, the Emergency Powers (Jurisdiction) Act which conferred "exclusive" original jurisdiction on the Federal Supreme Court with respect to any question that may arise as to the validity of the Emergency Powers Act or of any regulation, order or other instrument made thereunder as well as of any act done under them. In all states the enactments conferred on the Heads of the States the power to make regulations during an emergency which, in Ghana, embraced three different types of situations - "limited state of emergency",

"local state of emergency" and "state of emergency";[70] in other states reference was made to the constitutional definition of the terms. In the Ghana enactment, and as we have seen, in the Independence Constitutions of the different states, it was provided that the Head of State could make the requisite declaration.[71]

7.91 The requirement of the regulation-making power in Nigeria corresponded to the ordinary law-making formula - "for maintaining and securing peace, order and good government"; in Uganda, additionally for "suppression of mutiny, rebellion and riot and maintaining supplies and services essential to the life of the community; in Zambia, and also in Ghana, in one case ("state of emergency"), the "defence" of the state and also "public order" and "public safety" were added.[72] In Ghana, in the case of the "local state of emergency" the requirement of "defence" was dropped and the other objects were related to a particular "emergency area " that might be specified in the proclamation;[73] in the case of "limited state of emergency" the requirement was differently stated, namely, "in the interest of public health or to make available the uninterrupted supply and distribution of food, water, fuel or light or the means of locomotion to the community and the continued administration of government services", embodying what we have called the concept of "civil emergency".[74]

7.92 In Nigeria, the regulations could provide for the detention as well as the "deportation and exclusion" from the country or any part thereof; in Uganda, in addition, for restriction of movement;[76] in Zambia, the provision was similar to that of Uganda but qualified in one respect, namely, "deportation and exclusion from the Republic" could be made of persons who were not citizens;[77] in Ghana, in the case of "state of emergency",[78] for detention as well as for "deportation and exclusion of persons from Ghana" but in the case of "local state of emergency",[79] for "exclusion" from the "emergency area" and detention "for the commission

of any act in relation to the local state of emergency". The use of the term "act" underlined in the last sentence was indeed inappropriate. It was intended to mean an offence as appears from The Local State of Emergency (Doroma State) Regulations 1958 made under s.s. 3 and 6 of the Act.[80] Reg.2(2) provided that any of the persons named in schedule 2 shall, on entering the area described in schedule 1, be guilty of an offence which was punishable, on summary conviction, by a term of imprisonment which could extend to three months or a fine of £50 or both. The provision combined "detention" with "exclusion from the emergency area" but there was the interposition of the judicial process of trial with the right to bail and other common law protections which, despite the absence of a Bill of Rights in the Ghana Constitution, could be effectively invoked. Even so, the fact that the regulations constituted ad hominem legislation for which there was no dearth of precedent in Ghana,[81] made it less inoffensive.

7.93 Of the other subsidiary legislation made under the Emergency Powers Act, reference may be made to those of Nigeria with which the situation arising out of the constitutional breakdown in 1962 in the western region was sought to be dealt with.[82] Under Reg.2 of The Emergency Powers (Detention of Persons) Regulations, if the "Administrator" (who was to discharge the functions of the superseded regional executive and was responsible to the Federal Prime Minister) was "satisfied" that any person in the "emergency area" (western region) was or recently had been"concerned in acts prejudicial to public safety or in the preparation or instigation of such acts" and it was necessary to "exercise control" over him, he could pass a detention order either orally or in writing. Although a written confirmation of the oral order was required, it was contemplated that the order in any case, shall be "complied with forthwith" - a provision which was apparently based on a colonial precedent[83] which could possibly be challenged as ultra vires s.28 of the Independence

Constitution on the ground that it was not "reasonably justifiable for the purpose of dealing with the situation". There was in fact a move to amend the Constitution to introduce the power of preventive detention without declaration of emergency but whether the proposal contemplated deletion of the above clause is not known.[84]

7.94 Under Reg.2 of the Emergency Powers (Restriction Orders) Regulations it was provided that the Administrator could, if "satisfied" that it was necessary for "maintaining public order", direct that any person "shall be and remain at or shall not be "within the emergency area and also "notify his movements", either in addition or in the alternative. The only safeguard in the case of detention as well as restriction order was a mere executive control. The copy of the order in each case was to be transmitted "as soon as practicable" to the Federal Prime Minister who could "disallow" the order which was, otherwise, of an unlimited duration. Regulation 2 in both cases, therefore, was open to challenge as ultra vires s.29 of the Independence Constitution which contemplated that "the necessity or expediency of continuing the detention or restriction" was to be determined by an independent and impartial tribunal within a month and thereafter periodically at six months intervals.

(D) The Preventive Detention Acts

(a) Ghana

7.95 In Ghana, as we have seen, regulations providing for "detention" could be made after a declaration - either of a "state of emergency" or of a "local state of emergency" - had been made, but it was also provided in the 1957 Act that regulations appropriate for those situations could also be made and their approval obtained from Parliament in advance although they could be brought into effect only when a declaration was made.[85] The Act affirmed that it had replaced the Emergency Powers Orders in Council 1939,[86] but it did not follow the Order to provide that the regulations must also contemplate adequate safeguards; on the contrary it

incorporated an "indemnity",[87] and also a non-obstante,[88] clauses. The Act was a permanent measure and it did not also lay down the maximum time-limit during which the proclamation of emergency could remain in force. When enacted in 1958 the Preventive Detention Act was given a limited life of five years, subject to provision for extension for a further period of three years,[89] but it did away with the necessity of making any proclamation of emergency and subsidiary legislation to provide for detention in some but not all of the situations envisaged in the 1957 Act. It conferred power, under s.2(1), on the Governor-General to make a detention order against a citizen, if "satisfied" that it was necessary to "prevent him from acting in a manner prejudicial to the defence of Ghana, the relations of Ghana with other countries or the security of the State".[90] However, it provided for two important safeguards - within five days the detainee was to be informed of the "grounds" and he was to be afforded an opportunity of making "representations in writing" to the Governor-General.[91] Indeed these were far too inadequate in that detention in any particular case could extend to ten years and the Governor-General was not answerable to Parliament whereas the scope of judicial review was patently limited by the "subjective satisfaction clause" of the Act and absence of a Bill of Rights in the Constitution.

7.96 The background for the enactment of the measure was provided, it is said, by the deteriorating relations between the ruling party (the Convention People's Party) and the opposition (the United Party). Some of the leading members of the opposition had been deported and two of their M.Ps had been convicted although the conviction was quashed on appeal.[92] Although the 1957 Act did not lay down any requirement other than the satisfaction of the Governor-General for the proclamation of a "state of emergency" such a step in the wake of the events just mentioned would have definitely resulted in a loss of legitimacy which the ruling party was perhaps not prepared to accept. The meagre safeguards, whatever they were worth, apparently reflected the anxiety of the government to

secure credibility and legitimacy by improving upon the provisions of the 1957 Act. However, notwithstanding the professedly preventive character of the Act as expressed in s.2(1), the provision of s.3(3) which authorised detention for double the period specified in the order of a person who attempted to evade it, was patently penal.

7.97 The Act was amended from time to time until 1964 when the new Act consolidated the law and replaced the old enactment.[93] It provided, in addition, for "restriction orders" which could be passed as alternative measures and were not saddled with a separate requirement except that "in the opinion of the President a detention order would not be suitable on account of the age or health of the person or for any other reason."[94] Such restriction order could be made for a period of five years and, in addition to imposing restriction on movements, it could also impose "conditions" in respect of "employment or business" and "association or communication with other persons". Under s.8 the President could, when he considered such order to be "more appropriate" in the case of any detained person, substitute such order for the detention order. In the 1958 Act there were no parallel provisions but there was a provision to vary, revoke and suspend on conditions the detention order which was made more liberal in the 1964 Act in that the suspension could be even unconditional and the provision was also made applicable to restriction orders.[95] The 1964 Act being enacted as a permanent measure, it was provided in s.3 that a detention as well as a restriction order could be extended by the President for a further period of five years. The penal provision of s.3(3) of the 1958 Act was re-enacted in the later Act in s.6 which was also applicable to restriction orders. The procedural safeguard embodied in s.2(2) was also re-enacted in a similar manner.[96]

7.98 It is, however, necessary to take note of the altered constitutional position. Under the Republican Constitution the President combined the power which was previously exercised by the Governor General

and the Prime Minister. Further, in the new Constitution there also appeared in s.13 a statement of "fundamental principles" to which the President was required, on assuming charge of the office, to "solemnly declare his adherence". There was however a significant change in the scheme of the 1964 Act. The power to make the restriction and detention orders and the provision for the procedural safeguard were posited in separate sections whereas in the 1958 Act the power of making the detention order was posited in the first sub-section and the procedural safeguard was posited in the second sub-section of the same s.2 so that under the old Act it could be said with greater emphasis that the power was qualified. However, further observations on this point are reserved until examination of the judicial response. Nevertheless, it will not be inappropriate to mention in this context that within a few days of the enactment of the later Act, the Habeas Corpus Act 1964 was enacted.[97]

(b) Tanganyika

7.99. The distinctive feature of the law enacted in Tanganyika was that there was no provision for "restriction orders" in the Preventive Detention Act, 1962, of Tanganyika[98] although it had other provisions - such as the procedural safeguard which corresponded to the language and scheme of the 1964 Ghana Act[99] and the provision under which the President could "rescind" and also "suspend" the detention orders.[100] On the other hand it had other material differences also. The power of the President to direct "detention" of any person was saddled with two alternative requirements:[101]

> (a) Where it is shown to the satisfaction of the President that any person is conducting himself so as to be dangerous to peace and good order in any part of Tanganyika or is acting in a manner prejudicial to the defence of Tanganyika or the security of the State; or
>
> (b) The President is satisfied that an order. . . is necessary to prevent any person from acting in a manner prejudicial to peace and good order in any part of Tanganyika, or to the defence of Tanganyika or the security of the State
>
> [emphasis added]

However, the apparent distinction between the two requirements was narrowed down by providing that in all cases the President "shall require that any information on which he satisfies himself" shall be given on oath, unless he is "satisfied that it is not feasible or practicable" to do so in respect of "any particular item of information".[102] Further, there was another important provision that - "No order made under this Act shall be questioned in any court."[103]

7.100 The scope of judicial review in Ghana (under the 1958 Act), and in Tanganyika, apparently narrowed down to one common point, which was not debatable. In either jurisdiction the court could at least hold a detention illegal if there was any violation of the procedural safeguards, For, in Tanganyika, it was only the validity of the order and not the detention that was immunised against judicial challenge. It could also be argued that it was only the "formal" validity that was protected. In other words the exercise of the power of detention must conform to the prescribed requirements. However, an order passed under clause (b) quoted above appeared to have been insulated to a greater extent against judicial challenge by the use of the word "satisfied" to indicate the President's subjective satisfaction. In the case of an order passed under clause (a) the court could insist that it had to be satisfied that the President had sufficient material before him, even if unsworn, on which he had based his "satisfaction".

7.101 There was yet another angle to judicial review in Tanganyika. Here, unlike Ghana, the Act provided for an "Advisory Committee" with two members to be appointed by the Chief Justice and another two as well as the Chairman, by the President.[104] Although the President was not obliged to accept its "advice" a duty was laid on him to refer to it every order passed by him, "within a year of the order" even when no representation was made to him, but "as soon as may be" when a representation was made. Possibly because the enactment was a permanent

measure and it did not prescribe a maximum time limit, there was a provision for periodic review "at intervals not exceeding a year" which had an important facet which required the President not only to inform the Committee of the "grounds" but also "such other matters" which were relevant to his "continued detention". The Committee could "interview" the detained person but it is doubtful if the latter could insist on a personal hearing. In any case, it could be argued that for a "continued detention" beyond a year there had to be a fair and impartial consideration of the case. In any case where this right was infringed the aggrieved person could possibly secure his release.

7.102 Although the Republican Constitution of Tanganyika, like that of Ghana did not contain any Bill of Rights, the preamble spoke of liberty as an "inalienable right" and of the state being governed as a "democratic society". This appears to have inspired the provision for the "Advisory Committee" and it could equally be expected that the rulers were likely to tolerate an independent role of the judiciary which could ensure the exercise of the power of judicial review in a normal and uninhibited manner. Unfortunately, the provisions of s.4 cast doubts on the intentions of the rulers. It enabled the detainees being treated as ordinary criminals by authorising the President to make regulations for applying to them "any of the provisions of the Prisons Ordinance or of any rules made thereunder relating to convicted criminal prisoners and disapplying such provisions relating to civil prisoners," although the detainee was to be held as a "civil prisoner in custody or prison" by any police officer or prison officer.

## IV. Personal Liberty and One-party States

### (1) The philosophical base

7.103 A multi-party political system has come to be regarded in the western world as the only system which can ensure a democratic form of government and guarantee personal liberty. There is also a strong current

which favours the opinion that a parliamentary form of government best serves a modern democracy.[1] These ideas, however, did not carry conviction with the leaders of the new nations of Commonwealth Africa who were faced with tasks which the colonial rulers had not contemplated. There is now a growing realisation in the West of the position, which has been succinctly described as follows:

> The entire system of law and institutions inherited from colonialism at independence dictated that the new states were to be racked between the values of the subsistence sector, embodied in customary law and institutions, the values of modernising enclaves embodied in the received English law and institutions and the new values reflecting the claim of egalitarianism and instant development blown up by the wind of change. [emphasis added]

7.104 An important aspect of the "modernising" process does not appear to have been noted in the above passage. Our findings, as we have seen, suggest that the customary political institutions did not benefit from the modernising process. Rather, in the new form, they became a burden to the new rulers. The new Chiefs who had lost their traditional role and authority and also perhaps their relevance in the modern age to a great extent, came to be institutionalised in the Independence Constitutions of many states.[3] The institution, as we have seen, was best suited to a tribal society but the new states had cut across tribal boundaries and it was necessary for them to curb "tribalism" to ensure such stability as was required for "instant development". On the other hand, in many territories political parties came to be organised mostly along tribal lines.[4] The misuse of "freedom of association" by them, proved detrimental to national unity, as they no longer remained united nationalist movements of the pre-independence period. Each state had different problems and their different brands of "tribalism" but even in Tanzania, according to Nyerere, a multi-party system could have encouraged the growth of "factionalism".[5]

7.105 First Ghana, then Tanganyika, Malawi, Uganda and Zambia, one after another, in that order, became de jure one-party states. Although Ghana and later Uganda each succumbed to military rule, it is important to take note of the views expressed in December 1958 by President Nkrumah (then Prime Minister) on democracy, parliamentary government and preventive detention.[6] In a speech made at the Indian Council of World Affairs in New Delhi he asked those who criticised him for adopting "undemocratic" methods to consider the "reality of the situation". He observed:

> Certain disloyal and subversive elements in Ghana had had to be dealt with firmly because they prejudiced our very existence as a free and independent state. There had been plots and various attempts to exploit tribal and regional loyalties. Obviously steps had to be taken to preserve our internal security.

Speaking about his approach to democracy he asserted that Ghana society was "fundamentally democratic" by its "own form and tradition" in that the Chiefs had to "adhere to the rules and regulations laid down by the people". He added that the parliamentary system of western type was "subtle and sophisticated" as well as "difficult and cumbersome to apply to the traditional pattern of government". The essence of democracy, according to him, lay in universal adult suffrage and regular, free and unfettered elections.

7.106 There is no doubt about the fact that the "Convention People's Party" of President Nkrumah fought "tribalism" and what has been described as "the chorus of voices" against it was composed of such elements as the Ashanti Chiefs, who formed the hard core of the landlord and capitalist class, the Kumasi businessmen and the "Ewe" cocoa-farmers of Trans-Volta Togoland who demanded secession. Another form of "tribal" opposition manifested itself in the "National Liberation Movement" led by Dr. K.A. Busia, which reflected an "elitist" attitude. Even the "United Party", it appears, came to be organised as a protest against the ban on tribal, religious and regional parties.[7] Apparently the opposition

in Ghana did not play a constructive role as could be expected of it in a parliamentary system of the western type, but the ruling party was itself speaking in terms of a new philosophy when it asserted that: "The judiciary is an organ of Society and in our society people are supreme; hence the institutions of our society can enjoy free autonomy only up to the point that they serve the highest ideals of society."[8]

7.107 About the Ghana judiciary it has been observed that "Many of the judges were practising politicians and not trained lawyers" and those who valued independence and integrity either resigned or were dismissed.[9] Following an attempt on his life in 1962 President Nkrumah dismissed two of his Cabinet Ministers and the Executive Secretary of the Party who were later tried for treason by a special court presided over by the Chief Justice Sir Akru Korsah; they were acquitted but, as a result, the Chief Justice was himself dismissed and the defendants were re-arrested under the Preventive Detention Act.[10] A special law was enacted the next day and the judicial verdict came to be nullified.[11]

7.108 In Tanzania, President Nyerere categorically discarded the concept of a "neutral" judge. He spoke of a new philosophy in the following terms:[12]

> The fact that judges interpret the law makes it vital that they should be part of the society which is governed by the law. Their interpretation must be made in the light of the assumptions and aspirations of the society they live in. Otherwise their interpretation may appear ridiculous to that society and may lead to the whole concept of law being held in contempt by the people. . . In a one party state like Tanzania some of the problems of identification with the people are easier than in nations which are more divided or where the political system stresses diversity more than unity. . . What better place to teach, both by example and by precept, the fundamental principles of Rule of Law than at party meetings and party activities ? Our national unity allows us to use this opportunity for showing an understanding of the requirements of justice and for learning about people's meaning when they talk of justice. [Emphasis added]

Although Nyerere was speaking of the "law" and the "Rule of Law" the focal point of emphasis in his address was "national unity" which was bound to relegate law, as an institution of control, to a secondary place. However, at another place he observes that the "judiciary at any level must be independent of the executive arm of the state" and that the "execution of law should be without fear and favour".[13] Indeed, the judiciary was invested with a new and difficult role - to be free from personal but not political bias.

7.109 It has, however, to be admitted that Nyerere's political philosophies were not always expressed in clear and precise terms. About his views on personal liberty Cranford Pratt writes that it was expressed in terms of a "new balance" between the individual and the society with emphasis on social duties and communal relationship rather than on individual rights.[14] This was rather an abstract description which broadly corresponded to the traditional African values. However, John Hatch explains this in more concrete terms. The Preventive Detention Act was passed when Nyerere was out of office but as Hatch has said, "he considered that in a new country without the benefit of a large, respected police force and security network, with scanty communication and many enemies, it was necessary to sacrifice the liberty of a few innocent people to prevent the sabotage of the whole nation."[15]

7.110 In the course of an important speech delivered in 1964 on the occasion of the opening of the University College campus, Nyerere dealt at some length with the provision for preventive detention and his comments on human rights in general provide an insight into his philosophy and deserve to be quoted:[16]

> If for example, one person uses his freedom of speech and organisation in a manner which will greatly <u>reduce our prospect of economic development or endanger our national security</u>, what is the government to do ? Freedom of speech. . . movement. . . association are valuable things

> which we want to secure for all our people. But at the same time we must also secure, urgently, freedom from hunger and from ignorance and disease, for every one. Can we allow the abuse of one freedom to sabotage our national search for another ?
>
> Take the question of detention without trial. This is a desperately serious matter. It means that you are imprisoning a man who has not broken any written law or when you cannot be sure of proving beyond reasonable doubt that he has done so. You are restricting his liberty and making him suffer. . . for what you think he intends to do. . . Few things are more dangerous to the freedom of society than that. For freedom is indivisible. . . the freedom of every citizen is [thus] reduced. To suspend the Rule of Law under any circumstances is to leave open the possibility of the grossest injustices being perpetrated. Yet. . . I have. . . supported the introduction of [the] law. . . Our Union has neither the long tradition of nationhood, nor the strong physical means of national security which older countries take for granted. . .

In the above passage we find ample evidence for the proposition that Nyerere's continuing search for new norms is perhaps the reason why his ideas appear intractable to one uneducated in his philosophy. Even so, there is one point which emerges in bold relief and it is this - it is the individual in the society and not the individual versus the society or the state for whom he expresses his concern, in which, we can say, the realities of the situation reflected are common not only to the African states but to the third world as a whole. Pratt relates the idea to the notion of an "ideal democratic society" with an "underlying harmony of interest" in which there will be no need for an organized political faction.[17]

7.111 In Zambia, President Kaunda spoke of his "Humanism" in more certain and definite terms, for he made no secret of the fact that he understood "liberal democracy" to mean that there should be "respect for the individual in society". But it was the "common man" who needed protection against discrimination by the "privileged few"; this protection the Party must afford him and it must therefore be "strong" and "supreme" to do so.[18] Thus he emphasised the rights of the individual:

"The first and most important unit with the Party as indeed with the government, is the individual".[19] As we have seen in Nyerere's philosophy, Kaunda also makes an appeal in express terms to traditional values:

> This high valuation of man and respect for human dignity which is a legacy of our tradition should not be lost in the new Africa. . . African society has always been man-centred. . .[20]

Indeed, as has been observed, both Nyerere and Kaunda were profoundly influenced by the life and work of Mahatma Gandhi of India and it was Gandhi's emphasis on the people's traditional culture which appears to have appealed strongly to the two African statesmen.[21]

7.112 It is, however, necessary to take notice of the special situation that obtained in Zambia where tribalism was rampant and the economy had a strong industrial bias because of the copper mines. There was foreign investment in large measure and the expatriate personnel who manned industrial establishments also made their presence felt in Zambia. However, unlike Kenya, neither in Tanganyika nor in Zambia, was there any acute problem of the white settlers but the hostile Rhodesian regime on its borders posed special problems of internal security for Zambia. On account of its advantages of "party cohesion, tribal harmony and economic autonomy",[22] Tanganyika's commitment to socialism was more secure and certain with the result that individual rights came to be increasingly subordinated to the rights of the community. In Zambia the local situation did not allow the process to move fast. Kaunda had to meet tribal conflict within the party and government. His personal friend, Simon Kapwepwe, deserted him, and formed the United People's Party at the call of his tribesmen, the Bemba.[23] It is no surprise therefore that Kaunda's slogan, "One Zambia, One Nation" found a place in the preamble to the 1973 Constitution.

7.113 In Malawi, the underlying philosophy for the proposed One-party State Constitution recommended by the "Constitutional Committee"

was stated succinctly in its report in the following terms:[24]

> The Committee particularly kept in mind at all times the need in a country comparatively under-developed and inexperienced in nationhood, for a form of government which will afford the maximum degree of unity, resolution and stability to permit the maximum fulfilment of the country's human and physical resources in the shortest period of time.

Apparently the Report rehearsed the common arguments. Its detailed observations on ideas and institutions of government were similarly based on common arguments to a great extent, although in some areas it was more outspoken and candid. It was observed that the function of the judiciary was "not to question or obstruct the policies of the executive government but to ascertain the purposes of those policies by reference to the laws made by Parliament, and fairly and impartially to give effect to those purposes.[25] The Report was extremely critical of the Bill of Rights which, in the Independence Constitution, was accepted with "considerable" reservation. It provided, it was said, "unrealistic, illusory and ineffectual safeguard for minority groups": "in a democratic state laws depend for their ultimate authority upon the desire of the people to see them enforced." It was also said that as a member of the United Nations Malawi had "publicly guaranteed respect" for human rights which could be reiterated in the preamble to the proposed Constitution; a formal Bill of Rights was likely to create conflict between the Executive and the Judiciary.[26]

(2) The Institutional Devices for the Protection of Personal Liberty

(A) Constitutional Provisions

7.114 On a priori considerations the concepts of "unity" and "security of the state" which formed the common philosophical base in all One-party States found expression in the common provision in all Constitutions which declared the ruling party as the only organisation entitled to carry on political activities.[27] The "freedom of association" being thus constitutionally curtailed there was no scope for any organised opposition

to function and for that matter there could be no grievance of "persecution" of any citizen for professing any particular political belief or ideal, although it is a notorious fact that it was not the charm of political dogma but the tussle for power that really generated heat in the political controversies in which the new states of the third world found themselves embroiled as there could be little difference among the political parties on the basic issues of such problems as poverty, illiteracy and their like. Apparently cases of deprivation of personal liberty in the political context were bound to assume different complexions, such as over-zealous acts of the bureaucrats and party officials, depending upon the local situation in each state. It could therefore be argued that there was in fact no necessity to provide for constitutional protection of personal liberty in the political context inasmuch as any "political" act of any person could only take such form as sedition or other types of criminal activity, and that deprivation of liberty in any particular case being grounded upon the facts of the case, he was assured of the protection of the Rule of Law which was maintained under the new Constitutions. The new philosophy, not the constitutional provisions, however, envisaged, as we have seen, a different role for the judiciary and therefore it was not unusual to find in the new Constitutions a new institutional device through which the Rule of Law could be effectively ensured; Malawi was an exception not only in this respect but, as we shall see, in many other respects as well.

7.115 In both Tanzania and Zambia, the preamble formed an important part of the Constitutions although, unfortunately, the judges, following the Common Law canons of interpretation, did not recognise this fact, ignoring the position that a written (and Republican) Constitution was unknown to the Common Law of England. Although the preamble did not constitute the "letter" or the operative part or substantive provisions of the Constitution, it nevertheless carried the "ethos" or "spirit" of the

Constitution. That it was not meant to be a formal recital or an empty incantation of a few lofty ideals is borne out by the fact that the 1975 constitutional amendment in Tanzania also touched on the original preamble which had broadly re-enacted the preambles of the Independence and Republican Constitutions.[28]

7.116 In Malawi, the Constitution did not contain any preamble although the "Constitutional Committee" had, as we have seen, recommended one. In Tanzania and Zambia, the preambles expressly referred to "justice" and "liberty", although in Zambia the reference was extended to the "individual rights of citizens". The following short extracts will bear out the difference:

> Tanzania
> Whereas freedom, justice, fraternity and concord are founded upon (a) the recognition of the equality of all men and of their inherent dignity; (b) the recognition of the right of all men -
> (i) to protection of life, liberty and property;
> [emphasis added]
>
> Zambia
> Recognising that individual rights of citizens including freedom, justice, liberty and equality are founded on the realisation of the rights and duties of all men in the protection of life, liberty and property. . .
> [emphasis added]

There was yet another important difference between the two. In Zambia it was stated that it was the "bounden duty" of the State to "uphold the laws" whereas in Tanzania, "when men are united together in a community it is their duty. . . to uphold the laws".

7.117 In Tanzania there was no Bill of Rights but Zambia had one, a re-enactment of the provision of the Independence Constitution[29] while in Malawi in s.2(1) it was stated that "subject to the Constitution, the government of the Republic shall be founded upon the following principles".[30] This provision as well as that of clause (iii) read with sub-s.(2), quoted below, could be interpreted as incorporating referentially an enforceable Bill of Rights as enumerated in the Universal Declaration of Human Rights.

s.2(1)(iii) The Government and the people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights, and of adherence to the Law of Nations;

s.2(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub.s.(1) to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or the national economy. [emphasis added]

It is submitted that s.2 was not a mere preamble but a substantive part of the Constitution and the tone and tenor of the provisions indicated that it did not contain what are called "Directive Principles" but that the government had imposed upon itself a mandatory duty to do certain things which it could be compelled to perform. The fact that the recommendation of the "Constitutional Committee" was not fully accepted also supports this view. It is also submitted that the expression "subject to this Constitution" in both ss.35 and 45, dealing respectively with the exercise of legislative and executive powers, suggests that s.2, according to the scheme of the Constitution, was to be treated as the "supreme clause".

7.118 In Tanzania and Zambia the Constitutions introduced a new institutional device modelled on the provision of "Ombudsman" of the western world. In Tanzania, chapter VI (ss.67-69) provided for "The Permanent Commission of Enquiry"; in Zambia, Part IX (Arts.117-19), for the "Commission for Investigations". The Commission, in either case, is to "inquire into the conduct of any person to whom the Article/section applies in the exercise of his office or authority or in the abuse thereof". There is, however, a difference in the constitution of the two bodies in that an "Investigator-General" and three "Commissioners" in Zambia and in Tanzania, one "Chairman" and three "members", all appointed in both cases by the President, constituted the Commission.

7.119 In either case it was provided that powers, immunities and functions of the Commission shall be prescribed by an Act of Parliament and the Act

could also specify the persons to whom it applied. In the matter of applicability the constitutional limitation excluded from enquiry the conduct of the President and the Head of the Executive for Zanzibar in Tanzania and in Zambia only the President from its scope as well as review of judicial decisions. However, the more important and serious limitations were those that made its jurisdiction at once discretionary (enquiry at the President's, and the Commission's discretion) and advisory (report to the President at the conclusion of the enquiry). The institution deserves to be examined at greater length in order to appreciate its efficacy as a new institution of control in the two One-party states, one of which, Zambia, had another institution which may be examined first, briefly.

7.119 In Part IV (Arts. 32-36) of the Constitution of Zambia provision was made for a "Leadership Code" which was to be prepared by the Leadership Committee and was to be applicable to "specified officers". All allegations of non-compliance or breach of the Code were to be heard by a "Tribunal" with a Chairman qualified to be a High Court judge and appointed by the Chief Justice, and two other members. Although the Constitution in terms did not accord primacy to the organs of the Party over those of the State, President Kaunda advocated, as we have seen, the need for a "strong" Party. Naturally there could be a tendency among the party leaders to behave at times in an overbearing fashion actuated either by excessive zeal and enthusiasm or by motives of personal gain. When leaders were inspired by personal ambition there could even be cases of serious intra-party feuds developing to such proportion as to endanger the "security of state". It was desirable to control such conduct more effectively than could be secured through the device of the "Commission for Investigations" to maintain the "Rule of Law" and essentials of democracy. Despite the wide scope for the Code envisaged under the Constitution, unfortunately the present Code merely concerns itself with

cases of accumulation of wealth and resources by the leaders.[31]

(B) The African Ombudsman

7.120 In the "National Ethic" which President Nyerere prepared and circulated among the members of the Commission which was appointed to draft the One-party State Constitution, it was mentioned that every individual should have the right, among others, to dignity and respect and also to freedom of movement, which was subjected to the equal freedom of other citizens; freedom from arbitrary arrest was also mentioned.[32] In this context the Commission "re-examined" the question of a Bill of Rights. It was observed that "constitutional guarantees for the individual will defeat their own purpose if they serve to protect those whose object is to subvert and destroy democracy itself".[33] However, it was realised that a safeguard should be provided against any possible abuse of "discretionary power" as it was inevitable that such power was bound to be exercised in large measure in a developing country by the officials of the State as well as of the Party. The Commission noted that a Disciplinary Committee had been set up by TANU but considered that there should be a Committee established by law invested with necessary powers (not executive) and protections to perform the task which will deal with allegations of abuse of power by the state officials as well.[34] The Report does not spell out how mere enquiry and submission of its findings could provide an effective "remedy" to the aggrieved individual. It was observed that "the independence of the judiciary is the foundation of the rule of law" but it was not stated what role the judiciary could play in not only "controlling" the abuse of power but also "remedying" the wrong done.[35] There was a common field within which the two institutions might operate, but the Report did not suggest how their roles could be defined and co-ordinated. This was reflected, as we have seen, in the relevant provisions of the Constitution.

7.121 In s.1 of The Permanent Commission of Enquiry Act 1966 it was stated that it "shall be read as one with the Constitution".[36] Apparently, therefore, the Act itself does not expressly set out the nature and extent of "jurisdiction" and "application" whereas in the parallel enactment of Zambia, The Commission for Investigations Act 1974, ss.7 and 3 respectively dealt with these matters in precise terms.[37] It has been observed that the range of the "institutions" and "individuals" who could be the subject matter of enquiry in Zambia was wider than Tanzania;[38] apart from the Heads of State and Government, the "People's Defence Force" was also excluded in Tanzania.[39] It has been suggested that the expression "an allegation of misconduct or abuse of office or authority" (s.7(1)) could embrace "any matter of individual injustice and administrative abuse of power and authority involving corruption, tribalism, nepotism, intimidation and other forms of discrimination", as contemplated by the National Commission on the Establishment of One-party Participatory Democracy in Zambia.[40] However, the Ombudsman himself clarifies the ambit of jurisdiction.[41] Complaints alleging infractions of the Leadership Code were excepted. He also explains the expression "any matter which is sub judice" of s.7(2). Not only was the Commission unable to "review" any "judicial" decision, but it was also unable to receive complaints against any matter pending in a court of law.

7.122 In both Acts there was an important provision which invested the Commission with jurisdiction to enquire into matters in respect of which judicial review was expressly barred. It was provided that the Commission could exercise jurisdiction "notwithstanding any provision in written law to the effect that an act or omission shall be final, or that no appeal shall lie in respect thereof, or that no proceeding or decision shall be challenged, reviewed, quashed or called in question."[42] Indeed, the jurisdiction conferred on the Commission was wider than the supervisory

and "writ" jurisdictions of the High Court but the snag was that the Commission could not grant any relief to the aggrieved person. There was, of course, another aspect of the matter. The efficacy of the provision depended upon the interpretation placed upon the expression "misconduct or abuse of office or authority" which was the general jurisdictional requirement. It is doubtful whether cases involving "malice in law"[43] and the "recommendations" of the "Review Tribunals" set up under the preventive detention laws could be covered.

7.123 The Tanzanian Ombudsman is to some extent right in asserting that the institution fulfilled the "due process of law".[44] The countries in the "third world" cannot provide for adequate legal aid and it is true that litigation is an expensive as well as dilatory process which the common people of these countries cannot always cope with. Although in both Acts the Commission was not given any "executive power" to right any wrong done to any person, from the Annual Reports of the Permanent Commission of Enquiry it is found that in some cases the Commission could "satisfactorily correct" mistakes by "direct negotiations" with the parties involved.[45] This could perhaps be done by invoking the provision of the proviso to s.10(2) which required the Commission to hear the person or authority complained against before it makes adverse report against it to the President.[46]

7.124 There are certain important points about the procedure to be noted in that they show that the enquiry could be really effective as well as inexpensive and informal. The procedure was defined with greater precision in the Zambia Act which contemplated in express terms "complaint or allegation" to be made either orally or in writing and even prescribed a two years' limitation with a provision for waiving the bar.[47] More importantly, it was provided in either case that the proceedings shall be conducted <u>in camera</u>[48] and that the Commission could compel production of evidence from any source, including official records except

those which were certified by the President as might prove prejudicial to the security, defence or international relations of the country[49] or might involve disclosure of the deliberations of the cabinet.[50] In Zambia, legal representation "as of right" was expressly excluded;[51] in Tanzania, rules of evidence were so excluded.[52]

7.125 Indeed, the inquisitorial nature of the procedure best subserved the object of the enquiry. The Commission was not meant to act as a judicial tribunal adjucating upon the rights of the parties but to act as a domestic vigilante which rendered merely advisory opinion. An observation of the Tanzanian Ombudsman may be quoted to show that the people were interested in ultimate results which a public hearing would not have altered. He observed that "People are interested more in the results of the case than in proceedings and since such institutions do not have the power to change or reverse any decision, this alone renders public hearing meaningless".[53] On the other hand, there could be cases in which a public hearing could prove to be inconvenient and embarrassing to the establishment and the latter would, therefore, naturally tend to "obstruct" the course of the prdceedings in such cases defeating, thereby, the object of the enquiry; happily, causing "obstruction" in any manner was an offence in both Tanzania and Zambia.[54] In either Act it was also provided that except on the ground of "lack of jurisdiction", its "inquiry, proceeding, process or report" shall not be "challenged, reviewed, quashed or called in question in any court".[55] This provision certainly added to the efficacy of the institution, notwithstanding the rider, "any error or irregularity of form".

7.126 The annual reports of the Tanzanian Commission show that it had to deal with a number of cases of "detentions" by such authorities as the police, the Area and Regional Commissioners and other executive officials, but whether the decline in the number proved the efficacy of the Commission is open to doubt. In the first Report the total cases

of "detentions" were shown as 76, but in the Second, 30.[56] The period of "detentions" ranged from a few hours to a few days.[57] As for example, in one case a Member of Parliament was "locked-up" for five days under orders of the Regional Commissioner whose explanation was found unacceptable.[58] Indeed, it could not be supported, as pleaded, on the provisions of Regional and Area Commissioners (Amendment) Act 1963. The Act provided that when any Regional Commissioner had "reason to believe" that any person was likely to commit a breach of the peace and that such breach could not be prevented except by taking that person into custody, the Commissioner could arrest the person or direct his arrest but he had to be either produced before a Magistrate or released within 48 hours and he could not be re-arrested for the same cause.[59] In the instant case it was suggested that the detention was "renewed" every 48 hours which was in clear violation of the relevant provision. It was in cases of this type that it should have been possible for the Commission to be able to terminate the illegal detention instead of holding a post mortem over it, to prove its effectiveness and to gain credibility among the common people. The Commission realised this and also noted in its Annual Report for 1967-68 that in one case it received a letter that seven people were "locked-up" but even after a week when the letter reached it, the Commission could not get them released and it observed that "something must be done to remedy this."[60]

7.127 The advice of the Tanzanian Commission appears to have appealed to Zambia. In s.11 of the Zambia Act it is provided that the Commission can "make such orders, issue such writs and give such directions", having the same force as the order of the court, when it appears to the Commission that its powers are "likely to be frustrated by any action taken" by any person to whom the Act applies. The provision, as it stands, cannot effectively fulfil its purpose. The jurisdictional requirement is patently ambiguous. It will not always be easy to make out a case that "powers"

of the Commission will be frustrated if interim relief is not granted in a particular case, if the term "power" is equated with jurisdiction to inquire, as is likely to happen; and then the proof of its likelihood of being frustrated may also present problems. That apart, the Commission cannot, obviously, claim powers and jurisdiction of the High Court to issue what are known as "prerogative writs", such as mandamus and prohibition. On the other hand, the Commission is not invested with specific powers and jurisdiction of similar nature under either the Civil or the Criminal Procedure Code. Thus, it may be possible to challenge any order granting interim relief as unenforceable for want of jurisdiction.

V. Personal liberty and the law of Habeas Corpus in Africa

7.128 It is not proposed to make a detailed study of either the evolution or the development of the law of habeas corpus in Africa but to point out that habeas corpus has come to stay here as a deeply entrenched institution and has acquired a supraconstitutional importance: its form may have undergone changes in a few cases but its substance has withstood many changes that the Constitutions and laws have undergone in the different states. As an institution it has survived not only the frameworks of One-party States but even of the "New Grundnorm" of the Military Governments under which, in one state, as we shall see, it was merely "suspended" in particular cases and not generally.[1] In some cases special laws have been enacted with the avowed object of codifying the law while in other cases even under the general law there still exist two parallel rights. This position may be examined first to identify the scope and extent of these rights.

(1) Position under general law

7.129 The Independence Constitutions as well as the successive Constitutions in each state did not alter the general law in force in the territories prior to independence. Such laws therefore also constituted an important institutional device for the protection of

personal liberty in the post-independence period in all states. Besides the local statutes including the Codes of Criminal Procedure, in particular, the general law in all states consisted, inter alia, of the Common Law of England and "statutes of general application" as obtaining in England on particular dates; in many states this position was reiterated after independence by specific enactments.[2] The remedy of habeas corpus was, as we have seen, available in England at Common Law as well as under statutes, particularly of 1640, 1679 and 1816, for the protection of personal liberty. As Roberts-Wray observes, "the expression 'statutes of general application' is usually regarded as descriptive of Acts of Parliament which are of general relevance to the conditions of other countries and, in particular, not based upon policies and circumstances peculiar to England".[3] It has never been challenged, except on one occasion, that the English Habeas Corpus Acts were inapplicable in Africa.[4]

7.130 However, it must be stated that the formula employed in the Gold Coast Ordinance of 1876 which, it is asserted, became the "prototype" of all African reception statutes,[5] contained one important qualification notwithstanding the minor variation of "technique" in some cases:[6] the received law was to be administered by the "Supreme Court" (set up by the same document) within its jurisdiction which was, in the first instance, confined to the non-Africans or in other words, the Europeans.[7] In this respect the situation in Africa resembled that of India.[8] Whether in India or in Africa the "Supreme Courts" everywhere were modelled on the High Court of Justice in England and the British judges of those courts were empowered to exercise powers similar to those exercised by the judges of the Queen's Bench Division. In some African territories the superior courts were named "High Courts" instead of "Supreme Courts" but each court was a "Court of Record" and had jurisdiction similar to that of the Supreme Court. Therefore, as in England, these courts had powers

to issue writs of habeas corpus under Common Law as well as under statutory law of England. The right to the writ under Common Law which was introduced by a statute could be taken away by a statute. Therefore, although these courts had power to make general rules as to conduct of proceedings therein such rules, obviously, could not take away such important common law rights correlative to the right to the writ as the right of successive applications and of priority in the hearing of the application as well as the right of appeal. Whether such right did in fact survive after independence is however another question which will be dealt with separately.

7.131 In East and Central Africa (except Northern Rhodesia), following the Indian technique, the remedy of habeas corpus was also provided in the Criminal Procedure Codes which were of general application throughout the territories.[9] The High Courts, under these provisions, were empowered to give "directions in the nature of habeas corpus" in the following terms:

> (1) The High Court may whenever it thinks fit direct -
>
> (a) any person within the limits of the Protectorate be brought up before the court to be dealt with according to law;
>
> (b) any person illegally or improperly detained in public or private custody be set at liberty;
>
> [emphasis added]

We have, elsewhere in this study,[10] commented upon the significance of the underlined term "improperly" but in the present context we refer to the fact that in the provision referred to above it was also contemplated in sub-s.(2) that the court could frame rules to regulate the procedure in these matters. It could be argued that the provision in the Criminal Procedure Codes did not derogate from the powers of the High Courts to issue writs of habeas corpus under either the English Common Law or the statutes. The Codes did not generally deal with the powers and jurisdictions of the High Courts and therefore there could be no question of the existing powers and jurisdiction being in any manner curtailed by the Codes, by implication.

7.132 The position in East and Central Africa was apparently different from that of West Africa in another respect. Such questions as whether here such important Common Law rights as of successive applications and other cognate rights were available, as in West Africa[11] and if so, whether such rights could be abrogated by the High Courts in the exercise of their rule-making powers, conferred by the Codes specifically in respect of proceedings "in the nature of habeas corpus" do not appear to have been agitated before courts. It could be argued that in these territories it was a case of trichotomy of powers. On the Criminal side the High Court could make rules to abolish the aforesaid rights because the Code did not, in terms, deal with the right to the writ of habeas corpus but conferred a distinct and separate power on the High Court and created a distinct and separate jurisdiction. However, in the absence of any rules or any provision to the contrary in the rules there could be scope for invoking the Court's general jurisdiction, which was similar in nature to that of the West African Court. However, whether the ancillary rights, referred to above, did, in fact, survive in the general jurisdiction of the Court after independence has to be answered separately.

(2) Position under special laws

7.133 In the independent Malawi the provision was re-enacted in a modified form and also separately and not as part of the new Criminal Procedure and Evidence Code.[12] In s.16(1) of the Statute Law (Miscellaneous Provisions) Act[13] it was stated that the High Court shall "not issue any prerogative writ in the exercise of its civil or criminal jurisdiction" but in sub-s.(6) a remedy embodying the concept of habeas corpus was, nevertheless, provided. In Western Nigeria also there appeared in 1958 a local enactment, the Habeas Corpus Law.[14] Even in the absence of repeal in express terms of the English law of habeas corpus, it must be said that in these two territories the Common Law as well as the Statute Law of England relating to habeas corpus was, by necessary implication, repealed.[15]

The language employed in Western Nigeria, in fact, explicitly referred to the English Acts of 1679 and 1816. It also followed the language and scheme of those two statutes leaving no doubt that they were repealed and that the local enactment had codified the law on the subject. The position in independent Ghana was, however, different and will be separately examined.

7.134 We may first look at another aspect of the matter and for this it is necessary to point out that after independence the Constitution in each state became the primary source of powers and jurisdiction of the superior courts. Therefore, the mere fact that the status quo as respects general law was not disturbed did not mean that there was no change of such nature in the status of these courts as could affect their powers and jurisdiction. As for example, these courts could no longer claim, ipso facto, powers and jurisdiction similar to that of the Queen's Bench Division of England. On the other hand, as we have seen, some of the ancillary rights of the writ of habeas corpus were traceable to the nature of the writ, namely the Command of the Sovereign.[16] Therefore, how far the special laws and the Constitution in each state altered the scope and extent of these rights is a question, albeit an important one, but it can be answered only on a detailed investigation of the position in each state. Nevertheless, it is possible to say that such investigation must be aimed primarily at the determination of one important fact, namely, whether the courts were true legal successors of the former Supreme Courts. In fact during the military rule in Nigeria as well as in Ghana the framework of the superior courts was indeed altered;[17] in Ghana the court even held that under the 1960 Constitution the Supreme Court was established as a "completely new institution."[18]

7.135 The Habeas Corpus Act, 1964 of Ghana, professed to "consolidate" and "amend" the "law relating to the applications for habeas corpus[19] and

by s.6 expressly declared that the relevant English statutes of 1640, 1679, 1803, 1804, 1816 and 1862, shall cease to apply in Ghana. As a result the provision of bail embodied in ss 2 and 3 of the English statutes of 1679 and 1816 respectively became the foremost casualty for the Act did not have a parallel provision. The Act, in fact, did not express any concern to sustain the ethos or spirit of the English law of habeas corpus that it was for the detaining authority to produce the body of the prisoner with the "cause and caption" of the detention to satisfy the court that the detention was legal although s.4(1) of the Act it could be argued, placed a duty on the court to "order the release of the person detained unless satisfied that the detention was in accordance with law". What was conspicuously missing was an express duty to "inquire into the truth of the facts set forth in the return" as imposed by s.3 of the English 1816 Act. However, such a duty resulted, it could be argued, from the cumulative effect of ss.1(1), 2(b) and 4(1). It was s.2 which suffered the utmost debilitation. It inter alia provided that the court "may" make an order requiring either the detaining authority or the prisoner to "submit a report in writing stating the grounds of the detention".

7.136 The Act also took away two Common Law rights relating to successive application and appeal but in this it was merely following the developments in England: ss.1(4) and 5 of the Act incorporated the provisions of ss.14(2) and 15(1) respectively, of the English statute, the Administration of Justice Act 1960.[20] In this matter Nigeria had taken the lead by enacting in 1961, the Administration of Justice (Habeas Corpus) Act, with a similar provision by providing an appeal in the case of an order of release as well as of refusal to do so.[21] It did not expressly abrogate the Common Law right of successive application and on the other hand it was reiterated in s.3 that the appeal shall "take precedence over all other matters". It has also to be noted that the

Nigerian Act used the term "writ of habeas corpus ad subiciendum" while The Ghana Act avoided it. The Nigerian Act buttressed the right by further providing in s.2(3)(b) that failure to hear an application and adjudicate thereon within a "reasonable time" shall be tantamount to refusal to issue the writ.

7.137 There were some other aspects of the Ghana Act which showed that it was enacted to curtain the ambit of the existing right. Under s.3 the Chief Justice of the Supreme Court could direct that hearing in any particular case, in any High Court, to be before a bench of three judges. Under s.4(2) the High Court was debarred from deciding itself any question touching the vires of any law which it had to refer for the decision of the Supreme Court; of course pending decision the Supreme Court could enlarge the detained person on bail.

## VI. The judicial approach to personal liberty in Africa

7.138 Whether it is correct or not to equate the military governments with one-party governments, as has been suggested, is a question which we do not propose to answer at this stage but the proposition that they tend to be more autocratic admits of no exception.[1] In the light of the discussion made so far it is also possible to accept the view expressed in another quarter that the theory of the one-party state is not opposed to the existence of independent courts and that the constitutional framework is not necessarily geared to authoritarianism.[2] It is necessary to point out that Ghana as a one-party state had a framework which was different in many respects, which has already been noted. In any case it is reasonable to expect the judicial response to bear some relation to the type of government and the constitutional framework in any particular state and, as the military government by its nature stands far apart from the other types, the contribution of the judiciary to the development of the jurisprudence of military rule is likely to assume a different

complexion. We therefore propose to confine our study to the judicial response under non-military governments, starting with Ghana during the Nkrumah regime.

(1) Ghana

7.139 We have already referred to the decision in BALOGUN v EDUSI[3] in connection with the deportation laws and also to the legislative tradition of the colonial times which made light work of the writ of habeas corpus by suspending the writ on many occasions. The Minister had carried out the deportation in the BALOGUN case pending hearing of a habeas corpus application. He was indemnified by Parliament against all penalties for contempt of court but in its judgment the court nevertheless deplored the conduct of the government and held that the finding of contempt stood although no further order was made. It was held that by passing the enactment the government had accepted the position that the respondent was in contempt. However, this early jolt, in the very first year of attainment of independence appears to have left a lasting effect on the judiciary so as to influence its approach in dealing with habeas corpus applications in cases of preventive detention.

7.140 Within almost a year a habeas corpus application challenging an order made against 37 persons under the Preventive Detention Act 1958 came up before the court in re OKINE.[4] The Court's approach was reflected in the very first paragraph of the report in which the court held that the Act was "analogous to the Preventive Detention Regulations which were in force in Britain as a wartime measure". Reliance was placed, among others, on the LIVERSIDGE[5] case and it was held that even Lord Atkin in his dissenting judgment had referred to certain regulations in which the word "satisfied" was used without taking care to analyse either the whole judgment or even the dissent of Lord Atkin and disposing of the decision in a few sentenced by a few stray remarks. The Act required, as we have seen, the satisfaction to be in respect of "any person" which could well be interpreted to mean that the Act did not contemplate a "general" but

"specific" order in respect of each person sought to be detained while the impugned order had set out the names of 37 persons in the schedule. The order recited the "satisfaction" of the Governor-General but it was signed by Dr. Nkrumah as the Prime Minister and Minister of Defence who did not, it appears, swear any affidavit that there was a "real satisfaction" in respect of each person despite the allegation that the real object of the order was to silence the opposition. The court held that onus was on the applicant: to "prove bad faith" which they had not done and therefore an affidavit would not serve "any useful purpose."[6]

7.141 The matter was taken to the Court of Appeal.[7] The court held that there was no right of appeal. Although the court disposed of the matter on the preliminary issue it pointed out "by way of obiter dictum" that habeas corpus lies only in cases of unlawful detention and also referred to s.3(1) of the Act which provided that any person detained in pursuance of the order should be in "lawful custody". The interpretation was erroneous and apparently expanded the scope of the Act to give it effect more widely than the first court had done. This decision excluded challenge even in a case of mistaken identity which the first court had conceded in principle (although on the facts of the case of one of the applicants the prayer for relief grounded thereon had been refused). The first court also conceded that detention could also be challenged on the ground of the "genuineness of the order" and of the "over-stepping of statutory limits by the Minister", as well as of "the nationality of the applicant", as such matters were, according to the court, "relevant to the legality of the detention." However, the matter was further taken to the Supreme Court where, unfortunately, the argument was based on the retrospective application of the Courts Act 1960, which conferred power on the Supreme Court to entertain "any appeal from any court."[8] The argument was rejected but it is submitted that the Court of Appeal had apparently overlooked the fact that there was a Common Law right of appeal in such cases.[9]

7.142 In re AKOTO and seven others,[10] the Supreme Court was dealing with an appeal against the refusal by the High Court to issue a writ of habeas corpus against a similar order. It was contended, inter alia, that

> (2) by virtue of the Habeas Corpus Act of 1816 the court is required to enquire into the truth of the facts contained in "The Grounds" upon which the Governor-General was satisfied. . .
>
> (4) the grounds upon which the appellants were detained do not fall within the ambit of the expression "Acts prejudicial to the security of the state";
>
> (6) the Preventive Detention Act. . . is in excess of the powers conferred on Parliament by the Constitution. . . with respect to Art.13(1). . . or is contrary to the solemn declaration of the fundamental principles made by the President. . .
>
> (7) [the Act]. . . not having been passed upon a declaration of emergency is in violation of the Constitution. . .

The court held, seriatim, as follows:

> (2) As a "statute of general application", the 1816 Act was in force in Ghana but according to the ratio of the decision in the LIVERSIDGE case the "satisfaction" of the President could not be challenged;
>
> (4) The terms "security of state" was not limited to the defence of Ghana against a foreign power; the power of preventive detention could be invoked when the "basis of law" was undermined and the normal functioning of the government was being disrupted;
>
> (6) Art.13(1) imposed only a "moral obligation" on the President as the article used the word "should" and not "shall"; the "declaration did not constitute a bill of rights" and did not create legal obligations enforceable in a court of law - it was similar to the "coronation oath" of the Queen of England;
>
> (7) There was no constitutional prohibition against enactment of the Act as a peace-time measure.

The last point was rightly decided in that the first Republican Constitution did not have any specific provision relating to an "emergency". The reliance on the LIVERSIDGE case was misplaced in that it followed the line indicated in the OKINE case (supra); it was open to the court to see if the "satisfaction" was "real". It is, however, true that the concept of "security of the state" had a wider connotation as pointed out by his Lordship, although it is doubtful if the decision was right on the facts.

7.143 The most important point in the case was the interpretation of the "declaration" under Art. 13 and it is submitted that the court wrongly equated it with the English coronation oath. The court failed to take notice of a few important points that should have had a great bearing on the interpretation of the provision. Unlike the unwritten English Constitution, Ghana's Constitution was written. Besides, Art. 12 specifically provided for the oath of office. The provisions which were specifically described as the "fundamental principles" were embodied separately in Art. 13, which was not a mere preamble but a substantive part of the Constitution. The requirement of "adherence" constituted a duty that was imposed by the Constitution on the President who not only combined in himself the offices of the Heads of State and Government but was also a part of Parliament. Both the legislative and the executive power of the Republic vested ultimately in him. He was to exercise the powers subject to each and every provision of the Constitution and, as such, although the provision was captioned "fundamental principles" and not "fundamental rights" as in the case of the "Nigerian" and the "Neo-Nigerian" provisions, its import was not in any way different.[11]

7.144 In re DUMOGA and 12 others[12] the question whether the court can inquire into the truth or otherwise of the ground of detention under the 1816 Act was also agitated before the High Court at Accra before the Supreme Court's decision in the AKOTO case (supra). The High Court held, obiter, that the 1816 Act was not an Act of "general application" and it did not therefore apply in Ghana. The decision was not cited in the AKOTO case but the obiter dictum clearly lost its force after the Supreme Court's decision. Despite the obiter the High Court answered the question in the same way as in the cases of OKINE, earlier, and AKOTO, later. The power to detain under the Act for "security of state" was equated to the power to arrest and detain for the "defence of the realm", exercised in England

during the two world wars, and reliance was accordingly placed on the English "war-time cases".[13] As in the OKINE case, reliance was also placed on s.3(1) of the Act and the court went so far as to say that "there can surely be little or no point in resorting to the court" and that the only way open was to make "constant approach and appeal to influential parliamentarians to use their influence and good offices" to procure a reduction, if possible, in the period of detention and "the termination of the operation of the enabling Act."[14]

7.145 The Ghana cases had one distinctive feature in common which is worthy of notice. In all cases extensive reliance was placed upon s.3(1) of the Act and it was assumed that the detention order constituted a "lawful" authority for a "lawful custody", although the section simply spoke of the order as an "authority". It is interesting to see how the fiction was introduced as a result of the use of the term "lawful". The detention orders in all cases were expressed in the form of subsidiary legislation.[15] The court appears to have accepted the position that detentions under each order were under the direct authority of Parliament in that the orders constituted "law" and not executive actions. Although the judges did not expressly say so in the DUMOGA case (supra), the court gave vent to its feeling by stating that although Ghana was not at war, "a fully sovereign parliament composed of representatives of the people duly elected by universal adult suffrage" had "after due deliberation decided that conditions exist as to make it necessary for this rather drastic power to be conferred on the chief executive officer of the state to be by him exercised in his discretion and has accordingly made provision for it."[16]

(2) Nigeria:

7.146 As observed by Read, the introduction of bills of rights during the 1960s have had "only a very limited impact" in many states.[17] Even so, it has to be noted that in Nigeria, which led the other states in this

respect, within six years the Constitution was abrogated and therefore it is not possible to suggest along what course the development of constitutional jurisprudence would have otherwise proceeded. At least in one of the early cases, CHERANCI v CHERANCI[18] an attempt was made, it appears, to make a promising start by taking note of the "standard of reasonableness" evolved in the constitutional jurisprudence of the U.S.A. and India while interpreting the expression "reasonably justifiable in a democratic society". The case more directly involved the freedoms of conscience, expression, assembly and association but it is indicative of the early judicial approach towards the Bill of Rights at the dawn of independence.

7.147 The applicant was convicted under s.35 of the Children and Young Persons Law 1958 of the Northern region for inciting a young boy to participate in politics. The provision whoch prohibited young persons from taking part in political activities was impugned as ultra vires. The courts upheld the constitutionality of the provision on the ground of "public order" and "morality" of the general derogation clause. The court quoted with approval from the decision of the Indian Supreme Court in MADRAS v ROW[19] and also from Basu's Commentery on the Indian Constitution and stated the principles to be followed in the matter. It was observed: "The courts have been appointed sentinels to watch over the fundamental rights secured to the people of Nigeria by the Constitution. . . and to guard against any infringement of those rights by the state. . . to be effective guardians. . . the judges must not only act with self-restraint and due respect for the judgment of the legislature but they must also use their own impartial judgment without undue regard for the claims either of the citizen or of the state. . ."[20] The court added that to do so some standard had to be evolved for which it was necessary to draw upon the experience of other countries, as there had been no time to develop

any local standard in Nigeria.

7.148 In OLAWOYIN v A.G. NORTHERN REGION,[21] the same enactment was again challenged but the decision in the case was on the point of locus standi only. The applicant had alleged that he intended to educate his own children politically and that his right to do so might be infringed if the law was enforced at any time in the future. The court referred to decisions on the point by the courts in the U.S.A., Australia and India and held that the applicant lacked standing on the facts of the case. It was observed that the court had jurisdiction to make a declaratory judgment at the instance of a person who was found, on the facts, as having sufficient interest in the subject matter, when there was an allegation of infringement of fundamental rights.

7.149 We have already referred to the Emergency Powers Act 1961 and the regulations framed thereunder to deal with the "emergency" situation in the Western Region resulting from the constitutional breakdown in January 1962.[22] We are told that restriction orders, and also detention orders in some cases, were passed against some political leaders and their supporters.[23] There are, however, only two reported decisions and those also in respect of restriction orders possibly because of the fact that, as has been pointed out, more than half of those restricted or detained were released during the first three months of the emergency.[24] The leading case is WILLIAMS v MAJEKODUNMI (No. 3).[25] An action under the Emergency Powers (Jurisdiction) Act 1962 was brought in the Federal Supreme Court for declaration and injunction challenging the vires of the Act and the relevant regulations for restriction framed thereunder.

7.150 The court held that there was no abdication of legislative authority in authorising the making of the regulations. Unfortunately the challenge was not grounded on excessive delegation. The court, however, held on the facts of the case that, "there was nothing in the evidence

from which it could be inferred that it was reasonably justifiable to restrict plaintiff's freedom of movement and residence".[26] It was held that the fundamental rights must be regarded as essential to be maintained and preserved to serve as a norm of legislation under majority rule and that an invasion may be "essential" to the extent that it is necessary for some recognised public interest, and not further: the expression "reasonably justifiable. . ." of the derogation clause meant "ordered freedom".[27] By subjecting the provision to the constitutional test of the derogation clause it was shown that the "subjective satisfaction clause" no longer provided an impenetrable shield against judicial challenge. On the facts the court rightly held that the mere fact that the plaintiff was the legal adviser of the Action Group whose factional infighting had resulted in the emergency, could not be the ground for "satisfaction" about the fact that it was necessary to restrict him. However, as pointed out earlier, it was also possible for the court hold ultra vires the provision of "oral order", if challenged.[28] The decision was followed in ADEGBENRO v A.G. of the FEDERATION,[29] where a similar order was challenged although on the facts of the case the court arrived at a different conclusion.

(3) East Africa:

7.151 Although there exist in Kenya measures for "the preservation of public security", and in Tanzania, The Preventive Detention Act, there is no reported decision on any of these enactments. There are a few cases to be found in the Reports under the Deportation Ordinance and under the Emergency Powers (Detention) Regulations 1966, both of Uganda. The leading case was UGANDA v COMMISSIONER OF POLICE, exp. MATOVU.[30] The "neo-Nigerian" bill of rights of Uganda had guaranteed more effectively, as we have seen, the right of personal liberty against invasion in times of emergency but the court's approach, in sharp contrast to that of the Nigerian court in the WILLIAMS case (supra), rounded off the edge it had over its Nigerian counterpart. Following the line adopted by the Ghana

court in the DUMOGA case (supra), the Uganda court also relied on the English war-time cases to hold that the "satisfaction" of the Minister was impervious to judicial challenge. The court observed: "It is difficult to see how this court can, by application of an objective test, which is an operation in abstract, hold that the powers which over eighty citizens of Uganda, Members of Parliament had considered reasonably justifiable to be granted to the Minister to enable him to deal with a serious situation in the country, was not reasonably justifiable in the existing situation."[31]

7.152 The challenge to the vires of the provision having been refuted in the manner indicated above, the court proceeded to determine the question of compliance, on the facts of the case, with the constitutional provisions. The contention that the "grounds" were not furnished within five days was rejected upon holding that the requirement was applicable to detention under the detention order passed by the Minister and not to the "28-days pending decision" detention. However, the court upheld the contention that the constitutional requirement of "specifying in detail" the grounds had not been satisfied upon holding on facts that sufficient information was not given to enable the detainee to prepare his defence before the Review Tribunal. The mandatory language of the provision compelled the court to say so, but the court did not conceal its dissatisfaction with the provision and went on to question the wisdom of the founding fathers in the following terms:[32]

> It is not clear to us why Art.31(1)(a) of the Constitution should have required the Minister to furnish a detainee with a statement specifying in detail the grounds. . . One wonders to what extent the Minister could go in the specification of the grounds. . . The Minister. . . in virtue of his position, must of necessity, obtain his information through secret and confidential sources. It might not be in the interest of public security that such sources be disclosed.

7.153 The last two sentences in the above extract reproduced almost verbatim the language of the English war-time cases. Thus, after having reluctantly upheld the contention against the ratio of these cases, the

court termed the noncompliance a "mere matter of procedure" which was not fatal to the order of detention. It was not a "condition-precedent" but a "condition-subsequent", and that it was "curable", the court said.[33] It is true that the Uganda Constitution, unlike the Indian, did not circumscribe the power by a rigid time-limit, but, if the constitutional condition that the power of detention was subject to an effective right of representation was not strictly enforced, the executive could very well defeat the right by delaying, as well as by furnishing insufficient detail on various pretexts, despite the court's direction. It is submitted that the different constitutional provisions were all narrowly construed. As a result, the guarantee provided by the Bill of Rights lost its efficacy.

7.154 In IBINGRA v UGANDA,[34] the vires of the Deportation Ordinance enacted before the constitution came into effect, was challenged. The question arose on appeal against the refusal by the High Court to issue a writ of habeas corpus on the application of the appellant, who was held in custody pending the decision of the Minister on the question of deportation. It was held that only "lawful" orders made under a statute restricting freedom of movement should be held not to have infringed the Constitutional protection of personal liberty. The Constitution having permitted general derogation in respect of non-citizens only, the order made under the Ordinance in respect of a citizen contravened the constitutional provision and could not be a "lawful" order within the meaning of the Constitution. The court directed the High Court to issue the writ prayed for.

7.155 The decision had an important sequel. The case came up again before the Court of Appeal.[35] On the writ being issued the five appellants, who were detained at several places, were brought to Entebbe in Buganda. They were there released only to be rearrested under detention orders passed under the Emergency Powers (Detention) Regulations 1966 which were in force in Buganda only. The court held that the prisoners

were not "unlawfully" brought into Buganda to enable the impugned orders being passed and the orders, therefore, were not mala fide. It was held that although the judge had passed the order for immediate release of the prisoners the government acted rightly according to the common law procedure by bringing the prisoners to Entebbe to be produced in court. It is submitted that the allegation of mala fide could not be satisfactorily disposed of on this ground inasmuch as the voluntary act of the government, which was not in pursuance of the court's order, did not give it protection against a charge of mala fide.

7.156 In re IBRAHIM and others,[36] 78 aliens applied for a writ of habeas corpus while being detained by the police pending a decision on a detention order. During the pendency of the application, the Minister made the detention order. The names of the applicants were contained in a list attached to the order which was not signed and the applicants were not given any copy but the order was read out to them. It was held that it was not necessary to serve the order which was in the nature of a committal warrant. It was also, surprisingly, held that the order was not ex facie bad for omitting to specify in its body the names of the applicants. The court went on to hold that the constitutional requirement that the prisoners be informed of the reasons for arrest and detention was complied with and that the "grounds", according to the Constitution, could be served within two months. In the absence of any rules prescribing the form of the order, the court held, "the order as it stands is not obnoxious and is valid".[37]

7.157 It was conceded in the case by counsel for the applicants that the court cannot look behind a valid detention order but the court further held that "it must be assumed that the Minister ought to be and is deeply concerned about the liberty of the subject and issues order after considering all information before him" and that "he has the interest of

the State in mind and he is assumed to have acted judicially in arriving at the conclusion." The court, it appears, used the word "judicially" inadvertently in place of "judiciously" in that it was nobody's case that the parties should have been heard. The repeated use of the word "assumed" indicates the judicial approach which surpassed even that in the English wartime cases where the Home Secretary had filed affidavits. As regards the grievance against detention by the police "pending a decision", the court held that the matter could be challenged in appropriate proceedings.

(4) Central Africa:

7.158 Of all the African states Zambia has the largest number of reported decisions on personal liberty, which are notable also for the freshness of the judicial approach. First we may examine the lone decision from Malawi, in re PINDENI.[38] The applicant was arrested on a charge of being a rogue and vagabond. Later the same day a warrant under the Preservation of Public Security Regulations 1965 was issued for his detention in custody for 28 days pending decision on a "control order".[39] The warrant was extended from time to time and the detention continued for three months. In an application under s.16(6) of the Statute Law (Miscellaneous Provisions) Act 1967 it was, inter alia, contended by the applicant that he had been arrested on one ground but detained on another, and that, the "extension" of the warrant not being contemplated under the Regulations, the detention was illegal. It was held that although giving false reasons for arrest would violate the rule in CHRISTIE v LEACHINSKY,[40] in the instant case there was a second arrest by virtue of an order under the Regulations. The second contention was, however, upheld. The court observed that the Regulations had to be "strictly construed" as they were concerned with the liberty of the subject. The power of "pending-decision" detention was circumscribed by the requirement of "having reason to believe that there were grounds" for the making of either a detention order or a

control order by the Minister. The order had to be made within 28 days and, as it was not so made, the continued detention was illegal.

7.159. In Zambia, the leading case was the decision in the CHIPANGO case. The detention order was set aside by the High Court, holding that it violated the constitutional safeguards.[41] The applicant was furnished with the "grounds" after 16 days and not within 14 days, as the Constitution contemplated; similarly, the Gazette notification was made after seven weeks, and not within "one month". The court followed the Indian authorities and held that the "constitutional conditions subsequent to arrest" were equally mandatory and that a detention in violation of any such condition would be "unconstitutional and unlawful". The Attorney General's appeal was dismissed.[42] Doyle, C.J., observed (in the appeal) as follows:

> s.26A appears in a part of the Constitution which has formally and deliberately set out to enshrine the rights and freedoms of the people. . . to be interpreted effectively to protect the rights and freedoms. That the protection given is a limited protection is no reason for cutting down what is given.

7.160 His Lordship held that sub-s.(1)(b) gives protection against detention "incommuniendo". The condition was not a mere procedural step but it vitally affected the fact of detention. The publication of the fact in the Gazette was meant to enable the detainee's early release to be secured. It was not necessary, his Lordship said, to decide whether the delay in furnishing the grounds was also fatal as the condition was "in some order of descending importance". This observation undoubtedly whittled down to some extent the force of the High Court's decision but it was made up by the fact that the majority opinion in the LIVERSIDGE case was not accepted and, on the other hand, Lord Atkin's dissent was expressly approved as "vigorous" and "correct". His Lordship also quoted with approval from a decision of the Indian Supreme Court where it was held that, because of the subjective determination of the facts by the Executive,

Parliament had provided the necessary safeguards and therefore the requirements of the statute must be complied with.[43] Gardiner, J., concurred and added that "carrying out of either of these obligations out of time could not remedy the defect"; a new order was necessary.

7.161 In SINKAMBA v DOYLE, C.J.,[44] it was held that sub-regs.(8) and also 7(ii)(a) of Reg. 31 of the Preservation of Public Security Regulations, being in conflict with the new s.26A(1)(c) of the Constitution, were impliedly repealed by the latter,[45] which provided that the right to "review" did not arise until one year had elapsed. Under the regulations the Chief Justice was required to appoint the Chairman of the Review Tribunal and the applicant had applied to the Chief Justice to do so within a few days of his detention. The applicant had contended that the right of review under the regulation was not taken away and that the new s.26A(1)(c) provided for a further right of review "on request". On what it called "the apparent grammatical connotation", the court held that the legislature had stipulated a condition precedent ("if he so requests") and also added a limitation in point of time to the performance of the condition. The construction was also supported by stating the legislative history and the scheme of the relevant amendments. It is true that absurd results would have followed in the practical application of the two provisions as parallel measures but some of the reasons given were not convincing, such as that constitutional provision and the regulations both stood in the same category of "general law".

7.162 In KAPWEPWE and KAENGE v A.G.,[46] it was contended that the requirement of "specifying in detail the grounds" was not complied with and also that the discretion to detain was wrongly exercised as the allegations constituted criminal offences for which no prosecution was instituted. In the High Court, Scott, J., held that whether the court had the power to review the discretion of the President must be viewed in the light of the fact that the regulations were designed to cover the existence

of a situation described in s.29(1)(b) and that it must be shown that the measures taken were so unreasonable as to bring the application within the protection of s.28 (the "enforcement provision"). On appeal, Doyle, C.J., was more specific. Relying on English cases,[47] his Lordship held that where an authority has a discretion to act but gives no reason for such action, the court can infer that it had no good reason to act, but, in the instant case, the grounds of detention were given. As to the point whether the grounds were bad, not being "in detail", his Lordship equated the expression to the term "vague" used by Kania, C.J., of the Indian Supreme Court in his judgment in the ATMARAM case,[48] which his Lordship quoted with approval. As the bona fides of the President was not impugned his Lordship held that the fact that the detaining authority had chosen to detain in preference to laying a criminal charge did not make the act per se unreasonable.

7.163 Baron, J.P., listed a number of possible reasons for such preference but said that there was no onus of proof on the detaining authority. The allegations need not be particularised in the same way as a criminal charge. His Lordship also relied on the ATMARAM case (supra) to say that sufficient information such as would enable the detainee to make a "meaningful representation", has to be furnished. Gardiner, J.A., accepted the statements of law made by his colleagues but the three judges differed in their decision on the facts of the case of one of the appellants.

7.164 The applicant, in re PUTA,[49] was detained on 18.10.72 under an order passed on 17.10.72 which was revoked and replaced by a fresh order on 21.10.72, under the Preservation of Public Security Regulations. There was only one Gazette notification, in which the date of detention was not specified. In the written statement of grounds, also one, the date of detention was shown as 18.10.72. It was held that although one Gazette notification, which was within time, met the constitutional

requirement in that the detention was no longer "incommuniendu" despite the fact that the date was not mentioned, the written statement was bad as it mentioned only one date and also did not indicate whether the same grounds covered both detentions. The court quoted with approval from the Indian decision in the RAM KISHEN case[50] to say that the question of prejudice was irrelevant when a constitutional safeguard was infringed and that the objective standard in such cases should be that of an ordinary layman. The statement in the applicant's affidavit that he considered the grounds as relating to the detention of 18.10.72 was accepted as an "opinion reasonably held". The decision in the CHIPANGO case (supra) was relied upon to reiterate that the constitutional protections embodied in s.26A should be interpreted effectively to protect them.

7.165 The judiciary in Zambia acted with courage and imagination in building up a wholesome tradition of judicial review to protect constitutional rights by taking a bold decision initially to free itself from the impressive authority of the English wartime cases which had been misunderstood and wrongly applied in the other jurisdictions. In re ALICE MULENGA[51] the High Court re-asserted this position and observed that in the CHIPANGO case (supra) a precedent was set up by the Court of Appeal in expressing its preference for the Indian authorities despite the difference in the relevant provisions of the two Constitutions. The applicant who was detained under the regulations made a request for a review after three years but the Review Tribunal not having been fully constituted she complained that her constitutional right was infringed. The contention on behalf of the State that it could wait for one year before placing the matter before the Tribunal was rejected. The court held that although the Zambian Constitution (unlike the Indian) did not specify the period within which review must take place, it ought not to be unreasonably delayed. The court held that if the executive did not show good cause for the delay, "the bona fides of the continued

detention" could be challenged.

7.166 However, the application for habeas corpus was allowed mainly on the ground that the mandatory provisions of Reg.33(5) had been violated. A "specific" as well as a "general" authorisation for a place of detention was contemplated. The definition of "place of detention" in Reg. 2 of the Preservation of Public Security (Detained Persons) Regulations and also the double use of the word "such" in the main Reg.33(5) was referred to. In the instant case the court found that there was no "specific" authorisation in respect of place where the applicant was detained and the detention was therefore "unlawful". Once again the court refused to apply the test of "prejudice".

7.167 In re HENNING BUITENDAG,[52] the court acted with care and caution to see that the power of judicial review was exercised within appropriate limits. The exercise of the discretion to detain was challenged on the ground that the reason given for the detention was identical to the criminal charge of which the applicant was acquitted. The onus to prove mala fide was on the applicant, the court said and indeed rightly added that in the instant case it was not "clearly" shown that the appellant was innocent and his subsequent detention on the same ground was "unreasonable" in view of the fact that the acquittal was for various breaches of the Judges Rules.

7.168 An application for habeas corpus was allowed in re THOMAS CAIN[53] for supplying the grounds to the detainee after 14 days, in violation of the constitutional provisions. The applicant was arrested by the police and detained "pending decision" under sub-reg.(6) but this order was revoked after three days only to be substituted by a fresh order. After 13 days the detention order of the President under sub-reg.(1) was served to be revoked and substituted in turn by a similar order after another 12 days. Within 12 days of the last detention order the "grounds" were served on the applicant and it was contended on behalf of the State that the

service was within time. Doyle, C.J., observed that the applicant was in continuous physical detention at all relevant times and there was no interruption of that detention by the minimum fraction of time which elapsed between the handing over of the revocation order and the handing over of the new order of detention; there was also no interruption in law as detention was by the same authority and for the same reasons. In law, the detention and the revocation orders were co-terminus. Besides the principle of de minimis, the constitutional provision itself referred to "detention" while speaking of the 14-days time-limit and of "orders", the court said. In other words the Constitution did not contemplate different orders of 14 days.

7.169 The expression "as soon as reasonably practicable" used in the provision in respect of the 14-days time-limit imported a sense of urgency, the court held. It did not extend the time-limit. The court also held, relying on an Indian decision, that the grounds must be in existence on the date of the order.[54] But the court left open the question as to what would be the position if the successive detention orders were on different grounds. It was also left to the consideration of the appropriate authority the question of vires and form of sub-reg.(6) in that the policeman may not be able to give the grounds for the probable detention order, to conform to the constitutional requirement.

7.170 The decision in the CHIPANGO and also in the KAPWEPWE (supra) were relied upon in GILBERT MUTALE v A.G.,[55] in which the court allowed an application for habeas corpus against a detention order upon holding that the grounds supplied were vague and the applicant was unable to make effective representation to the President. On behalf of the State an affidavit was filed to explain the grounds which the court possibly took as new grounds and observed that it was concerned with the grounds that were furnished to the applicant within 14 days time-limit. Perhaps the position was better

stated in re PUTA (supra) as what was material was the fact of the detainee's own understanding, tested by an ordinary layman's standard.

Conclusion

7.171 It has to be noted that in all the cases we have discussed, except in the single case from Malawi, decisions were given on applications for habeas corpus and neither the courts nor the litigants appear to have taken seriously the special enforcement provisions of the Constitutions which, it was expected, would supply the place of the named remedies.[56] In Zambia, in PARDOOR KATONGO v A.G.[57] it was held that the provision added nothing new to the power which the court already possessed and even the Uganda court in the MATOVU case (supra) emphasised the fact that the provision could be invoked only when there was no alternative remedy. Thus, the "extra-constitutional" remedy of habeas corpus came to occupy an almost "supra-constitutional" status. Unfortunately, it was not matched everywhere, as we have seen, by a vigorous judicial response possibly for the reason that it had a fragile existence in that it could be, as was the case in Malawi, abrogated by an ordinary law. However, that could be avoided by a constitutional entrenchment of the right. This was achieved in the 1969 Constitution of Ghana which, as Read points out,[58] "surely resulted from a fuller reappraisal than any other current Constitution in Africa" as Ghana, we may add, had not only seen One-party rule and Military rule but had seen enfeebled judicial efforts to protect personal liberty. Even though military rule has been reinstated, the change in the complexion of the judicial approach is worthy of special notice.[59] For a "rethinking of the judicial role" advocated by Claire Palley[60] we have to examine the new jurisprudence evolved under the military governments of Ghana, Nigeria and Uganda, but we have also to commend as bold, imaginative and courageous the approach of the Zambian courts.

# Chapter 8

# EMERGENCY PROVISIONS UNDER MILITARY RULE

## I. The new "Grundnorm"

### (1) Some aspects of military "take-overs" in the New Commonwealth

8.1 The principle of civil supremacy, which was a manifestation of the common law rule contemplating the civil power calling the army to "aid" it and not to supplant it, is one of the corner stones of the British Constitution. Unfortunately, as we have seen, the doctrine of martial law evolved in the colonial context negated this principle. We have however noticed that the doctrine did not strike roots in Commonwealth Africa.[1] On the other hand, there was a different colonial tradition in so far as the Indian sub-continent was concerned.[2] Nevertheless, although Pakistan was the first Commonwealth state to witness a military "take-over", on the continent of Africa, Nigeria, Ghana, Sierra Leone and Uganda also witnessed similar events. Finer has given three general reasons for military intervention in the new states and he has put "pre-existence of a tradition of military intervention" at the third place, as a "supplementary" reason, the two "principal" reasons being - "legitimacy" was shaken and disputed and "the material conditions for fostering and sustaining powerful civilian organisations" were lacking.[3]

8.2 In Pakistan, President Iskander Mirza issued a "Proclamation" on 7th October 1958 to "abrogate" the Constitution; dismiss the Central and Provincial governments; dissolve the legislatures; "abolish" all political parties; and to declare that "until alternative arrangements are made Pakistan will come under Martial Law" and that General Ayub Khan was appointed as the C-in-C of the Pakistan Army and Chief Martial Law Administrator. He gave detailed reasons justifying the action taken, blaming mainly the politicians and also the Constitution which according

to him did not "suit the genius of the Muslim people". General Ayub Khan, as Supreme Commander and Chief Martial Law Administrator issued separately the same day a "Proclamation of Martial Law".[4] A few weeks later, on October 27, President Mirza resigned and General Ayub Khan assumed the Presidency.[5] The first martial law regime continued until June 8, 1962.

8.3 On the second occasion there were two "Proclamations of Martial Law", both under the signature of General Yahya Khan who declared that President Ayub Khan had "handed over all powers" to him and also that he had "assumed the office of the President" and that "in the interest of national security" it had become "necessary to place the country under Martial Law" as a situation had arisen "in which civil administration cannot effectively function".[6] Reference in the first-published proclamation (both dated 31.3.69) was made to the "declaration" made on 25th March, 1969, by President Ayub Khan when he relinquished office and invited General Yahya Khan, C-in-C of the Pakistan Army, to "do his Constitutional duty" of restoring law and order in the country. It has been suggested that, although there was general discontent among the people with the administration, the immediate cause of the promulgation of martial law was the signing of the peace agreement between India and Pakistan, which had evoked strong public protests.[7] Although the second martial law regime did not end until the 20th April, 1972, by a "Proclamation" made on 20th December 1971, President Yahya Khan relinquished office and "declared" that Mr. Z.A. Bhutto "shall be the Chief Martial Law Administrator and shall command all the armed forces of Pakistan and shall also be the President of Pakistan."[8] It has to be noted that, possibly because of the decision in ASMA JILANI[9] the Interim Constitution of 1972 which replaced the second martial law regime, contained a "validation clause" in Art. 281,[10] unlike the "saving and

repeal" provisions contained in Art. 225 of the 1962 Constitution, which had replaced the first martial law regime.

8.4 On the third occasion the "Proclamation of Martial Law" was issued by the Chief of Army Staff, General Zia-ul-Huq, on the 5th July, 1977, in which it was stated that he had "proclaimed Martial Law throughout Pakistan" and had assumed the office of the Chief Martial Law Administrator; that the President would continue in office but the Prime Minister and the Federal Ministers would cease to hold office; that the Central and the Provincial legislatures would stand dissolved and that the Constitution "shall remain in abeyance".[11] On this occasion, however, there was "Martial Law" already in force in some of the cities, having been declared by the Federal government a few months earlier.[12]

8.5 In contrast with the bloodless coups of Pakistan, the President of Bangladesh, Shaikh Mujibur Rahman, was the foremost victim of the coup that took place there on the 15th August 1975. There was a radio announcement that Khondkar Mostaque Ahmed had become the new President; that the armed forces had "taken-over", and that martial law had been proclaimed.[13] A "proclamation" was issued by the new President a few days later, on 20th August, by which he "suspended" certain provisions of the Constitution and assumed power to issue Martial Law Regulations.[14] The reasons for the coup were not stated in the proclamation but it has been suggested that the main causes of the coup were the prevalence of corruption in ruling circles and favours shown to the "Awami League Militia".[15] Subsequently, on 8th November 1975 and 29th November 1976 two more "proclamations" were issued by A.M. Sayem, to whom Khondkar M. Ahmed had "handed over" the office of the President.[16] In the second proclamation (of 8th November 1975) it was stated that for the "effective enforcement of martial law" it had become necessary "to assume the powers of Chief Martial Law Administrator" and the signatory was described in the

proclamation as "President and the Chief Martial Law Administrator". By the third proclamation (of 29.11.76) President Sayem "handed over" the office of the Chief Martial Law Administrator to the Chief of Army Staff, Major General Ziaur Rahman, who was later sworn in as the President also on 21st April 1977 on the resignation of President Sayem. On 23rd April 1977 General Ziaur Rahman (acting as the President and Chief Martial Law Administrator) made The Proclamations (Amendment) Order 1977 by which a new provision, para 3A, captioned "Validation of certain proclamations etc." was inserted in the Fourth Schedule of the Constitution.[17] It contemplated a blanket ban against judicial review of "proclamations and all martial law regulations and orders and all other laws made during the period between 15th August 1975 and the date of revocation of the said proclamations and withdrawal of martial law".

8.6 The position was different in Commonwealth Africa: nowhere has the military "take-over" resulted in "promulgation" of "Martial Law" as a deliberate measure to form an integral part of the new "Grundnorm". However, the first Nigerian coup, like that of Bangladesh, resulted in the killing of important political figures including the Federal Prime Minister and Finance Minister besides others and there also appeared a faint reference to "Martial Law" in a broadcast over Radio Kaduna in relation to the Northern provinces.[18] The coup had been engineered by the young Majors and was organised regionally at Kaduna, Ibadan and Lagos. Therefore, there was some confusion in the initial stage but finally on behalf of the Federal Cabinet a "handing-over document" was signed entrusting the administration of the country as a "temporary measure" to the army and the police "under the control of "Major-General Ironsi". On 15th January 1966 (almost twelve hours after the Kaduna broadcast) the cabinet decision was broadcast over the radio and Major-General Ironsi, as Supreme Commander of the Military Government announced the decrees for the

suspension of the offices of President, Prime Minister, the dissolution of Parliament and of the functioning of a military government in each region responsible to the Federal military government.[19] There was no reference to "Martial Law" in General Ironsi's broadcast from Lagos.

8.7 It has been observed that the first Nigerian coup, which displaced the civil government there, was motivated by "national interest".[20] The general background of all coups according to Nwabueze, was provided by "corruption, waste, concentration of wealth in a few hands, increasing unemployment, general maladministration, especially of the army, electoral malpractices and other types of political perversions of the constitutional system and tribalism".[21] In the African context greater importance has to be attached to the last-mentioned factor. For, on 29th July 1966, Nigeria witnessed a second coup resulting in General Ironsi himself being killed. It has been pointed out that the January coup came to be considered as "an Ibo plan for Ibo domination".[22] As has been suggested, the immediate cause for the second coup was Decree No. 34, made on May 24, which purported to abolish federalism.[23] The killing of Ibos in the North as a result of the second coup eventually involved Nigeria in a civil war when the military leader of Eastern Nigeria declared there the Republic of Biafra on 30th May 1967 which was, however, liquidated within less than three years.

8.8. The important point to be noted about the Nigerian coup which does not appear to have received due attention is the apparent lack of concern by the military rulers to bridge appropriately and carefully the breach of legal continuity. In s.18 (2) of the Constitution (Suspension and Modification) Decree 1966 (Decree No. 1) it was stated that the decree shall be deemed to have come into force on 17th January 1966 although the breakdown of constitutional machinery took place on 15th January 1966. In the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 (Decree No. 28), which was made after the Federal Military Government

had won the Biafra war and which was in fact made to nullify the effect of the decision in the LAKANMI case,[24] reference was, no doubt, made to the "revolutions" which took place in 1966, on January 15 and July 29, but retrospective operation of the decree was not expressly contemplated. A return to civil rule is contemplated by October 1979 but it is not known if the new Constitution now being drafted will contain a "validation clause" similar to, or even better worded than Art. 281 of Pakistan's Interim Constitution of 1972, to bridge finally the breach which has so far remained unchallenged.[25]

8.9 The Ghana coups on both occasions had one distinctive feature in that there was a collaboration of the police and the armed forces; the Commissioner of Police figured as the Deputy Chairman of the "National Liberation Council" which was established by the "Proclamation" made on the occasion of the first coup. Although this proclamation expressly referred to the "co-operation of the Police service" in assuming the "Government of the State of Ghana" by the armed forces on the 24th February 1966, there was no reference in the National Redemption Council (Establishment) Proclamation 1972 to the part played in the second coup by the police service except the bare fact that the Inspector General of Police figured as a member of the National Redemption Council established on 13th January 1972 under the proclamation. However, unlike Nigeria, where neither the 1966 Decree No. 1 nor the 1970 Decree No. 28 offered any justification for the "take-over", on both occasions in Ghana the proclamations expressly recited that it was "in the interest of the people of Ghana". The Ghanaian "Proclamations" and the Nigerian "Decrees" had an important common feature in that they did not contain any reference whatsoever to "Martial Laws"; this was also common to the 1971 "Proclamation" of Uganda.

8.10 It has, however, to be noted that when the first period of military

rule came to an end in Ghana on 1st October 1969, The Constitution (Consequential and Transitional Provisions) Decree 1969 (NLCD 406) was enacted and by s.4(1) of the Decree it was provided that all decrees issued in pursuance of the proclamation "shall form part of the laws of Ghana" and in the preamble of the decree it was recited that the decree was made in the exercise of the powers "reserved to the National Liberation Council" under the new Constitution itself. The "Proclamation" was repealed by s.3 and even in the "saving clause" provision was made only as respects existing rights under the former Constitution. It was doubtful if s.4 could extend to executive acts done in pursuance of the decrees; besides, it did not afford a blanket protection against judicial challenge to the decrees themselves.

8.11 It has been suggested that for each coup in Ghana the corporate interest of the army supplied the primary motivation: in 1966 it was favour shown by Nkrumah for the "Presidential Guard" and his neglect of the men and material of the army; in 1969 Dr. Busia's government was charged specifically with "victimization of military and police personnel" besides being accused generally of "malpractice, mismanagement and arbitrary dismissals."[26] It is, however, an admitted fact that Ghana under the Nkrumah regime had reached a state of economic and political bankruptcy.[27] Although in Ghana political detentions had assumed a serious form, the military rulers, as has been observed, justified their seizure of power for restoring freedom in Nigeria and Uganda also, by releasing political detainees.[28]

8.12 In 1967 there was a coup in Sierra Leone but military rule there lasted for barely thirteen months. The army/police partnership there bore some resemblance to the Ghana rule but it had a distinctive feature. As has been observed, "the initial purpose of the coup was to use a limited period of martial law" and to use the army "as an instrument of civilian politics".[29] However, Brigadier Lansana, who had staged the first coup on March 21, was himself deposed and arrested in the second coup

led by Major Blake, on March 23. It is stated that, although the authors of the second coup were also influenced by civilian politics, the additional factor in their case was the influence of the Nigerian and the Ghanaian coups of 1966.[30] It is therefore possible to suggest that the inadvertent reference in Kaduna to "Martial Law", which was in a sense retracted at Federal level in Nigeria, might have misled the coup-makers in Sierra Leone. For Brigadier Lansana had only declared "Martial Law" and such steps as suspension of the Constitution, dissolution of political parties and formation of the National Reformation Council (composed of army and police officers), were taken subsequently.[31] It has also been pointed out that Sierra Leone was the first African country where the successor civilian government had put on trial its former military rulers.[32] On March 23, 1971, there was an attempt to stage another coup but it failed.

8.13 Besides Nigeria and Ghana, the only other state in Commonwealth Africa where military rule is still continuing is Uganda, where the "Proclamation" of the coup was "made" as well as published on 2nd February 1971; it appeared under the signature of Major General Idi Amin Dada as Military Head of State, Head of Government and C-in-C of Armed Forces. In the preamble of the proclamation it was stated that "on the 25th day of January, 1971, the Armed Forces of Uganda, for reasons given in the statement by them to the Nation on that day, took over the powers of the Government of the Republic of Uganda and vested those powers in me".

8.14 However, the "Proclamation" in Uganda as also its counterparts in Ghana and Nigeria, had a distinctive feature: they all differed in yet another important aspect (besides the absence of reference to "martial law") from their counterparts in Pakistan where, on the first two occasions, the "Proclamations of Martial Law" contemplated setting up of "Special Courts" (in 1958) and "Military Courts" (in 1969) for the trial and punishment not only of breaches of the Martial Law Regulations and Orders but of

offences under ordinary law as well; in 1977 also a similar provision was made in Pakistan, but by a separate instrument, C.M.L.A.'s Order No. 4, which was made a few days after the coup. In respect of Ghana and Nigeria it has been observed that the military rulers there "tried to maintain conditions of a free society and the rule of law" and that there were "no police state methods, no regimentation of individual's life such as are characteristic of the society of totalitarian states".[33] It is doubtful if the same thing could be said of Pakistan as well as Uganda. General Amin has been quoted as speaking to the High Court judges and magistrates in November 1976 to the effect that he respected and attached great importance to the rule of law[34] but it is also stated that "there is no way of telling how many people have been murdered since Amin came to power" and that the official explanation of the killings by firing squads was that they had been tried and sentenced by military tribunals.[35]

8.15 It has been observed that in Pakistan the army was impatient with "cumbrous and corrupt bureaucracy" and that it had "emerged in a politically constructive role" to serve "social ends".[36] It may be questioned whether such a process did not lead to a certain amount of regimentation of social life. There is, however, no doubt that the Pakistan army has gradually departed from the colonial tradition which had provided a strong apolitical and professional base for the armed forces. It has been observed that the "social role" of the armed forces in the new states depended on the political stability and also the nature of the national leadership and its standing in the eyes of the masses.[37] Events in Pakistan, however, show that these factors also determined the political role of the army. Although Pakistan shared with India, as a part of British India, a prolonged experience of the working of parliamentary democracy, unlike the states of Commonwealth Africa, it had the misfortune of losing very early its experienced and charismatic political leaders

like Mr. M.A. Jinnah and Mr. Liaquat Ali Khan.

8.16 A mere change in the personnel of the government or even the replacement of one party by another in the seat of government in a multi-party democracy does not necessarily involve the process of change in the replacement of one "grundnorm" by another; parties or personnels committed to amending the "grundnorm" carry out their "election pledges" in accordance with the "procedure" laid down by the existing"grundnorm" to secure at once "legality" and "legitimacy". However, in the military "take-overs", as we have seen, these concepts lost their meaning and relevance. As Hans Kelsen has observed, a successful revolution begets its own legitimacy.[38] The true reason perhaps is that when a "revolution" is engineered by the military, the latter has to face certain practical problems relating not only to the difficulty of working within the existing institutional framework but also those relating to its own establishment which make it difficult for the new rulers to adopt in toto the existing "grundnorm". By training, experience and also because of the fact that they had to function within the monolithic structure of the military organisation, the new rulers were ill-suited to fulfil the role of the politicians who not merely manned but successfully manipulated the intricate mechanism of the executive and legislative organs of the government. Thus, we find that the military rule following a "take-over" fulfils itself in a new "grundnorm" by modifying the existing "grundnorm" to suit the institutional framework of the government. This process of metamorphosis was not the same everywhere. Therefore, we propose to examine separately in one group, Pakistan and Bangladesh, and in another group the Commonwealth Africa. It has to be noted however that even these two groups had one common element in that the claim of "legitimacy" was mainly founded in the fact that the new rulers did not arrogate to themselves the essential judicial power. In this respect the pre-existing "grundnorm" continued to prevail. On the other hand, the martial law group found an

additional prop to support what we may call the internal or domestic aspect of legitimacy, based on colonial tradition.

(2) The institutional framework of military governments

(A) Pakistan and Bangladesh

8.17 It is interesting to note that in Pakistan, although the office of the President was preserved during the three military regimes, the right to tamper with the existing "grundnorm", the Constitution in particular, was arrogated by the Chief Martial Law Administrator. Apparently, "Martial Law" was considered as a supra-constitutional as well as superior norm which could be invoked to claim legitimacy for the action taken to "abrogate" or "to keep in abeyance" the Constitution. After the last coup of 1977 (also after the first coup of 1958, for some time), the offices of the President and Chief Martial Law Administrator have been held by different persons despite the "take-over" but on the second occasion General Yahya Khan assumed both offices from the outset. The Provisional Constitution Order was promulgated by him in his capacity as Chief Martial Law Administrator and not as the President. On the last occasion, in 1977, although on other matters "President's Post-Proclamation Orders" were issued, the basic document of the new "grundnorm", the Laws (Continuance in Force) Order 1977, was issued as C.M.L.A.'s Order No. 1 of 1977. On the first occasion, however, the basic document, the Laws (Continuance in Force) Order 1958, was issued as President's Order (Post Proclamation) No. 1 of 1958. But in this case also it was observed that the Order was made in pursuance of a proclamation of 7th October (under which the country was placed under martial law). In Bangladesh in the Presidential Proclamation of 20th August 1975 it was stated that the "Martial Law Regulations and Orders" made by him "shall have effect notwithstanding anything contained in the Constitution" and that "subject to such Regulations the Constitution to continue in force".[39]

We have also seen that under the Second Proclamation in Bangladesh the President found it necessary to assume powers of Chief Martial Law Administrator and that when the Constitution was amendedin 1977 to insert there a validation clause (para 3A, Fourth Schedule) the relevant instrument was issued under the signature of "President and Chief Martial Law Administrator".[40] Thus, it could be said that all instruments made during military rule in Pakistan and Bangladesh, whether they were issued by the President or the Chief Martial Law Administrator (when the two offices were not combined in one person), derived their validity from the basic fact that the country was placed under Martial Law or in other words internal or "domestic legitimacy" was sought to be achieved through "martial law".

8.18 It is apparent, however, that some distinction was sought to be maintained in Pakistan between "Regulations" and "Orders" and also between the instruments which were made by the Chief Martial Law Administrator and those which were made by his subordinates. As for example, Order No. 9 of the "Martial Law Orders" made on 11th October 1958 by the Chief Martial Law Administrator expressly contemplated that in case of conflict between the "orders and regulations" made by him and those made by the Administrators and sub-administrators, "the latter shall conform to the former".[41] The Chief Martial Law Administrator also reserved to himself unfettered powers to delegate legislative authority by providing that "Martial Law Orders and Martial Law Regulations" could be issued "by any Administrator or by any officer authorised" by him, vide Reg. 2 of the Martial Law Regulations made on 7th October 1958.[42] What should be the status of a Presidential order was also an important question in so far as the 1977 coup was concerned as the civilian (constitutionally-elected) President has continued in office all along. The answer is to be found in paragraph 3(1) of C.M.L.A.'s Order No. 1 of 1977 which provided that "the President shall act on and in accordance with the advice of the Chief

Martial Law Administrator."

8.19 The basic documents of all three coups of Pakistan contained one common provision which should be considered to be an important part of the core of the new "grundnorm". Notwithstanding the "abrogation" ("abeyance" in 1977) of the Constitution, the country was to be "governed as nearly as may be" in accordance with the said Constitution, albeit subject to any instrument ("Regulation" or "Order") made by the Chief Martial Law Administrator and also by the President, in 1958 and 1977.[43] It was also expressly provided on all three occasions that all courts shall continue to have and exercise all powers and jurisdictions which they possessed on the date of the coup.[44] However, each time this provision was subjected to a twofold limitation: any manner of process of any court shall not issue to any martial law authority and no court "shall call or permit to be called in question" the "Proclamation", the "Regulations" and "Orders" and also (in 1958 and 1969) "any finding, judgment [sentence] or order of a Special Military Court or a Summary Military Court."[45] The "fundamental rights" were either "abrogated" (1969) or "suspended" (1977);[46] the existing laws ("all laws") were to continue subject to adaptation as might be made from time to time.[47] On all three occasions it was also provided that the provision in any law for consideration by a "Review (Advisory) Board" of any "detention order" shall be of no effect.[48] Reference may be made to a general but important provision of the "Proclamations of Martial Law": the regulations and orders had to be published but in such a manner as was found convenient.[49]

8.20 These provisions, in our submission, made up the core of the new "grundnorm" of the Martial Law regimes in Pakistan and constituted the basic features of the new institutional framework within which was accommodated the scope of authority of the Chief Administrator and the subordinate functionaries appointed by him, such as the "Deputy" and "Sub" Administrators. Prof. Gledhill appropriately points out that the first martial law regime

"resembled the government of British India by the East India Company in the nineteenth century more than the military regimes which have been set up in other countries which have attained independence".[50] On subsequent occasions also it was the same position in Pakistan and, as we have seen, the colonial tradition had created the precedent and the pattern for it. There was, of course, some deviation from the pattern to be noted in the case of Bangladesh military regime for its sustained devotion to the Constitution which in fact, made it outstanding in the whole of the Commonwealth in this respect.

## (B) Commonwealth Africa

8.21 The bureaucracy undoubtedly has been, as Nwabueze points out, the mainstay of military governments everywhere.[51] The colonial armies in Africa, it is stated, were built on the British Indian model.[52] It was therefore the work of the bureaucracy in Africa, unaccustomed as it was with the concept of "Martial Law", that the institutional framework of the military rule there was not built upon the edifice of martial law. We propose however to examine briefly the basic documents of the military regimes of Ghana, Nigeria and Uganda.

8.22 In Ghana, following both coups, as well as in Uganda, "Proclamations" were issued but in every case it was by the head of the new regime and in every case it was provided that subject to certain reservations, the Constitution (in Uganda, only Chapters IV and V, which related to "The Executive" and "The Parliament" respectively) was "suspended". In Ghana, ss.2 of the "Proclamations" appertaining to both coups embodied the "suspension clause" which was qualified by the words "subject to any Decree" (also subject to the other provisions of the proclamation itself in 1972). In Uganda the proclamation also contained an "inconsistency clause" in s.8 which contemplated that those provisions of the Constitution (including Arts. 1,3 and 63) which were inconsistent

with the proclamation shall, "to the extent of such inconsistency, be void" but subject to the proclamation "the operation of the Constitution and the existing laws shall not be affected" but shall be "construed with such modifications, qualifications and adaptations" as might be considered necessary "to bring them into conformity" with the proclamation.[53]
In Nigeria also the first document, the Constitution (Suspension and Modification) Decree 1966, numbered as Decree No. 1, "suspended" parts of the Constitution in an almost similar manner.[54] However, following the decision of the Supreme Court in the LAKANMI case,[55] Decree No. 28, The Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970, used the term "abrogated" in its preamble, as follows:

> Whereas the military revolution which took place on January 15, 1966 and which was followed by another on July 29, 1966, effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree 1966 (1966 No. 1) . . . and whereas. . . there was established a new government. . . the "Federal Military Government" with absolute powers to make laws for the peace, order and good government of Nigeria. . . the said Federal Military Government permitted certain provisions of the. . . Constitution of 1963 to remain in operation as supplementary to the said Decree. . . [emphasis added]

8.23 By S.1(1) of the Decree the preamble was "affirmed and declared as forming part" of the Decree, but the use of the expression in the preamble "except what has been preserved" in reference to Decree No. 1, clearly indicated that the Decree (no.28) was to be read subject to Decree No. 1: the later Decree did not establish a new legal order and the expression "the whole pre-existing legal order" could not, therefore, be treated as referring either to the "general law" of the land, which was preserved by the earlier Decree subject to the rule laid down in s.3(4) thereof, or to the judiciary, whose powers, albeit circumscribed by s.6 thereof, were preserved. As in Pakistan, in Nigeria and in Ghana and Uganda, also, two new norms were established under military rule - (1) law made by the new rulers (by Decrees and by Edicts in the Regions, in

Nigeria) was to prevail over any other rule of both written and unwritten law as well as of the former Constitution if and whatever retained in any state,[56] and (2) the judiciary was precluded expressly (in Ghana and Uganda, by implication, and only potentially) from "questioning" such law.

8.24 In Nigeria, s.6 of Decree No. 1 provided that "No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria", and in ss 4 and 5 it was declared that a Decree and an Edict were "made" when they were "signed" and they could be promulgated "in any manner", not necessarily by gazette notifications. In Uganda, in s.7 of the Proclamation it was inter alia stated that "No action or other legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court for or on account of or in respect of any act, matter or thing done during the continuation of operations consequent upon or incidental to the said take-over of the powers of the Government", [emphasis added]; ss. 3 and 4 vested "all legislative powers referred to in the Constitution" in Major-General Amin and empowered him to exercise the same "through promulgation of decrees evidenced in writing" signed by him and "sealed with the Public Seal". In Ghana, s.2(3) of the Proclamation, "subject to any decree that may be made", allowed continued existence with the "same powers" and discharge of "same functions" by "all courts". In all cases, therefore, "the power and jurisdiction" of courts to entertain applications for habeas corpus was not touched as in Bangladesh (in respect of both "constitutional" and "statutory" rights) and also in Pakistan (in respect of the "statutory" right, also "constitutional" rights in 1958). In Ghana and Uganda even the scope of interference by courts in such applications was not directly affected. Everywhere, except possibly in Nigeria under Decree No. 28, validity of subsidiary legislation could also be challenged subject of course to the fact that often the difference between the principal and

subsidiary legislation and also between them and executive action was obliterated as the new legal order did not strictly recognise the doctrine of separation of powers. It is true that the absolute legislative power of the new regimes confronted the judiciary with a formidable challenge; any inconvenient decision could be nullified by an ex post facto legislation to uphold the supremacy of not only a legislative but also an executive action.

(3) The "New Rule of Law"

8.25 It was idle to expect the new regimes to accept the view that any form of firm and rigid control on its powers was necessary as a sine qua non of a "good government", without being a "constitutional" government. The first document, whether it was a "proclamation" or a "decree", by its own terms, yielded absolute legislative sovereignty to the new regimes. (In Bangladesh, power to "amend" the proclamation was expressly reserved in clause (h) of the first proclamation.) In the ultimate analysis therefore it turns out that each successive document dealing with either judicial or legislative power (which could be termed as the means of control) hoisted its own "grundnorm". Thus, a search for the new "grundnorm" in the legislative instruments of the new regimes was bound to be a mere exercise in futility. The search had to be directed to the appropriate institution of stability which was to be found in the judiciary and its immutable role of interpreting laws. The very fact that not only the superior courts but even the other ordinary courts were allowed to function, albeit supplemented (but not supplanted) by military courts, was itself of great importance. By retaining the judiciary the new rulers demonstrated their adherence (often formal) to "Rule of Law" to bolster their claim to not only internal or domestic, but also to external, "legitimacy". It cannot be gainsaid that any modern state, irrespective of the form of its political order, could not ignore the call of international accountability in the new world order. President Amin's public

pronouncement (quoted at para 8.14 above) strongly supports this contention.

8.26 Indeed, the military regimes of Africa rejected the idea of "martial law" but even in the case of Pakistan and Bangladesh it must be said that the basic feature of the new "grundnorm" was not martial law but (as everywhere else) a modified form of rule of law which might be called the "New Rule of Law". Despite the apparent lack of concern to conform to the old norms of "legality" and "legitimacy", in all cases an appeal to the former Constitution was retained in some form or other; it was either "suspended" (in some cases partly), and even "modified" or "amended" in some cases, or "kept in abeyance", and the country was to be governed "as nearly as may be" in accordance with it. In Bangladesh sub-para (5) of the newly inserted para 3A of the Fourth Schedule of the Constitution expressly contemplated "continuous" operation of the Constitution notwithstanding the interposition of the martial law rule.[59] This appeal manifested itself patently in the fact that the judicial power vested by the Constitution in the superior courts remained posited there. The mere fact that their "powers" and "jurisdiction" were circumscribed did not mean that they were either not allowed to function independently or that judicial power ceased to vest in them, as Professor Nwabueze appears to contend.[60] He observes that the judicial power ceased to be "independent" and that it was "submerged" in the "absolute legislative sovereignty" of the military governments because of the "absoluteness" of the "sovereignty" of the National Liberation Council in Ghana, and in Nigeria, because of the provisions of the 1970 Decree (No. 28).[61] This narrow approach obviously overlooks the argument of international accountability. We reiterate that the independence of the judiciary was ensured by the "New Rule of Law".

8.27 The distinctive feature of the "New Rule of Law" was that it was a "self-activating" and "self-regulatory" device that the judiciary could

use as a new norm of interpretation by assuming a prominent role in the new framework without resorting to indiscriminate judicial activism. It is a notorious fact that in each state military intervention took place for lack of the required degree of political acculturation due to which constitutional means were found inadequate to correct deviant political behaviour expressed in the charges of various forms of corruption, especially of "tribalism" in Africa, against the political leaders. Such behaviour often manifested itself in "oppression" when the Constitution was perverted and the "Rule of Law" was violated with impunity, as in Ghana.[62] Therefore, the new rulers were committed to restore and preserve the "Rule of Law" but the nature of the military organisation, its discipline and training and also the task of providing a "clean administration" necessarily produced a different approach in matters relating to personal liberty in particular of which the judiciary was expected to take notice to satisfactorily fulfil its new role. The Constitution provided for various types of institutional restraints on all organs of government but under the new legal order the judiciary appeared to be the only institution which could exercise any restraint on the new regimes who combined in themselves both executive and legislative functions necessitating greater use of "external" restraint. The task of upholding the "New Rule of Law" therefore devolved solely upon the judiciary and the "New Rule of Law" could be equated to the capacity of the judiciary to evolve a suitable approach in the matter of interpretation of the Decrees and Orders of the new regimes; in the area of personal liberty it could be reasonably expected that the judiciary would be inclined to show more "judicial courage" than "judicial restraint" in view of their Common Law background.[63]

8.28 Clearly the traditional power and jurisdiction of courts to interpret laws had to be exercised in each case in the context of local provisions. In Commonwealth Africa, it was only in Nigeria that the courts

were expressly debarred from "questioning" the "validity" of the "Decree", "Edict" and the "Instrument";[64] in Pakistan also the protected instruments were named.[65] However, it was possible for the courts everywhere (including Bangladesh) to construe the expression "question as to validity" as meaning that the power to make the named documents could not be questioned. The expression did not hold out a mandate for the makers, the court could hold, to ignore the procedural requirements for the performance of the legislative and executive acts contemplated under the "Proclamations", "Decrees" and other instruments of the new rulers and also under existing laws. In other words a distinction could be made between "essential" and "formal" validity and it could be held that a challenge to the "formal" validity was not excluded and the court could strike down the document if it was not signed by the appropriate authority or was not sealed in the prescribed manner or did not fulfil any other procedural requirement.[66] Of course it could possibly be argued that in Nigeria Decree No.28 (s.1(2)(b)) aimed at destroying this distinction but this could be met by reading the two clauses ejesdem generis.[67] In all cases there was, in addition, a limitless scope for interpreting the provisions of the documents themselves and also of acts done or action taken under them. Unfortunately, in Pakistan (in 1969 and also in 1977), the power of interpretation of the legislative instruments (M.L. "Regulations" and "Orders") was taken away from the courts and vested in the authority issuing the same: it was provided that all question of interpretation thereof "shall" be referred to such authority and the decision by the latter thereon "shall not be questioned in any court."[68]

## II. New forms of "emergency" provisions

### (1) Special law-enforcement powers of the armed forces

8.29 In Pakistan, in 1958, Martial Law Regulation No. 18 prescribed the death penalty (later reduced) for failure by any person to give, when

required, "his correct name and address and produce his permit or pass, to any military or civil officer or any soldier or policeman". In Bangladesh the power of investigation of an offence was vested in an officer not below the rank of Major vide Reg. 7 who could exercise all powers of search, seizure and arrest contemplated under the Code of Criminal Procedure.[69] In Ghana, the provision took a slightly different form. It was tersely stated in the Law Enforcement (Powers of the Army) Decree 1966.[70] It empowered "any member of the Ghana Army not below the rank of Sergeant" to perform "any function" conferred on a member of the Police Service "in relation to the prevention and detection of crime, apprehension of offenders, maintenance of public order and the safety of persons and property" and conferred on him the powers of arrest and search exercised by a police officer. The significant aspect of the new power was reflected in the underlined expression, which was a term of art which embodied the concept of "emergency". Apart from the fact that the term was not defined, unlike the ordinary powers of a police officer under the Criminal Code, it was not circumscribed by the requirement of "reasonable cause to believe". There was, therefore, little scope under the decree for the court to play a monitoring role in regulating the power by subjecting in each case the exercise of the power to the test of "necessity".

8.30 In Nigeria, the Armed Forces and Police (Special Powers) Decree 1967 expressly mentioned that "a state of emergency exists in Nigeria" requiring "special powers" to be conferred "during its continuance" in derogation of the provisions of the Criminal Code.[71] The Decree conferred powers of arrest, entry, search and seizure on members of the armed forces concurrently with the police officers, but in all cases the requirement of "reasonable grounds/cause to believe" was added while extending the application of the power to "any offence", which was not defined.[72] The most significant provision of the Decree was s.3 which

concurrently authorised the Police and the Army Chiefs to order the detention of any person for an unlimited period if they were "satisfied" that such person "is or recently has been concerned in acts prejudicial to public order, or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him." The language was apparently borrowed from preventive detention laws but with one important change in that the power could be exercised only "by order in writing".[73] The Nigerian Constitution permitted the enactment of such laws only during an "emergency" and it is important to note that Decree No. 1 promulgated by the Federal Military Government did not "suspend" the relevant provisions of the Constitution.[74] In dealing with cases under the "emergency laws" made under the Constitution, the Nigerian judiciary had made a courageous and imaginative approach unburdened by the authority of the English wartime cases and therefore it could be expected that the approach could be maintained with greater vigour and that the courts would refuse to accept the ipse dixit of the detaining authority despite the use of "subjective satisfaction clause" in the Decree.[75]

8.31 In Uganda the provisions were more elaborate and the power which came to be conferred on the army was also more circumscribed. The Armed Forces (Powers of Arrest) Decree 1971 which, for the first time, conferred them on "a soldier or prison officer" had a life of twelve months and it was re-enacted in 1972 but finally repealed in 1973.[76] The Decree specified the provisions of the Penal Code in respect of which the power of summary arrest was to be exercised, and that too "on reasonable grounds" (s.2), but in effecting arrest or preventing escape "necessary" (not reasonable) force could be used under s.3. The Decree also conferred powers in respect of entry, search and seizure but under s.10 it was provided that the person exercising the power "shall show his identity

card" to "any one who asks to see it and who is affected by any action". These provisions were re-enacted in The Military Police (Powers of Arrest) Decree 1973[77] but now the beneficiary of the power was "a military police officer in uniform". Under certain circumstances the military police officer could, under s.7, use arms but he had to give warning and he could act only when the warning was unheeded and in the case of preventing a rescue and effecting an arrest, only when he had "reasonable grounds to believe" that there was danger of grievous bodily harm to somebody. Under s.8(4) an arrested person could be detained up to 28 days pending investigation but he could not be subjected to "torture or undue hardship"; in the case of an offence triable by a Military Tribunal, only on the order of the officer commanding he could be detained for more than twenty four hours.

## 2. Military Courts

8.32 The Martial Law regimes in Pakistan and Bangladesh contemplated setting up military courts at the very inception of their rule.[78] In Bangladesh, as well as on all three occasions in Pakistan, two types of such courts were set up - Special Military Courts and Summary Military (Martial Law) Courts.[79] The ordinary criminal courts continued to function with concurrent jurisdiction,[80] but for trials in the new courts of either type the procedure applicable to Courts Martial under the Pakistan Army Act was to be followed.[81] The 1977 regime in Pakistan prescribed new and enhanced forms of punishments which included whipping and, in the case of theft, dacoity and robbery, amputation of the hand.[82] The Summary Military Courts could not, however, impose the sentence of either death or "amputation" which the Special Military Courts could do (to be confirmed albeit by the Chief Martial Law Administrator).[83] The proceedings of the Summary Military Courts had to be submitted "without delay" to the Zonal Martial Law Administrator for "review".[84] In 1969,

the "Martial Law Orders" (No. 8) prescribed special procedure for grant of bail.[85] The President of the Court could grant bail only when he was satisfied that the charge was "not of a serious nature" and that the accused would neither abscond nor tamper with evidence. As we have already seen, no decision or verdict of such courts could be challenged in any civil court.[86] In Bangladesh also the military courts could try any offence but the Summary Military Court could pass a sentence of five years imprisonment. There could be no appeal against the "unanimous judgment or decision" of a Special Military Court but an "Appellate Tribunal" constituted with a judge of either Supreme Court or High Court could hear appeals against other decisions of the new courts. Sentences of death and life imprisonment required confirmation by the President,[87] In fact the Bangladesh Martial Law Regulations (No. 1 of 1975) was meant to be a complete code by providing in Reg.3 for the "procedure of martial law courts", in Reg.4, for "appeals and confirmation" and in Reg.6 for restrictions on bail.[88] In 1976 new Regs. 15, 16 and 17 were added to create new offences prescribing imprisonment for ten years and fine (in case of Reg. 17 also confiscation of whole or part of accused's property) for "criticising martial law", "creating fear" and for "prejudicial acts".[89] The offence under Reg.17 could be tried by a special tribunal in accordance with special procedure.[90]

8.33 Under "The Trial by Military Tribunals Decree" of Uganda,[91] the "Defence Council" could constitute such Tribunals with five to seven officers of the armed forces for conducting trials under the Decree in respect of such offences of the Penal Code as the Decree had itself specified.[92] Under s.4 the President[93] could order the trial of any person (members of the armed forces excepted) by the Tribunal if he was "satisfied" that acts of such person who was charged with any of the offences of the Penal Code specified in the section were "calculated to intimidate or alarm members of the public or to bring the military government under contempt or disrepute".[94] The Decree did not specify

the procedure to be followed by the Tribunal but in s.5 it was stated that although sentence in the case of an offence under s.183 of the Penal Code shall be determined by the Tribunal it shall not be carried out without the consent of the President; in other cases, sentence was to be imposed according to the Penal Code. In Uganda the Bill of Rights of the Constitution not being suspended legality of any trial in violation of the constitutional safeguards could possibly be challenged even if the "satisfaction" of the President could not be reviewed.[95] Much depended however on the fact ... whether the court was prepared to construe strictly the term "operations" that occurred in clause 7 of the Proclamation[96] as well as in the subsequent Decrees.[97]

### (3) "Preventive Detention" legislation

#### (A) Uganda

8.34 The Detention (Prescription of Time Limit) Decree[98] was for all intent and purposes an ex post facto legislation. It was to "provide for the limited detention of persons arrested during and after military operations."[99] Special notice has to be taken of the fact that the term "operations" in s.1 of the Decree was qualified, unlike its counterpart in clause 7 of the Proclamation, by the word "military". The section prescribed a six months' time-limit for the continued detention of such persons.[100] By s.2 the Minister of Internal Affairs was empowered to appoint "a Committee consisting of such number of persons as he considered appropriate to review the cases" of the detained persons and "advise the President in relation thereto as it sees fit". The procedure for the "review" of the cases of preventive detention provided by Art.10(5) was expressly superseded and a new procedure was provided in s.3 which contemplated that the detainee

> (a) shall be afforded reasonable facilities to consult at his own expense a legal representative of his own choice who shall be permitted to make representations to the committee on that person's behalf; and

(b) shall be permitted to appear before the committee in person or by a legal representative of his choice.

8.35 In addition, it was provided by s.4 that the Commissions of Inquiry Act, with certain exceptions and modifications, shall apply to an "inquiry" under the Decree but whether this was done to emphasize the "fact-finding" or the "advisory" nature of the Committee's jurisdiction it is difficult to say. By s.6 the Minister was required to "designate" the "place of detention". On the other hand, s.5 provided for "immunity" in wide terms to preclude actions for compensation by the detainees but the courts could use as a handle the requirements of "good faith", "execution of duty", "defence of Uganda", "public safety", "enforcement of discipline", "law and order" and "public interest" despite their being in the alternative and in large number, to give relief in appropriate cases.

8.36 The power to make detention orders prospectively was conferred by a new s.2, substituted by The Detention (Prescription of Time Limit) (Amendment) Decree.[101] The Minister was required to be "personally satisfied" before making such orders, although he could act on the "report of any authorised officer", who could order the arrest of any person whom he suspected "upon reasonable grounds to be a person to whom the section applied" but he had to report the arrest to the Minister "as soon as practicable". The omission of the requirement of "reasonableness" is due possibly to the fact that the person could be detained until the expiry of fourteen days and within this period the Minister could pass an order for his continued detention. The section applies, it was stated, to any person who,

(a) is conducting or has conducted himself in a manner dangerous to peace and good order; or
(b) is endeavouring or has endeavoured to excite enmity between the people of Uganda and the Government; or
(c) is intruguing or has intrigued against the lawful authority of the Government.

8.37 The provision for "review" was re-cast in new ss. 3 and 4 to conform closely to those of art.10(5) which was, in terms, inapplicable:

within 30 days the detainee was to be given a statement "specifying in detail the grounds"; the first review, and the periodic reviews, were to take place every three months and "he shall at all reasonable times be afforded facilities to consult, at his own expense an advocate of his choice; the "Review Committee" was to consist of one Chairman (who shall be a judge of the High Court) and not less than two members who were all to be appointed by the Minister "after consultation with the Chief Justice"; the Committee was to "examine all allegations of facts" and was to be "informed of all sources of information" but when so required by the State it had to withhold from any person the identity as well as the facts tending to disclose the identity of the informant; the Minister was to give reasons to the Committee if he did not accept its "recommendations" and to cause to be published in the Gazette "from time to time" the names of not all but of those persons whose cases had been reviewed indicating whether detention in any case was continuing against the "recommendations". The Committee could even visit the places of detention and receive complaints which it could communicate to the Minister. Under the new s.11 it was provided that the Decree would expire, unless earlier repealed, on the repeal or expiry of the Suspension of Political Activities Decree.

(8) Nigeria

8.38 The State Security (Detention of Persons) Decree 1966 (hereinafter called the principal decree) was the first legislation on the subject in Nigeria which, in its schedule, contained the names of the detained persons, twelve in number.[102] In the cases of subsequent detentions, Decrees were made in a similar way, and numbered consecutively as Nos. 2 to 15. The schedule in each case named the detainees and in each Decree it was stated that the provisions of ss.2 to 6 of the principal Decree also applied (in the principal as well as in the subsequent Decrees); the preamble recited the "satisfaction" (as to the necessity of the

detentions) of the Head of the Federal Military Government and also the fact that the arrest and detention were "in the interest of the security of Nigeria"; and s.1 in each case fixed a six months time-limit for detentions under the decree, at such places as might be directed by the Head of the Federal Military Government "either generally or specifically" and under such conditions as he might direct as to "confinement including conditions as to maintenance, discipline and punishment for breaches of discipline".[103] The provision of ss.2 to 6 of the principal decree may now be examined in greater detail.

8.39 Section 2 enabled a detainee to make "representations in writing" to the Federal Military Government but did not impose any duty on the latter to supply the detainee with the "grounds" for the detention. The section made a vague and unconnected statement that - "but information which is against the public interest shall not at any time be disclosed thereafter by any persons." The underlined word "thereafter" could be related in the context only to the event of submission of representation but the court could also infer a right to obtain "grounds" as a necessary corollary of the right of "representation" and rely on the statement as embodying the qualification of the right to be supplied with the "grounds". This would have made effective the right of "representation" granted under the Decree although under s.3 "Tribunals" for "advising" the Government "on the detention cases" could be constituted if the government thought it fit to do so at "its discretion". A two-member tribunal was contemplated, of whom one was to be the Chairman, a lawyer "nominated by the Chief Justice", but both members must "appear to the Federal Government" to be capable of exercising "independent and impartial judgment". Members could be appointed for a particular case or a series of cases and the tribunal could consider not all cases but only those which the Government considered "necessary" to refer to it.

8.40 The tribunal was empowered to regulate its own procedure and it

could possibly hear the detainee in person or even allow legal representation despite the provision in clause (d) of s.3 - "but nothing in this section shall entitle any person. . . to attend in person or to be represented by any person during the consideration by the tribunal of the case. . ." The tribunal had to "submit its report on the basis of material placed before it", within four weeks of the date of reference. Not only was the report not binding on the government but there was also no duty imposed on the government to communicate its decision either to the tribunal or to the detainee. Indeed the detainee had no other right either. Under s.6(b) the remedy of habeas corpus appears to have been expressly excluded but the provision that the application shall not lie "at the instance of a person detained under the decree", if construed strictly, might enable the court to grant relief inasmuch as at common law the rules of standing in such applications were very liberal and the section, in terms, did not take away the court's jurisdiction in such matters although it expressly suspended the Bill of Rights of the Constitution "for the purpose of the decree". Clause (a) debarred the courts from adjudicating on the violation of the Bill of Rights expressly but on the terms of the Decree itself relief could apparently be given in cases of mistaken identity, detention beyond six months and of detention at places not authorised "either generally or specifically".

8.41 It is, however, necessary to point out that preventive detention as a permanent measure appears to have been provided for subsequently in s.3 of Special Powers Decree of 1967.[104] Although the 1967 Decree did not contain procedural safeguards, such as the right of representation or provision for any kind of "review" it also did not expressly suspend either the constitutional Bill of Rights or the remedy of habeas corpus. Moreover, in any particular case the "validity" of a particular "order" of detention would be challenged and not the provision of the Decree itself and the courts, therefore, would possibly feel less

handicapped. In the case of the State Security Decree of 1966, on the other hand, it would require tremendous efforts to convince the court that what was being challenged was not the Decree or the "validity" of any of its provisions but an action taken under the decree which was not in conformity with its provisions. In either case, however, the detainees could aspire for success only in the event of the courts showing their willingness to use judicial valour without undue circumspection. Indeed, the 1967 Decree, providing for unlimited detention ("until the order is revoked") without expressly invoking the aid of emergency provisions, made it all the easier for courts to strike down detention orders in particular cases for infraction of the right to personal liberty.

(C) Ghana

8.42 The National Liberation Council (Protective Custody) Decree 1966[105] (hereinafter called the principal decree) was also ex post facto legislation. It was made on 2nd March 1966 but in s.2 of the Decree it was stated that "it shall be deemed to have come into force at 4 o'clock in the morning of the 24th day of February, 1966" and in the schedule it listed, among others, the Ministers, the Members of Parliament and the Secretaries of the "dissolved Convention People's Party" who were, according to s.1, "taken into custody and kept in protective custody for such period as the National Liberation Council may determine". In the preamble it was recited that the Council was "satisfied" that the Decree was "necessary for the preservation of public peace and the protection of the persons described in the schedule" and that it was made "in pursuance of the Proclamation".

8.43 For subsequent detentions a process similar to that of Nigeria was followed but in the short title of each of the Decrees the word "(Amendment)" was inserted and in s.1 of each such Decree it was stated that the principal decree was amended by insertion at the end of the

schedule to that decree certain names which were mentioned in each decree.[106] On the 6th September 1966, The National Liberation Council (Protective Custody)(Amendment) (No.8) Decree 1966,[107] was made to impose restrictions on movement on "every person released from protective custody under [that] Decree". He was required to "notify in writing", at least seven days before his intended departure from Ghana, his exact date of departure, mode of travel, destination and such other matters as the Commissioner of Police (C.I.D.) might "reasonably specify". Any person who contravened the Decree was liable to be prosecuted and to suffer imprisonment up to one year. This Decree, as well as the other "Amendment" Decrees and also the principal decree, were all "repealed" by The National Liberation Council (Protective Custody)(Consolidation) Decree 1966,[108] which, in fact, re-enacted the substantive provisions of No. 8 Amendment Decree and also probably consolidated the detentions, albeit under a new provision (s.1), as follows:

> Each of the persons described in the schedule. . . shall be taken into custody and shall be detained in such place and for such period as the National Liberation Council may determine. [emphasis added]

8.44 The National Liberation Council (Protective Custody) Decree 1967[109] provided for the detention of a large number of persons belonging to the armed forces, whose names as well as respective ranks were indicated in the schedule. In s.2 it was provided that each of the detainees is to be "deemed to be a prisoner within the meaning of s.60 of the Prisons Act". The process of preventive detention was brought to an end at the termination of the military rule under the first coup by The Release of Persons from Custody Decree, 1969,[110] but not without providing for indemnity in s.1(2), as follows:

> Until their release the holding in custody of all persons described in sub-paragraph (1) of this paragraph shall, notwithstanding anything to the contrary, be deemed at all times and for all purposes to have been lawful.

Besides, as the 1969 Constitution drew its authority from The Constituent Assembly (Amendment) Decree 1969 (N.L.C.D. 380), it was doubtful whether the civilian government could enact any retro-active law to impugn the validity of the detentions or even, whether the courts could give any relief imputing special significance to the term "suspension" in relation to the former Constitution. However, it has to be recalled that neither the Proclamations nor any of the "Protective Custody" Decrees expressly barred judicial review and therefore the courts in Ghana possibly possessed the largest measure of freedom in granting relief to the detainees. Although the Preventive Detention Act 1964 was repealed during military rule, the Habeas Corpus Act 1964 does not appear to have been touched.[111]

8.45 During the second coup also provision was made for the detention of any person "in such place and for such period and subject to such conditions as the National Redemption Council [might] direct", by the Preventive Custody Decree 1972[112] but the technique was slightly changed, vide s.2, as follows:

> [the Council] may, by executive instrument authorise the arrest and detention of any other person in respect of whom they are satisfied that it is in the interest of national security or in the interest of the safety of the person so to do and any such instrument may amend or repeal the schedule to this Decree. [emphasis added]

The scope of the judicial review was not reduced, it is submitted, by the new phraseology or even by the new technique of "executive instruments" and as we have seen even the 1969 Proclamation did not expressly curtail its scope. However, it is doubtful if the courts could go so far as to hold specific retroactive legislation[113] ultra vires the maxim nulla poena sine lege or even the general principles of common law.

## III. The Judicial Response

### (1) Pakistan

8.46 We have already seen that after all three coups the basic documents purported to curtail the scope of judicial review in almost identical terms, by providing that the specified instruments made by the martial law authorities shall not be questioned in any court.[114] In 1969 and 1977 the authorities, as we have seen, reacted strongly against the judicial courage of the superior courts and enacted additional measures to stultify the efforts of the judiciary who had made a determined bid to promote the "New Rule of Law" by handing down the decisions in MIR HASAN and ASMA JILANI.[115] No doubt the latest enterprise had taken away the "power of interpretation" from the courts but the "power of adjudication", which formed the very basis of the existence of the courts, obviously could not be dealt with in a similar way. The courts still possessed the power to apply to the facts of a given case the "interpretation" of any instrument which could now be given only by the authorities themselves.[116] The question, however, did not arise in this form in either of the decisions: in both cases the courts mainly dealt with the legality of the regimes and, while in MIR HASAN the full bench of the Lahore High Court interpreted the impugned regulations and held the same to have been impliedly repealed, in ASMA JILANI the Supreme Court categorically held ultra vires the impugned regulation and also the Jurisdiction of Courts (Removal of Doubts) Order 1969, holding the maker of the instruments (General Yahya Khan) to be an usurper.

8.47 We propose to discuss now some other decisions but consider it necessary to point out that in 1977 an effort was made to tamper with the court's "power of adjudication" also by the Chief Martial Law Administrator's Order No. 10 [para (b)] by providing that -

> If any question arises as to correctness, legality or propriety of the exercise of any powers or jurisdiction by a Special Military Court or a Summary Military Court or a Martial Law Authority. . . it shall be referred to Chief Martial Law Administrator whose decision thereon shall be final. . . [emphasis added]

It is submitted that the provision did not affect the court's power to adjudicate upon a finding of fact made by the named functionaries; the protection was extended merely to their "power" and "jurisdiction". The provision has not come for interpretation in any decision uptil now but it has to be noted that it had a parallel in Art.3(3) of Removal of Doubts Order 1969. The instrument, which was later held ultra vires as a whole in ASMA JILANI by the Supreme Court, was unsuccessfully challenged in the Lahore High Court in FAZAL AHMED v STATE.[117] The court observed that in the preamble and in arts. 2, 3 and 4 of the Order the intention of the law-giver was clearly spelled out and added as follows:

> After the promulgation of this declaratory statute there is no doubt. . . that the martial law authorities are the sole judges of both law and facts of the matter before them. . .

Of course the decision is no longer good law, even then it may be mentioned that law was too broadly stated in the case.

8.48 On early occasions, however, the same High Court showed conspicuous judicial courage in SHER MUHAMMAD v NASIRUDDIN[118] and MUNZOOR ELAHI v STATE.[119] Of course it has to be conceded that the decisions were handed down during the first martial law regime when the "additional provision" was not there. In the first case the court quashed the proceedings taken against the petitioner by the municipal authorities. It was held that the jurisdiction of the court was not ousted on the mere assertion that the impugned proceedings were authorised by a Martial Law regulation or order. The court could see if the purported exercise of power was justified in law and was exercised in accordance with the regulation. In the second case the court held that, as an order passed without jurisdiction was a nullity, the court could see if the military tribunal had the power to try the offence or to pass the impugned sentence.

8.49 In 1977 the Martial Law regime was in fact an extension of the martial law declared by the civil government and we have seen that the

Lahore High Court had held the said declaration to be illegal and that it had struck down the Pakistan Army (Amendment) Act No. X of 1977.[120] In IQBAL AHMED v STATE[121] the court ordered the prisoner to be set at liberty upon holding that the tribunal to which the case was transferred for trial under the said Act had lost its jurisdiction to deal with the matter and the remand order passed by it was therefore illegal and the petitioner was being held in illegal detention.

8.50 In a later case the same High Court similarly ordered the prisoner to be released. In BEGUM SHAHEEN RAMAY v STATE,[122] although the provisions of the Constitution could not be invoked, the court could issue a writ in the nature of habeas corpus under s.491 of the Criminal Procedure Code as the prisoner had been illegally detained. The warrant under which the petitioner was committed to jail was not signed in the instant case by all the members constituting the tribunal: the detention was therefore held to be illegal.

8.51 In Pakistan, as we have seen, the basic documents in effect authorised preventive detention for an indefinite period by providing that the existing provision of law for the review of the case of a detainee shall cease to be effective.[123] Unfortunately, the provision does not appear to have been interpreted by any court but in view of the importance attached to the machinery of the military courts in Pakistan it can be reasonably suggested that preventive detention had perhaps become unnecessary there under military rule. In Bangladesh Reg.17 apparently provided a handy alternative to preventive detention by defining "prejudicial acts" to mean such acts as could be prejudicial to the "defence of Bangladesh" or to "public safety" which could be tried and punished by "special tribunals". In this connection it is to be noted that the blanket ban against judicial review contemplated under Reg.4(9) protected only "order, judgment, decision or sentence of a martial law court".

(2) Commonwealth Africa

8.52 In view of the assertion in Decree No. 29 of 1970 by the military rulers of Nigeria that the "military revolution" had "abrogated the whole pre-existing legal order" which, by implication, claimed the establishment of a new legal order, and not an emergency situation under the pre-existing legal order, the military rule could not be characterised as a "national emergency" in constitutional terms as observed in some quarters but it is correct, as has been stated, that only a few cases involving infractions of personal liberty came before the courts.[125] It is difficult to say if this was because the litigants felt terrorised by the "gun-power" or because there was lack of proper appreciation of the new jurisprudence which demanded a courageous and imaginative approach on the part of both bar and the bench.[126] It is true that although the military rulers of Nigeria claim to be a merely "corrective regime", in the case of Ghana as well as Uganda, serious complaints of "political killings" and torture of political detainees have been recorded.[127]

8.53 In fact there is not a single reported decision on any case of preventive detention by military government in Uganda, yet in NSUBUGA v A.G.[128] the court allowed in part an action for damages for false imprisonment which was alleged to have been made under the 1969 Emergency Regulations. It was held that the arrest and detention under the Regulation was not proved and, as the plaintiff was neither taken before the Magistrate nor released on bond nor charged with any offence, the provisions of the Criminal Procedure Code were violated in holding him in detention for 21 days. It was also held that the claim was not barred by Decree No. 19 of 1972 which prohibited the institution of legal proceedings for the recovery of damages against the new rulers in respect of wrongs committed by the Civil government for "political matters". The court rejected the contention holding that the words "or for any cause whatsoever" of s.1(1)

of the Decree ought to be read ejesdem generis.

8.54 In MOJEED AGBAJE v COMMR. OF POLICE,[129] the High Court of the Western State of Nigeria issued a writ of habeas corpus holding the detention order to be illegal for non-conformity with the provisions of s.3(1) of Decree No. 24 of 1967.[130] The order related the "satisfaction" of the detaining authority to "security of the Federation of Nigeria" which was not listed in the section as one of the jurisdictional requirements which were stated in terms of different acts concerned with "public order". The detainee had complained that he was not informed of the reasons of his arrest and detention in spite of repeated demands. Indeed, it was a case of "flagrant" violation of s.21(2) of the Constitution, which provision the Decree under which the order was passed had not suspended as had been done in the case of detentions under the "State Security" Decrees. Aguda, J., observed:[131]

> . . . these are wide and arbitrary powers in derogation of the entrenched clauses of the Constitution relating to fundamental rights. . . there is cast upon the Inspector General of Police the onus to establish before any court. . . that he has complied strictly with the enactment. . . any material deviation from the provisions of the Act must. . . render the detention. . . null and void. . . for which. . . habeas corpus is an appropriate remedy.

Although the court made a rather inapposite reference to the decisions in the HALLIDAY and LIVERSIDGE cases,[132] to highlight the "conflict" - the liberty of the citizen versus the safety and corporate existence of the state - it was rightly observed that "in the process the courts have a vital role to play" and that "it is partly for the restoration of such conflicts that courts in the land have been established.[133] The decision was indeed the trend-setter in the exposition of what we have preferred to call the "New Rule of Law".[134]

8.55 In re: M. OLAYORI and others,[135] the Lagos High Court also allowed an application for habeas corpus, holding an order under the same Decree to be illegal. The applicants were contractors to the Nigerian Army. It was alleged that they had received money for services not rendered and

for goods not delivered. They were arrested by the Army but later released on "bail" on what was said to be an "enforced promise" to pay the money claimed by the Army. They were re-arrested and detained after they had started legal proceedings on being released. Relying on the GREENE case[136] the State Counsel contended that the court could not inquire into the order and that it was also not necessary for the government to file an affidavit to deny the allegations. The court quoted a passage from the decision and observed:[137]

> I hope this quotation shows beyond doubt that the court did inquire into the accuracy of the statements in the affidavit and on such enquiry held that there was ample evidence to justify the action. . .

Earlier in the judgement the court cautioned "those who advise the authorities on these matters and seek to justify the action under the umbrella of Ex p. Greene case".[138] The court referred to Jowitt[139] and Halsbury[140] on the meaning of the term "public order" and held that mere failure to pay an amount arbitrarily imposed could not be treated as "an act prejudicial to public order".[141] Although the decision in the AGBAJE case (supra) does not appear to have been cited in the instant case, the court expressly referred in this case to "Rule of Law" and observed that the same must prevail even though there was an allegation in this case of corruption and embezzlement of public funds and it was possible for the Chief of the Army to make a Decree to deal with the inconvenient situation that might arise.[142] The court also held that the order was ambiguous and was bad on that ground. It merely reproduced the language of s.3(1) of the Decree which contemplated alternative charges. The court observed that the impugned order was one of the "stereotyped copies" which were available for "ready use when required".[143] It is submitted for the same reasons the court could have further held that the "satisfaction" was not real.

8.56 The same High Court, in a subsequent decision, OKON EYO and

E.O. EYO v. ARMED FORCES,[144] however, rejected the challenge made against an order under the same Decree on the similar ground of "uncertainty", holding that the impugned order was an "instrument" within the meaning of s.1(3)(b) of Decree No. 28 of 1970.[145] The term being not defined either in the Decree or even in the Interpretation Act,[146] it ought to have been construed to mean subordinate legislation and that the impugned order could not, apparently, be categorised as such. The restricted and unimaginative approach of the court could possibly be explained by the fact that it rejected all other contentions of the prisoners although some of them were indeed substantial and merited serious consideration. It had been contended that the order did not specify the period of detention and that it was not addressed to any particular prison officer. The detention was also challenged as being mala fide, but the contention was rejected by making a reference to the HALLIDAY and LIVERSIDGE cases and observing that the reasons of "satisfaction" of the detaining authority could not be inquired into. It was unfortunate that the court failed to note the distinction between the two contentions.

8.57 The bar of s.1(3)(b) of the 1970 Decree does not appear to have been pleaded in C.D. ONWUDIWE v COMMR. OF POLICE[147] and the Enugu High Court held that the order was bad as it contained all the alternative "grounds or causes" specified in s.3(1) of the 1967 Decree. In the affidavit of the State only the fact and the date of detention were stated: it was argued, relying on the LIVERSIDGE case, that other facts need not be disclosed for "security reasons". The court relied on the decision in the GREENE case to say that the "causes and grounds" of detention could be inquired into by pointing out the fact that s.3(1) had adopted the language of Reg.18B of the Defence Regulations, 1939, of England. It was also pointed out that unlike the State Security (Detention of Persons) Decrees, the Decree in the instant case interfered neither with the "constitutional rights" nor with the right to the writ of habeas corpus and that the right

of being informed of the reasons guaranteed by s.21(2) of the Constitution was violated.

8.58 On the general scope of judicial review we may summarise the views expressed in three decisions of the Supreme Court. In the first case, UNIVERSITY OF IBADAN v ADEMOLEKUN,[148] the validity of Edict No. 15 of 1967 of the Military Governor of Western Nigeria, was challenged. A new Court of Appeal was set up for the State which was interposed between the High Court and the Supreme Court. For the first time s.6 of Decree No. 1 of 1966 came to be interpreted and the court held that it was "not to be read in isolation" and that the Decree had to be "read as a whole". By reading ss. 3 and 6 together the court held that it could enquire whether an Edict was void to any extent under s.3(4) or that the impugned Edict was void as being inconsistent with the Constitution. In the LAKANMI case[149] the court went a step further and held that the impugned Decree, Decree No. 45 of 1968 was invalid on the ground, among others, that the Federal Military Government was an "interim constitutional government" and that in making laws for "peace, order and good government" under s.3, it could derogate from the provisions of the Constitution to the extent necessary under the doctrine of necessity. It was indeed a bold decision in that it nullified the effect of the proviso added by the Decree No. 1 to s.1 of the Constitution to provide that the "Constitution shall not prevail over a Decree". It was held that the 1966 - No. 1 Decree impliedly provided for separation of powers and, as the impugned Decree of 1968 impinged upon the sphere of the judiciary, it was void.

8.59 We have already noted that Decree No. 28 of 1970 came as a sequel to the decision in the LAKANMI case[150] and although it purported to nullify the effect of the decision it has to be noted that it enacted the law declared in the ADAMOLEKUN case. It re-asserted that a Decree shall prevail over the unsuspended provisions of the Constitution but it did not make an Edict equally supreme. Further, it reasserted that

a Decree as well as an Edict could not be challenged on the ground that there was no "valid legislative authority" to make the same, as held in the ADAMOLEKUN case while explaining the scope of s.6 of Decree No. 1. The last-mentioned decision was therefore followed in the more recent case of B.C. ONYIUKE v EASTERN STATES INTERIM ASSETS & LIABILITY AGENCY[151] in which The Detention of Persons Edict No. 11 of 1966 of Eastern Nigeria and all subsequent amendments thereof were held ultra vires s.3 of Decree No. 1 and also ss. 22 and 31 of the Constitution. Edict No. 11 empowered the Military Governor to detain certain classes of persons for reasons of "state security" which was a Federal subject and its amendment Edict No. 32 empowered him to confiscate the detainee's property which under the Constitution could be done either in consequence of acquisition by civil process (for consideration) or on conviction of a crime in a court of law. The court reiterated that the doctrine of separation of power continued to prevail and as the two Edicts constituted a "legislative judgment" they must be struck down.

8.60 We thus find that the judiciary in Nigeria consistently tried to uphold the basic principles of Rule of Law in which, in normal circumstances, it had to be aided by the legislature. For, the usual notion of Rule of Law postulated government of the state by just, fair and equitable laws eschewing the arbitrary exercise of power. By inviting itself to perform the task single-handed it assumed a dual role which, by implication, warranted the power of judicial review to be exercised in a more imaginative way with a greater anxiety to control the mounting complaints of excesses and abuses resulting from the merger of the legislature and the executive under the new set-up. A new balance was thus struck by the "New Rule of Law" between the different organs of government on the one hand and between the state and the individual on the other hand.

8.61 We now turn to Ghana and examine first the decisions rendered under military rule during the first coup. In Exp. BRAIMAH,[152] the Court of Appeal allowed the appeal by the General Officer Commanding of Ghana Army against the judgment of Accra High Court which had granted a writ of habeas corpus. The applicant, a Nigerian national, was arrested by army authorities on suspicion of having committed theft, in exercise of powers under N.L.C.D. 109.[153] However, it was the interpretation of the Criminal Procedure Code (Amendment) Decree 1966 (N.L.C.D.93) which was the main point at issue. The Decree amended s.15 of the Code by adding a new sub-s.(5) which was in fact a re-enactment of the proviso to sub-s.(2) which the Decree repealed. Any person summarily arrested could be detained with the consent of the Attorney General for "a period of twenty-eight days or such other period" as he might determine, without the provision of bail. In the instant case the Attorney General issued another "consent in writing" as required after the expiry of 28 days, which was challenged as being illegal.

8.62 The court rejected the contention, relying on s.32(1) of the English Interpretation Act which, the court said, corresponded to similar provision in the Ghana Act, and which provided that a statutory power could be exercised "from time to time" as occasion required. No importance was attached to the rider "unless the contrary intention appears". It was possible to construe the words "or such other period" of sub-s.(5) of the Decree as a manifestation of "contrary intention". It could be argued that the Attorney General could give consent for detention even for a longer period than 28 days but he could give consent only once after he had made up his mind to do so. This construction could be supported by the additional reasons that the provision of bail was excluded and the provision being restrictive of liberty had to be strictly construed. However, the court held that under s.2 of the Habeas Corpus Act 1964 it could inquire into the facts justifying the "consent"; it would not therefore

suffice to merely exhibit the "consent" in the return. On the facts it was held that the "consent" was justified but it was observed that the provision constituted a "very wide departure from the accepted principles of the administration of the criminal law". The court also expressed the hope that "early consideration" would be given to the "removal" of the provision from the Statute Book.

8.63 The single reported decision on preventive detention was the case of REPUBLIC v DIRECTOR OF PRISONS, EXPARTE SALIFA.[154] It had an important and interesting sequel in that after the prisoner was restored to his liberty by Anterki, J., he was re-arrested next day but this time he was not equally fortunate and Crabbe, J., dismissed his application for a writ of habeas corpus by his judgment in REPUBLIC v DIRECTOR OF SPECIAL BRANCH, EXPARTE SALIFA.[155] Even the first application appears to have been made after the prisoner was in detention for more than a year and Anterkyi, J. held that the document exhibited in the case as a Decree authorising the detention was not a Decree in the eye of the law in that it did not meet the requirement of paragraph 3(1) of the Proclamation. It was held that although a Decree can be given retrospective operation, "publication of it in the Gazette, numbering thereof in accordance with the order in which decrees are published, printing and publication thereof by the Government Printer, together with its consequent purport that it was signed by the Chairman of the National Liberation Council, cannot be respectively legally dispensed with in the making and issuing of a decree having the force of law". It was held that the word "and" connecting the words "make" and "issue" was used unequivocally in the conjunctive sense and that the word "issue" meant, according to the Dictionary, "publish, put into circulation". Reliance was placed by the State on paragraph 2(2) of the Courts Decree 1966 (N.L.C.D. 84) to suggest that the matter should be referred to the Court of Appeal to decide "whether [the] enactment was made in excess of the powers conferred on the authorities for making

such enactment". It was held that the provision did not apply as the fact that the impugned decree was an enactment was itself denied. The court also rejected the contention that the National Liberation Council had unlimited powers by referring to the preamble of the Proclamation that it was established "in the interest of the People of Ghana" and for "proper administration" and "maintenance of law and order".

8.64 Crabbe, J., on the other hand (in the second case) held that "a decree issued by the National Liberation Council cannot be said to be ineffective unless it has been published in the Gazette and a number assigned to it" by relying on the expression "as soon as practicable" in paragraph 3(6) of the Proclamation which prescribed for the publication of the Decrees in the Gazette and on the expression "unless otherwise provided in that Decree" of sub-paragraph (7) which, subject to the rider just mentioned, provided that a Decree shall come into force from the date of publication in the Gazette. The impugned Decree, in fact, expressly provided for retrospective operation and had dispensed with the fulfilment of the requirement of Gazette publication for that purpose. However, the court saw the difficulty in holding the Decree valid according to sub-paragraph (1), which spoke of the "issue" of the Decree after it was made. Therefore, instead of giving it its plain and natural meaning, as done by Anterkyi, J., the court imputed to it the meaning - "operation", in the context, upon holding, surprisingly, that use of the word "publication" would be tantamount to giving it special meaning. There still remained the last hurdle as there was no printed copy in the instant case. This objection was summarily dismissed as "not pertinent to the present exercise". The last objection that the Decree did not bear any serial number was met by holding that it had a short title and that the two requirements were alternatives whose purpose was to identify the Decree and further that the relevant provision did not say that "every" Decree but merely said that Decrees shall be numbered. At the end the court even went so far as to record

a definite finding that "there is no evidence before me that it is not intended that it shall not be published". For, the court could not ignore the cardinal principle of Rule of Law which made "promulgation" an essential condition for the validity of any law.

8.65 The laboured exercise was a classic example of judicial restraint of an extreme degree not warranted by the role of the judiciary envisaged under the new "grundnorm". The reason for the deliberate departure from the normal rules of construction by refusing to invest the procedural safeguards with mandatory character could only be explained by an unexpressed concern on the part of the court to avoid a direct confrontation with the new executive authority of the State which might result in the loss of prestige by the judiciary. Although there was a striking similarity in the approach displayed in this case with that of the decision in Exp. BRAIMAH (supra) the court expressed its helplessness in a milder term by ending its judgment with a quotation from Lord MacDermott's Hamlyn Lecture, "Protection from Power" to which, as it said, it desired "to draw the attention" of the counsel. The approach also appears to be influenced, erroneously, we submit, by the fact that the applicant did not deny in his application the charge of subversion.

8.66 We may now examine the few relevant reported decisions rendered under military rule during the second coup. As we have seen, earlier the power of detention pending investigation was exercised by a combined operation under two decrees of which one was merely an amendment of the Criminal Procedure Code. This was now provided in a single decree, The Armed Forces (Special Powers) Decree 1973,[156] but it appeared now in a new form:

> s.3(1) Where he is satisfied that such action is in the public interest, a Regional Commissioner may arrest, or order any member of the Armed Forces to arrest -
>
> (a). . .; (b) . . .; (c) . . . .; (d) . . .;
>
> (2) Any person arrested under this section shall be detained in military custody until such time as the Regional Commissioner or the National Redemption Council may otherwise direct. [emphasis added]

The offensive activities which rendered a person liable to arrest and detention were specified in clauses (a) to (d) of sub-s. (1), unlike the 1966 provision (N.L.C.D. 109 and 93) which was applicable to "crime" generally and to offences against "public order". Only cl.(d) was in general terms, namely, "practices by means of which members of the public are likely to be cheated or deceived;" the other clauses spoke of specific acts affecting the interest of the "government". The doubt about the time-limit of detention and even the limit itself was removed and at the same time the decision to detain was made a purely executive affair by removing also the Attorney-General from the picture.

8.67 The above provisions were examined by Taylor, J., of the High Court at Accra who allowed the applications for habeas corpus in the two cases - REPUBLIC against (1) I.G.P. ex p. ANIAGYEI (II)[157] and (2) GREATER ACCRA REGIONAL COMMR. ex p. NAAWU (III).[158] In the first case the prisoner was arrested by the police and detained in a police cell. The court held that the Regional Commissioner could not delegate his authority to arrest to any person and that the arrest was bad as it was not made either by the Commissioner or by any member of the armed forces. It was also held that the provision for detention in "military custody" was mandatory and the detention was therefore illegal, being in violation of this provision. The executive and the legislative bodies were separate entities not only as a matter of pure legal theory but as a "practical reality", the court observed and it added that if a power was not exercised by any authority according to law, "the courts in the exercise of their judicial functions as guardians of legality" had to "remedy the situation particularly in cases affecting liberty of the subject".[159] Proceeding further the court recalled Lord Atkin's dissent in the LIVERSIDGE case and also referred to s.4(1) of the Habeas Corpus Act 1964 saying that it had a duty to find out the reasons for detention in any particular case and if

no "satisfactory legal reasons" were shown by the detaining authority the prisoner had to be released.

8.68 In the second case the scope of s.4(1) had to be examined in greater detail. The arrest and detention were under orders of the Regional Commissioner but he did not file any return. Instead his Deputy filed an affidavit stating that the Regional Commissioner had ordered the arrest and detention of the prisoner upon his being satisfied in accordance with s.3(1)(d) of the Decree that the applicant indulged in practices by means of which the members of the public were likely to be deceived. The court observed:[160]

> Quite apart from the fact that the nature of the practices was not indicated in the affidavit, the allegation that the Regional Commissioner was satisfied is a matter that the deponent cannot possibly know or prove unless he was told by the Regional Commissioner in which case the matter becomes hearsay.

The court granted an adjournment to enable the Regional Commissioner to submit the "report in writing" contemplated by s.2 of the Act but it was not submitted and at the resumed hearing it was contended that the matters contained in clauses (a) to (d) of s.3(1) of the Decree need not be established in a court. Analysing the provision the court held that "the Regional Commissioner has a duty to satisfy himself whether it is in the public interest to arrest such a person" and that the subjective satisfaction could not be stretched further to any other issue.[161] The court approved Lord Atkin's "vigorous" dissent and observed that even in England, "the Liversidge ratio has never been applied to my knowledge to a factual situation elaborately and extensively set down in considerable detail in an enactment and made a condition-precedent for the exercise of a discretionary power".[162] Referring to the Habeas Corpus Act the court observed that the right to the writ dated back to the establishment of the Supreme Court in Ghana in 1876 and by saving the duties and powers of the courts the new regime was anxious to "ensure the rule of law".[163]

8.69 In a subsequent decision the same High Court, however, struck a discordant note while dealing with a case of detention under an "Executive Instrument" made under the Preventive Custody Decree 1972.[164] The applicant was at first arrested by the police on 2nd December 1975 but he was let off on bail although he was not informed of the reasons for his arrest. On 5th December he was again arrested. An application for habeas corpus was filed on the ninth but on the eleventh, during the pendency of the application the impugned Executive Instrument No. 156 of 1975 was made by the Supreme Military Council authorising the detention of the prisoner retrospectively from 2nd December. The court held that although the detention from 5th to 11th December was "unlawful", the instrument had retrospectively "legalised" it, being "virtually an Act of Indemnity". It was further held that exercise of discretionary power of a "legislative nature" could not be questioned and went so far as to say that "the Supreme Military Council has acquired plenary sovereign power more absolute than the legislature and other powers enjoyed by the regime which it superseded."[165] It is unfortunate that the court did not at all refer to the 1972 Proclamation[166] but speaking in vague and general terms it went on to say that "We in this country with our colonial past and as heirs of English Common Law are no strangers to this type of sovereignty". It is submitted that the court failed to appreciate the subtle nature of the role of "Rule of Law" in what it called "the sovereignty of Westminster type".

8.70 In other words in this case the court refused to uphold the "New Rule of Law". Instead of assuming a dominant role in the new polity it tried to play a subservient role by unequivocally declaring that "the High Court is acting as a sort of an agent but more correctly as a servant of the Supreme Military Council and can hardly question the Decree." This approach was patently lacking not only in judicial valour but also in imagination. The court held that the impugned "instrument" could only

be tested with reference to the parent Decree but even then it failed to construe the two documents to hold that neither the Habeas Corpus Act 1964 nor the general principles of common law were expressly repealed by either of them. As the grounds of the detention were not examined two substantial contentions were rejected, namely, it was a case of mistaken identity and that the detention was for alleged criminal offences which had nothing to do with "national security".

8.71 We thus see that unlike Nigeria, the Ghana court displayed an inconsistent and ambivalent approach, oscillating between the two extremities of the two concepts of judicial restraint and judicial valour. In one respect however the courts were by and large consistent. Whenever the 1964 Habeas Corpus Act came up for examination, the courts interpreted its provisions in such a manner as to retain the Common Law right to the writ in an almost unaltered form despite the strenuous effort of the legislature to alter it substantially.[167] The inconsistency in the approach of courts in both jurisdictions towards the English wartime cases was, however, a welcome feature. It proved that there was a genuine effort to make a proper evaluation of the underlying principles of those cases and generally there was a tendency to discard the view that these cases had erected the supposed impregnable shield against judicial review.

## Conclusion

8.72 It is true that the laws enacted by the military rulers asserted themselves "vigorously" as happened during the colonial period but the colonial rulers did not go so far as to enact retrospective penal laws violating at once the rule against the Bill of Attainder and the maxim nulla poena sine lege. The colonial rulers were anxious to claim "legitimacy" for their rule by maintaining their scrupulous regard for "legality". The military rulers were, however, faced with a different yet more difficult task. When they assumed power they claimed that the important

institutions of the old machinery had failed and they had come to repair them and put the machinery in good order. So they could not discard the old institutions altogether yet they could claim "legitimacy" only when they had fulfilled their goal. This required political stability, to which the liberty of the individual had to be subordinated. A new balance was to be struck between the interest of the State and of the individual. This task they did not deny to the judiciary. The goals, and more so the means to achieve them, necessarily differed under a civil and a military government. New norms and also a new "Grundnorm" came into existence and only the judicial test could invest them with "legality". The courts in Africa were better placed than those of Pakistan in accepting "necessity" as a reliable guide in promoting the "New Rule of Law" as the basis of the new "grundnorm" because the military rulers of Africa did not declare that "Martial Law" formed the basis of the new jurisprudence. On the other hand the judiciary in Bangladesh could possibly find its efforts to uphold the "New Rule of Law" stultified by the peculiar stance of "legality" adopted by the military rulers there by allowing the Constitution "to continue to operate" albeit amended in such a way (by inserting the new clause 3A in the Fourth Schedule) as to neutralise the force and effect of the "self-activating" role of the judiciary contemplated under the new "grundnorm". Indeed Bangladesh, a new state, and also the last in the Commonwealth to succumb to military rule, could verily claim the unique distinction of launching an unique experiment to fulfil in a novel way the twin test of "legality" and "legitimacy".

PART IV

Chapter 9

# THE PROSPECTS FOR PERSONAL LIBERTY: CONCLUSIONS

## I. Personal Liberty as a "value" concept

### (1) The key-note of the "value-process"

9.1 We indicated in the Introduction that the key-note of the "value-process" is the triangle which is formed by the value-concepts of "human rights", "social-security" and "state-security". If at any time any of the arms of the triangle is overstretched, the state of equilibrium in any society and polity is likely to be disturbed. Revolutions are likely to occur and new norms of social and political values are likely to be established. We have seen that ideas concerning "state" and "society" and also "liberty" and "security" in relation to the "[human] person" have undergone changes at different times in different climes. These ideas have acquired different values from time to time and it is also a fact that these values have been hierarchically graded.

9.2 Unfortunately, although a man (the "[human] person") is born free, freedom of movement as well as liberty and security of the "[human] person", have not always been accorded the highest place in the hierarchy of values in every society and polity. The "value-process" has woven a weird pattern as homo sapiens has progressively marched from the darkest ages to the increasingly brighter ages of civilisation. The Greeks and Romans of the "bright age" used the words eleutheria and libertas to convey the idea of being unimpeded in the exercise of movement but their slaves and bondsmen could not move freely.[1] It may be interesting to re-capitulate briefly the operation of the "value-process" in those territories with which this study is primarily concerned. They may, in terms of "value-process" be appropriately described as common law jurisdictions, because of the distinctive common feature of their legal systems under which the judges eventually operate the lever by which the

arms of the triangle are manipulated to keep proper measure, through another value-concept, "Rule of Law".

(2) The operation of the "value-process"

(A) The United Kingdom

9.3 We have seen that in Greece and Rome, the cradles of Western civilisations, the concept of "Natural Law" had a tremendous influence in evolving the different "value-concepts" relevant to personal liberty and that the Christian Church became the vehicle to carry the concept to the Anglo-Saxon world. Here, in England, it came to be blended with the Teutonic concept of liberty and, in due course, embodied in the institution of "positive law" which is compendiously described as "Common Law". In other words, natural law was transformed into the moral content of positive law. But, at times, when the machinery that made the positive law behaved erratically, the appeal to natural law was revived until at last "public opinion" (promoted in the twentieth century to a great extent by the "media") started to assert itself vigorously and became an integral part of the value process. Common Law, which engendered values that found expression in Magna Carta, was also responsible for the later constitutional documents such as the Petition of Right, the Bill of Right and the Act of Settlement.[3] Indeed, the same values embracing the ethos of liberty were responsible for raising the status of the procedural writ of habeas corpus subjiciendum ad respondendum into that of a constitutional writ.[4] Again, the same values finally established the position, albeit built upon the foundation of habeas corpus, that under English law any restraint on the liberty of the person is prima facie illegal.[5] However, the central idea of the institution of Common Law responsible for promoting and proliferating new institutions of law was, indeed, the independence of the judiciary which was sought to be established firmly by the Act of Settlement. In interpreting statutes and expounding common law the judges tried to uphold what has come to be known as the "Rule of Law",

which could claim a precursor in the "due process clause" of Magna Carta.[6]

9.4 The content of the concept of Rule of Law has, however, varied from time to time reflecting the corresponding change in social and political values. Nevertheless the judges have generally tried to protect and retain the basic elements of the concept, of which the central theme was control of both executive and legislative arms of the State. The bizarre operation of the "value-process", however, became evident when England acquired colonies, in that an effective implementation of colonial policy (with the dominant feature aiming at the entrenchment of colonial rule) needed a concerted effort at home and also abroad. In the dependencies the "[human] person" was seen in different colours - "British European subjects", "native subjects", (in Ireland, as Protestants (loyal and superior) and Catholics (disloyal and inferior) and "British protected persons" in protectorates.[7] Much later, in the twentieth century, at home, during the two world wars, the "value-process" operated still differently: even a subject could be marked out for his "hostile origin or association".[8] Not only the legislators but the judges also in either context leaned in favour of the "State" and enforced the "Rule of Law" to the detriment of the "[human] person".

9.5 The notable failure of the English judiciary in the colonial context was seen in the evolution of the so-called "doctrine of martial law".[9] Similarly, the expatriate judges in Africa not only acted with a signal lack of imagination in dealing with "witchcraft cases",[10] but also contributed, in some measure at least, to the evolution of what may be called the African brand of "colonial constitutionalism".[11] This double standard of British justice was apparently the result of the bizarre operation of the "value-process" which may well be included in the term "contradictions" of the British rule, as noticed by Indian and African political leaders.[12] Indeed, the absence of moral content in some of the colonial laws and executive acts was as great a "contradiction" of the

British value of justice, and a fortiori, of the Rule of Law, as was the fact that the judiciary often failed to control the executive and the legislature in dependencies.

9.6 However, the prominent feature of operation of the "value-process" in the dependencies may be more appropriately described by the terms "legality" and "legalism", which came to be accepted as value-concepts in the particular context of the dependencies. Indeed, the colonial rule was generally, a priori, illegitimate and appropriate substitutes had to be found for the concept of "legitimacy". It became possible to reject the appeal to "morality" by invoking these concepts. A mere formal compliance with the norms of positive law enacted in the dependencies was considered sufficient to sustain the claim to "legitimacy", no matter how the norms were evolved or how and by what machinery the law was enacted, administered and enforced. There was no question then of international accountability and these concepts proved to be of immense value. Indeed, in the dependencies the entire framework of emergency legislation, its enforcement and administration, was founded upon the concepts of "legality" and "legalism".

9.7 It was perhaps in the field of "preventive justice" that the operation of the "value-process" proved to be rather intractable because of the emphasis on the choice of values. Laws for "social-security" have been enacted in England on the principle of "preventive justice" to deal with such ancient evils as vagrancy and recidivism, as also the modern menace of drunken driving. In each case, the law was a response to a contemporary social problem of deviant behaviour necessitating the use of drastic measures but in each case the role of the executive in the administration of the law was subjected to judicial superintendence. The judiciary too reacted positively to the change in emphasis on choice of values, and leaned in favour of society vis-a-vis the individual.[13] This is understandable, as the judiciary was not denied its traditional role, but it is difficult to understand why the

judiciary reacted in a similar way when it was a question of the protection of the state, and not society, from the activities of an individual, by giving primacy to the interests of the state despite the fact that the laws enacted for "the defence of the realm" purported to deny the judiciary its traditional role.[14]

9.8 These laws too, as Lord Atkinson observed in HALLIDAY, were founded upon the principle of preventive justice - a common law concept (founded on the "jurisdiction of suspicion") which was also reflected in the Justice of the Peace Act, 1360.[15] What the judiciary did was to evolve an ad hoc legal norm to deal with an ad hoc situation. Indeed, the judicial response to a situation requiring a choice of values is a distinguishing feature of the Common Law itself, as reflected in the doctrine of necessity,[16] but what distinguishes the English judiciary from its counterparts in the New Commonwealth is that it considers the role of choice of values in the operation of the "value-process" as a subordinate, yet delicate but not dominant, aspect of the process, in that a choice adversely affecting the "[human] person" is made on only exceptionally strong and substantial grounds. In other words it accepts the position that certain values have a transcendental character, for which the "value process", operating through a strong and representative "public opinion" is to a large extent responsible.

(B) The New Commonwealth: Asia and Africa

9.9 The particular aspect of the operation of the "value-process" in Commonwealth Asia and Africa that merits special attention in this study is the effect of the new attitudes in the emergent states on the question of the choice of values. This is because although attitudes differ in the new states in so far as traditional ideas and institutions are concerned, there is a significant unanimity in so far as attitudes towards situations of "emergency" are concerned. It is the common attitude that has come to be known as that of the "Third World attitude". The new states are not only

unduly concerned about the fact that the new polities are by necessity and also by choice, goal-oriented, but they are also perhaps unduly apprehensive of what has come to be known as "neo-colonialism".[17] The new attitudes have by and large swamped the traditional values as the latter are likely to impede achievement of new goals.

9.10 On the other hand the colonial rule itself may be said to have modified traditional values to a great extent, so that the new polities inherited these modified values as a colonial legacy. This is particularly true of the African states of the Commonwealth and of India. The latter had the "village assembly" (panchayat) as the framework of the traditional polity.[18] Not only the absence of a strong central Pan-Indian government but the concept of dharma also ensured that in the scale of traditional values the "[human] person" had his due share.[19] The Mughal rule in India did not alter the position as it could not break down the traditional structure of Indian society. On the other hand, the super-imposition on the indigenous societies of western values during British rule, which saw the emergence of elite groups in all dependencies, was accompanied in the case of Africa by a deliberate attempt to "modernise" the traditional instutitions and in the case of India by a wholesale replacement thereof by Anglo-Saxon Laws and institutions. So, even the modification of values in the two territories took different forms.

9.11 In both Africa and India, the traditional societies attached great importance to the concept of "duty" and to those of "discussion" and "consensus" in all processes of decision-making and dispute-settlement. It is true that in West Africa, in particular, in some "chiefly societies" and also in Uganda in East Africa, the traditional ruler had the "power of life and death" over his subjects, but in all cases the office of the ruler was exposed to the test of legitimacy with inbuilt institutions providing checks and balances. In other words, "African despotism" was largely a myth. On the other hand the Anglo-Saxon laws

and institutions contemplated an adversarial context. Moreover, the colonial polity was an "unlimited government" which conformed neither to the Westminster pattern nor to the traditional African pattern.

9.12 In Pakistan and Malaysia the new attitudes have to conform apparently to the principles of Islam, which has been accepted as the state religion in both these states, as is Buddhism in Sri Lanka. But we have also seen that in every new state of the Indian sub-continent, including Bangladesh, the "village assemblies" have retained their appeal in some form or other, due possibly more to the practical reason that societies in all these states are preponderantely agrarian. Even Islamic principles, as embodied in the Pakistan Constitution, deny absolute power to a temporal sovereign and contain positive injunctions against the abuse of authority. Thus we find that although the Asian and African societies are still agrarian and although they have not absorbed western values at the grass roots, the traditional base is conducive to political acculturation attuned to democratic rule obtaining in the industrialised societies of the western world.

9.13 It cannot be gainsaid that in a divided and less literate society, western democratic values find difficulty in striking roots and unfortunately the African and Asian societies are neither homogeneous nor have they attained the appropriate level of literacy.[20] However, it is interesting to note that, although religious differences in Northern Ireland have made it difficult for democracy to function there, in Asia, with the sole exception of Pakistan, stratification of societies in terms of either religious or linguistic or ethnic or economic or political levels, has not proved to be a handicap to the same extent.[21] It is true that, although there have been regular elections in India, until recently, the Congress Party has always been returned to power, but at no time has any political leader of India (even Mrs Indira Gandhi before her last defeat) ever thought of abandoning the multi-party democracy of the western model.[22]

Sri Lanka's record is still better: opposing political parties have been returned to power alternately in successive elections. On the other hand, although the judiciary in every state represents an elite group which has absorbed western values extensively in all states the record of the Pakistan judiciary is outstanding in so far as matters relating to personal liberty are concerned.[23]

9.14 However, the political leaders - the executive and the legislature - another elite group, in all states, share in common the "third world attitude". The leaders of the developing world loudly proclaim that their states have to be in a "perpetual state of emergency" to fight poverty, ignorance and disease for which colonialism and imperialism is blamed.[24] Indeed, all Asian states and even most of the African states provide in their Constitutions for "declarations of emergencies" generally against actual or threatened external aggression and internal disturbance. Indeed, India and Pakistan were twice involved in hostil ities but even in Sri Lanka and Malaysia there have been long periods of uninterrupted "emergencies" during which stringent measures curtailing personal liberty for the purpose of "internal security" have been in force.[25] Such measures are required, it is claimed, to ensure "political stability" and economic progress, which are considered necessary for achieving the declared goals.[26] In Africa, on the other hand, the problems of "internal security" assumed such acute forms and proportions that democratic regimes in Ghana, Nigeria and Uganda still remain "suspended". There can be no doubt that the "value-process" did not operate satisfactorily in these states: the leaders abandoned the democratic values, and institutions without values could hardly survive.[27]

(3) <u>The role of the "value-process" in standard-setting in the field of Human Rights</u>

9.15 It is thus apparent that the "value-process" has an important role to play in the field of standard-setting in the field of human rights.

The "value-process" has a dual purpose: it can act as both a cause and an effect. An existing political order, manifestly democratic in form, is overthrown when the citizens are denied the essential civil and political rights and democratic institutions are perverted. Its successor, the new political order, is invariably undemocratic in nature and it denies these rights in a more unabashed manner as the "value-concepts" change. Indeed, the importance of the "value-process" has been recognised under the international legal system and standards have been provided in a seminal form in the United Nations Charter but more comprehensively in the Universal Declaration and in the International Covenant on Civil and Political Rights.[28] We have seen that, in striking a balance between "state security" and human rights, the international system takes into account the inevitability of diversity in the political orders of the world, and more particularly of the fragility of the political systems of the "Third World", by allowing derogations even from the right to personal liberty during "emergency".

9.16 However, the common minimum standard contemplated under the international system as well as under the European Convention envisages at least two positively-stated inviolable safeguards, namely, there shall be in all cases provision for effective remedy and that under no circumstances shall any person be subjected to torture and similar treatment, signifying the inherent worth of the "[human] person". There are good grounds to canvass a similar if not the same status for the negatively-stated right of personal liberty; indeed, the same phraseology is used in the Bills of Rights of the New Commonwealth. The only apparent hiatus under the international system that has been left unbridged is the law relating to "domestic" terrorism although the growing threat to "state security" from "terrorists", not only in Northern Ireland but elsewhere in Europe (as in Italy and West Germany), has encouraged the evolution of a regional standard on "terrorism".

9.17 There is thus ample evidence of the fact that standard-setting

in the field of human rights under the international legal system has contributed a great deal to the increasing recognition of the right of personal liberty (among other human rights) as a "legal" concept under national legal systems. It may be added that more intense international and, particularly, regional activity in the field of human rights is necessary so as to enrich the content of the legal concept of these rights under the national legal system, but such activities are also desirable for the satisfactory operation of the "value-process" through a strong "public opinion". As the "value-process", a priori, informs the legal systems at all levels, it is necessary that those who operate the "value-process" - the executive, the legislature and the judiciary - accept the internationally prescribed standards as respects the worth of the "[human] person" as immutable and also the universal application of those standards.

## II. Personal liberty as a "legal" concept

### (1) Norms of "protection"

#### (A) Common Law

##### (a) A general view

9.18 In the unwritten British Constitution the Common Law still provides the basic framework for the liberties of the subject, in the form of legal maxims and decisions of courts. Liberty of the person at common law is possibly best protected by the well-established maxim which postulates that every restraint on the liberty of the person is prima facie illegal. Indeed, in this study we have contended that this principle followed from habeas corpus and that the great writ itself was of hoary antiquity, preceding (albeit in a seminal form) even the Great Charter.[29] To contend therefore that personal liberty, under English law, is considered as "a gift of the law" is tantamount to denying without authority the validity of one of the basic postulates of common law. Indeed, personal liberty may be considered as a "regulated freedom" but it

cannot be considered as "a gift of the law"; it is not the "gift" of either the Great Charter or of any of the later constitutional documents. Indeed, the Great Charter was itself founded upon the primacy of the "common customs of the realm"; it was not a "revolutionary document".[30]

9.19 We have seen that the various norms of protection of personal liberty listed in express terms in the Universal Declaration and the International Covenant of 1966, as well as in the European Convention, are all borrowed from the English common law.[31] These norms also appear not only as legal rights (in the Criminal Codes) but many of them also appear as "constitutional rights" in the national legal systems as parts of the several "Bills of Rights" of the Asian and African states of the New Commonwealth. There the common law is also generally the "basic" or "residuary" law (Sri Lanka excepted), although it has a minimal role now in these states. This, notwithstanding the supremacy of Constitutions, has apparently ensured a better "legal" protection of personal liberty in these states. In England the concept of the supremacy of Parliament has increasingly encroached upon the dominant role of common law and has possibly come very near to limiting the primacy of common law to the operation of the "value-process", operating through norms of interpretation adopted by the courts - the role which common law retains in the Asian and African states as well. The English position is manifested by the laws enacted to deal with the Northern Ireland problem[32] and also by the demand for a Bill of Rights for the United Kingdom notwithstanding the fact that the common-law legal protections appear (under new labels) in the international and also regional laws applicable to the United Kingdom.[33]

9.20 It is still not possible to say that the recent trend in internationalising the human rights aspect of the national legal traditions will gain momentum and will, in the near future, convert itself into a more positive process of the unification of laws affecting personal liberty generally; this may well not occur. Therefore the

judges may still find scope, not only to enrich the content of such legal norms as the "Rule of Law" and "ultra vires", but, in a similar way, they may also evolve newer concepts under the pervasive umbrella of the common law. In the United Kingdom, the problem of Northern Ireland, whether or not it ends in a political solution in the near future, is no longer the sole problem presenting acute controversy in so far as personal liberty is concerned. In a wider context, problems of race relations, immigration and also the environment (the last-mentioned potentially more important in view of British involvement in nuclear technology and also of the scientific advancement of Britain in other fields) are also increasingly attracting notice. The new directions predicate a concentration of greater powers in both executive and legislature, with the result that there is a likelihood of a wider impingement on the right of personal liberty, calling for a more imaginative approach by the judiciary to the new problems: resort by it to the common law for the solution of these problems is thus inevitable.

(b) Bail and Habeas Corpus

9.21 Among the various modes of protection evolved in common law the right to bail and habeas corpus are undoubtedly the most important ones. However, as we have seen, there has been a great deal of legislative activity in England in relation to the rights, not only in the recent past; the process started in the remote past.[34] In the Asian and African states of the Commonwealth the legislative process can be traced back to the Indian Criminal Codes, first drafted in part in 1837 (Penal Code) but later modified and supplemented in 1860 (Criminal Procedure Code).[35] Both these rights are also recognised and adopted in the international and in the European regional laws relating to human rights.[36]

9.22 It is interesting to note that while the recent legislation in England has restricted the scope of the common law right to the writ of habeas corpus,[37] its scope has been expanded in the successive Constitutions

of Pakistan (of 1962, 1972 and 1973) and in that of Bangladesh also.[38] Even the provision of the Indian Code, embodying what we have called the "statutory right" has expanded to some extent the scope of the writ in the Asian and African states by introducing the additional concept of "impropriety" in that the traditional concept of the right was confined to testing merely the "illegality" of the detention.[39] However, the "constitutional right", available in other Asian and African states also, has not received a similar boost as in Pakistan. Indeed, the African "constitutional right", which was modelled on the European Convention, has found a relatively lukewarm response from the litigants and judges alike: preference has been shown for the concurrent right available either at common law or under the respective statute in each state.[40]

9.23 However, the position in all states is not the same. In many states, the common law right has been abrogated, expressly or by implication. In India, rather surprisingly, the judiciary has robbed the citizen of the concurrent common law right,[41] In this study we have made a strong plea for reconsideration of the position by the Indian Supreme Court on substantial grounds which we have indicated in detail.[42] We have also pleaded in this study for more imaginative use of the common law right wherever available, in that sufficient notice has not been taken of what we have called the "ancillary rights".[43] In England the principal, as well as the ancillary right to the writ has been tampered with by legislation but in the Asian and African states generally there has not been a similar legislative enterprise and therefore there is no reason why these rights should not be exercised to their fullest extent.[44] It is true that one of the important incidents of the common law writ is its character of the command of the sovereign but it is essentially a procedural right which ought to continue therefore, untrimmed, in the new states despite the loss of sovereignty over them of the British Crown, unless of course the powers and jurisdiction of the courts are substantially altered under the new legal framework.

9.24 Indeed, the perverse decision in the DARNEL case provoked the British Parliament to enact legislation to fortify the right but in times of war the right was also "suspended" in England.[45] In India the colonial policy dictated a different course: the jurisdiction of courts to issue the writ in respect of "natives" only was excluded, first by Parliamentary enactments of 1781 and 1784 and later in 1818 by a "Regulation" made by the Governor General, for "reasons of state" ("security of British dominions").[46] Still later, in England, during the last two world wars, although the right was not suspended, the measures enacted adopted a more sophisticated technique of exclusion of jurisdiction.[47] The courts interpreted relevant legislation by evolving ad hoc norms through the "value-process" and restricted the scope of the writ.[48] Unfortunately the courts in the new states came to hold divergent views in respect of those decisions as the "value-process" did not operate in a similar way in all cases on account of local conditions. In the result they applied inappropriately the same ad hoc norms of interpretation to "peacetime laws".[49]

(c) Remedy in Tort

9.25 At common law an action for false imprisonment is considered as an incidental, and not a principal, remedy against illegal detention. An action for false imprisonment does not preclude applications for bail or habeas corpus by the plaintiff. Indeed, it is a right of a different type which was directly related to the question of reasonable and probable cause for suspicion for the arrest. The question was for the decision of the jury under the old law.[50] At common law a person who acts honestly and reasonably commits no actionable wrong.[51] Although the remedy has also been adopted in the International and Regional Human Rights Documents by contemplating "enforceable right to compensation" for "unlawful arrest or detention", it is in addition to the principal remedy of judicial scrutiny of the "lawfulness of detention" and "order of release". In African and Asian states of the Commonwealth, the remedy in tort found

no appeal in spite of the fact that in all states (except Sri Lanka) common law was introduced a long time ago.

(B) Bills of Rights and personal liberty

(a) Provisions of African and Asian Constitutions

(i) The Background

9.26 The Asian Constitutions (except Sri Lanka's Independence Constitution) are autochthonous in the sense of being "home-grown" (not necessarily in the sense of legal autochthony) and among them India's is the earliest one, enacted in 1949. Long before independence the Indian political leaders had positive views about a Bill of Rights. They had suffered long periods of incarceration during the struggle for freedom and were convinced that civil and political rights could best be protected by a Bill of Rights; accordingly they also made a strong plea for such provisions to be included in any constitutional settlement that the British might propose.[52] It is true that the leaders represented the elite group and had absorbed western political values in large measure, but the demand for a Bill of Rights did not militate against traditional values either. India was also a member of the League of Nations and later one of the original members of the United Nations. The totality of circumstances infused national aspiration into the concept of a Bill of Rights cherished by the Indian leaders. When the process of constitution-making started the provisions of the United Nations' Charter and of the Universal Declaration were before them. Notice was also taken of the relevant provisions of the Japanese Constitution enacted in 1945.[53] There was also the existing constitutional framework of the Government of India Act 1935. But above all loomed large the realities of the partition and its aftermath.[54] Thus the Bill of Rights that finally emerged represented, on the one hand, the fulfilment of a national aspiration and, on the other hand, a difficult compromise of a pragmatic and idealistic approach.

9.27 In Pakistan, the first Constitution followed India's model,

albeit with an Islamic bias expressed in the preamble in a pronounced form. The provisions of the Constitutions of 1962, 1972 (Interim) and 1973 were indeed influenced by the intervening Martial Law regimes.[55] The Malaysian Constitution (1957) also followed the Indian model, albeit with an Islamic bias which was expressed in less pronounced form in that it did not, in a similar way, expressly invoke Islamic philosophy. In India and Pakistan (except in 1962) the constitution-making process was carried out by the Constituent Assembly in each case but the Constitution of Malaysia was drafted by a Commission consisting of a British Chairman and members among others, from the Indian and Pakistan judiciary. In Malaysia there also existed the traditional political framework which was continued in the new Constitution in a modified form. In Malaysia the Bill of Rights was in fact a response to the problem of its ethnic minorities.[56]

9.28 In Africa British decolonisation started in 1957 and in all cases the Independence Constitutions were essentially of "Westminster-make". In the case of Ghana (1957) and also Tanganyika (1961), the Constitutions did not contain any Bill of Rights but in Nigeria, even before independence, a comprehensive Bill of Rights modelled on the European Convention was provided in 1959. Thus in Africa there was no reason for the political leaders to consider the Bills of Rights as the fulfilment of national aspiration. Indeed the provisions were more important from the standpoint of the colonial rulers, in that they discharged their international obligation under Art. 1 of the European Convention.[57] Nevertheless, the provisions generally survived the radical change in the political order that took place in Africa; only Malawi discarded it.[58] Although Kenya and Uganda became de facto One-party States and Zambia, de jure (later Uganda also), the Constitutions retained the Bills of Rights. Two other de jure One-party states, Tanzania and Malawi, however, adopted a different approach indeed to display their solidarity with international concern and respect for human rights.[59] In Africa, therefore, it is the appeal of the international

system and the fear of isolation that generally provide the philosophical base for the institutional and also the uninstitutionalised Bill of Rights.[60]

(ii) The Right to personal liberty

9.29 Only in the Universal Declaration is the relevant provision positively stated: "Everyone has the right to life, liberty and security of person." In all other human rights and constitutional documents considered in this study, international, regional and national, the formula is stated in negative terms: "No one [person] shall be deprived of his [personal] liberty, except according to [procedure] prescribed [established] by law." The only deviation from this general formula is to be noticed in the emphasis in some cases on "procedure" and in other cases in the absence of such an emphasis.[61] The nature, scope, origin and content of the right have, however, been considered in detail by the Indian Supreme Court only, in two important decisions, in 1950 and 1976 respectively in the GOPALAN and HABEAS CORPUS cases respectively. The most interesting aspect of the matter, however, is that during the course of the last 26 years the Indian judiciary has not developed a "consensus" on matters relating to personal liberty and the dominant view (albeit variously stated) still considers personal liberty as the "gift of the law". Thus the Indian court ignored the fact that under the international system human rights jurisprudence has invested the right with a special status.[63]

9.30 Clearly such a view, and its remarkable consistency and inflexibility, raises grave doubts about institutionalised Bills of Rights acting as positive norms of "legal" protection of personal liberty. Indeed the Indian court did not at all consider the fact that the Bill of Right had a positive purpose, namely to provide, among other things, "better" protection of the existing rights. In both decisions the "value-process" operated in a bizarre fashion: only one judge (Fazl Ali, J.) in 1950 referred to the traditional institution of panchayat and in 1976

also a single judge (Khanna, J.) referred to the Universal Declaration, for proper evaluation of the worth of the "[human] person"; the majority even lacked unanimity of approach in both decisions.[64] The Indian Supreme Court is of the view that the Constitution has "conferred" the right of personal liberty; that the pre-existing rights cease to exist when a Bill of Right is enacted and that the scope, nature and extent of "protections" of pre-existing rights could therefore be altered and also scaled down under a Bill of Rights.[65] It is submitted that the use of negative language in connection with protection of the right of personal liberty in all human rights and constitutional documents is indicative of a positive injunction against prescribing norms to permit scaling down of existing protections.[66]

9.31 It is true that in the judicial context norms of interpretation form the core of the "value-process" and the Indian court has, in many decisions (including GOPALAN and the HABEAS CORPUS case), made an attempt to establish the position, most appropriately, that in the interpretation of the constitutional provisions the American norms are to be preferred to the English. But the court has not gone far enough. In the first place even on this point a consensus is lacking and secondly the Court has failed to take notice of the fact that the American Constitution does not belong to the new world order and therefore the American norms have not yet taken account of the international human rights jurisprudence. In the international and regional human rights documents as well as in African Bills of Rights the right to personal liberty is embellished by the express prohibition of torture and similar treatment. On the other hand, although in the Indian model there is no such provision, the Indian Bill of Rights conforms to the international and the regional model in its emphasis on "procedure". It was to avoid the dilemma that the American judges faced in dealing with the "due process clause" of the American Constitution that the Indian court professedly scaled down the value of the

"[human] person"; it failed to construe the expression "procedure" in the light of the international human rights documents, containing the same expression. In fact, in GOPALAN, the judges did not consider any of these documents at all.

9.32 In the neo-Indian Model (in the Bangladesh and later Pakistan Constitutions), on the other hand, there is an express provision as respects the prohibition of torture and similar treatments, in addition to a "due process clause". No doubt, these provisions appear there following reappraisal of the constitutional position on the termination of the Martial Law regimes. In Ghana, which did not have a Bill of Rights, the new Constitution enacted after the first Military Rule had ended, also contained such a provision in its Bill of Rights. In this case also it was not a mere formal incorporation of the "neo-Nigerian" Bill of Rights. In Ghana the new Constitution was short-lived but it was possibly the lingering effect of the African brand of "colonial-constitutionalism" which was manifested in the absence of judicial response there. In Pakistan there was a positive judicial response in BEGUM SHAMIM AFRIDI.[67] Undoubtedly the national experience was reflected in Pakistan in the operation of the "value-process" in the "constituent legislature" and judiciary alike.[68]

(iii) The enforcement of the right: the constitutional remedy

9.33 We have already dealt with two out of three minimum protections envisaged under international and regional human rights documents. The third, the requirement that there must exist in domestic law adequate provision for the enforcement of the right, is indeed the most important protection in so far as African and Asian states are concerned, in that there is no scope in these states for availing a remedy at any other forum. There is no regional forum of any type in Asia while in Africa the OAU possesses limited jurisdiction.[69] Moreover, there is no likelihood of any African and Asian states acceding to the Optional Protocol of the 1966 International Covenant; very few have cared even to ratify the Covenant.[70]

9.34 In this matter, as we have seen, the pattern of the right differs. Even in the Indian model, India stands alone by naming expressly the writ of habeas corpus; in Malaysia the writ is not named. But in the neo-Indian model, although the writ is not named, the phraseology is different, not Malaysian. The Nigerian and neo-Nigerian models also do not name the writ but follow generally the phraseology of the Indian model; Ghana (1969) also named the writ but, unlike India, did not provide for the contingency of "suspension". However, as we have seen, in all Commonwealth African states the right to habeas corpus was available under the existing law which was not superseded by the Bills of Rights. In some cases it appeared in the form of the common law right, in other cases as a statutory right and also as concurrent rights in many cases.[71] No doubt such rights could be abrogated at any time by ordinary legislation but the Constitutions in Africa did not expressly provide for "suspension" of the right. In this respect all Asian states were also more or less in a similar position; the peculiar feature of the Indian position, however, deserves special notice.

9.35 In India the Supreme Court has held that common law right to the writ has ceased to exist long before independence.[72] The statutory right, which was provided in the Criminal Procedure Code, also lapsed when a new Code was passed in 1973. Although the constitutional right can be exercised in the Supreme Court and also in the High Courts in the several States, the executive (President) can indirectly suspend the right even without invoking the express provision of Art. 32(4) which permitted the right to be suspended in so far as the Supreme Court is concerned. The Constitution expressly provides (vide Art.359(1)) that "the right to move any court" for the enforcement of any part of the Bill of Rights may be "suspended" by a Presidential Order during "emergency". The Supreme Court has held that such an Order contemplates a blanket ban and habeas corpus cannot be issued although an action for false imprisonment is not

barred.[73] The court did not attach any importance to Art.32(4). In our view habeas corpus in India can be suspended either by express legislation under Art.32(4) or by specifying Art.32 itself in the Order passed under Art.359(1).[74] However, it is doubtful if the remedy of false imprisonment can be considered adequate and "effective" according to international norms of protection of the right to personal liberty. It is patent that the provision for an "enforceable right to compensation" for "unlawful arrest or detention" has been envisaged as an incidental remedy; the provision contemplating a judicial scrutiny of "lawfulness of detention" is apparently the principal remedy, according to international norms.[75] The Indian court might have come to a different conclusion if it had taken into consideration this position.

(iv) The United Kingdom Bill of Rights Debate

9.36 It cannot be gainsaid that the power of judicial review, not only of executive acts but also of Parliamentary enactments, lies at the heart of the provision of Bills of Rights if they are to be considered as effective norms of protection. Thus, in the United Kingdom the deeply entrenched and pervasive concept of the supremacy of Parliament has stood as a stumbling block to arguments advanced in favour of a Bill of Rights. In 1974 Lord Justice Scarman (in the Hamlyn Lectures) lent his support to the view expressed in some influential quarters that the ancient concept was open to challenge.[76] In opening the debate, he appears to have expressed the view that the common law has outlived its utility as an appropriate norm of protection and therefore posed the question - Why should a curb not be placed on Parliament herself when the issue was one of human rights ?[77]

9.37 In 1975 it was acknowledged that there was a shift in public opinion in favour of a Bill of Rights and that it was founded in the belief that, although the existing system was not unsatisfactory, there was room for improvement and that a Bill of Rights provided a "better protection"

of human rights.[78] In 1976 this view was contested by Lord Lloyd of Hampstead.[79] According to him, under a Bill of Rights the judges become responsible for "determining and delimiting the operative values in society" although they are not equipped for such a task by their training and background; they lack a suitably imaginative approach.[80] Indeed the approach of the Indian judges was, as we have seen, inflexible and therefore Lord Lloyd's contention that a Bill of Rights might prove to be "inflexible" is to be given due weight. According to him, the real question is whether the existing process of "legislative policy-making" should be abandoned in favour of judicial policy-making. But, is it really true, as he appears to suggest, that only the legislators (and not the judges) are responsive to the "value-process" in that only legislators are exposed to public debate on any issue ? For, such debate is, in substantial part, carried on through the "media" and the judges are not insulated against the "media".

9.38 However, participating in the debate, Lord Hailsham, in the third Richard O'Sullivan Lecture delivered in 1977, rightly pointed out that one should not ignore the fact that "Parliament itself can be made an instrument of tyranny".[81] It is true, as Lord Hailsham suggests, that "majorities particularly when influenced by populist leaders and demagogues of the left or right can ride roughshod" over the rights of the minorities and the individual.[82] Lord Hailsham's remarks would obviously be even more appropriate in the context of the emergent states of Africa and Asia.[83] The debate is inconclusive and views are still to crystallize, but one thing is definitely established: a basic question is still to be answered - is not Parliament and also the judiciary expected to distinguish between the essential fundamental character and relative value of the several rights recognised as fundamental rights and the inevitably flexible nature of the norms of protection ? It is submitted that if this distinction is recognised by both organs, the

"value-process" can operate satisfactorily and neither are the judges likely to adopt an inflexible attitude nor is a Bill of Rights likely to become inflexible.

(b) The one-party state alternatives

9.39 Only Zambia, among the one-party states of Commonwealth Africa, has an enforceable Bill of Rights. But it also provides, in addition, for an Ombudsman, as in Tanzania. In both states, the preambles of the two Constitutions grant recognition to the right of personal liberty. In Malawi, although the Constitution contains no preamble at all, there is a substantive provision which is capable of being interpreted as incorporating referentially an enforceable Bill of Rights as it purports to adopt the Universal Declaration as a part of the Constitution.[84]

9.40 However, in Africa the Ombudsman is a significant novelty in so far as the institutionalised norms of protection of human rights are concerned. In both states the Ombudsman has a wide jurisdiction to inquire into complaints of abuse of authority by the bureaucracy but he has no power to grant relief. Indeed, the new norm is a positive manifestation of the philosophy of the new political order under which there is a continuous search for a new balance to be struck between the interests of the state and the individual as the state is seen as the extension of the African tradition of the extended family system.[85]

(2) Norms of "restraints" and "safeguards"

(A) The general jurisprudential base

9.41 The value-concepts of "state-security" and "social-security" a priori postulate the imposition and enforcement of sanctions against individuals. The idea is not foreign to traditional African and Asian societies and polities. It is also interesting to note, as we have seen, that the Anglo-Saxon classification of sanctions into two broad categories, preventive and punitive, was also not unknown to them.[86] The main differences lie in the types and forms as well as in the motivations; and also in institutions of "law" and legal system through which the

sanctions were contemplated, administered and enforced. However, the traditional ideas and institutions have limited relevance now (confined possibly to political expediency only) although the British adapted the traditional sanction of banishment in Africa in a rather strange fashion, under the colonial label of "deportation" and applied the sanction for "state security".[87] And strangely in some states the colonial tradition is maintained even now.[88] It is difficult to concede that either the colonial enterprise or even its extension are justified whether under modern penology, or under human rights jurisprudence; its operation does not conform to the modern concepts of externment and internment, adopted in India.[89]

9.42 In this study we have been primarily concerned with such restraints imposed by the state on personal liberty as take the form of preventive sanctions and we have seen that such sanctions have served the purpose of "state-security" as well as "social-security". In either case punitive sanctions are also used in obvious recognition of the fact that the norms of protections of personal liberty have, inevitably, to be flexible in nature. In Northern Ireland, punitive sanctions are increasingly used against "terrorism" for "state-security"; on the other hand, to fight recidivism also similar sanctions are used for "social-security". There is also a twilight zone in which the distinction is blurred and both types of sanctions are used, albeit at different stages, as in the case of "vagrancy" and "drunken driving" for "social-security". Indeed, judicial opinion has taken notice of the fact that the normative classification does not always correspond with the purpose and effect of the sanction and that the line between the two is very thin.[90]

9.43 However, we submit that the thin line is not as thin as it is supposed to be. The distinction is manifested in the fact that anticipatory sanctions are imposed on "untested suspicion" and not on "proof" or "tested suspicion". The difference in the nature of the two

sanctions, however, postulates the application of different norms of protection or what are more commonly known as "safeguards". Particularly in the jurisprudence of "preventive detention" but also generally in relation to the measures usually adopted for "state-security", the question of "legitimacy" acquires importance in the context of the norms of protection. Fragile and inadequate safeguards manifesting lack of concern for the consensus of the governed exposed the ruler to the tests of "international accountability" and "domestic legitimacy".

9.44 At common law the "reasonableness" of suspicion invariably constitutes the most important and indispensable element of the norms of protection adopted, against almost all types of restraints.[91] The concept, as we have seen, originated in the norms of protection evolved against the power of arrest. Indeed, the concept imparts vitality and efficacy to the norm of protection, by eschewing the arbitrary use of power by means of judicial interposition for adjudging compliance with the test of "reasonableness". Under certain circumstances, the parallel concept of "necessity" regulates this test. The latter is, thus, a regulatory measure but it is also self-regulatory in the sense that flexibility is its key-note.[91] The two concepts at common law provide the main jurisprudential base for all norms of "restraints" and "safeguards".

9.45 Of course the common law has to concede primacy to legislation even in the dependencies. The concepts of "legality" and "legalism" came to prevail in the new milieu, to replace the two common law concepts. Restraints assumed more stringent forms in that the safeguards lost their higher value and appeared in a diminitive form. The illegitimate use of the power to impose sanctions was sought to be justified by the twin concepts of "legality" and "legalism". In the first place mere formal compliance with the new norms was considered sufficient to sustain "legitimacy". Secondly, the norms themselves were so erected that they

sanctioned the arbitrary use of power. Indeed, the twin concepts are basically "power-centred". They are primarily concerned with the power to rule rather than the duty to provide a "good government". These concepts also found favour with the new rulers of the emergent states. In the new context they served the purpose of "domestic legitimacy" and also "international accountability".[92]

(B) "Social-security" measures

(a) Power of Arrest

9.46 We have seen that the common law power of arrest has been gradually supplanted in England by statutory power. Under the old law it was related mainly to the distinction between felony and misdemeanour which was abolished in 1967. The power has changed complexion in its statutory form in many ways, of which the most significant aspect is its double role of providing "substantive" and "procedural" norms. This signifies its role as an important instrument of law-enforcement, which forms the basis of "social-security". As we have seen, under the "vagrancy" and "drunken-driving" laws, through a wholesome operation of the "value-process" at judicial level, the power has been invested with a "substantive" content.[93] The personal liberty of an offender is allowed to be restrained to disable him from committing an act of "imminent danger" to society. This supplements the "procedural" norm which authorises arrest solely for initiating proceedings against the offender. At common law the power of arrest to prevent a breach of the peace mainly served a "preventive" purpose, which has not been superseded.[94]

9.47 It is, however, important to remember that, as an arrest constitutes a threshold restraint on personal liberty, various other norms of protection have also been evolved at common law. The outstanding ones we have already mentioned, viz., bail, habeas corpus and action for false imprisonment.[95] It is necessary however to reiterate the importance of some other rights or norms of protection as these rights

have been, from time to time, tampered with in a wholesale manner in the laws enacted for "state-security", described in the study as "emergency laws".[96] It is unnecessary to rehearse the discussion on these rights but their importance demands that the more important ones are listed or rather re-listed:[97] a person arrested is entitled:

i) to know the true reasons of arrest;
ii) not to be detained for interrogation without lawful arrest;
iii) not to be detained "pending enquiry or investigation" without lawful arrest;
iv) not to be detained on any "pretence" of arrest;
v) to be taken to the police station or magistrate with reasonable dispatch after arrest;
vi) to resist an unlawful arrest;
vii) not to be subjected to unreasonable use of force in the lawful exercise of the power.

9.47 In Asian and African states the respective Criminal Codes exhaustively lay down the incidents of the power of arrest and also the "safeguards" which correspond more or less to those listed above. The codification of criminal law was first undertaken in India and the Indian Codes (particularly the Criminal Procedure Code) became the model for the other Commonwealth states.[98] One important difference has, however, to be noted. In the Indian Code there is no (even none originally) power of arrest in case of breach of the peace but in some other states the provision exists.[99] The important requirement of "reasonableness" of suspicion has been retained in all the Asian and African Codes. It is also important to note that one of the common law safeguards, namely, the obligation of the state to inform the person concerned of the reasons for his arrest, finds a place in the Bills of Rights of Commonwealth African and Asian states.[100] Indeed, as we have seen, this safeguard has been internationalised.[101]

(b) Preventive justice: Prevention of crime

(i) Power to bind over

9.48 The power to bind over existed at common law to deal with conduct and activities considered as contra bonos mores and contra pacem, which enabled the Conservators of the Peace and their successors, the Justices,

to take security from any person for keeping the peace or to be of good behaviour. The provision was later amplified in the Justice of the Peace Act 1361.[102] The provision apparently aims at abridging the hiatus between legal and moral norms and exemplifies the wholesome flexibility as well as diversity of the norms of restraints of common law. The jurisdiction embodies the concept of "preventive justice" which postulates the application of anticipatory sanctions but what is more significant is that the provision recognises the desirability of imposing, in respect of a jurisdiction based on untested suspicion, sanctions of less rigorous but more flexible nature. The flexibility of the sanctions imparted a wholesome flexibility to the jurisdictional base itself permitting the jurisdiction to be exercised even in cases concerning "state-security". The court emphasized the important nexus between "violent" conduct of a person and the breach of the peace.[103]

9.49 In African and Asian criminal codes the jurisdiction appears as so-called "security provisions". As in England, the power can be exercised by courts but only when the prescribed statutory conditions - precedent are satisfied. In England the power flowed from three sources - Common law, Commissions of Justices and the 1361 Act - imparting greater flexibility to the jurisdiction. The Indian Code provides the general model for Asian and African Codes. A provision embracing the English concept of "vagrancy" which has no relevance to Africa and Asia still appears in certain Codes although in India it was discarded in 1973. In many states, except India, a modified version of the "security provision" appears in the "emergency laws" also which generally provided for more stringent restraints such as of arrest and detention.[104]

(ii) Control of the recidivist

9.50 While Blackstone attached more importance to the power to bind over to emphasize the role of "preventive justice", Bentham related it more directly to penology.[105] There is a strong current of opinion

suggesting that Bentham's reaction to the "uncertain" and "savage" character of the old Criminal Law of England ushered in the era of "liberalism and reform" which made recidivism a "practical possibility".[106] Legislative efforts to fight the evil in England resulted in the gradual embellishment of the concept of "protection of society"; measures were first enacted in 1871 and then in 1908, 1948, 1967 and 1973.[107] However, originally the evil was not considered as a disease requiring proper diagnosis and prognosis and its treatment was therefore provided in the "dual-track system of punishment" - a sentence of penal servitude followed by "preventive detention".[108]

9.51 It cannot be gainsaid that in England the reform therapy has come to be applied very late but it is doubtful if the therapy has evolved satisfactory norms of protection of personal liberty. From a close study of the successive reforming enactments one gains the impression that the legislative enterprise is mainly an exercise in semantics; the evolution of norms do not reflect any radical change in approach.[104] Although the latest enactments include the alternative concept of "corrective training", the basic idea of the new norm of restraint still savours of punitive quality. Marc Ancel's New Social Defence Theory rightly lays stress on co-ordinating the activities of the different agencies and institutions connected with the enactment, administration and enforcement of the relevant law to impart "fresh strength to the renewal of the preventive or reformative activity" in the field.[110]

9.52 In refreshing contrast, we find the reform therapy's application to the problem in India not only to be early in time but also to proceed in the appropriate direction, which has given it a preventive bias.[111] The main provision to deal with "habitual offenders" is in all Commonwealth Asian and African Criminal Codes in the chapter containing "security provisions". In India, provisions with a distinctly "reformatory" purpose and less severe norms of restraints, namely,

"internment" or "externment" instead of "detention" also exist.[112] On the other hand, in Africa, the supplementary provisions take different form, adopting the English concept of "preventive detention" which in some cases appear under the label of "preventive custody".[113]

9.53 It is true that the problem of recidivism assumes different forms, shapes and proportions, depending on the social milieu, and the "value-process" also operates differently in different lands, but the basic question to be considered in all cases is whether the recidivist is a sick person or a social menace ? The question, we submit, ought to be answered in all jurisdictions with reference to human rights jurisprudence. There is some resemblance between his sickness and the behaviour of a "political offender" and there is already a tendency to treat political detainees as sick persons and to hold that detention in their case serves as a reformative influence.[114]

(C) "State-security" measures

(a) Emergency jurisprudence and "value-process"

9.54 The growth of strong nation-states and the consolidation of the process, are phenomena peculiar to the new world order. England has a well-established tradition of a stable monarchy; it was further fortified in the constitutional settlement of 1688: the Bill of Rights was enacted for "declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown". Indeed, in a monarchy the state is personified in the person of the monarch; preserving the order of succession to the crown was the means of avoiding a constitutional breakdown. However, even in this constitutional document there is no mention of the right of the state but the emphasis is on the rights of the subjects. How the state could act in a situation threatening constitutional breakdown (whether resulting from an external aggression or rebellion) was thus left to be determined by the common law and Parliament. The "value-process" is thus supposed to operate principally through these institutions and indeed it was so operated during "emergency" situations, in England.

9.55 The judges, who are the principal operators of the "value-process" under common law, evolved the concept of "necessity" to deal with "emergency" situations but they also evolved the so-called "doctrine of martial law" to deal with such situations in the dependencies.[115] In England the use of martial law was expressly forbidden by the Petition of Rights and it was never used thereafter. In the dependencies it was used and the judges approved the enterprise, giving rise to the so-called doctrine of martial law. In the dependencies it was necessary to quell rebellions to entrench the colonial rule, which the judges considered as their "legitimate" function, and therefore they resorted to "legalism" to carry it out effectively. Their endorsement of the action of the colonial executive conferred "legality" on the enterprise. In the domestic context in England, the "value-process" operated in a different fashion, in that here "public opinion", which was an important ingredient of the process, influenced in a different manner the judges' interpretation of the law. The judicial response to "emergency legislation" operating the same "value-process" through a publicopinion evolved ad hoc norms of interpretation of the law.[116]

9.56 Elsewhere in the Commonwealth, the "Westminster made" Constitutions did not contain any "emergency provision". In 1960, in s.6 of its new Bill of Rights, Canada made provision for situations of "war, invasion or insurrection, real or apprehended". It also took care to provide in s.5 that the Bill of Rights should not be so construed as to "abrogate or abridge any human rights or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of the Act". The underlined expression, however, introduced an element of ambiguity if the Indian experience was any guide although there can be no doubt that the Bill of Rights was meant to give "better" protection not only to the enumerated but also to the unenumerated existing rights.[117] In the Constitutions of all Commonwealth Asian and African states containing Bills of Rights (albeit saddled by "emergency provisions" besides "derogation"),

the absence of a provision similar to s.5 of the Canadian Bill of Rights), apparently enfeebled greatly the norms of protection of personal liberty in view of the debilitation contemplated through the double-filter of the "emergency provisions" and "derogations".

9.57 It is true that there is no likelihood of "public opinion" in the Asian and African states conforming to a single common pattern. This is manifested in the fact that the judges in Malaysia expressed their preference for English decisions while judges in some African states (particularly Zambia) not only preferred to follow the Indian decisions but they went a step further.[118] While the Indian court was divided in its approach to the "English wartime cases", the Zambia Court developed a positive approach and acted with greater imagination and insight to discern the inapplicability of the ad hoc norm evolved in those cases.[119] Unfortunately, the most bizarre operation of the "value-process" by the African judiciary was to be noticed in evolving the emergency jurisprudence under military rule in some of these states.[120]

9.58 As we have seen, the institutional framework of military government made the normal functioning of the Rule of Law difficult. A new "value-concept" had to take its place. The only institution that could evolve or rather recognise the new concept was the judiciary. We have called the concept the "New Rule of Law".[121] Under it the judiciary had to assume a "self-activiating" and "self-regulatory" role.[122] In other words, with the institutionalised norms of control of the government having been "abrogated" or "suspended" and "public opinion" also having been stifled, it was incumbent upon it to recognise its new role as the only "independent" institution of stability and authority and to step up accordingly "judicial activism" and also to monitor itself its new role. It is an a priori proposition which follows from the common law primacy attached to the "independence of the judiciary". Under new conditions of military rule, the "value-process" could function satisfactorily only through the new norms of protection, namely, the "self-regulatory" and

"self-activating" role of the judiciary. The Pakistan judiciary adopted the new norm but in Africa the judiciary displayed an ambivalent approach.[123]

(b) Some insight into "emergency provisions"

(i) Common Law: Necessity and Martial Law

9.59 The test of necessity was wrongly propounded in the SHIPMONEY case and the decision was nullified by a parliamentary enactment. The decision in SHIPMONEY excluded judicial review and turned the concept into a rigid one.[124] The true test of necessity contemplates a "self-regulatory" and flexible role for the concept manifested in its several aspects, labelled as "civil", "state" and "military" apart from the fact that the concept has also gained ground in criminal law in different jurisdictions.[125] In America this test of necessity, upon which the so-called doctrine of martial law was justified, was rejected in MILLIGAN.[126] In both English and American jurisdictions the concept of "military necessity" has been considered by the courts and it has been held that the concept does not exclude judicial review.[127] In "Humanitarian Law" the applicability of military necessity has been extended to internal conflicts.[128] As humanitarian considerations import the concept of reasonableness, judicial review is a priori included under all circumstances, including those of "emergency".[129] Indeed, in Pakistan and Nigeria and under slightly different circumstances in Rhodesia and Cyprus this position has been accepted in substance by the courts.[130]

9.60 It is true that there is no recent decision of any English court on the so-called doctrine of martial law, but in all leading text-books on English constitutional law an effort, indeed a laboured effort, is still made to maintain it as a valid legal doctrine by trying desperately to clear the terminological confusion in which it is wrapped.[131] The doctrine in substance postulates the exercise by the military of executive, legislative as well as judicial powers: it can enact "martial law regulations" to prescribe offences and penalties, set up military courts

to try offenders (including civilians) and preclude the superior courts from exercising its power of judicial review durante bello in respect of the acts of the military authorities.[132] That is how the military acted on many occasions in the dependencies, stating that "martial law" was "declared" in the particular area. This was challenged in the courts in England, but without success.[133] The court knew that "martial law" as known to Common Law was proscribed by the Petition of Rights so the courts gave a new meaning to the ancient expression of "time of war", extended the common law concept of "meeting force with force" and even at times drew upon the concept of the prerogative.[134] This was nothing but an exercise in "legalism" because the decisions, as we have seen, could not be strictly supported according to accepted principles of common law. More precisely it was an obiter in D.P. MARAIS that became directly responsible for the doctrine.[135] Unfortunately, the jurists and textbook writers endorsing the decisions and the doctrine expounded therein have not investigated the matter in depth.[136] The doctrine thus gained currency and got itself firmly established in due course. The most unfortunate result that flowed from it manifested itself in the military rule in Pakistan and Bangladesh where the military rulers based their claim to "domestic legitimacy" by invoking the doctrine.[137] However, the Pakistan court acted with imagination and courage and found out the insecure legal foundation of the doctrine.[138] The process of evolution as well as rejection of the doctrine and its consequences and operation provide some interesting insight into "emergency provisions" of the Commonwealth.

(ii) African and Asian Colonial Constitutions and Emergency Legislation

9.61 The African brand of "colonial constitutionalism" and the two phases of the "unlimited" and "direct" government in India had different features as the colonial policy followed in the different territories did not conform to a single uniform pattern except in respect of the basic norm which envisaged entrenchment of the colonial rule everywhere. In many

territories (such as British India and Ceylon, but not Africa) such stringent measures as "martial law" was used by the colonial executive on many occasions to enforce the policy of entrenchment but legislative measures, local and "Westminster-make" were also used. These measures had one common feature. They resulted in the Rule of Law being perverted on many occasions in that equality before law and equal protection of law was denied to "native subjects"; the laws were patently discriminatory. Particular mention, in this connection may be made of the "deportation" laws of Africa and in respect of India, of the British Acts of 1781 and 1784 and the Bengal Regulation of 1818.[139] Later, perhaps, it was discovered that resort to "legalism" did not always succeed in achieving "legality" as we have seen that the vires of some measures were challengeable and indeed in some cases the challenges were made and also successfully upheld.[140]

9.62 In spite of differences respecting details of structure and other matters, the colonial constitutions had one thing in common: the institutions of colonial governments everywhere were subject to the overall control of Whitehall and Westminster. Thus, all subjects in the dependencies had to eventually look to the British Parliament for effective protection of personal liberty. Nevertheless, there was an important difference in the Indian and African positions: Indians being associated from the very beginning with the colonial legislative process could possibly (as in the case of the Rowlatt Act) exercise some control over the colonial executive while African representation in the colonial legislative assemblies having come very late and in relatively meagre proportion, the process of local control did not possibly obtain there until the eve of independence.[141] This position appears to have some relation to the fact that The Emergency Powers Order in Council 1939, which provided the basic framework of the later emergency laws of other territories, was not made applicable to India. As we have seen, the pace of constitutional development was quickened in India cluminating in the

1935 Constitution and the colonial legislature acting thereunder enacted the Defence of India Act 1939 as a substitute for the Order.

9.63 In India "rules" were framed by the executive under the Act while elsewhere "regulations" were made under the Order.[142] The subsidiary legislations in both cases had similar features which could be distinguished from their parallel United Kingdom legislation in respect of two important provisions in that the laws of the dependencies provides for a very wide delegation of power and also purported to exclude judicial review.[143] It is also to be noted that in almost all cases "regulations" made under the Order contemplated the interposition of armed forces and restraints of a more severe type, albeit of varying degree, in the different territories: in Africa, generally the regulations of West Africa were of the extreme type but obviously still stringent measures were contemplated under the Kenya regulations made for the special situation arising from the Mau Mau rebellion.[144] The restraints of more general type included arrest, detention pending enquiry, detention for specified or unspecified period (without trial) and also less severe type of restrictions on movements and activities. The Indian "rules" contemplated more or less similar restraints and thus, in common with the African regulations, differed from the provisions made in England where "internment" (under Reg. 14B of 1914) and "detention" (under Reg.18B of 1939) could be made only under orders of the Secretary of State. It is also to be noted that the English regulations contemplated the safeguard of consideration by an "advisory committee" of any "representation" made by the detainee which the Defence of India Rule 1939 did not provide.[145]

(iii) The English "wartime cases"

9.64 We have already pointed out that the judges in England had evolved an ad hoc norm in dealing with the above cases and that in many jurisdictions in the New Commonwealth this significant aspect of the "value-process" was overlooked by some of the judges of the independence era.

There are certain points to be noted in this connection to obtain a deeper and clearer insight into the emergency jurisprudence of the New Commonwealth. In the above cases the judges in England exercised judicial restraint only to curtail and not to negate their own power of judicial review.[146] The courts did not hold that a habeas corpus could not be issued in any case and under any circumstances. The courts had made it clear in evolving what came to be known as the "subjective satisfaction theory" that the theory operated in the context of "war" only.[147] It is also necessary to note that even in evolving the new norm the judges did not speak with the same voice. Indeed, in the two leading cases, there were powerful dissents and Lord Atkin's view in the latter case (LIVERSIDGE) has, as we have seen, come to prevail even in England as laying the correct position in law.[148]

9.65 However, the most important aspect of the cases which appears to have been overlooked so far is that Lord Atkin's dissent has apparently provided the basic framework of the preventive detention jurisprudence of India.[149] His emphasis on "grounds" and "particulars" to be provided to the detainee for making the safeguard effective was recognised in the Indian Constitution.[150] The Indian judiciary has not acknowledged this but has adopted (albeit covertly) his expressions: the courts have used the words "grounds" and "particulars" although in the Constitution (in cls. (4) and (5) of Art. 22), the words are "grounds" and "fact", respectively. In this connection it is also to be noted that the Constitution-makers were also possibly influenced by the Indian court's decision, in which preference was expressed for Lord Atkin's dissent.[151]

(iv) Emergencies, Preventive Detention and Constitutional Safeguards in Independent Asia and Africa

9.66 With the transfer of power to "legitimate" rulers there was no reason to think that the prospect of personal liberty would not improve after Independence. But the high incidence of detention without trial

and long periods of simulated emergencies in many states have already gained a high notoriety.[152] Indeed all states having Bills of Rights also had constitutional provisions for proclamations of emergencies. There was obviously ready and immediate colonial precedent for such provision as was also in the case of "preventive detention". However, there is an important difference in the provisions of African and Asian constitutions: in Africa, the provision for derogation from Bills of Rights during emergencies permit laws for preventive detention to be enacted.[153] In the Indian Constitution legislation for preventive detention is permissible even without the declaration of emergency.[154] In Pakistan, Bangladesh, Malaysia and Singapore also the position is the same as in India.[155] Sri Lanka has no justiciable Bill of Rights but there not only is law for preventive detention permissible in normal times under the constitution, but the latter does not even prescribe any "limitations" in respect of such laws.[156]

9.67 The important change in all territories resulting from independence is reflected in the provision that the declaration of an emergency by the executive requires Parliamentary endorsement in each case.[157] In India, the constitution-makers did not deliberately provide for "peacetime law" for preventive detention but in accepting the infra-structure of the existing constitutional framework they also accepted the existing provision as a necessary evil and then imposed constitutional limitations on it to curtail its possible evil consequences.[158] Unfortunately this factual position, which we may describe as the "Constitutional-limitation Theory", has not been brought to the notice of the courts and as a result the Indian judiciary has construed the relevant provision (Art. 22) by conforming to the rules of literal and grammatical interpretation.[159] The Pakistan, Bangladesh and Malaysian provisions were modelled on the Indian provision and thus <u>dehors</u> the legislative history, which was peculiar to India, the same theory ought to

apply also in their case on the general theory of constructive and liberal interpretation of Republican Constitutions.[160]

9.68 However, in all cases the ambit of the "constitutional-limitations" was not the same. The only common provision in respect of the right of "representation" of the detainee was also provided in all cases with the additional safeguard that such representation shall be "considered" by an "advisory" body - "tribunal" or "advisory board". In all cases, however, the independence of the body was not equally or adequately secured. The provision of a time-limit on detentions appeared in different Constitutions in various forms but in all Asian states it was linked to the provision of the "consideration" of the representation by the advisory board, whose opinion had binding force in India, Pakistan and Bangladesh. In view of the fact that the term "preventive detention" was used but not defined in every Commonwealth Asian Constitution it is possible to contend that the interposition of the advisory board was also meant to vest the "ultimate subjective satisfaction" in it; this was meant to curtail the scope of the "primary subjective satisfaction" of the executive, which vested in the latter according to "subjective satisfaction theory" accepted in colonial law.[161] Like the "Constitutional-limitation theory" this aspect of the constitutional safeguard, which was common, according to us, to all Asian Constitutional Bills of Rights, has also not been noticed in any jurisdiction. As a result the judiciary in Malaysia refused to follow Indian case-law by magnifying the importance of difference in certain provisions of the two Bills of Rights, namely, the "advisory" nature of the Board's opinion and the omission of the word "procedure" in the provision defining personal liberty, in Malaysia.[162]

9.69 The legislative measures enacted in all states deliberately used the language of English wartime measures (also appearing in the local Colonial legislation everywhere) to invoke the well-established "subjective

satisfaction theory". Although there was scope to construe the provision to exclude its operation in some cases this was not done.[163] In Africa, in Tanganyika and Ghana, preventive detention was provided by Parliamentary enactments as in India and also carried the same title, Preventive Detention Acts. However, in Ghana and also in Pakistan (under the Security of Pakistan Act) there were alternative provisions for "restriction orders" also.[164] In Sri Lanka, "detention" could be provided by subsidiary legislation.[165] In Africa, in other states, alternative restraints of "restriction" and "detention" were provided, albeit under subsidiary legislation, the "regulations" (in Kenya, Zambia and Malawi, made under the Preservation of Public Security Ordinance).[166] There were also enacted The Emergency Powers Acts in Ghana, Nigeria, Uganda and Zambia which contemplated the making of "regulations" and in all cases these regulations provided, inter alia, for "deportation" which, as we have earlier pointed out, was an unfortunate colonial legacy.[167]

9.70 Although the provision of preventive detention in all cases, whether under Parliamentary enactment or subsidiary legislation, was saddled with the constitutional safeguard of the right of representation for the detainee, the vitality of the safeguard was undoubtedly affected by the status of the instruments in each case. It is, however, interesting to note that in India in 1975 all normal constitutional safeguards were "temporarily" removed ("suspended") by amending the Maintenance of Internal Security Act 1971 but this process was justifiable only as a result of the amendment of the Constitution itself to enable such temporary provision being made.[168]

(v) Terrorism and Law

9.71 In Northern Ireland, the problem of terrorism still poses a serious threat to "state-security"; in Malaysia also the threat has not completely vanished. In Africa, particularly, the Mau Mau rebellion in Kenya posed a serious threat to the colonial rule there. In all territories almost similar types of measures were enacted but in Northern Ireland there is now

a shift in emphasis on the aspect of "social-security" and, in preference to "preventive detention", measures are taken now for the criminal prosecution of those involved in acts of terrorism.[169] However, the basic problem of denial of human rights comes to the surface when action is taken, of necessity, not only in identifying and isolating the suspect but in "hunting" him and other suspects also. Powers of arrest and detention for "questioning" and "interrogating" such suspects are not only provided in ample measure but are often misused.[170] The interposition of the military in the law-enforcement process accentuates further the severity of the measures. Moreover, a fair trial according to the established common law norms (popularly called the British standard of justice) in "terrorist offences" is difficult to obtain in all cases.[171] In other words it is again the colonial stance of "legality" that is adopted, by modifying the rules of evidence and trial procedure. The larger question, whether a "terrorist" is a "criminal" under international law, does not admit of a simple and unequivocal answer in view of recent developments of the law in this field.[172] So, all that can possibly be said emphatically is that a legal solution of a political problem is not easy and satisfactory.

## III. Conclusion: a plea for infusion of "humanitarianism" into national legal systems - integration of "value" and "legal" concepts

### (1) General prospects

9.72 If the present position in respect of "political detentions" is a true indicator of future prospects for personal liberty in the New Commonwealth then it must be admitted that they are not bright. We have already quoted at some length relevant statistics in connection with the situation obtaining in Northern Ireland which has a special dimension of "terrorism".[173] However, it is interesting to note that the futility of the persistent and intensive experimentation in "legality" and "legalism", coupled with Britain's accession to the European Convention, is

contributing to the growing realisation of the need to integrate the "legal concept" with the value-concept" of personal liberty. This is manifested in the recommendations of the Gardiner Committee which have unfortunately not been accepted in toto.[174] They include measures such as a "re-settlement scheme" for the detainees and also payment of money to persons released or about to be released.[175] These measures apparently aimed at their material rehabilitation and, albeit rightly, drew a distinction between a terrorist and other "political offenders". But, the use of violence is as much a menace to "social-security" as it is to "state-security". There is thus a prima facie case to pay particular attention to the "terrorist" also to see if he is to be considered as a sick person, needing reform-therapy. Obviously such an approach postulated that not only was post-trial treatment in respect of a terrorist to be given a "humanitarian" bias, but the legal norms involved in the process of "hunting" him - arrest, questioning, interrogation and trial, also require to be similarly treated. Indeed, it has been rightly observed that the legal norms now employed are only a step short of martial law.[176]

9.73 Turning now to the African and Asian panorama revealed in the Amnesty International Report of 1977, we find a different pattern of events.[177] The incidence of political detentions has not assumed any importance under military rule, except in Bangladesh. In July 1976 a delegation of the Amnesty International which visited the country expressed concern about the conditions of political detainees estimated between 10,000 and 15,000. In the local press it was reported on 19th February 1977 that out of 36,685 in detention, only one-fifth had been tried and convicted by Special Tribunals set up under Martial Law Regulation. Objection has also been taken to the trial procedure and sentences of execution. In 1976-77 "a large number of people" were sentenced by military tribunals and executed, but they were charged with "armed robbery". In Ghana eight persons were tried by military

tribunal in May 1976, of whom five were sentenced to death. In Uganda, it is alleged that "several thousands" were killed by the security forces during 1976-77; that the problem is one of "government-sanctioned killings" and "torture" and not of detentions. In Kenya there were less than ten political detainees. In Malawi in August 1976 and also in early 1977, more than 1000 persons were detained, on each occasion, for varying periods; it is alleged that several persons have been held for more than 10 years. In Zambia 15 university students were arrested in 1976 but they were released within a few months. In June 1977, in Pakistan, it was alleged that 50,000 persons had been arrested under orders of the civilian government and that although 13,000 persons were "detained" all of them except a "few hundred" had been released. It is claimed that in Malaysia "several hundreds" are still in detention, some for the last 13 years. In Singapore, there are 40 "political prisoners" some of whom have been held for 10 years. In both states widespread use by the police of "public confessions" has created a serious problem. The Communist Party is illegal in these two states and the law operates harshly against "political suspects" who are also labelled as "communist suspects". In Sri Lanka it is alleged that in May 1977 there were 2000 political detainees. In October 1976, 18,000 persons were arrested after an insurrection but out of these 11,500 persons were released and 3,872 were charged and tried by a special "Commission". In India an emergency was declared in June 1975. In the general elections in March 1977 the ruling Congress Party was replaced by the Janata Party at the Centre and in July 1977 the new Home Minister announced in Parliament that 34,630 persons had been detained during the emergency.[178]

(2) Some suggestions: "Humanitarian" Constitutional Safeguards and Commonwealth Habeas Corpus Court

9.74 The events in India provide a key to the solution of the problem in the New Commonwealth. The events bear out our assertion that it is wrong to assume that in the scale of traditional values, in Asia and

Africa, personal liberty is not rated highly. The traditional societies may not have absorbed western values but in the Asian and African societies and polities the arbitrary use of power has not been tolerated. In the west the humanitarian law is based on Christian piety; in India the concept of dharma infuses "humanitarianism". Indeed modern Indian leaders have themselves advised the world to follow dharma so that peace might reign in the world.[179] When they failed to follow the precept themselves they lost peace at home. The new leaders have realised the need, in effect, to integrate the "value-concept" with the "legal concept" of personal liberty and have proposed amendment of the Constitution. In the Amendment Bill it is inter alia proposed that there cannot be any proclamation of emergency unless the internal disturbance amounts to armed rebellion; the right to move the court for the enforcement of the right to personal liberty cannot be suspended during emergency and that there cannot be preventive detention in any case for more than two months without the opinion of the Advisory Board which, it is proposed, will now be headed by a sitting judge of the appropriate High Court.[180]

9.75 It is submitted that these provisions adequately suit the other Asian and African states but India can borrow the wholesome safeguards available under the existing Constitutional provisions in some other states. The triangle of "value-process" is common to all political systems. The three "value-concepts" of "state-security", "social-security" and "human rights" have to be properly balanced, for which it is necessary to ensure that a proper order of alignment obtains between the existing institutions. A common model of norms of "restraints" and "safeguards" is necessary for all states. The model should reflect "humanitarian" values and, besides including the provisions indicated above (proposed in India), it should also include the following as Constitutional safeguards:

a) There should be no "peacetime law" for preventive detention and even in the "emergency law" norms of restraints should be flexible, permitting use of lenient measures like "restrictions" in suitable cases.

b) Provision for detention should eschew any wide delegation of power.

c) A maximum period (applicable in all cases) should be prescribed.

d) There should be, in the case of detention, a positive injunction against the torture of political detainees, and also provision for wholesome conditions of detentions being ensured, by appropriate means (such as regular visits by independent "Inspection Committees" and implementation of their recommendations).

e) There should be express prohibition against detention incommunicado. All cases of detentions, with necessary particulars, should be published in official gazettes.

f) During the period of detention, appropriate financial assistance should be provided to the family of the detainee for its maintenance.

g) There should be provision for adequate compensation to be paid to the detainee, which may be in the form of liquidated damages.

9.76 There may be some difficulty about habeas corpus: opinions may differ on the question whether suspension of the writ should be totally prohibited or whether the right of suspension may be confined to the legislature. Indeed, the right to "regulate" the civil and political rights of its citizens and even aliens, and also the right to administer law and justice against any person within the territory of any State, are the two chief attributes of sovereignty which vests in the State. It will be jurisprudentially unsound to contemplate a total denial of the right of the State to "regulate" personal liberty. It is necessary, however, to ensure that the power of review by the courts is not excluded in any case either expressly or by the use of the so-called "subjective satisfaction clauses". The judiciary in common law jurisdictions is the ultimate level of operation of the "value-process". It is true that, unlike the English judges, in the New Commonwealth the judges, being largely unaided by "public opinion", find it difficult to operate the "value-process" in a similar manner, but for that other measures are necessary, such as, fortifying and expanding the base of the "media", encouraging

the development of pressure groups and also establishing regional institutions comparable to the European Convention in Asia and Africa. However, it is not suggested that there is no scope in any jurisdiction, to improve the "legal" institutions to secure in a "better" way the "independence of the judiciary". It is also not suggested that by and large the judiciary has not fulfilled its traditional role objectively as in many cases it has ordered the release of political detainees particularly when it could avoid a confrontation with the legislature. Rather, it is enigmatic that this obvious judicial concern for "state-security" went unnoticed by the executive and the legislature and concern at both these levels to curtail judicial review remained unabated in all states even after independence. Possibly, the judiciary is considered as a "western" institution, and therefore, not trusted.

9.77 The idea of "world habeas corpus" as the "legal ultimate for the unity of mankind" has indeed much to commend itself.[181] It is true that the growth of the international system under the new world order has made it possible for the Common Law tradition to prevail over the Civil Law tradition but a beginning may perhaps be made with greater success if the idea is pursued first with the institution of the Commonwealth Habeas Corpus Court and, to start with, African and Asian circuits may be allowed to function as independent units constituted under regional treaties between the respective states. Such an enterprise will obviously make easier the blending of western and traditional values of the respective regions leading to the realisation of the innate "worth of the [human] person" and to a brighter prospect for personal liberty in those regions.

# ABBREVIATIONS

## Law Reports (U.K., U.S.A., Australia)

| | |
|---|---|
| All E.R. | All England Reports |
| A.C. | Appeal Cases (Law Reports) |
| App. Cas. | Law Reports, Appeal Cases, House of Lords |
| Ch. | Chancery Division (Law Reports) |
| Cald. Mag. Cas. | Caldecott Magistrate's Cases |
| Co. Rep. | Coke's Reports |
| C.B.N.S. | Common Bench, Nisi Prius |
| Dowl. & Ryl. (M.C.) | Dowling & Ryland's Magistrate's Cases. |
| E.R. | English Reports |
| Ir. R. | Irish Reports |
| J.P. | Justice of the Peace |
| K.B. | King's Bench Divisions (Law Reports) |
| Law J. Rep. | Law Journal Reports |
| L.T. | Law Times Reports |
| M.I.A. | Moore's Indian Appeals |
| N.I. | Northern Ireland Law Reports |
| Q.B. | Queen's Bench Division (Law Reports) |
| R.T.R. | Road Traffic Reports |
| Sol.Jo. | Solicitor's Journal |
| St.Tr. | (Howell's) State Trials |
| W.L.R. | Weekly Law Reports |
| U.S. | United States Reports, Official Edition (U.S.A.) |
| L.ed. | United States Supreme Court Reports Lawyer's Edition (U.S.A.) |
| C.L.R. | Commonwealth Law Reports (Australia) |

## Law Reports (Asia)

| | |
|---|---|
| AIR (Jour., S.C., P.C., Cal., Bom., Mad., Nag. &c.) | All India Reporter (Journal, Supreme Court Privy Council, and the High Courts respectively, Calcutta, Bombay, Madras, Nagpur &c.) |
| D.L.R. | Dacca Law Reports (Bangladesh) |
| ILR (Cal., Bom., Mad. &c.) | Indian Law Reports (High Court sections, as above) |
| Morton's Reports | T.C. Morton's Decisions of the Supreme Court at Fort William in Bengal (from 1774 to 1841) |
| M.L.J. | Malayan Law Journal (Malaysia and Singapore) |

| | |
|---|---|
| N.L.R. | New Law Reports (Ceylon) |
| P.L.D. | Pakistan Legal Decisions |
| Pak.L.R. | Pakistan Law Reports |
| S.C.A. | Supreme Courts Appeals (India) |
| S.C.C. | Supreme Courts Cases (India) |
| S.C.J. | Supreme Courts Journal (India) |
| S.C.R. | Supreme Courts Reports (India) |
| Strange's Reports | Sir Thomas Strange's Notes on Cases in the Recorder and the Supreme Court at Madras (1798-1816) |

Law Reports (Africa)

| | |
|---|---|
| ALR, Mal. | African Law Reports, Malawi section. |
| All N.L.R. | All Nigeria Law Reports |
| E.A. | East African Law Reports |
| E.A.C.A. | Law Reports of the Court of Appeal of Eastern Africa |
| G. & G. | A Source Book of Constitutional Law of Ghana. S.O. Gyandon Jr. and J. Griffiths(eds) (Faculty of Law, University of Ghana, No.1) |
| G.L.R. | Ghana Law Reports |
| K.L.R. | Law Reports of Kenya |
| N.R.N.L.R. | Law Reports of the Northern Region of Nigeria |
| R. & N. | Rhodesia and Nyasaland Law Reports |
| South Africa L.R. | South Africa Law Reports |
| S.C. | Judgments of the Supreme Courts of Nigeria |
| S.J.Z. | Selected Judgments of Zambia |
| W.A.C.A. | Selected Judgments of the West African Court of Appeal |
| Z.R. | Zambia Law Reports |

Other Journals

| | |
|---|---|
| Anglo-Am. L.R. | Anglo-American Law Review |
| Am.Bar Assn. Jrl. | American Bar Association Journal |
| Am.J.Com.L. | American Journal of Comparative Law |
| Br.Jrl.Socio. | British Journal of Sociology |
| Can. Bar Rev. | Canadian Bar Review |
| Crim.L.Rev. | Criminal Law Review |
| Colum.L.Rev. | Columbia Law Review (U.S.A.) |
| Cur.Leg.Prob. | Current Legal Problems |
| E.A.J.L. | East African Law Journal |

| | |
|---|---|
| How. L.J. | Howard Law Journal (U.S.A.) |
| I.C.L.Q. | International Comparative Law Quarterly |
| J.A.L. | Journal of African Law |
| Jrnl. of Mod.Afr. Studies | Journal of Modern African Studies |
| J.I.L.I. | Journal of Indian Law Institute |
| Jrl. of Intenl. Commn. of Jur. | Journal of International Commission of Jurists |
| Jur.Rev. | Juridical Review |
| K.C.A. | Keesing's Contemporary Archives |
| L.Q.R. | Law Quarterly Review |
| Mod. L.R. | Modern Law Review |
| Mal.L.Rev. | Malayan Law Review |
| New L.J. | New Law Journal |
| N.I.Leg. Qly. | Northern Ireland Legal Quarterly |
| Nig. L.J. | Nigerian Law Journal |
| N.D.R. | Notre Dame Lawyer (U.S.A.) |
| Ohio St. L.J. | Ohio State Law Journal (U.S.A.) |
| Rev. of Ghana Law | Review of Ghana Law |
| Zamb. L.J. | Zambia Law Journal |

General

| | |
|---|---|
| Bl. Comm. | Blackstone's Commentaries on the Laws of England |
| Co. Instt. | Coke's Institutes of the Laws of England. |

## NOTES

INTRODUCTION (paras. I.1 to I.10: pages 1 to 6)

1. Problems of the New Commonwealth, pp.3-7.

2. S.A. de Smith, The New Commonwealth and its Constitutions, pp.13, 17, et seq

3. Maurice Cranston, What are Human Rights ?, pp.5-6; 19.

4. The Preamble of the United Nations Charter.

5. "Some Observations on Peace, Law and Human Rights", in Transitional Law in a Changing Society, ed. W. Friedmann and others, p.242, at p.251.

6. Ibid., p.253.

7. Infra, pr. 5.194; also see n.181, infra, p.331

8. Legal Control of Government, p.3.

9. Infra, pr. 1.235 et seq; also see prop. 2.1 and 3.1-4 for definition of the terms

10. Infra, pr. 9.1 also prs.

CHAPTER 1

SECTION I (paras. 1.1 to 1.98; pages 7 to 60)

1. The Development of Constitutional Guarantees of Liberty, p.7.

2. Four Essays on Liberty, p.121.

3. Western Philosophers, p.8.

4. Ibid., p.9.

5. "Liberalism" defined in the International Encyclopaedia of Social Sciences, vol.9, pp.276-82.

6. Maurice Cranston, What are Human Rights ? p.1.

7. Infra, pr. 1.12

8. Christopher Morris, Western Political Thought, vol.1, p.39.

8a. L.C.McDonald, Western Political Theory, Part I, p.16.

8b. Ibid., p.17.

9. John Bowle, Western Political Thought, p.51.

10. Morris, op.cit., supra (n.8), p.112.

11. Ibid., p.114.

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13. Ibid., p.127.
14. Ibid., p.129.
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16. Bowle, op.cit., supra (n.9), p.89
17. Ibid., p.91.
18. Ibid., p.94, quoted from Bk. III, s.22 of De Republica.
19. Morris, op.cit., supra (n.8), p.156.
20. Ibid., p.157.
21. Ibid., p.162.
22. McDonald, op.cit., supra (n.8a), p.100.
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27. McDonald, op.cit., supra (n.8a), p.111.
28. Ibid., p.121.
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30. Ibid., p.34.
31. Ibid.
32. Ibid., p.35.
33. Ibid., p.36.
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35. Bowle, op.cit., supra (n.9), p.180.
36. Morall, op.cit., supra (n.26), p.76.
37. Walter Ullmann, The Individual and Society in the Middle Ages, pp.55, 57.
38. Ibid., pp.68, 69.
39. Ibid., p.70.
40. Infra, prs 1.31, 36-39, for detailed discussion.
41. Ullmann, op.cit., supra (n.37), p.74.
42. Cranston, op.cit., supra (n.3), p.40.
43. Ibid., p.41.

44. Ibid., p.43.

45. F.J.C. Hearnshaw, The Social and Political Ideas of Some Great Thinkers.

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47. Ibid., p.51.

48. Ibid., p.52.

49. Ibid., p.53.

50. Ibid., p.55.

51. Ibid., p.54.

52. Ibid., pp.54-55.

53. Ibid., p.61.

54. Christopher Morris, Political Thought in England, p.183.

55. Ibid., p.182.

56. Ibid., p.179.

57. Ibid., p.178.

58. Ibid., p.184.

59. Ibid., pp.186-87.

60. Ibid., pp.186, 189.

61. Hearnshaw, op.cit. supra (n.45), p.140.

62. Ibid., p.141.

63. Ibid., p.148.

64. Ibid., p.149.

65 and 66. Ibid., p.155.

67. Ibid., p.158.

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69. Ibid., p.160.

70. Ibid., p.161.

71. Ibid., pp.162-63.

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74. Bowle, op.cit., supra (n.9), p.330.

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81 and 82 Ibid., p.57.

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84. Ibid., p.59.

85. Ibid., pp.61-62.

86. Bowle, op.cit., supra (n.9), p.368.

87. Ibid., p.402.

88. Ibid., pp.402-03.

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90. Ibid., p.400.

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92. Ibid., p.417.

93. Cranston, op.cit., supra (n.3), p.69.

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96. Ibid., p.82.

97. Bowle, op.cit., supra (n.9), p.425.

98. Ibid., p.428.

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104. Encyclopaedia Americana, vol.16, pp.306-306a.

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115. Ibid., p.51.

116. Quoted by A.E.D. Howard, Magna Carta Text and Commentary, p.24.

117. W.H. Dunham (Jr.) "Magna Carta and British Constitutionalism" in The Great Charter, op.cit.,(supra, n.111), p.31.

118. Ibid., p.35.

119. ~~Supra~~ infra, pr. 3.11 et seq

120. ~~Supra~~ infra, prs 1.44, 77-78 and 3.50-51

121. Sir Leslie Scarman, English Law - the New Dimension, p.74.

122. Supra, prs. 4.16 et seq, and 4.197 et seq (decisions in HALLIDAY and McELDUFF respectively).

123. A.E.D. Howard, op.cit., supra (n.116).

124. Sir Paul Vinogradoff, Essay on Chapter 39 in the Commemoration Essays, op.cit., supra (n.105), p.80; also see, Holdsworth, History of English Law, p.211.

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126. Ibid., pp.377-79.

127. "Per iudicum parium vel per legem terrae" in the Commemoration Essays, op.cit., supra,(n.105), pp.106-08.

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130. Loc.cit., supra (n.124).

131. McKechnie, op.cit., supra (n.107), p.380.

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133. A.V. Dicey, An Introduction to the Study of the Law of Constitution, p.207.

134. Infra, pr. 1.78 ff sq

135. McKechnie, op.cit., supra (n.107), p.136.

136. Infra, pr. 1.57, esp. n.163

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139. CALVIN'S case, (1607) 7 Co Rep 1a; also see Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya, p.124.

140. Loc.cit., supra (n.111), p. 83

141. W.H. Dunham, op.cit., supra, (n.117), pp.21-22.

142. In re AMEER KHAN, (1870) 6 Beng. L.R. 392; see infra, pr. 5.130

143. de Smith, op.cit., supra (n.2 of Introduction), pp.72, 114.

144. Ibid., p.72; see also supra pr.1.35.

145. Ibid., p.72.

146. Sir James Fitzjames Stephen, A History of Criminal Law of England, vol.1, p.217.

147. Ibid., p.233.

148. Ibid., p.240.

149. Ibid., p.234; Stephen wrongly cites the statutes as c.12.

150. Infra, pr. ✱

151. Loc.cit., supra (n.146), p.235.

152. Ibid., p.243.

153. See LINFORD v FITZROY (1849) 116 E.R. 1255.

154. Infra, pr. 1.55

155. The special provisions apply only in the case of "scheduled offences"; right of appeal against refusal of bail was expressly saved under sub-s.(5).

156. Infra, pr.1, 78.

157. A.V. Dicey, op.cit., supra (n.133), pp.228-30.

158. Infra, pr. 4.2, 22, 86.

159. Art.9 of the International Covenant on Civil and Political Rights 1966.

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163 and 164. Ibid., p.10.

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166. Ibid., pp.273-74.

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168. Maxwell Cohen, "Some Considerations on the Origins of Habeas Corpus" (1938) 16 Can. Bar Rev. 92, 116.

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170. 3 Bl. Comm. 131.

171. 2 Co.Instt. 53.

172. 3 Bl. Comm. 133.

173. Maitland, op.cit., supra (n.165) pp.312-13.

174. J.P. Kenyan, The Stuart Constitution, p.420.

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177. J.P. Kenyon, op.cit., supra (n.174), p. 8, esp. fn.3

178. Supra, pr. 1.58.

179. Maitland, op.cit., supra (n.165), p.312.

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183. [1588] 1 Leo. 71.

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185. [1627] 3 St. Tr. 1.

186. Ibid., p.1A.

187. Meador, op.cit., supra (n.162), p.14.

188. Loc.cit., supra (n.165), p.314.

189. SELDON's case (1629) 3 St.Tr. 235.

190. Supra, pr. 1.62.

191. [1670] 6 St.Tr.999.

192. [1676] 6 St.Tr.1190.

193. Supra, pr. 1.58.

194. [1771] 20 St.Tr. 1.

195. [1820] 10 E.R. 716.

196. [1844] 115 E.R. 180.

197. Supra, pr.1.64.

198. [1891] 60 Law J.Rep. (Q.B.) 89, 92; [1890] 15 App Cas 506.

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201. Supra, n.198, pr. 1.73.

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205. [1959] 1 Q.B. 358.

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217. Supra, pr. 1.77.

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220. Infra, pr. 4.16, 51, 69

221. Infra, pr. 4.82

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224. Ibid., p.308.

225. Ex p. LEES [1941] 1 K.B. 72; see infra, pr.

226. Infra, pr. 1.86; see also infra, pr.

227. Infra, pr. 1.87, 7.160

228. [1916] 2 K.B. 742.

229. [1960] 2 Q.B. 222.

230. Infra, pr. 4.16, 56, 69

231. [1964] 1 Q.B. 191.

232. [1968] A.C. 192.

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234. Ibid., p.615,

235. [1861] 3 El. & El. 487; 30 Law J. Rep. (Q.B.) 129.

236. [1910] 2 K.B. 576.

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239. [1960] 1 Q.B. 241.

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241. [1759] 2 Burr. 834: 96 E.R. 1264.

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243. [1928] A.C. 459.

244. Ibid., p.468.

245. Infra, pr.1. 97 (in re AMEER KHAN).

246. Supra, pr.1.87.

247. (1870) 6 Beng. L.R. 392.

248. Infra, prs. 5.53, 55; 6.33-35; 7.131

249. Infra, prs. 8.41, 44.

SECTION II

(Subsection 1) (paras. 1.99 to 1.145; pages 60 to 82).

1. The State and the Citizen, p.105.

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6. see Report of the Civil Courts Commission, C. Sess P XXIII, 1952, p.188

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8 and 9. Outlines of Historical Jurisprudence, pp.216-17, 223.

10. Prehistoric India to 1000 B.C., p.259.

11. Ibid., pp.212-13.

12. Loc.cit., supra, n.1, at p.93.

13. India - What can it teach us ? pp.19-20.

14. Ibid., p.43.

15. Constituent Assembly Debates, vol.VII, pp.38-39.

16. Village Communities in the East and West, p.212.

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19. Fourteenth Report of the Law Commission of India, pp.26-27, pr.8.

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23. The Hindu Judicial System, p.118.

24. A History of Hindu Political Theories, p.19.

25. Corporate Life in Ancient India, p.125.

26. A History of Village Communities in Westerb India, Introduction, pp.ix-x.

27. Local Government in Ancient India, pp.3-10.

28. Loc.cit., supra, n.23, at pp.74-75.

29. Vol.I, p.91.

30. Loc.cit., supra, n.20, at p.152, part II.

31. Loc.cit., supra, n.23, at p.156.

32. Loc.cit., supra, n.20, at p.154, part II.

33. Loc.cit., supra, n.27, at p.36.

34. Púga = assembly of members of a locality; śreni = corporation; guild.

35. Loc.cit., supra, n.27, at p.43.

36. Loc.cit., supra, n.23, at pp.86-87.

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42. Supra, prs. 1.113, 116-17.

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48. Ibid., p.84.

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51. Ibid., pp.240-41.

52. History of Dharmasastra, p.257.

53. Loc.cit., supra, n.23, at p.230.

54. R. Shamasastry, Kautilya's Arthasastra, p.258.

55. Ibid., p.267.

56. Ibid., pp.267-68.

57. Loc.cit., supra, n.24, at pp.197-98.

58. Loc.cit., supra, n.23, at p.218.

59. Gopas = Headmen; guards (literally, protectors; sometimes village accountant)

60. Sthanikas = district officers.

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62. Loc.cit., supra, n.26, at pp.54-56.

63. Some Contributions of South India to Indian Culture, p.413.

64. Supra, n.41, at p.136.

65. Loc.cit., supra, n.7, at pp.45-46.

66. Loc.cit., supra, n.24, quoted by Murty (op.cit., supra, n.2) at p.131.

67. Saletore, op.cit., supra, n.7 at p.38.

68. Loc.cit., supra, n.24, quoted by Murty (op.cit., supra, n.2) at pp.132-34.

69. Supra, pr. 1.13 ; see also Saletore, op.cit., supra, n.7, at p.276 and also Panikar, op.cit., supra, n.1 at p.122.

70. Panikar, op.cit., supra, n.1 at pp.113-14; see also Saletore, op.cit., supra, n.7, at p.65.

71. Loc.cit., supra, n.1, at pp.114-15.

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73. Loc.cit., supra, n.1, at p.117.

74. Loc.cit., supra, n.7 at pp.89-90.

75. Ibid., p.205.

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77. Sources of Law and Society in Ancient India, pp.335-39.

78. Saletore, op.cit., supra, n.7, at p.12.

79. Ibid., p.13.

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81. Ibid., p. 16 et seq.

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83. Loc.cit., supra, n.27 at p.10.

84. Loc.cit., supra, n.26, at p.307.

85. Mughal Administration, pp.2, 19.

86. Ibid., pp.8-9.

87. Ibid., pp.13-19.

88. Ibid.

89. At p.109.

90. At p.170.

91. Ibid., p.168.

92. Ibid., p.208.

93. Loc.cit., supra, n.89, at p.164.

94. History of Criminal Law of England.

95. Justice and Police in Bengal, p.37.

96. Ibid., p.38.

97. Ibid., p.39.

98. Ibid., p.31; see also B.N. Pandey, The Introduction of English Law into India, p.19.

99. George Rankin, Background to Indian Law, pp.163-64; see also M.B. Ahmad, op.cit., supra, n.90, at pp.232, 236.

100. Loc.cit., supra. n.90, at p.240.

101. Ibid., p.239.

102. Gandhi's full name was Mohandas Karamchand Ghandi but he was popularly known as Mahatma Gandhi and came to be known as the Father of the Nation; Jawaharlal Nehru became the first Prime Minister of free India and Vallabhai Patel, the Deputy Prime Minister and Home Minister.

103. Quoted by Murty, op.cit., supra, n.2, at pp.187-88.

104. Infra, pr. 1.220; 7.111

105. Hind Swaraj or Indian Home Rule, p.92.

106. Discovery of India, p.269.

107. Ibid., p.292.

108. Glimpses of World History, pp.543-44.

109. Ibid., p.865.

110. Quoted by Murty, op.cit., supra, n.2, at p.203.

111. R.K. Karanjia, The Mind of Mr. Nehru, p.97.

112. See Constituent Assembly Debates, vol.VII, pp.521-27; Dr. Rajendra Prasad was a leading political figure of India who became the President of the Constituent Assembly and later the first President of the Indian Republic.

113. B. Shiva-Rao, Framing India's Constitution, Select Documents, vol.1, p.43.

114. Ibid., p.17.

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117. D.N. Majumdar, Caste and Communication in an Indian Village, p.343.

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122. M.P. Jain, Outlines of Indian Legal History, p.283.

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birthplace of early man in preference to that of China, Central Asia, India and the Tigris-Euphrates river valley (p.39) and also assert that the 'blacks' spread from Africa to South India and Australia (pp.24-25); see also for a general account, The Growth of African Civilisations, pp.3-20, by J.D. Drew Cooper, E.A. Ayandak, R.J. Gavin and A.E. Afigbo.

3. V.C. Ferkin, Africa's Search for Identity, pp.5-6.

4. H.N. Chittick and R.I. Rotberg (eds.), East Africa and the Orient, pp.11-12.

5. Michael Crowder, The Story of Nigeria, p.27.

6. M.S.M. Kiwanuka, The Empire of Bunyoro-Kitara - Myth or Reality, p.1.

7. Sir Alan Burns, History of Nigeria, p.65.

8. F.D. Fage, A History of West Africa, p.54.

9. J.F. Ade-Ajayi and Michael Crowder, History of West Africa, vol.2, p.412

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30. Carlston, op.cit., supra (n.1) at p.99.

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Section III (paras. 1.224 to 1.270; pages 126 to 157)

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30. J.E.S. Fawcett, "United Nations and International Law" in The Evolving United Nations, p.60 (ed. K.J. Twitchett).

31. Ibid.

32. K.J. Twitchett, "The International Drama: The United Nations on the World Stage" and G.L. Goodwin, "The United Nations: Expectations and Experience", both in The Evolving United Nations, op.cit., supra (n.30).

33. Loc.cit., supra (n.32) at p.3.

34. Loc.cit., supra (n.32) at p.48.

35. "The Human Rights and Domestic Jurisdiction" in Recueil Des Cours, 1968 II, Academie de Droit International, Terme 124 de la collection, p.352.

36. Ibid., p.442.

37. See U.N. Document, A/CN. 4/2, 15 Dec. 1948.

38. Ibid., p.21.

39. Ibid., pp.22-23.

40. See U.N. Document, A/CN.4/SR.5, 26 Apr. 1949.

41. See U.N. Document, ST/TAO/HR/48, containing the proceedings of the seminar organised by the United Nations Division on Human Rights in co-operation with the Tanzanian Government, between 23 October and 5 November, 1973.

42. Ibid., p.9, pr.41.

43. James Barros (ed.) The United Nations: Past, Present and Future, p.10.

44. Ibid.

45. See, Ian Brownlie, Basic Documents on Human Rights, p.106.

46. Loc.cit., supra, n.29, at p.63.

47. John Carey, United Nations Protection of Civil and Political Rights; quoted at p.13.

48. Loc.cit., supra, n.47, at pp.13-14.

49. See Infra, pr. 5.199.

50. See infra, pr. 7.115-17; discussion on the Constitutional provisions of Tanzania, Zambia and Malawi.

51. See S.A. de Smith, Constitutional and Administrative Law, pp.128 et seq.

52. See A.H. Robertson (ed.) Human Rights in National and International Law, p.300.

53. Ibid.

54. See infra, pr. 1.270.

55. See infra, pr.8.14.

56. See infra, pr. 2.1.

57. See p.60, Council of Europe Year Book on European Convention on Human Rights for 1976.

58. See General Assembly Resolutions, 615 (VII) and 719 (VIII).

59. See Everyman's United Nations, p.138 (United Nations Publications Sales No. E.71.1.10).

60. Wilfred Jenks quoted by William Dale, "Human Rights in the United Kingdom" (1976) 25 ICLQ 292, 293.

61. Brownlie, op.cit., supra (n.45) at p.338.

62. See infra, pr. 7.57.

63. In sec. I of European Convention - Art. 2 deals with the "right to life;" Arts. 3 and 4 contain provisions prohibiting "torture, inhumane or degrading punishment" and "slavery and servitude"; Art. 5 deals, albeit more comprehensively, with "right to liberty and security of person" emphasizing (as in Art. 9 of the 1966 International Covenant) the importance of "procedure prescribed by law".

64. See supra, n.62 for Arts. 2-4.

65. See the Minutes of Evidence taken before the Select Committee on a Bill of Rights: House of Lords, Session 1976-77, 1977-78, p.43. pr. 3.45.

66. See Human Rights in National and International Law, op.cit., supra. (n.52) at p.275.

67. Hector Monro, "Claims for violations of Human Rights II" (1976) 126 New L.J. 305.

68. [1974] 1 W.L.R. 683.

69. Ibid., p.694.

70. [1975] 3 W.L.R. 225; R v Secretary of State for Home Affairs, ex parte Bhajan Singh.

71. Decided by the Court of Appeal on 11.2.75, see The Times

72. Decided by the European Court on 21.2.75, see The Times

73. [1969] 1 All ER 80: Corocraft Ltd. v Pan American Airways.

74. See n.65 supra, at p.30, pr. 1.06.

75. See supra, Chapter 4, Section II.

76. See Everyman's United Nations, op.cit. (supra n.59) at p.66.

77. See The Cameron Report, Cmd. 532, Belfast 1969; The Hunt Report, Cmd. 535, Belfast, 1969; The Compton Report, Cmnd. 4823, 1971; The Diplock Report, Cmnd 5185, 1972; The Parker Report, Cmnd. 4901, 1972; The Scarman Report, Cmd. 566, Belfast 1972; The Gardiner Report, Cmnd. 5847, 1975.

78. The Protection of Human Rights by Law in Northern Ireland, Cmnd. 7009 (HMSO, London, Nov. 1977).

79. See infra, pr.7.56 et seq.

80. See the Habeas Corpus case, infra, pr. 5.185 et seq; at 1976 (2) S.C.C. 521, 747 (pr. 525).

81 Executive Action and the Rule of Law, p.3 (International Commission of Jurists, Geneva, 1962).

82. Ibid., p.4.

83. Ibid., p.16.

84. Ibid., p.23.

85. This finding is based on our personal investigation as we were allowed access to the original material available at the archives of the Commission in Geneva.

86 See infra pr. 4.147 et seq for a discussion of the relevant provisions of the Act.

87. See infra. Chapters 6 and 7 where relevant provisions are discussed.

88. See Macropaedia, Encyclopaedia Britannica, vol.8, p.459.

89. "International Law and the Suppression of Terrorism" in Malaya Law Review Legal Essays, p.129.

90. Urban Guerrillas, p.32.

91. "Collective Human Rights of Peoples and Minorities"(1976) 25 ICLQ 102, 108.

92. Loc.cit., supra, n.84 at p.135.

93. Ibid., p.130.

94. See, Proceedings of the meetings of the "6th Committee on Legal Questions" of the UN General Assembly, 30th session; 1581st meeting held on 4 Dec. 1975; see also UN Doc. A/9028.

95. Ibid., pp.283-84.

96. See United Nations Year Book on Human Rights for 1973-74, p.282, for General Assembly Res. No. 3059 (XXVIII) of 2 Nov. 1973.

97. See General Assembly Res. No. 3452 (XXX), of 9 Dec. 1975, UN Doc. A/10408.

98. See KCA, 28177, Feb. 4 1977; see also KCA 28924, April 17, 1977.

99. The Times, London, 23 April 1977.

100. Quoted at p.240, United Nations Journal, W.F. Buckley (Jr.)

101. See p.5, Cmnd. 6197 (HMSO, 1975).

102. See p.1, Cmnd. 6198 (HMSO, 1975).

103. See "Some Observations on Peace, Law and Human Rights" in Transitional Law in a Changing Society, op.cit. (supra n.29) at p.243.

104. Ibid., p.254.

CHAPTER 2

(SECTIONS I and II) (paras. 2.1 to 2.109; pages 158 to 208)

1. Sir Alfred Denning, Freedom under the Law, p.5.

2. CHRISTIE v LEACHINSKY [1947] A.C. 573, 600; see also infra, pr. 2.38.

3. PROHIBITIONS DEL ROY (1607) 12 Co.Rep.63, decided in the Exchequer Chamber "by all judges of England", concurring with Sir Edward Coke.

4. See, 2 Co.Instt.136, 591 and 616; also 3 Co.Instt. 46, 50.

5. See infra, pr.3.1-4.

6. The Criminal Law Act 1967.

7. See infra, pr. 2.88.

8. Professor T.F.T. Plucknett, A Concise History of the Common Law, p.423.

9. Sir Carleton Kemp Allen, The Queen's Peace, pp.9-11.

10. Ibid., pp. 11, 13.

11. Henry Adams, "Anglo-Saxon Procedure" in Essays on Anglo-Saxon Law, p.262.

12. A General View of the Criminal Law of England, p.25.

13. Palg. Eng. Com., Ch.VI, p.200.

14. T.A. Critchley, A History of Police in England and Wales, 900-1966.

15. Pollock and Maitland, History of English Law, pp.578, 582.

16. See infra, n.88; J.L. Lambert discusses some views (cited at n.88 infra) in "Reasonable Cause to Arrest" (1973) Public Law 285.

17. When the Romans colonised Britain they may have established their laws and institutions in particular areas but when the Roman civilisation perished it yielded place to Germanic laws and

institutions in Britain as in many other places in Europe. Indeed, in this study we are primarily concerned with the Common Law of England and its development was, in fact, accelerated only after the Norman Conquest. Moreover its beginnings can only be traced to Anglo-Saxon traditions and not to Roman laws and institutions. See, generally, Dr. William Stubbs, The Constitutional History of England, p.3; and Sir Charles Ogilvie, The King's Government and the Common Law, pp.9-11, 18-19.

18. Dr. William Stubbs, Select Charters, p.141.

19. Pollock and Maitland, op.cit., supra (n.15), p.583.

20. T.A. Critchley, op.cit., supra (n.14), p.5.

21. Dr. William Stubbs, op.cit., supra (n.18), pp.472-74.

22. T.A. Critchley, op.cit., supra (n.14), p.6.

23. Loc.cit., supra (n.12), p.29.

24. Sir James Stephen, A History of the Criminal Law of England, p.200.

25. Ibid., p.194.

26. Loc.cit., supra. (n.12), p.30; see also, MACKALLEY's case, infra, pr. 2.28.

27. Blackstone's Commentaries, Vol.IV, ch.XXI, p.340.

28. Sir J.F. Stephen and Herbert Stephen, A Digest of the Law of Criminal Procedure in Indictable Offences, Part III.

29. Ibid., Ch.XII, p.59.

30. The History of the Pleas of the Crown, vol. II, Ch.X.

31. Ibid., p.77.

32. Ibid., p.78.

33. Ibid., p.81.

34. Ibid., p.82.

35. Ibid., p.85.

36. Ibid., pp.91-92.

37. Ibid., p.94.

38. Ibid., pp.105-08.

39. Ibid., p.110.

40. Ibid., p.111.

41. Ibid., p.116.

42. "Arrest for felony at Common Law", 1954, Crim.L.Rev. 408.

43. "Arrest for Breach of the Peace", ibid., p.578.
43a. GlanvilleWilliams, op.cit., (supra, n.42),pp.415-16
44. (1611) 9 Co. Rep. 68: 77 E.R. 824.

45. 77 E.R. 824, at p.830.

46. Ibid., p.830.

47. Ibid., p.830.

48. Ibid., p.834.

49. (1709) 92 E.R. 349.

50. See, FOSTER's Crown Cases: Discourse upon a few branches of the Common Law, p.312.

51. Ibid., p.315.

52. (1779) 168 E.R. 205.

53. (1833) 168 E.R. 1311:

54. (1861) 169 E.R. 1305:

55. (1786) Cald. Mag. Cas. 291.

56. (1810) 128 E.R. 6:

57. (1933) 150 L.T. 412: (1934) 98 J.P. 103.

58. (1813) 170 E.R. 1431:

59. (1825) 3 Dowl. & Ryl. (M.C.) 299.

60. [1914] 1 K.B. 595 (emphasis supplied).

61. [1947] A.C. 573 (H.L.); [1947] 1 All E.R. 567.

62. Ibid., pp.578-88.

63. Ibid., pp.590-91.

64. Ibid., pp.591-92.

65. Ibid., p.598.

66. Dennis Paling, "Christie v. Leachinsky revisited", (1974) 118 Sol. Jrl. 320.

67. (1966) 3 All E.R. 931.

68. [1966] 2 Q.B. 414.

69. [1973] 2 All E.R. 645 (C.A.)

70. [1952] 1 All E.R. 1203 (H.L.)

71. (1951) 1 All E.R. 814 at p.817.

72. (1952) 1 All E.R.1203 at p.1205.

73. Ibid., p.1207.

74. Ibid., p.1211.

75. (1971) 1 All E.R. 173 (C.A.)

76. Supra, n.66.

77. Emphasis supplied to indicate the further extension.

78. Supra, pr.2.42.

79. Supra, n.67.

80. Supra, n.68.

81. (1970) 1 All E.R.987.

82. David Lanham, "Arrest, Detention and Compulsion" (1974) Crim.L.Rev.288.

83. (1973) 2 All E.R. 645.

84. (1919) 122 L.T. 44; (1918-19) All E R. Rep Ext. 1490

85. (1845) 7 Q.B. 742.

86. (1858) 4 C.B. N.S. 204.

87. (1972) 116 Sol. Jo. 632.

88. J.L. Lambert, op.cit., supra., n.16 [contrast with the views of Dr. Glanville Williams, op.cit., supra, n.42 and also in "Statutory Power of Arrest" in (1958) Crim.L.Rev.73, 153; Dr. L.H. Leigh, Police Power in England and Wales, p.34 ; David Lanham, op.cit., supra, n.82].

89. (1964) 2 All E.R. 610 (C.A.) - emphasis supplied to indicate the typical trend of judicial approach adopting interchangeable phrases to signify the flexible content of the concept.

90. Ibid., pp.618-19.

91. Halsbury's Laws of England, 3rd ed., vol.25, pr.699.

92. Ibid., vol.38, pr. 1266.

93. Supra., n.89.

94. (1698) 91 E.R. 1147 (emphasis added).

95. (1751) 96 E.R. 782.

96. (1839) 132 E.R. 1278.

97. Supra, n.55.

98. (1780) 99 E.R. 230.

99 Supra, n.57.

100. Supra., n.49.

101. (1970) A.C. 942; (1969) 3 All E.R. 1626.

102. (1944) 1 All. E.R. 326 (C.A.)

103. ~~Ibid., p.~~ (1969) 3 ANER 1626, 1630

104. Supra, pr. 2.59.

105. Loc.cit., supra, n.42 at p.419 of the article.

106. "Statutory Power of Arrest" in 1958 Crim.Law Rev. 73, 153.

107. (1830) 4 C. & P. 350.

108. (1848) 2 Ex. 223.

109. (1867) L.R. 2 C.P. 461.

110. (1876) 36 L.T. 5.

111. (1918) 1 K.B. 158.

112. (1937) 1 K.B. 232.

113. (1941) 3 All E.R. 45.

114. (1925) 2 K.B. 354.

115. L.H.Leigh, Police Power in England and Wales, p. 65.

116. J.L. Lambert, op.cit., supra (n.16).

117. (1971) 401 U.S. 560.

118. (1968) 2 All E.R. 993 in infra, pr.2.100.

119. (1948) 338 U.S.160.

120. (1963) 374 U.S. 23.

121. See supra, prs. 2.17, 20 and 25.

122. Glanville Williams, Criminal Law, The General Part, p.715.

123. See infra, pr. 2.83, 114.

124. See infra, pr.2.103 (n.213).

125. Loc.cit., supra (n.30), p.90.

126. Kenny's Outlines of Criminal Law, p.565 (pr. 698).

127. Loc.cit., supra (n.28), p.59; (esp. Art. 98(b) ), see also, pr.2.17, supra.

128. See, "Arrest for Breach of the Peace" (1954) Crim.L.Rev. 578.

129. Halsbury's Laws of England, 4th ed., vol. 11 , pr.108 ( p. 76)

130. Ibid., pr. 108(P 77)

131. Loc.cit., supra (n.128), p.

132. [1835] 149 E.R. 1285.

133. [1837] 150 E.R. 845.

134. [1836] 150 E.R. 539.

135. [1843] 8 E.R. 851.

136. [1843] 134 E.R. 507.

137. Ian Brownlie, The Law Relating to Public Order, p.4.

138. Richard Burn, The Justice of the Peace, vol. V, pp.756-57, 759.

139. Loc.cit., supra (n.137), p.119.

140. See infra, pr. 2.111

141. See infra, pr. 2.114

142. See, generally, WARD v. HOLMAN [1964] 2 All E.R. 727; WILSON v SKEOCK, (1949) 113 J.P. 294; also see infra, pr.

143. Loc.cit., supra (n.24), vol. III, pp.283-84.

144. Sir Whitley Stokes, The Anglo-India Codes, vol. 1, Introduction, pp.x-xii.

145. Sir Leon Radzinowicz, Sir Fitzjames Stephen and His Contribution to the Development of Criminal Law, p.21.

146. See Parliamentary Papers, 1878-79, vol.20, pp.169, 172, 177-78.

147. See the Seventh Report of the Law Revision Committee: Felony and Misdemeanour, Cmnd. 2659, pr. 6, 11.

148. W.C.E. Daniels, The Common Law in West Africa, pp.249-50.

149. R.Y. Hedges, "Liability under Nigerian Criminal Codes" in Changing Law in Developing Countries, pp.184-85.

150. J.S. Read, "Crime and Punishment in East Africa" (1964) How.L.J. 164, 165 and "Criminal Law in Africa Today and Tomorrow" (1963) J.A.L. 5.

151. T.O. Elias, Ghana and Sierra Leone: The Development of their Laws and Constitutions, p.304.

152. J.S. Read, "Criminal Law in Africa Today and Tomorrow" (1963) J.A.L.5, 6.

153. H.F. Morris and J.S. Read, Indirect Rule and the Search for Justice, p.11

154. C.R. de Silva, Ceylon under the British Occupation, vol.1, pp.314-15.

155. Sir Ivor Jennings and H.W. Tambian, The Dominion of Ceylon: The Development of its Laws and Constitutions, p.

156. B.A. Mallal, Mallal's Criminal Procedure, p.2.

157. Ibid., p.3.

158. See supra, pr. 2.37.

159. See Seventh Report, op.cit., supra (n.147), pr.14.

160 and 161. R.J. Walker, "Abolition of Felony" (1968) 118 New L.J. 19.

162 and 163. E. Roydhouse, The Criminal Law and Criminal Justice Acts 1967.

164. See HANDCOCK v BAKER [1800] 126 E.R. 1270.

165. Home Office Working Party on Vagrancy and Street Offences, Working Paper (H.M.S.O. London, 1974).

166. See History of English Law, vol.4, p.300.

167. W.J. Chambliss, Crime and the Legal Process, pp.51, 56-57, 61.

168. See Home Office Working Paper, op.cit., supra (n.165), pr. 4.

169. [1937] 1 K.B. 232; see also infra, pr. 2.94.

170. [1974] 2 All E.R. 211.

171. Loc.cit., supra (n.122), p.211.

172. L.H. Leigh, Police Power in England and Wales, p.96.

173. Glanville Williams, "Police Control of Intending Criminals" (1955), Crim.L.Rev. 147.

174. [1860] 21 E.R.253.

175. [1911] 104 L.T. 921.

176. Loc.cit., supra (n.173), p.74.

177. See SCOTT v BAKER (infra, pr. 2.100); conviction set aside as specimen not collected in strict compliance with s.3 of the Road Traffic Act 1967.

178. [1917] 117 E.R. 304.

179. [1937] 1 K.B. 232.

180. Ibid., pp.244-45.

181. Ibid., p.252.

182. [1918] 1 K.B. 158; see also infra, pr. 2.99.

183. See, generally, RAWLINGS v SMITH (1938) 1 K.B. 675; and R v FIARBURN (1949) 2 K.B. 690.

184. See Road Safety Legislation 1965, Cmnd. 2859.

185. See L.H. Leigh, op.cit., supra (n.172), p.104

186. See J.M. Evans, "Police Powers and Road Traffic Offences" (1973) 36 Mod.L.Rev. 260, 269.

187. See WALKER v LOVEL (1975) R.T.R. 377.

188. See the rights listed at pr. 2.26, supra.

189. See J.M. Evans, op.cit., supra (n.186), p.269.

190. [1918] 1 K.B. 158.

191. Ibid., p.165.

192. [1965] 2 All E.R. 271.

193. Ibid., p.274.

194. Ibid., p.278.

195. [1968] 2 All E.R. 993.

196 and 197. Ibid., p.998.

198. Richard Card, "Breath Tests - Driving, Suspicion and Requirement", (1972) New L.J. 848.

199. [1970] A.C. 1072.

200. [1975] R.T.R. 377.

201. Ibid., 389.

202. [1972] R.T.R. 316.

203. See discussion on the legislation for "Defence of the Realm", infra, pr.4.11 et seq.

204. [1972] R.T.R. 316, 326.

205. [1970] R.T.R. 1.

206. [1972] R.T.R. 316, 356.

207. [1973] R.T.R. 74.

208. See supra, pr.2.38-39.

209. The leave to appeal to the House of Lords in WALKER v LOVEL was given by Widgery L.C.J., after expressing his helplessness in the face of the decision in the HOLAH case, see [1975] R.T.R. 61.

210. For a private person's summary power of arrest see relevant provisions of the respective Criminal Procedure Codes of each country, as below: Indian model (India up to 1973; and Pakistan and Bangladesh;1898 Code) (s.59); India, 1973 (s.43); Sri Lanka, cap. 20, Legislative Enactments of Ceylon, 1956 (s.35); Malaysia, cap. 6, Laws of Federated Malaya States, 1935 (s.27); Singapore, cap. 113, Laws of Singapore, 1970 (s.33); Kenya, cap. 75, Laws of Kenya, 1968 (s.34 (1)); Uganda, cap. 107, Laws of Uganda, 1964 (s.28 (1)); Tanzania, cap. 20, Laws of Tanganyika, Supp. 60 (s.32 (1)); Zambia, cap. 7, Laws of Zambia, 1965 (s.27(1)); Malawi, cap. 8.01, Laws of Malawi, 1973 (s.33(1)); Ghana, Act No. 30 of 1960 (s.12); Northern Nigeria, cap. 30, Laws of Northern Nigeria, 1963 (s.28, Appendix I); Nigeria (Southern States), cap.43, Laws of Federation and Lagos, 1958 (s.12).

211. For police officer's summary power of arrest see also the several Codes, referred to above; relevant sections only quoted below: Indian Model, s.54 (1898 Code); India, s.41 (1973); Sri Lanka, s.32; Malaysia, s.23; Singapore, s.31; Kenya, s.29; Uganda, s.23; Tanzania, s.27; Zambia, s.22; Malawi, s.28; Ghana, s.10; Northern Nigeria, s.26; Nigeria (S), 10.

212. In British India, finally in 1882; the provision existed in 1861 and 1872 Codes.

213. In East and Central Africa and also in Sri Lanka, Malaysia and Singapore, a police officer can arrest without warrant any person when the breach of the peace is committed in his presence, see provisions quoted at n.211, supra; as to India, see note 214, infra and pr. 2.103.

214. See, First Reports of Her Majesty's Commissioners, Parliamentary Papers, vol.25, p.76 (London, 1856).

215. See several Codes, quoted at note 210, supra; relevant sections of the respective Codes quoted below:
Indian model, s.55 (1898); omitted in 1973 (India); Sri Lanka, s.32(1)(h
Malaysia, s.23 (i), (g), (h) and (i); Singapore, s.31 (1) (g), (h) and (i); Kenya, s.30; Uganda, s.24, Tanzania, s.28; Zambia, s.23; Malawi, s.29; Nigeria (S), s.10(1), (i) and (j); Northern Nigeria, s.26(e) and (g).

216. Ibid., relevant provisions of the respective Codes quoted below: India (also Pakistan and Bangladesh), s.151 (1898; and in India also, 1973); Sri Lanka, s.117; Malaysia, s.105; Singapore, s.112; Kenya, s.64; Uganda, s.58; Tanzania (repealed); Zambia, s.58; Malawi, s.64; Northern Nigeria, s.26 (e); Nigeria (S) s.55)

217. See supra, n.210.

218. See the several Codes, quoted at n.210; relevant sections of the respective codes quoted below:
Kenya, s.34(2); Uganda, s.28(2); Tanzania, s.32(2); Zambia, s.27(2); Malawi, s.33(2); Ghana, s.13; Nigeria (S), s.13.

219. Ibid., relevant sections of the respective Codes quoted below:
Indian model, ss.48 and 50; India, ss.46 and 49 (1973);
Sri Lanka, s.23 and 28; Malaysia, s.15 and 19(i); Singapore, s.23 and 27(i); Kenya, ss. 21 and 24; Uganda, ss.15 and 18; Tanzania, ss.19 and 22; Zambia, ss.15 and 18; Malawi, ss.20 and 23; Ghana, ss. 3 and 6; Northern Nigeria, s.37; Nigeria (S), s.3 and 4. (Only the Asian Codes scrupulously followed the Indian model as respects use of force in making arrest).

220. See supra WALTERS case, pr.2.37.

221. See the several Penal Codes, as below:
Indian model (1860), ss.224, 225 and 225B; Sri Lanka, cap. 19 of Legislative Enactments of Ceylon 1956, ss.218, 219 and 220.
Malaysia, cap. 45 of the Laws of the Federated Malaya States 1935, ss.224, 225 and 225A; Singapore, cap.103 of the Laws of Singapore 1970, ss.224, 225 and 225B; Kenya, cap. 63 of Laws of Kenya, 1970, ss.122-24; Uganda, cap.106 of the Laws of Uganda, 1964, ss.102-04; Tanzania, cap.16 of the Laws of Tanganyika, Supp.64, ss.115 and 116; Zambia, cap. 6 of the Laws of Zambia 1965, ss.100-102.
Malawi, cap. 7.01 of the Laws of Malawi 1973, ss.114-17; Ghana, Act 29 of 1960, s.226; Northern Nigeria, cap.89 of Laws of Northern

Nigeria, 1963, ss.171-73; Nigeria (S), cap 42, Laws of Federation and Lagos 1958, ss. 134 and 135.

SECTION III (paras. 2.110 to 2.125; pages 208 to 218).

1. See, Blackstone's Commentaries, vol.IV, pr.252.

2. Michael Dalton, The Country Justice, p.1.

3. Ibid., p.2.

4. Ibid., p.20.

5. Loc.cit., supra (n.1), pr.254; see also Hawkins, A Treatise of the Pleas of the Crown, Bk. 1, Ch. 61, s.2.

6. Richard Burn, The Justice of the Peace, vol.V, pp.756-57, 759.

7. See Archbold's Pleading, Evidence and Practice in Criminal Cases, 38th ed., pr. 669; see also, Stone's Justices' Manual, 110th ed., vol.1, pp.26, 118-19, 170.

8. [1914] 3 K.B.229.

9. [1840] 4 J.P.728.

10. [1907] 2 K.B. 380.

11. [1964] 2 K.B.573.

12. See the several Criminal Procedure Codes (reference quoted at n.210, supra); relevant provisions of the respective Codes, as below: Indian model, Chapter VIII (ss.106-10 (esp. ); Sri Lanka, Chapter VII (ss.80-83 (esp. ); Malaysia, Chapter VII (ss.66-82); Singapore, Chapter VII (ss.70-89); Kenya, Part III (ss.44-46, esp. ); Uganda, Part III. (ss.37-40, esp. ); Tanzania, Part III. (ss.41-45, esp. ); Zambia, Part III (ss.36-39, esp. ); Malawi, Part III (ss.42-45, esp. ); Northern Nigeria, Chapter VII (ss.87-89, esp. ); Nigeria (Southern, Part IV (ss.35-37, esp. ).

13. The expression "involving"occurring in s.106 of the Indian Model gave rise to a spate of litigation in British India; it was eventually deleted in the new Code enacted in India in 1973.

14. In Northern Nigeria, the Code used the term "illegal act" instead of "wrongful act" purporting obviously to restrict the jurisdiction.

15. The African Codes fall into three categories in so far as this provision (s.109 in the Indian Model) is concerned; Northern Nigeria has none; Southern Nigeria, Kenya, Tanganyika, Zambia and Ghana have adopted only cl. (a) of s.109 of the Indian model while Malawi and Uganda have adopted both clauses.

16. For other anti-recidivist measures, see infra, pr.s.2.123-25.

17. See, 37th Report of the Law Commission of India, 1967, pr.299, p.81.

18. See, M.R.A. Khan, "Sociological Aspects of ss.109-10 of the Criminal Code" (1963), 5 J.I.L.I. 498; see also Law Commissions Report, op.cit.,

supra (n.17) which discusses at pr.281 (pp.73-74) the relevant case-law.

19. See Selections from the Records of the Government of India, Home, Revenue and Agriculture Dept., No.170 (1880), pp.27, 30, 45; see also Khan, op.cit., supra (n.18).

20. For a critique of the Act, see, P. Le Pelley, "Vagrancy and the Law in Kenya" (1969) E.A.L.J., 195.

21. See, BANKOLE v POLICE (1973) N.N.L.R. 180.

22. Plucknett, op.cit., supra (n.8, Sections I and II), p.75.

23. Ibid., p.74.

24. Norval Morris, The Habitual Offender, p.18.

25. Ibid., p.12; see also, Glanville Williams, "The Courts and Persistent Offenders", (1963) Crim.L.Rev. 730.

26. See, Studies in the Cause of Delinquency and Treatment of Offenders, Study No. 5, Persistent Criminals, p.5. (H.M.S.O., London, 1963).

27. Morris, op.cit., supra (n.24), p.34.

28. Marc Ancel, Special Defence, p.69.

29. Ibid., p.8.

30. Ibid., p.69.

31. K.S. Pillai, Principles of Criminology, pp.338-40.

31a. See supra, pr. I.123

32. See, Syndicate Study of the National Police Academy of India, published as "Operation of Special Laws relating to Externment of Bad Characters" in (1969) 11 J.I.L.I. 1, 2.

33. Ibid., p.7.

34. See, HARI v DEPUTY COMMISSIONER, POLICE, AIR 1956 S.C.559.

35. See, INDERJIT SINGH v DELHI, AIR 1953 Punj. 52.

36. See, M.P. v BALDEO PRASAD, AIR 1961 S.C. 293.

37. See, the several Codes cited at n.210 of sections I and II, supra; the relevant provisions of the respective Codes are: Tanzania, s.5A; Zambia, ss.197A and B; Malawi, ss.145(5)-(8); Ghana, ss.178 and 300; Northern Nigeria, s.256.

38. Cap.60 of Laws of Uganda 1951.

SECTION IV (paras. 2.126 to 2.127; pages 218-19).

1. See supra, pr. I.246

2. J.H. Merryman, The Civil Law Tradition, p.21.

3. Ibid., p.28.

4. See the Secretariat Memorandum on Art. 57 of European Convention of the Directorate of Human Rights, Council of Europe, Document No. H(76) 15, p.2 (Strasbourg, 15 October 1976).

5. See infra, pr.9.37.

6. See United Nations Documents: A/10158, 23 July 1975; A/10158/Add.1, 21 October 1975; E/CN.4/Sub.27374, 31 May 1976; E/CN.4/Sub.2/376, 26 July 1976

CHAPTER 3 (paras. 3.1 to 3.120; pages 220 to 273).

1. See United Nations Charter, Preamble, para. 1.

2. See Introduction, esp. para . I.9; also generally, Chapter 1.

3. Kenny, op.cit., supra (n.126, Ch.2, ss.I and II), p.72; see also, R v DUDLEY AND STEPHEN [1884] 14 Q.B. 273 in which the defence of necessity was expressly raised but without success (Three shipwrecked men after being without food for eight days at sea killed a boy to eat his body; they were convicted of homicide); see also R v STRATTON, infra, pr. 3.

4. Russell on Crime, p.92 (1964 ed.).

5. Ibid., p.93.

6. "Defence of Necessity" (1953) 6 Cur.Leg.Prob. 216, 223.

7. Ibid., p.224.

8. See SOUTHWARK L.B.C. v WILLIAMS [1971] 2 W.L.R. 471; defence denied to homeless squatters occupying vacant houses holding that it was not a case of "imminent peril".

9 and 10. See Stokes, op.cit., supra (n.144 of Ch. 2, ss.I and II), Introduction, pp.xxiv-xxvi.

11. See S.H. Kadish and M.G. Paulsen, Criminal Law and its Process, pp.534-36

12. See [1824] 26 Fed.Cas.360: the jury convicted the crew of manslaughter for throwing overboard some passengers to save others; they were sentenced to six months imprisonment.

13. Quoted in Perkin's Criminal Law, p.849.

14. [1637] 3 St.Tr.826.

15. See Steinberg's Dictionary of British History, p.343.

16. [1637] 3 ST. Tr. 826, 844.

17. W.S. Holdsworth, "Martial Law Historically Considered", (1902) 18 L.Q.R. 117, 124.

18. Ibid., pp.124-25.

19. Ibid., p.125.

20. [1637] 3 ST. Tr. 826, 1134.

21. See de Smith, op.cit., supra (n.215, Ch.1, Section I), p.71, fn.25.

22. Loc.cit., supra (n.6), p.227.

23. Ibid., p.225.

24. Loc.cit., supra (n.21), pp.70-71.

25. See supra, pr.3.11 (esp. n.17).

26. [1866] 18 L. ed. 281.

27. [1873] 84 US 570.

28. See, generally, J.D.M. Derrett, "Factum Valet: The Adventures of a Maxim", (1958) 7 I.C.L.Q. 280; see also T.K.K. Iyer, infra, n.34.

29. [1868] 7 Wallace 700; 74 US.

29a. [1799] 21 St.Tr. 1045, 1224.

30. PLD 1955 F.C. 435.

31. PLD 1955 F.C. 387.

32. [1964] Cyp. L.R. 195.

33. 1968 [2] South African L.R. 284.

34. T.K.K. Iyer, "Constitutional Law in Pakistan: Kelsen In Court" (1973) 21 Am.J.Comp.L. 759, 768.

35. [1969] 1 A.C. 645, 732.

36. Unreported; see infra, pr. 8.58 (n. 149)

37. PLD 1958 S.C. 533.

38. Loc.cit., supra (n.21), p.71, fn.24.

39. PLD 1972 S.C. 139.

40. See Iyer, op.cit., supra (n.34), p.765.

41. D.S.K. Ong,"Legal Aspects of Constitutional Breakdown in the Commonwealth", p.138 (unpublished University of London PhD (law) thesis, 1972).

42. Ibid., p.124.

43. In JILANI, cited at n.39, supra.

44. [1932] 77 L. ed. 375.

45. [1943] 320 U.S. 81.

46. [1944] 323 US 214.

47. [1606] 12 Co Rep 12; the right does not extend to every man according to Winfield and Jolowicz on Tort, p.638.

48. [1965] A.C. 75; the effect of the decision was neutralised by War Damage Act 1965.

49. Nanette Dembitz, "Racial Discrimination and Military Judgments", (1945) 45 Colum.L.Rev. 175.

50. Ibid., p.179.

51. Ibid., p.178.

52. Ibid., p.207.

53. Ibid., p.208.

54. Ibid., p.238.

55. Ibid., p.208.

56. H. Lauterpacht (ed.) International Law, p.231.

57. Ibid., p.232.

58. Ibid., p.233, fn. 2.

59.

60. S.D. Bailey, Prohibitions and Restraints in War, pp.103-04.

61. Ibid., p.103.

62. Ibid., p.86.

63. Ibid., p.88.

64. Loc.cit., supra (n.21), p.516.

65. Dicey, op.cit., supra (n.133, Ch.1, sec.I), p.287.

66. e.g. Jamaica, South Africa, Ceylon and British India.

67. See W. Forsyth, Cases and Opinions on Constitutional Law, p.190.

68. Loc.cit., supra (n.21), p.516.

69. Loc.cit., supra (n.137, Ch.2, secs. I and II), p.125.

70. "What is Martial Law" (1902) 18 L.Q.R. 152, 156 .

71. Ibid., p.158, footnote.

72. Loc.cit., supra, n.69, ibid.

73. Loc.cit., supra (n.21), p.517; see also infra pr.

74. A.E.D. Howard, op.cit., supra (n.116, Ch.1, sec. I), pp.26-27.

75. Holdsworth, op.cit., supra (n.17), p.120.

76. Ibid., p.123.

77. Loc.cit., supra (n.24, Ch.2, secs. I and II), vol.1, p.208.

78. Loc.cit., supra (n.17), 121.

79. Ibid., p.122.

80. Loc.cit., supra (n.77), p.210.

81. Loc.cit., supra (n.67), p.212.

82. Loc.cit., supra (n.1, Ch.2, sec. III), p.238.

83. Loc.cit., supra (n.77), p.201.

84. Ibid., p.205.

85. Loc.cit., supra (n.65), p. 288

86. Ibid., p.290.

87. Ibid., p. 293; also see (1798) 27 St. Tr. 614

88. R.F.V. Heuston (ed.) Essays in Constitutional Law, p.151.

89. Ibid., p.152.

90. Ibid., p.159; see also infra, n.125 (the decision is discussed at pr.3.86).

91. "Law and Order in Times of Emergency", (1972) Jur.Rev. 1, 12.

92. "Martial Law and the State of Siege", (1969) (1) S.C.J. 43, 46.

93. Ibid., p.50.

94. Loc.cit., supra (n.21), p.516.

95. Quoted by Forsyth, op.cit., supra (n.67), p.210.

96. At p.166, vol. X, 1949 edn.

97. Ibid., p.164.

98. See infra, pr. 4.

99. Stephen, op.cit., supra (n.77), vol.IV, pp.143-52.

100. Ibid., p.152.

101. Loc.cit., supra (n.69), ibid.

102. Minnatur, op.cit., supra, n.92, ibid.

103. Paul Wilkinson, Political Terrorism, pp.140-41.

104. See supra, pr.3.70 for use of Martial Law in British India.

105. Quoted by Stephen, loc.cit., supra (n.77), p.214.

106. [1798] 27 St.Tr. 765; The court awarded damages against the Sheriff for flogging the Master of a French ship during the Irish disorder of 1798.

107. Cases in Constitutional Law, p.236.

108. Liam de Paor, Divided Ulster, p.44.

109. Stephen, op.cit., supra (n.77), p.212.

110. [1919] ILR 1 Lah. 326.

111. [1920] 47 I.A. 126.

112. P.K. Tripathi, "Judicial and Legislative Control over the Executive during Martial Law", AIR 1964 Jour. 82.

113. [1870] L.R. 6 Q.B. 1.

114. [1607] 12 Co Rep 63.

115. [1611] 12 Co Rep 74.

116. [1627] 3 St. Tr. 1.

117. [1902] A.C. 109.

118. Loc.cit., supra (n.17), p.123.

119. Loc.cit., supra (n.88), p.161.

120. [1921] II I.R. 241.

121. Ibid., p.272.

122. Ibid.

123. Loc.cit., supra (n.77), p.216.

124. [1907] A.C. 93.

125. [1921] I I.R. 265.

126. [1920] A.C. 508.

127. [1921] I I.R. 265, 275.

128. [1923] I I.R. 5.

129. [1921] II I.R. 317.

130. [1921] II I.R.333.

131. [1921] 2 A.C. 570.

132. [1923] II I.R. 13.

133. Ibid., p.26.

134. Ibid., p.28.

135. P.K. Tripathi, op.cit., supra (n.112).

136. See supra, pr. 3.15.

137. [1946] 327 US 304.

138. [1909] 212 US 78.

139. P.K. Tripathi, "Martial Law in India", AIR 1963 Jour. 66.

139a. See infra pr. 5.191-92; Beg and Bhagwati J.J. of the Indian Supreme Court also appear to hold similar views in the HABEAS CORPUS case.

140. Tripathi, op.cit., supra (n.112), p.85; see also infra, pr. 5.192 for the views of Bhagwati, J. and pr. 5.191, of Beg J. (contra) in the HABEAS CORPUS case.

141. See infra, pr.5.86 for Ceylon and pr.7.64-65 for African states.

142. See infra, pr.7.68 et seq (esp. pr 7.71-73)

143. See infra, pr. 4.1-6

144. Infra, pr. 4.86

145. See Constitutions of several states: Sri Lanka, s.12 (1972); Malaysia, Art. 160 (1957); Tanzania, s.85 (1965); Zambia, s.2(1) 1973; Malawi, s.2(1), 1966.

146. See KCA, 23 Sept. 1977, p.28567.

147. Ibid., p.28570; also Gaz. of Pakistan, E.O., Part I, 5 July 1977.

148. KCA, 13-19 October 1975, p.27381.

149. Pak. L.R. (1953) Lah. 825.

150. Ibid., p.847.

151. Ibid., pp.841-42.

152. Ibid., p.843.

153. PLD 1969 Lah. 786.

154. Loc.cit., supra (n.21), p.517, fn. 21.

155. PLD 1969 Lah. 786, 816.

156. Ibid., p.819.

156a. The court did not apparently invoke the doctrine of ultra vires but applied that of implied repeal in arriving at the decision.

157. PLD 1972 S.C.139.

158. Ibid., p.187.

159. PLD 1973 S.C. 49.

160. PLD 1977 Lah. 846.

161. PLD 1977 Kar 604.

162. Ibid., p.633.

163. Ibid., pp.674-75.

164. PLD 1977 Kar 1044.

165. See infra pr. 5.213.

166. See Amnesty International Report for 1977, pp. 169-72.

167. See infra, pr. 4.224.

CHAPTER 4

SECTION I (paras. 4.1 to 4.86; pages 274 to 305)

1. Supra, pr. 3.13

2. Supra, pr. 3.35

3. Supra, pr. 3.52

4. Allen, Law and Order, p.42.

4a. Defence of the Realm Act 1914, Defence of the Realm (No.2) Act 1914 and the Defence of the Realm Consolidation Act 1914.

4b. Defence of the Realm (Amendment) Act 1915.

5. Keeton, "Liversidge v Anderson", (1942) 5 Mod.L.Rev. 162, 166.

6. Supra, pr. 3.50

7. Allen, op.cit., supra (n.4), p.45.

8. Supra, pr. 3.62

9. [1917] A.C. 260.

10. Ibid., pp.268-69

11. Ibid., p.267.

12. Ibid., p.270.

13. Ibid., p.270.

14. Keeton, op.cit., supra (n.5), 167.

15. [1917] A.C.260, 273.

16. Infra, pr. 4.60.

17. [1917] A.C.260, 274.

18. Ibid., p.275.

19. Ibid., p.272.

20. Ibid., p.308.

21. Infra, pr. 4.193

22. Infra, pr. 4.69, 72

23. [1917] A.C.260, 272.

24. Ibid., p.294.

25. Ibid., p.296.

26. Discussed at pr. 1.65, supra.

27. [1917] A.C.260, 300.

28. Ibid., p.286.

29. Ibid., pp.279-80.

30. Ibid., pp.282-83.

31. Ibid., p.284.

32. Ibid., p.303.

33. Ibid., p.291.

34. Ibid., p.288.

35. Ibid., pp.287-88.

36. Allen, op.cit., supra (n.4), p.378.

37. Ibid., p.60.

37a. See, The Emergency Powers (Defence) Act, 1939 - 2 & 3 Geo. 6, c.62.

38. Supra, pr. 4.7.

39. Allen, op.cit., supra (n.4), p.53.

39a. See The Emergency Powers (Defence) Act 1940 - 3 & 4 Geo. 6, c.20.

40. See The Emergency Powers (Defence)(No.2) Act 1940 - 3 & 4 Geo.6, c.45.

41. See articles in [1942] 58 LQR by Sir W.S. Holdsworth at p. 1 by Professor A.L. Goodhart at pp.3 & 243 and by Sir Charleton K. Allen at p.232.

42. Keeton, op.cit., supra (n.5) at pp.169-70; and Allen, op.cit., supra (n.4), p.364.

43. R.F.V. Heuston, "Liversidge v Anderson: Two footnotes", [1971] 87 L.Q.R. 161.

44. A.L. Goodhart, "Notes", [1942] 58 L.Q.R. 3.4.

45. Allen, op.cit., supra (n.4), p.369.

46. [1942] A.C.206.

47. Ibid., p.211.

48 and 49. Ibid., pp.219-20.

50, Ibid., p.251.

51. Ibid., p.257.

52. Ibid., p.258.

53. Loc.cit., supra (n.44), p.4.

54. Supra, pr.4.22, 40.

55. Allen, "Reg.18B and Reasonable Cause", [1942] 58 L.Q.R. 232, 236.

56. [1942] A.C.206, 265-66.

57. Ibid., p.282.

58. Ibid., p.279.

59. Heuston, "Liversidge v Anderson in Retrospect", [1970] 86 L.Q.R. 33, 67.

60. Ibid., p.68.

61. Infra, pr. 4.223

62. Infra, pr. 5.152

63. [1942] A.C.206, 232.

64. Ibid., p.226.

65. Ibid., pp.228-30.

66. Ibid., p.231.

67. Holdsworth, "Notes", [1942] 58 L.Q.R. 1.

68. Supra, 4.22, 40.

69. Loc.cit., supra (n.5), p.171.

70. [1942] A.C. 226, pp.232-37.

71. Ibid., p.238.

72. Ibid., p.239.

73. Ibid., p.240.

74. Infra, pr. 5.95, 152

75. [1942] A.C.284.

76. [1942] A.C. 206, 241.

77. [1942] A.C. 284, 296.

78. [1942] 1 K.B. 87.

79. Ibid., p.95.

80. Ibid., p.98.

81. Ibid., p.99.

82. [1941] 1 K.B. 72.

83. Ibid., p.78.

84. Ibid., p.79.

85. Ibid., p.84.

86. [1941] 2 All E.R. 749.

87. Ibid., p.751.

88. Ibid., p.761.

89. Ibid., p.762.

90. Ibid., p.764.

91. Ibid., p.754.

92. Ibid., p.755.

93. Ibid., pp.755-56.

94. [1942] 1 All E.R. 373.

95. [1941] 2 All E.R. 665.

96. Ibid., p.669.

97. [1942] 1 All E.R. 207.

98. Ibid., p.211.

99. Ibid., p.209.

100. See supra pr. 4.3, esp. n.4, for the influence of "public opinion" on the "value-process" during the Second World War.

101. See infra, paras. 4.202, 216-23.

SECTION II (paras. 4.87 to 4.224; pages 306 to 360 )

1. Richard Rose, Governing without Consensus, p.53.

2. Ibid., p.58.

3. Liam de Paor, Divided Ulster, p.17.

4. The city was originally known as "Derry"; it was renamed as "Londonderry" when the City of London undertook to "plant" the County of Coleraine after the flight of the Ulster Earls.

5. The annual celebration of this event in 1969 escalated the "civil war" as a result of induction of British Army.

6. G.I.T. Machin, The Catholic Question in British Politics, 1820 to 1830, p.9.

7. Richard Rose, op.cit., p.80.

8. Edward Hyams, Terrorists and Terrorism, p.90.

9. See supra, pr. 3.67, 68

10. Richard Rose, op.cit., p.81.

11. Ibid., p.86.

12. Ibid., p.92.

13. Loc.cit., supra (n.21, Ch.3), p.641, fn.27.

14. K. Boyle, T. Hadden and P. Hillyard, Law and State, p.7.

15. "The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution", (1972) 1 Anglo-Amer. L.Rev. 368, 369.

16. Liam de Paor, op.cit., supra (n.10, Ch.3), pp.165, 168.

17. Richard Rose, op.cit., pp.34-35, 96-97.

18. See Scarman Report, pr.5.10, vol.1, Cmnd. 566 (H.M.S.O. Belfast), 1972.

19. Richard Rose, op.cit., p.31.

20. A House Divided, p.90.

21. Ibid., p.93.

22. Paul Wilkinson, op.cit., supra (n.103, Ch.3), p.

23. See Cameron Report, paras. 160, 165, 171, 177, 223-24, 232, Cmnd. 532 (H.M.S.O. Belfast) 1969.

24. See (a) Evan Luard (ed.) The International Regulation of Civil War, p.19;
(b) R.A.Falk (ed.) The International Law of Civil War, pp.17-19;
(c) KCA, 26 August 1977, pp.28523-24: The International Diplomatic Conference on "Humanitarian Law applicable to armed conflicts" held at Geneva on 10th June 1977 decided that the combatants of the National Liberation Movements recognised by the Organization of African Unity be allowed "protections equivalent in all respects" applicable in the case of POWs under the Third Geneva Convention.
(d) Cedric Thornberry, "International Human Rights Standards in Emergency Situations: Soldiers, Lawyers and Politicians" - a paper read on 25.11.72 at the seminar on Detentions under Emergency Conditions organised by the British Institute of Human Rights.

25. Liam de Paor, op.cit., p.201.

26. Scarman Report, op.cit., p.44 of vol.II.

27. Quoted by John Magee, Northern Ireland: Crisis and Conflict, pp.147-48.

28. See, The Future of Northern Ireland: A Paper for Discussion, pr.79 (H.M.S.O., London) 1972.

29. Hans Kelsen, Principles of International Law, p.412.

30. Sir R.G. Thompson, Revolutionary War in World Strategy 1945-69, p.15.

30a. See supra, pr. 3.67.

31. See Claire Palley, supra, n.15, p.400.

32. See supra, pr. 4.90, esp. n.8

33. See, Report of the Commission of Inquiry appointed to examine the purpose and effect of the Civil Authorities (Special Powers)Acts (Northern Ireland) 1922 and 1933, by the National Council of Civil Liberties, London, in 1936, p.39.

34. J.Ll.J. Edwards, "Special Powers in Northern Ireland" (1956) Crim.L.Rev. 7, 8, 17-18.

35. Claire Palley, op.cit., p.400.

36. Boyle, Hadden, Hillyard, op.cit., p.7.

37. Ibid., p.56.

38. Harry Calvert, Constitutional Law in Northern Ireland, p.381.

39. J.Ll.J. Edwards, op.cit., p.10.

40. See supra, pr.

41. See, Claire Palley, op.cit., p.401, fn. 163; Report of N.C.C.L. Commission, op.cit., supra, n.33, p.26: RUC is described as an "Armed Body" equipped with armoured cars, machine guns and policemen carrying revolvers and carbines; Hunt Report, pr.102, Cmnd. 535 (H.M.S.O. Belfast, 1969).

42. Claire Palley, op.cit., pp.402-404.

43. Ibid., p.401.

44. See infra, pr. 4.195 (p.349) for the test of s.4(1).

45. Harry Calvert, op.cit., p.381.

46. See supra, pr. 1.252-53, esp notes 63 + 64.

47. Harry Calvert, op.cit., p.381.

48. J.Ll.J. Edwards, op.cit., pp.10-11.

49. See supra, pr. 1.253

50. See de Smith, op.cit., supra (n.21, Ch.3), pp.566-67.

51. See supra, pr. 2.26, 46

52. See supra, pr. 3.66-67

53. See N.C.C.L. pamphlet entitled, A Review of the 1936 NCCL Commission of Inquiry, p.13 (London, 1972).

54. See British Army Field Instructions, Army Code No. 70771, revised November 1972 - popularly called "Yellow Card".

54a. Ibid., see also Rule 8.

55. See, International Review of the Red Cross, No. 130, January 1972 - Red Cross delegates found it necessary to make periodic visits to these prisons, such as Crumlin Road Prison, Belfast; Long Kesh Internment Camp, Lisburn; and Transit Centre on board the ship "Maidstone, Belfast Harbour. See also, Irish Times, Dublin, 25.11.74.

56. See Report of NCCL Commission, op.cit., supra (n.33), p.27; see also infra, paras 4.131, 135.

57. See Re McELDUFF, infra, pr. 4.197

58. See, Compton Report, pr.33, Cmnd. 4823, (HMSO, London, 1971).

59. See "Open Letter" of 20th September 1971 by the General Secretary of the N.C.C.L., London, to the British Prime Minister Mr. Edward Heath, pr.27 (printed in the Council's pamphlet entitled, "Crisis in Northern Ireland").

60. See Compton Report, op.cit., supra, paras 35-41; see also infra, pr.4.135

61. Scarman Report, op.cit., supra, considered the allegation but held the same to be "devoid of substance", see pr. 3.2, vol.1.

62. Supra, n.41 (second part).

63. See, "Open Letter", op.cit., supra (n.59), paras 26, 43, 45 and 47.

64. Ibid., para. 29.

65. See, Report of the European Commission on Human Rights adopted on 25 January 1976 in Application No. 5310/71: Ireland v U.K., Annexe II at p.121; see also [1972) Y.B. [ECHR] 77, 248, 252; Cameron Report, op.cit., supra, pr. 230: the criticism that "RUC was essentially an instrument of party government" held justified on account of the nature of relationship between the Minister and the RUC.

66. See, The Times, London, 19 January 1978.

67. See, Diplock Report, pp. 1, 5, Cmnd. 5185 (HMSO, London, 1972).

68. A suggestion was made to the Gardiner Committee to include violence by the government also in the definition; see B.J. Narain, Public Law in Northern Ireland, p.541.

69. See Review No. 9 (December 1972) International Commission of Jurists.

70. Loc.cit., supra (n.67), pr. 2.

71. Ibid., pr.5.

72. Ibid., paras 9-10.

73. Ibid., paras 12, 14-16.

74. Ibid., pr. 27.

75. Ibid., pr. 29.

76. Ibid., pr. 32.

77. Ibid., paras 42, 46-48.

78. Ibid., pr. 49.

79. Ibid., paras 89-90.

80. Ibid., pr. 84; see also infra, pr. 4.135 for judgment of the European Court in Ireland v U.K.

81. See, "Emergency Powers and Criminal Process" (1973) Crim.L.Rev. 406.

82. See, B.J. Narain, op.cit., supra (n.68), pp.487 et seq.

83. See supra, pr. 3.66-67

84. See Halsbury's Statutes, 3rd edn., vol. 45, p.1551.

85. See, Gardiner Report, pr. 15, Cmnd. 5847 (H.M.S.O., London, 1975).

86. Ibid., pr.16.

87. Ibid., pr. 19.

88. Ibid., pr. 21.

89. Ibid., pr. 123.

90. Ibid., pr. 129.

91. Ibid., paras 128, 130-32, 152.

92. Ibid., paras 152-54.

93. Ibid., pr. 148.

94. Ibid., paras 159-60.

95. Ibid., pr. 163.

96. Ibid., pr. 166.

97. Ibid., p.58.

98. See p.3, "E.P. Act and Why it Should be Replaced" - a pamphlet of the Northern Ireland Civil Rights Association (Belfast, 1974).

99. See, Harry Street's comments on the Act in (1975) Crim L.Rev. 192.

100. Halsbury's Statutes, 3rd edn., vol.44, p.164.

101. See infra, pr. 4.216, 222

102. Loc.cit., supra (n.99)

103. Ibid., see also, The Guardian, London, 23 December 1974 for the report on the case of ALBERT O'RAVE.

103a. See infra, pr. 4.216

104. KCA, 4 June 1976, p.27762.

105. The Times, London, 6 Dec. 1975.

106. The Irish Times, Dublin, 14 Feb. 1973.

107. The Times, London, 31 October 1973.

108. The Times, London, 8 April 1973.

109. The Times, London, 5 April 1974.

110. KCA (January 20-26, 1975), p.26930.

111. Ibid. (4 June 1976),p.27761.

112. Ibid. (27 May 1977),p.28370.

113. Father Denis Faul, The Shame of Merlyn Rees, pp.5-6.

114. Ibid., p.7.

115. KCA (Nov. 3-6 1975),p.27420.

116. Ibid. (Dec. 10, 1976),p.28095.

117. Ibid. (Dec. 2, 1977), p.28698.

118. See infra, Table A .

119. See KCA (May 27, 1977), p.28370.

120. The Times, London, 4 February 1975.

121. [1922] 56 I.L.T.R. 170.

122. See supra, pr. 4.16 et seq; (n.9).

123. See supra, pr.1.67 (n.191).

124. The statement of Mr. Best, former Attorney General of Northern Ireland quoted in NCCL Commission's Report of 1936 (supra, n.33), p.21.

125. Ibid., pp.18-10, 21.

126. Halsbury's Statutes, second edn., vol.17, p.169.

127. See infra, pr. 4.29, 30

128. [1972] N.I. 91.

129. Ibid., p.115.

130. [1972] N.I. 1.

131. Ibid., p.14.

132. See supra pr. 2.38 et seq. (n.61).

133. [1972] N.I. 1, 15.

134. See supra, pr. 4.56 et seq. (n.46).

135. [1972] N.I. 1, 20.

136. Ibid., p.26.

137. [1972] N.I. 118.

138. [1972] N.I. 91, 115.

139. [1972] N.I. 118, 122-23.

140. [1973] 3 All E.R. 883.

141. [1973] N.I. 31.

142. Ibid., p.36.

143. Ibid., p.38.

144. Digested at [1972] 23 N.I. Leg. Qly. 113.

145. Ibid., p.331.

146. [1961] 1 Q.B. 125: PATT v GREYHOUND RACING ASSOCIATION, No. 1.

147. [1916] 22 C.L.R. 183: R v BOARD OF APPEAL, Exp. KAY

148. [1976] 3 W.L.R. 235.

149. Supra, pr. 4.119, esp. n.53.

150. [1976] 3 W.L.R. 235, 245.

151. Loc.cit., supra (n.85), pr. 70.

152. [1976] 3 W.L.R. 235, 245.

153. Ibid., pp.245-46.

154. Ibid., p.247.

155. [1971] N.I. 13.

156. Supra, pr. 4.194, 197 (decisions in HUME, McELDUFF).

157. Supra, pr. 4.202, 216-23 (decisions in HUME, AG's SPECIAL REFERENCE, DEVLIN).

158. Supra, pr. 1.255 (see n.73).

159. Ibid. (See notes, 68, 70-71).

160. Supra, section I; esp. pr. 4.22, 86.

161. Loc.cit, supra, n.24(d).

162. See supra, pr. 3.120 for the judicial response in a comparable jurisdiction (Pakistan) although military intervention there was of a different type.

CHAPTER 5

SECTION I (paras 5.1 to 5.44: pages 361 to 385)

1. See, Sir Ivor Jennings and H.W. Tambiah, The Dominion of Ceylon: The Development of its Laws and Constitution (Br. C.W. Series, vol.7), pp.7-10.

2. See, Sir Courtenay Ilbert, Government of India, p.19.

3. Sir John William Kaye, The Administration of East India Company, pp.64-65, 67, 68.

4. Dr. A.B. Keith, The Constitutional History of India, pp.27-28.

5. Ibid., p.4.

6. Criminal jurisdiction vested in the Governor and the Council who were also invested with appellate jurisdiction in civil matters dealt with by the Mayors' courts.

7. Macaulay's Essays, vol.iii, p.177.

8. W.A.J. Archbold, Outlines of Indian Constitutional History, p.49.

9. Loc.cit., p.77.

10. Herbert Cowell, History and Constitution of the Courts and Legislative Authorities in India, p.24.

11. Ibid., p.37.

12. See ibid., pp.41-56 (esp. fn. at p.44) for a detailed discussion on the causes of failure of the experiment.

13. Ibid., p.63.

14. Ibid., p.62.

15. Cf. infra, pr. 5.3.

16. Cowell, op.cit., p.68.

17. Ibid., p.44.

18. Ibid., p.63.

19. Ibid., p.68.

20. 167 E.R. 371: 3 Rob. Adm. Rep. 22-32.

21. 39 & 40 Geo. III, c.79 and 47 Geo. III, sess. 2, c.58, respectively.

22. 53 Geo. III, c.155.

23. 3 & 4 Will. IV, c.85; the prohibition as respects prerogative was later amended by 16 & 17 Vict., c.95 (s.26).

24. See, 24 Geo.III, c.25.

25. See, Cowell, op.cit., pp.31-32.

26. See, infra, pr.5.17: the local Regulations eventually contemplated similar provisions in Bengal (1818), Madras (1819) and Bombay (1827).

27. See, supra, pr. 3.72 ~~4.5~~

28. Acts Nos. 34 and 3 of 1850 and 1858 respectively; see also, Act No. 15 of 1874.

29. See Bengal State Prisoners Regulation (Adaptation) Order 1947 made by the Governor General under the Indian Independence Act 1947.

30. See The Repealing and Amending Act 1952 (Act No. 49 of 1952), s.2 read with Schedule 1.

31. See, infra, pr. 5.130.

32. See Cowell, op.cit., at p.80; see also, Alan Gledhill, The Republic of India, p.18 (no.6 of Br.C.W. series, Stevens, London, 1964): he observes that the Council was "becoming so independent and inquisitive as to provoke complaints from a Governor General and the British Cabinet that it gave itself the airs of a "petty parliament" and "grand inquest of the nation".

33. The principal Act was 5 & 6 Geo.5, c.61; it was amended in 1916 by 6 & 7 Geo. 5, c.37 and again in 1919 by 9 & 10 Geo. 5, c.101. The amendment of 1919 came as a sequel to the declaration made on 20th August 1917 by the Secretary of State to the effect that His Majesty's Government was committed to "the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British Empire" - quoted by Griffiths, op.cit., n.35 (infra), at pp.82-83.

34. Although the Act restricted the activities of the Council to legislation, half of the members of the Council were now to be non-officials; the 1861 Act also established two "local legislatures" in Madras and Bombay and empowered the Governors of those Presidencies to nominate members to their Councils for the purpose of law-making although laws enacted by all legislatures in India required the assent of the Governor General for their validity.

35. See Sir Percival Griffiths, Modern India, p.81; in 1892 the number of members of the Legislative Councils was increased, particularly the number of the non-official members (55 & 56 Vict., c.92) but the principle of elective representation and even non-official majorities came to be recognised only in 1909 (vide 9 Edw.7, c.4).

36. See infra, pr.7.2 and esp. n.4

37. Under the 1861 Act the Governor General could, by proclamation, constitute new Provinces and apply the provisions of the Act to them. Accordingly, in 1886 and 1897 respectively new Provinces (the N.W. Province, Oudh and the Punjab) with Legislative Councils were constituted; in 1919 there were eight Provinces each with a "local legislature".

38. Under s.45A, provision (by rules) could be made for the classification of "central and provincial subjects" for defining the competence of the respective "Local" (Provincial) and Indian (Central) legislatures.

39. Cf. similar provision in the 1833 Act; see supra, pr. 5.11. s. 65, also

40 to 42. See D.D. Basu, Commentary on the Constitution of India, 5th edn., vol.1, p.129.

43. Alan Gledhill, op.cit., supra, p.11.

44. See, The Indian (Proclamation of Emergency) Act 1946.

45. The practice of making express reservation of the right (when the right was generally excluded in any Act) of "British European subjects" to judicial review appears to have ceased on the assumption in 1858 of "direct government"; however, under s.72 of the 1915-19 Constitution, the Governor General could, for "peace and good government" make and promulgate Ordinances "in cases of emergency" and the provision did not contemplate any general exclusion of the right of judicial review.

46. See, Jagadish Saran Sharma (ed.) India's Struggle for Freedom (Select Documents and Sources), vol.1, pp.84-92.

47. See Gazette of India, 1919, Part V; for the legislative history see the "objects and reasons" at pp.10-15; for the Report of the Select Committee, see pp.28-34.

48. See ibid., pp.28-34.

49. The enactment was originally proposed in the Bill to be named as Criminal Law (Emergency Powers) Act 1919.

50. Griffiths, op.cit., supra, p.92.

51. Vivian Bose, "Preventive Detention in India" (1961) 3 Jrl. of Internl. Commn. of Jur. 87, 92.

52. Ibid., pp.89-90.

53. AIR 1943 F.C.1; the decision was however over-ruled by the Privy Council in EMPEROR v SIBNATH BENERJI, AIR 1945 P.C.156; see infra pr. 5.134-36. for a discussion on these two decisions.

54. See supra, pr.5.42; the section provided that "no order heretofore made against any person under r.26, D.I. Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under s.2, D.I.Act 1939". [emphasis added]

SECTION II (paras 5.45 to 5.81: pages 385 to 408).

1. See infra, Ch 7, sec. V

2. See supra, pr. 1.59

3. See supra, pr. 5.10.

4. [1837] 1 M.I.A. 175.

5. [1863] 9 M.I.A. 387, 425.

6. [1608] 7 Co.Rep. 1: 2 St. Tr. 559.

7. See supra, pr. 5.2; also, infra, pr.

8. See supra, pr.5.7; also, infra, pr.

9. As to Calcutta, see Cowell, op.cit., supra, p.41; see also, decisions in R v RAMGOVIND MITTER, [1781] Morton's Report 210 and In re COZA ZACHARIAH KHAN [1779] Morton's Report 263; Madras, see decisions in KING v THOMAS MONISEE [1810] 2 Strange's Report 119 and KING v LT.COL.SYMONS [1814] 2 Strange's Report 256; Bombay, see, infra, pr. 5.47.

10. [1829-31] 1 Knapp's Reports 1, pp.19 et seq.

11. See supra, pr. 5.7.

12. Vivian Bose, "The Migration of the Common Law" (1960) 76 L.Q.R. 59.

13. Renton and Phillimore, Colonial Laws and Courts, pp.45 et seq.

14. In GIRINDRA NATH v BIRENDRA NATH, AIR 1927 Cal. 496, 500.

15. [1848] Taylor 428.

16. The Expansion of the Common Law, p.16 (Stevens, London, 1904).

17. See his Preface to the 1st edition of the Older Statutes relating to India reproduced in vol.1 of the Collection of Statutes Relating to India (Supdt., Govt. Printing, India, Calcutta, 1913).

18. [1870] 5 Beng. L.R. 426.

19. A.G. Noorani, Indian Political Trials, p.89.

20. [1861] 24 & 25 Vict., c.104.

21. AIR 1927 Cal. 496, 503.

22. [1870] 6 Beng., L.R. 392; see infra, pr. 5.130 et. seq.

23. (1) In re NATARAJA IYER, [1912] ILR 36 Mad. 72.
(2) LEGAL REMEMBRANCER v MATILAL GHOSE [1913] ILR 41 Cal. 173.

24. Referred at p.505 in GIRINDRA NATH (supra, n.21).

25. AIR 1945 P.C. 156; see infra, pr. 5.136.

26. See infra, pr. 5.196

27. See (1) In re GOVINDAN NAIR, AIR 1922 Mad. 499.
(2) MAHOMEDALI v ISMAILJI [1926] ILR 50 Bom. 616.

28. AIR 1939 Mad. 120.

29. Ibid., p.132.

30. AIR 1939 P.C. 213.

31. Supra, n.28, at p.132.

32. AIR 1920 P.C.23; quoted at p.132, n.28, supra.

33. See supra, pr. 5.23

34. At p.26, n.32, supra.

35. See supra, pr.5.11 for s.43.

36. 6 Beng. L.R. 392, 475-76; see also pp.481-82.

37. Ibid., p.477.

38. Ibid., p.482.

39. [1928] A.C. 459; see also infra, pr.

40. [1879] ILR 4 Cal. 172.

41. Ibid., pp.180-81.

42. AIR 1927 Cal. 496; see supra, pr.

43. Ibid., pp.502-03.

44. Ibid., p.503.

45. See his Commentary on the Laws of England, vol.1, Bk. 1, Ch.10.

46. See supra, pr. 5.45 (n.6).

47. Supra, pr. 1.59

48. Supra, pr. 1.71

49. Supra, pr. 1.82

50. See supra, pr. 5.189.

51. See Stokes, op.cit., n.17, pr.

52. [1932] ILR 60 Cal. 364.

53. See pr.37.3, vol.1 of the 41st Report (1969) of the Law Commission of India.

54. HAR SWARUP v GENERAL MANAGER, AIR 1975 SC 202.

55. See, s.4, The Constitution (Forty-second) Amendment Act, 1976.

56. (a) In India there were several High Courts at independence and eighteen in 1978; in Pakistan, at independence, including East Pakistan (later Bangladesh) two High Courts and in 1978 four High Courts;
(b) In Bangladesh, after 1976, there is one "Supreme Court" and one "High Court".

57. See infra, pr. 5.186.

58. See infra, para. 5.213

59. The Constitution (Fifth Amendment) Act 1976.

60. The Constitution (Third Amendment) Act 1975.

61. BEGUM SHAHEEN RAMAY v STATE, PLD 1977 Lah. 1414.

62. See, discussion in the Habeas Corpus Case, infra, pr. 5.186 et seq.

63. See Act No. XXIV of 1973 - The Constitution (Second Amendment) Act 1973.

64. See Act No. XI of 1975 - The Constitution (Fourth Amendment) Act 1975.

65. See, The Second Proclamation (Seventh Amendment) Order 1976, para 2 and esp. items nos. 1 and 4 of the Schedule, in Bangladesh Gazette Extraordinary, dated 28.5.76; by the amendment a new Art.44 and new Chapters 1 and 1A were substituted for the existing provisions envisaging two separate institutions, one "Supreme Court" with appellate and advisory jurisdictions and a "High Court" with original and appellate jurisdictions. In 1977, by Martial Law Regulation No. XXXIV, restrictions were imposed on the passing of "interim order" and "issuing writs" by the High Court which did not however affect habeas corpus. (See, Bangladesh Gazette Extraordinary, dated 9.3.77).

66. T. Nadaraja, The Legal System of Ceylon in its Historical Setting, p.57 and esp. n.9 (p.68).

67. Ibid., pp.57, 59.

68. See L.J.M. Cooray, An Introduction to the Legal System of Ceylon, pp.28, 47.

69. Ordinance No. 5 of 1852, cap. 79, Legal Enactments of Ceylon 1956: it made applicable English law in "maritime matters" and "commercial matters".

70. See Nadaraya, op.cit., n.83 at p.80; also see supra, pr.

71. Ibid., p.161 (n.169), p.97 and p.107 (n.33); see also, G.C. Mendis, The Colebrook-Cameron Papers, vol.II, pp.51-53.

72. Ibid

73. Ibid

74. See, Sir Ivor Jenning and H.W. Tambian, op.cit., pp.85-86, and Nadaraja, op.cit., p.125.

75. See infra, pr. 7.130 and supra, pr. 5.9

76. [1926] 29 NLR 52, 55.

77. [1958] 60 N.L.R. 529, 530; see however the decision in, Re MARK ANTONY LYSTER BRACEGIRDLE, [1937] 39 N.L.R. 193 in which the court did not examine the scope of s.45 but on a consideration of the principles of English law set aside the order of deportation holding the same to be ultra vires Art. III, pr.3, of 1896 OIC under which the Governor was invested with "emergency powers".

SECTION III (paras 5.82 to 5.129: pages 408 to 443)

1. Despite the fact that the steam-roller majority of the Congress Party in India enabled the Constitution to be amended with comparative ease and by the end of 1976 the Amendment Acts have come to number 42, the concept of One-party state could not gain constitutional acceptance in India (also in Pakistan) as happened in Bangladesh where the Constitution (Fourth Amendment) Act, enacted in 1975, inserted Art.117-A to provide for "the national party"; in each state the Bill of Rights was captioned "Fundamental Rights", see, Constitutions, India (part III), Pakistan (part II), 1956 and 1973, Bangladesh (part III).

2. See s.54 as to Constitutional Court, also, infra, pr. 5.77; as to Bill of Rights, see s.18 esp. sub-s.(2) and also s.17, also, supra, pr. 5.81

3. See supra, pr.5.77 et seq. In 1972 the Privy Council's jurisdiction to hear appeals from Ceylon was terminated; the controversial decisions are: LIYANAGE v R [1967] 1 A.C.259; IBRALEBBE v R. [1964] A.C.900; and esp. BRIBERY COMMISSIONER v RANASINGHE [1965] A.C. 172.

5. See pp. 58 et seq (esp. p.62), Constituent Assembly Debates, vol.1.

6. Inserted by ss.5 and 14 of the Constitution (First Amendment) Act 1951; by the end of 1976 as many as 188 Central and State Acts came to be included in the Ninth Schedule by amendment of the Constitution.

7. See esp. item Nos. 92 and 104 covering respectively The Maintenance of Internal Security Act 1971 and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, inserted in 1975 by The Constitution (39th Amendment) Act (s.5).

8. AIR 1967 SC 1643.

9. AIR 1973 SC: [1973] Supp. SCR1: [1973] 4 SCC 225.

10. See s.55 of the Constitution (Forty-second Amendment) Act 1976; the newly-inserted clause (4) provided that no amendment of the Constitution (including the provisions of Part III) "shall be called in question in any court on any ground".

11. See infra, pr. 5.186 et. seq

12. See PLD 1972 S.C. 139, 213.

13. Per Afzal Zullah and Ataullah Sajjad JJ; PLD 1972 SC 139.

14. PLD 1973 SC 49, 73.

15. India, Art. 13; Pakistan, Art. 4 (1956), Art. 8(1973); Bangladesh, Arts. 7(2) and 26.

16. Art. 2 (1962), Art. 4 (1973).

17. Art.27, Bangladesh; Arts. 5(1) and 25(1) respectively in 1956 and 1973, Pakistan; Art.18(1)(a), Sri Lanka.

18. see infra, pr. 6.68, esp. n. 71.

19. See infra, pr. 6.68

20. See s.2, Constitution (Twenty-fourth) Amendment Act 1971.

21. see the decision in the HABEAS CORPUS case discussed at pr. 5.186 et. seq

22. See the letter by the Chairman of the Advisory Committee on Fundamental Rights at p.437, vol.III, Constituent Assy. Debates.

23. Part IV in India; in Pakistan, Part III (1956), Part III, Chapter 2 (1973).

24. Part II in Bangladesh; in Sri Lanka, Chapter V.

25. See s.11, Constitution (Forty-second Amendment) Act 1976.

26. See Art. 4 (1962), Art. 5(2), 1973.

27. See infra, pr. 8.2,3.

28. Quoted in Preserving Our Democratic Structure (Directorate of Audio Visual Publicity (DAVP), Government of India, New Delhi, 1975).

29. See supra, pr 1.247

30. See infra, pr. 7.58

31. Art.36 (Bangladesh); s.18(1)(i), Sri Lanka; Art.9(3), Malaysia (adopted in Singapore), see supra, pr. ; Art.19(1)(d) and (e), India; Art. 11(a) and Art.15 respectively of 1956 and 1973 Constitutions of Pakistan.

32. Supra, pr. 5.27.

33. Infra, pr.7.57

34. See, Constitutions, Bangladesh (Art.34(5)), Pakistan (Art.14(2)).

35. The interrelation between the two groups was examined in GOPALAN first and later in SHAMBHU NATH and HARADHAN SAHA; see infra, prs. 5.139, 168 and 177, respectively.

36. See infra, pr. 5.139.

37. In the Constituent Assembly, the Chairman of the Drafting Committee conceded that there was a possibility, albeit rare, of the legislature being "packed" with party men who might feel disposed to make laws prejudicing seriously the right to personal liberty. See, C.A.D., vol.7, pp.999-1001.

38. See infra, pr. 6.40

39. A provision for protection against arbitrary arrest, search and seizure was proposed for inclusion in the Indian Bill of Rights. The proposal was hotly debated and was eventually rejected in a somewhat controversial manner. See, C.A.D., vol. 7 , pp.794, 797, 840-42

40. See C.A.D., vol.9, pp.1541-70, esp. p.1159 for Dr Ambedkar's views.

41. See infra, pr.5.93; Bhagwati, J., in FAGUSHAW apparently overlooks this point although he refers extensively to the C.A. Debates.

42. The New States of Asia, p.196.

43. Per Krishna Iyer, J., in SADHU ROY v STATE OF WEST BENGAL, AIR 1975 S.C. 919, 923 at pr.10.

44. See infra, pr. 5.168

45. See Rajeev Dhavan, The Supreme Court of India and Parliamentary Sovereignty, pp.121, 134.

46. See supra, pr. 5.88, esp. n.30; see also C.A.D.

47. See infra, pr. 5.180

48. Cf. position in Malaysia and Singapore; see infra, pr.6.46

49. For legislative competence, see item No.9, List I (Union List) - "Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India. . ." and item No. 3 of List III (Concurrent List) - ". . . for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community. . .".

50. See infra, pr.5.173; Bose, J. in KRISHANAN and Bhagwati, J., in FAGU SHAW also hold the same view.

51. See infra, pr.7.67 as to position in African Commonwealth.

52. The Bill which became the Constitution (Second Amendment) Act 1973 in Bangladesh was adopted in September whereas the 1973 Pakistan Constitution was adopted much earlier, in April.

53. See Constitution Amendment Acts, 1975 (Thirty-eighth) and 1976 (Forty-second).

54. Eventually the decision was reversed by the Supreme Court but the Election laws as well as the Constitution was amended to nullify the effect of the decision and also to pre-empt judicial challenge to the amendments; see item No. 87 of the Ninth Schedule, inserted by the Constitution (Thirty-ninth Amendment) Act 1975; see also, David Selbourne, op.cit. (n.57 infra) at pp.132-33.

55. See Reason for Emergency published by the Directorate of Audio-Visual Publicity, New Delhi (Veerendra Printers, New Delhi).

56. See, Gazette of India, Extraordinary, sec. 3, sub-s.(1), No.169, dated 26.6.75 for the Proclamation of Emergency dated 25.6.75 made by the President under Art. 352(1). Two days later the President made an Order under Art. 359(1) suspending the right to move any court for the enforcement of the rights conferred by Arts. 14, 21 and 22 (see, Gazette of India, Extraordinary, sec.3, sub-s.(1), No.172, dated 27.6.75). The Janata Party was returned to power at the centre in the general election held in March 1977. The new government appointed a Commission of Inquiry to probe into the justification and consequences of the emergency rule. Justice Shah, Retired Chief Justice of India headed the one-man Commission. The Commission submitted its "interim report" on 15.5.78. The Commission criticised the role of the former Prime Minister, Mrs. Indira Gandhi in the declaration of emergency. In the Report it was said that the emergency was "unwarranted" and "politically motivated". It also held the arrests during the emergency as "illegal". (See, The Times and The Guardian, London, 16.5.78).

57. See David Selbourne, An Eye to India, pp.30, 131.

58. See C.A.D., vol.9, pp.186-98 and 523-54, esp. p.538.

59. Ordinances were in fact enacted both before and after the enactment of cl. (1.A) to amend "MISA" and "COFEPOSA" (cf. Ordinance Nos. 4, 7, 16, of 1975); see also infra, prs.

60. See Art. 192(1) and 233(2) of 1956 and 1973 Constitution respectively.

61. See Arts.191(6) and 192(3) of 1956 and Arts.232(7) and 233(3) of 1973.

62. See Art. 83(2) of the Indian Constitution for a similar provision; in

fact the Indian Parliament had in fact extended its life in 1975 and had thereafter passed laws amending the Constitution.

63. Ordinance No. 25 of 1947, cap. of the Legal Enactments of Ceylon, 1956.

64. See infra, n. 54.

65. Act no. 26 of 1971; amended by Acts Nos. 39 and of 1975 and also "temporarily amended" by s.6 (6)(a) of the Defence and Internal Security of India Act 1971.

66. Act No. 4 of 1950; throughout its life "PDA" remained a temporary measure extended from time to time until it was succeeded by "MISA" as a permanent measure.

67. See Vivian Bose, op.cit., at p.94.

68. Ibid., p.93.

69. Ibid., p.96.

70. The provision was "temporarily amended", see infra, pr. 5.114

71. The words "twelve days" as originally enacted were substituted by "twenty days" by an amendment.

72. Ibid., the words "twenty" days as originally enacted were substituted by "twentyfive" days.

73. Generally in all states one of the sitting judges of the High Court was usually appointed as the Chairman of the Board.

74. See infra, pr. 5.180.

75. See s.6(6)(b), Defence and Internal Security of India Act 1971 (Act No. 42 of 1971).

76. See infra, pr. 5.171

77. See s.15, PDA and s.16, MISA.

78. See ss. 6 and 7, Act No. 39 of 1975; the provision was further amended.

79. See the HABEAS CORPUS case, see infra, pr. 5.186.

80. Act No. 52 of 1974, enacted on 13 Dec. 1974.

81. See, s.2, Act No. 35 of 1975, enacted on 1 August 1975.

82. See supra, pr. 4.3,4

83. See supra, pr. 4.83

84. See, s.4, Act No. 35 of 1975.

85. See David Selbourne, op.cit., p.147, for popular reaction to the detention measures of 1975.

86. See infra, Ch. 8

87. Act No. XXXV of 1952 with an initial life of three years which was extended from time to time (by Ordinance No. VII of 1958, extended up to 1960); the Act was amended in 1955 and also in 1956, 1957, 1958 (twice) and also in 1959.

88. Ordinance No. LXXVIII of 1958; called the Bangladesh Public Safety Ordinance in Bangladesh.

89. See, ss. 5 and 6, Act No. XIII of 1958.

90. Ibid., s.7.

91. See, s.3, Act No. XLVI of 1958.

92. After the enactment of the Constitution in 1956 this provision could be challenged as there was no provision in the Pakistan Constitution parallel to cl (7) of Art. 22 of the Indian Constitution.

93. See, RAHMAT ELAHI v WEST PAKISTAN, PLD 1965 Lah 112.

93a. See, infra, prs. 7.75, 85 for African States.

94. See The Amnesty International Report 1977, pp.217-19 (Amnesty International Publications, London, 1977).

95. See, s.22, as amended by Interpretation (Amendment) Act, No. 18 of 1972.

96. See supra, pr 5.80 for p.45

96a. The power of the courts to issue habeas corpus (U/s. 45, Courts Ordinance) having been saved (see supra, pr. 5.127, esp. n.95) the courts could, thereunder, adjudge the "illegality of impropriety" of a detention.

97. See, The Public Security (Amendment) Act, No. 8 of 1959.

SECTION IV (paras 5.130 to 5.215, pages 443 to 500)

1. [1870] 6 Beng. L.R. 392; see, A.G.Noorani, op.cit., supra for historical background.

2. See supra, prs 5.17-20.

3. See supra, pr. 5.7.

4. [1779] Morton's Report 263.

5. See supra, pr. 5.53.

6. See supra, pr. 5.6.

7. See supra, pr. 5.49.

8. See supra, prs. 5.7, 20.

9. See supra, prs. 5.11 and 1.

10. See supra, pr. 5.18 for p.2

11. See supra, pr. 4.16, 56-85

12. For the relevant provisions, see pr. 5.40 et seq.

13. AIR 1943 F.C. 1.

14. See pr. 5.43.

15. At p.8c, see n.13.

16. See supra., pr. 4.16 et seq.

17. See supra, pr. 5.40.

18. At p.8h, see n.13.

19. See supra, pr. 4.72

20. AIR 1945 P.C. 156.

21. Ibid., p.159; see also, supra, pr.

22. Ibid., p.160.

23. AIR 1943 Cal. 377.

24. AIR 1943 F.C. 75.

25. AIR 1946 P.C. 123.

26. AIR 1945 Nag. 8.

27. See supra, pr. 4.56 et seq.

28. AIR 1950 S.C. 27; (1950) S.C.R.88; (1950) S.L.J.174.

29. See C.H. Alexandrowicz-Alexander, "The Supreme Court of India as a Habeas Corpus Bench", 22 Mad.Univ.L.J. part 2, pp.71-81.

30. Ibid., p.76.

31. See s.3 of Ordinance No.19 of 1950 promulgated by the President on 23rd June 1950 and also the Preventive Detention (Amendment) Acts of 1950 and 1951.

32. See pr.138, GOPALAN.

33. Ibid., pr.139.

34. Ibid., pr.136.

35. Ibid., pr.134.

36. See infra, pr. 5.168.

37. Ibid., pr.96.

38. See supra, pr. 5.93

39. See paras 58 (Fazl Ali J.), judgement in GOPALAN.

40. See supra, pr. 2.48

41. See infra, pr. 5.168.

42. See pr.77, GOPALAN.

43. Ibid., prs. 84-85.

44. Ibid., pr.88.

45. Ibid., pr.92.

46. Ibid., pr.27.

47. Ibid., pr. 123.

48 and 49. Ibid., pr.165.

50. Ibid., pr.201.

51. Ibid., prs. 166, 203.

52. Ibid., pr. 207.

53. Ibid., pr.250.

54. Ibid., pr.248.

55. Ibid., pr.35.

56. Ibid., pr.39.

57. Ibid., pr.127.

58. Ibid., pr.125.

59. Ibid., pr.251.

60. See entry 9, List I and entry 3, List III of the seventh schedule and Art.22, clauses (4) to (7).

61. See supra, pr. 4.68

62. See supra, pr. 5.134

63. See supra, pr. 5.138

64. See supra, pr. 5.113

65. See supra, p.5.144.

66. [1951] S.C.R. 167: AIR 1951 S.C.157; 1951 S.C.J.208.

67. Ibid., p.179.

68. In Malaysia (see pr. 6.46); also in the "New-Nigerian" Bills of Rights (cf. pr. 7.63)

69. At pp.183-84 in ATMARAM (supra, n.66).

70. See supra, pr. 4.16

71. At p.192 in ATMARAM (supra, n.66).

72. Ibid., p.194.

73. Ibid., p.210.

74. Ibid., p.206.

75. Ibid., p.206.

76. [1951] S.C.R.212; AIR 1951 S.C. 174; 1951 S.C.J. 233; TARAPADADE v STATE OF WEST BENGAL.

77. Ibid., pp.217-78.

78. Ibid., pp.218-19.

79. [1952] S.C.R.756; AIR 1952 S.C. 350; UJAGAR SINGH v STATE OF PUNJAB.

80. [1951] S.C.R.451: AIR 1951 S.C.270; RAMSINGH v STATE OF DELHI.

81. Ibid., pp.458-59.

82. Ibid., p.465.

83. Ibid., 470.

84. RAM KRISHAN v STATE OF DELHI [1953] S.C.R. 708; AIR 1953 S.C. 318; [1953] S.C.A. 604.

85. Ibid., p.712.

86. Ibid., p.713.

87. SHIBBAN LAL SAKSENA v STATE OF UP [1954] SCR 418; [1954] SCJ 73; [1954] SCA 53.

88. Ibid., p.422.

89. THAKUR PRASAD BANIA AND OTHERS v STATE OF BIHAR, AIR 1955 SC 631.

90. DWARKA DAS BHATIA v STATE OF JAMMU AND KASHMIR, 1956 SCR 948; AIR 1957 SC 164.

91. PURANLAL LAKHANPAL v UNION OF INDIA, 1958 SCR 460: AIR 1958 SC 163.

92. NARESH CHANDRA GANGULI v STATE OF WEST BENGAL, AIR 1959 SC 1335; 1960 SCJ 303.

93. Ibid., pp.11-12.

94. HARIBANDHU DAS v DISTRICT MAGISTRATE, CUTTACK, AIR 1969 SC 43.

95. [1950] SCJ 433: AIR 1953 SC 451: ASHUTOSH LAHIRY v STATE OF DELHI.

96. [1952] SCR 395; AIR 1952 SC 106: [1952] SCJ 111: [1952] SCA 230; NARANJAN SINGH NATHAWAN v STATE OF PUNJAB.

97. See supra, pr.5.163.

98. See however SAHIB SINGH DUGAL and another v UNION OF INDIA, AIR 1966 SC 340; it was held that the detaining authority did not act mala fide by ordering detention of the accused under the Act by dropping criminal proceedings being unable to get sufficient evidence to ensure conviction.

99. MAKHAN SINGH TARSIKKA v STATE OF PUNJAB, AIR 1964 SC 1120.

100. RAMESHWAR SHAW v DISTRICT MAGISTRATE, BURDWAN, AIR 1964 SC 334.

101. SAMBHU NATH SARKAR v STATE OF WEST BENGAL, AIR 1973 SC 1425.

102. R.C. COOPER v UNION OF INDIA [1970] 3 SCR 530: AIR 1970 SC 564.

103. At pr.39 (p.1441) in SAMBHU NATH (n.101, supra)

104. See supra, pr. 5.114, 117

105. At pr. 38 (p.1441), SAMBHUNATH (n.101, supra).

106. Ibid., pr.35 (p.1439).

107. Ibid., pr.29 at p.1436.

108. FAGU SHAW v STATE OF WEST BENGAL, AIR 1974 SC 613.

109. Ibid., pr.17 at p.618.

110. S. KRISHNAN v STATE OF MADRAS [1951] SCR 621: AIR 1951 SC 301: [1951] SCJ 453.

111. STATE OF WEST BENGAL v ASOKE DEY, AIR 1972 SC 1660: [1972] 1 SCC 199.

112. At pr.14 (p.617) and pr.16 (p.618) in FAGU SHAW (n.108 supra).

113. Ibid., pr.18 (p.618).

114. Ibid., pr.40 (p.625).

115. Ibid., pr.40 (pp.625-26).

116. See supra n.110.

117. At p.633 (pr.51) in FAGU SHAW (n.108, supra).

118. At p.652, KRISHANAN (n.110, supra.)

119. At p.622 (pr.33) in FAGU SHAW (n.108, supra).

120. Ibid., p.631 (pr.47).

121. See, STATE OF MYSORE v R.V. BIDAP, AIR 1973 SC 2555.

122. At p.628 (pr. 45) in FAGU SHAW (n.108).

123. See supra, pr. 5.93

124. Quoted in FAGU SHAW at p.629 (pr. 45).

125. Ibid., p.630, pr.46.

126. Ibid., p.631, pr.47.

127. Ibid., p.632, pr.49.

128. See supra, pr. 5.96

129. HARADHAN SAHA v STATE OF WEST BENGAL, AIR 1974 SC 2154.

130. Ibid., pr.27, p.

131. Ibid., pr.31, pp.2159-60.

132. Ibid., pr.32, p.2160.

133. Ibid., pr.33, p.2160.

134. BIRAM CHAND v STATE OF UP; AIR 1974 SC 1161, (referred at pr.34 in HARADHAN).

135. Ibid., pr.9, p.1165.

136. Ibid., pr.10, p.1165.

137. Ibid., pr.12, p.1166.

138. KHUDIRAM DAS v STATE OF WEST BENGAL, AIR 1975 S.C. 550.

139. Ibid., pr.11 (p.558).

140. SADHU ROY v STATE OF WEST BENGAL, AIR 1975 S.C. 919.

141. Ibid., pr.10 (p.924).

142. See infra, pr. 5.205-6

143. Prof. P.K. Tripathi, Member, Law Commission of India, has observed that "Ray Court" is different from its predecessors "which were marked by an anti-Parliament and sometimes anti-centre activism" while pleading that "it will be an irony if the powers of this court were to be clipped for the damage caused by its predecessors whose policies it is avidly engaged in reversing." See Submissions made before the Swaran Singh Committee, in [1976] 2 SCC Journal section 29, 43.

144. UNION OF INDIA v BHANUDAS, AIR 1977 SC 1027.

145. Ibid., pr.32 (pp.1046-47).

146. See supra, pr. 5.74 and infra, pr. 5.213

147. At p.1051 (pr.48) in BHANUDAS, supra, n.144.

148. Ibid., p.1052 (pr.52).

149. Ibid., pp.1052-53 (pr.53).

150. Ibid., pr.24.

151. Ibid., at pr.30; the decision in State of Bombay v Virkumar Gulabchand Shah, AIR 1952 SC 335, was concerned with a charge under a penal enactment (subsidiary legislation made under Defence of India Rules, 1939) in which the court had observed that "wartime measures hastily enacted to meet an emergency to be construed more liberally in favour of the state".

152. See supra, pr. 1.247

153. K.T.M.S. ABDUL KADER v UNION OF INDIA, AIR 1977 Mad. 386.

154. [1976] 2 SCC 521: AIR 1976 SC 1207: [1976] SCR

155. See ibid., pp.524-25, also p.529 for the arguments advanced by the Respondent - petitioners.

156. AIR 1964 SC 381, see supra, n.99.

157. Ibid., p.399, pr.35.

158. Ibid., p.400, pr.36.

159. Ibid., pr.38.

160. Ibid., p.401, pr.39.

161. Ibid., p.414, pr.71.

162. Ibid., pr.73.

163. AIR 1966 SC 744; RAM MANOHAR v STATE OF BIHAR.

164. Ibid., p.751, pr.27.

165. Ibid., p.744, pr.4.

166. MOHAN CHOWDHURY v CHIEF COMMISSIONER, TRIPURA, AIR 1964 SC 173.

167. In HABEAS CORPUS case (supra, n. 154) at p.714, pr.474.

168. Ibid., p.877, pr.57.

169. Ibid., pp.631-32, pr.286.

170. Ibid., pp.669-71, pr.397-99.

171. Ibid., pp.744-45, pr.520.

172. Ibid., pp.641-42, pr.320-21.

173. See supra, pr.3.104, esp. n.139.

174. In HABEAS CORPUS case (n.154) at p.703, pr.461; also supra, pr.3.80

175. Ibid., p.705, pr.463.

176. Ibid., p.642, pr.323; see also supra, pr.5.190.

177. Ibid., p.577, pr.58.

178. KHARAK SINGH v STATE OF U.P. [1964] 1 SCR 332; AIR 1963 SC 1295.

179. In HABEAS CORPUS case, pp.578-79, pr.67.

180. Ibid., p.579, pr.68.

181. Beg, J., considered the Bill of Rights "from the viewpoint of personal freedom" only at pp.602-12, pr.182 et seq; Chandrachud, J. applied the converse test saying, "If the enforcement of the fundamental rights can be suspended during an emergency, it is hard to accept that the right to enforce non-fundamental rights relating to the same subject-matter should remain alive," at pp.664-65, pr.379; on the other hand, Sastri, J., in GOPALAN at pr.99 observed that "fundamental rights [were] so called because they have been retained by the people and made paramount to delegated power."

182. Ibid., p.778, pr.596.

183. See supra, pr.4; see also HABEAS CORPUS case, pr. 5.186

184. See supra, pr.1.65 + 3.9

185. In HABEAS CORPUS case (n.154) at pp.579-80, prs. 72-73.

186. Ibid., pp.570-71, prs. 24, 30, 31 and 33.

187. Ibid., pp.612-13, pr.217 et seq.

188. Ibid., pp.652-54, pr.351 et seq.

189. Ibid., pp.682-84, pr.428-31.

190. Ibid., p.762, pr.564.

191. Ibid., pr.565.

192. Ibid., pr.564.

193. Ibid., p.761, pr.562.

194. Ibid., p.754, pr.542.

195. [1973] 4 SCC 225, 333,

196. [1969] 1 All ER 80; see also supra, pr. 1.255.

197. In HABEAS CORPUS case at p.755, pr.543.

198. Ibid., p.754, pr.538.

199. Ibid., p.749, pr.530.

200. Ibid., p.583, pr.92.

201. Ibid., p.585, pr.101.

202. See supra, pr.3.

203. See supra, pr.5.~~188~~ 190, esp. n.165.

204. See supra, pr.5.62-65

205. In HABEAS CORPUS case, see paras 112, 113, 250 and 419.

206. Ibid., see paras 123, 236, 410, 412 and 500.

207. Ibid., pr. 228.

208. Ibid., pr.344.

209. Ibid., pr.481.

210. See supra, pr. 5.74, 86.

211. See supra, pr. 5.98

212. PLD 1957 Lah. 497.

213. PLD 1958 SC 499.

214. See supra, prs. 5.86, 92

215. PLD 1966 SC 286.

216. See supra, pr. 5.123 for the provision.

217. See supra, pr. 5.123 for the provision.

218. See supra, pr. 5.74 for the provision.

219. See pp.326-27 in ROWSHAN BIJAYA (n.215).

220. Ibid., p.298.

221. Ibid., p.314.

222. Ibid., p.312.

223. PLD 1967 SC 373: GHULAM JILANI v GOVT OF WEST PAKISTAN.

224. Ibid., pp.389-90.

225. Ibid.

226. Ibid.

227. Ibid., p.392.

228. Ibid., p.399.

229. PLD 1968 SC 313, 323, 325; ABDUL BAQI BALUCH v GOVERNMENT OF PAKISTAN.

230. Ibid., p.325.

231. PLD 1969 SC 14: GOVT. OF WEST PAKISTAN v BEGUM ABDUL KARIM SHORISH KASHMIRI.

232 [1974] 26 D.L.R.201.

233. For the educational and environmental background of the judges of the Indian Supreme Court, see, Rajeev Dhavan, The Supreme Court and Parliamentary Sovereignty,

234. See supra, pr. 5.134, 136

235. See supra, pr. 5.181, 186 and esp. n.143

236. See supra, pr. 5.101 and esp. n. 56

237. See supra, pr.5.180 esp. n.139.

Notes of vol. II

CHAPTER 6 (paras 6.1 to 6.88: pages 1 to 56).

1. The political history of the peninsula could be traced with some certainty as far back as 600-700 B.C. when the beginnings of the Indian influence could be seen. However, there is no doubt that Singapore (originally known as Tumasek) was founded in 1200-1300 A.D. by an Indian Prince from Sumatra, whose descendant Prince Parameswara, later moved to the mainland and founded Malacca in 1402 A.D. The continuity was maintained when the British came to India but the connection with British India was snapped by s.1 of the Straits Settlements Act 1866 by

virtue of which British Malaya ceased to be a part of British India. (see, generally, L.A. Sheridan (ed.) Malay and Singapore, the Borneo Territories: Development of their laws and Constitutions, pp.xv and 3,4 (vol.9, Br.C.W. series).

2. The important provisions of Malaysia Constitution which were adopted in Singapore were - Arts. 5-12, Part II (Fundamental Liberties) and Arts. 149-151, Parts XI (Special powers against subversion and emergency powers). However, in Singapore all these provisions could be amended by the Singapore legislature like ordinary law by virtue of s.6(2) of the Singapore Independence Act.

3. See infra, pr.7.23 et seq.

4. Richard Clutterbuck, Riot and Revolution in Singapore and Malaya, p.33.

5. Harry Miller, Jungle War in Malaya, p.27.

6. Ibid., pp.27-28.

7. Richard Clutterbuck, op.cit., p.37.

8. Harry Miller, op.cit., p.30.

9. Ibid., pp.18-19, 37.

10. Ibid., p.194.

11. Ibid., p.48.

12. Richard Clutterbuck, op.cit., p.274.

13. See infra pr.6.67 (ASSA SINGH).

14. See Crl.Proc.Codes (Amendment) Ordinance 1955 (No. 217 of 1955 of Fedn. of Malaya).

15. See, Report of the Federation of Malaya Constitutional Commission, pr.23 (HMSO, London, 1957).

16. Ibid., p.34.

16a. Notwithstanding the wide powers available under the 1948 OIC and also the Agreement, in the long title of the Ordinance it was stated that the power to make regulations was conferred on the High Commissioner for "emergency or public danger". (The last-mentioned underlined expressions, it is to be noted, were not used in the 1939 OIC). Indeed in substantive provision (s.3) also the same expressions used in the Ordinance, possibly to justify the wide amplitude of the power.

17. Cf. UK, Emergency Powers Act 1920 (ss. 1 and 2) and Emergency Powers Order in Council 1939 (s.6(1)); see also Art. 149, Constitution of Malaysia.

18. See supra, pr.4.105

19. Richard Clutterbuck, op.cit., p.175.

20. See infra, pr.8. 41, 43

21. See supra, pr.4. 16, 4 56 of sw

22. In 1950, by Amendment No. 13, cl.(3) of Reg.17 was amended to make it the"duty" of the Chairman of the advisory board to inform the objector of the "grounds" and such other "particulars" as he considered sufficient to enable the objector to "present" his case; see also n.23, below, for procedure under the new Reg.17 of the 1951 Regulations.

23. In its new form in the 1951 Regulations, Reg.17 appeared as a crude amalgam of old and new provisions. Some of the new features deserve to be noticed:
    (i) clause (1)(a) was saddled with a new proviso which authorised the Chief Secretary to make a "further order" for a "further period not exceeding two years";
    (ii) under new clause (1)(c) the detainee could, after expiry of 18 months, "request" that his case be "reviewed by the Chief Secretary". The latter could, if he thought fit, refer any case to a "Committee of Review" for "consideration and advice".
    (iii) The bad draftsmanship of the new Reg.17 was reflected in the provision of clause (3). In apparent conflict with clause (1)(c) it empowered the Committee to "consider and decide" and further said that its "decision" should be "final". Clause (4A) also added to the confusion by elaborating the scope of the "decision". Clause (3A) was saddled with a proviso which authorised the Committee Chairman to refer "any particular case" to a Commission for "consideration and decision".
    (iv) The new Reg.17A added a proviso that the Chief Secretary could allow the detainee to have his objection heard by the appropriate Committee in the Colony (Singapore). Apart from its extra-territorial operation which was favourable to the detainee and was not likely to be challenged, it also suffered from the defect of a similar "conflict" in that the new clause (1)(c) had abrogated the right to make "objection".

24. See supra, pr.4.105

25. See ibid., pr.4.119

26. Harry Miller, op.cit., pp.49-50.

27. Cmnd. 5847, pr.70; see also supra, pr. 4.218

28. Infra, pr.6.49

29. Ibid., pr.6.51

30. A grossly extended notion of vicarious criminal liability was introduced making the inhabitants of any area liable as a body for certain offences committed within the area. In a democratic form of government the "fundamental liberties" of the citizens as a body could not naturally be tampered with in a despotic manner with such wide power of punishment derogating from the basic principles of Rule of Law. In 1951, the scope of the punishment which, until then, could be either fine or closure of one or more shops in the area, was widened by the new Reg.17D(2). It provided for "detention in custody" and expressly barred "appeal". The only safeguard being non-application of the provision to federal citizens and British subjects with a further provision that the Chief Secretary could suspend, on conditions, the operation of the order at his discretion.

31. See supra, pr.1.54

32. Ibid., pr.1.91

33. Sheridan, op.cit. (supra, n.1), p.11.

34 and 35. [1875] L.R. 6 P.C.381, 392-94.

36. See supra, pr.1.73 et seq.

37. See, ss.9 and 10, Courts Ordinance 1907.

38. See supra, pr.1.90 et seq.

39. See supra, pr.1.93

40. Sheridan, op.cit., p.20.

41. Ibid., p.19.

42. See Courts Enactment, (Ordinance No. 14 of 1918; Cap.27 Laws of Federated Malaya States 1935) ss.3(i)(a) and s.50.

43. Cap.113 of Singapore Statutes 1970 (cap.21 of Laws of Straits Settlements 1936).

44. Cap. 6 of 1935 Laws of the Federated Malaya States, 1935.

45. See Mallal's Criminal Procedure, p.526; s.317 did not expressly state that the common law right to the writ was abrogated.

46. ss.317 and 325 of 1970 edition re-enacted the provisions of ss.386 and 396 of 1936 edition.

47. Cf. s.491, Indian Criminal Procedure Code 1898; see supra, pr. 5.55

48. See supra, pr.5.55

48a. By 1976 Constitutional amendment (in Malaysia) the safeguard guaranteed by Art.5 was denied, with retrospective effect, to a person "arrested or detained or placed under restricted residence under any law relating to the safety of the Federation". (see, Amnesty International Report 1977, p.198).

49. See, Report of the Constitutional Commission, op.cit. (supra, n.15), pr.161: "These rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them a special protection". The underlining is meant to indicate the imprecision - cf. supra, pr. 6.39.

50. L.A. Sheridan, "Constitutional Problems of Malaysia" [1964] 13 I.C.L.Q. 1349, 57; we do not agree with his interpretation of the word "may" - cf. pr. 6.43; see also, his Malaya and Singapore. . .Laws and Constitutions, op.cit.(supra, n.1), p.48.

51. CHIA KHIN SZE, see infra, pr.6.65, n.63; see however, SURINDER SINGH (infra, pr.6.69, n.72) and ASSA SINGH (infra, pr.6.67, n.67).

52. See, Report of Constitutional Commission, op.cit., supra, pr.172: "The history and continued existence of the present emergency show that organised attempts to subvert constitutional government by

violence or other unlawful means may have to be met at an early stage by use of emergency powers if they are to be prevented from developing into serious and immediate threats to the safety of the State. We recommend different provisions for dealing with different situations.

53. Infra, pr.6.11

54. See supra, pr.4.138

55. Supra, pr.6.26; see also, Reg.6D of 1948 Emg.Regulations.

56. s.59 was an expanded version of Reg.4C of 1948 Emg.Regulations; see supra, pr.6.27.

57. See supra, pr.6.19.

58. Ibid., pr.6.25.

59. Cf. s.4(2), Emerg.Regn.Ordn.1948; supra, pr.6.11.

60. See, Richard Clutterbuck, op.cit., p.261.

61. Supra, pr.6.22.

62. Supra, prs. 6.32-33, 39.

62a. For position obtaining after 1976, see supra, n.48a.

63. [1958] M.L.J.105.

64. See supra, pr.6.7.

65. Loke Kit Choy, "Fundamental Rights of Arrested Persons", [1958] Mal.L. Rev. 113, 115 and "Constitutional Supremacy in Malaysia in the light of two recent decisions" (1969) Mal.L.Rev. 260, 263.

66. [1968] 1 M.L.J. 92.

67. [1969] 2 M.L.J. 30.

68. Ibid., pp.38, 43.

69. See supra, pr. 6.7.

70. [1969] 2 M.L.J. 30, 46.

71. See D. Basu, Commentary on the Constitution of India, vol.1, p.149; esp. cases cited at footnotes 15-17, ibid.

72. [1962] M.L.J. 169.

72a. Ibid., p.171.

73. [1969] 2 M.L.J. 129.

74. AIR 1966 S.C.740; see also, supra, pr.5.190 (n.163).

75. [1941] 1 K.B. 72; see also supra, pr. 4.76

76. [1969] 2 M.L.J.129, 140.

77. Ibid., p.137.

78. [1942] A.C.206, see also supra, pr.4.

79. [1969] 2 M.L.J.129, 147.

80. Ibid., pp.146-47.

81. AIR 1966 S.C. 1925.

82. [1942] A.C.284; see also supra, pr.4.

83. Supra, pr.4.86

84. Supra, pr.4.76

85. Supra, pr.4.70

86. [1969] 2 M.L.J.129, 151.

87 and 88. Ibid., p.148.

89. Supra, pr.6.47

90. [1969] 2 M.L.J.129, 150-51.

91. AIR 1951 S.C.157; see also, supra, pr.5.

92. [1969] 2 M.L.J.129, 150.

93. [1917] A.C.260; see also supra, pr.4.

94. [1969] 2 M.L.J. 130, 147.

95 and 96. Ibid., p.153.

97. Ibid., p.153.

98. Ibid., p.141.

99. Supra, pr.4.16

100. [1969] 2 M.L.J.129, 157.

101. Ibid., p.158.

102. Supra, pr.6.78.

103. Supra, pr.5.152

104. Supra, pr.4.63

105. [1959] M.L.J.217.

106. Ibid., p.219.

107. [1968] 2 M.L.J. 219.

108. Ibid., p.221.

109. Ibid., pp.221-22

110. Supra, pr.6.47

111. (1970) 1 M.L.J. 91

112 and 113. Ibid., p.92

114. Rowena Daw, "Preventive Detention in Singapore - A comment on the case of Lee Mau Seng" (1972) Mal. L. Rev. 276

115. (1971) 2 M.L.J. 137

116. Supra, prs. 6.22, 62

117. (1971) 2 M.L.J. 137, 145

118. Rowena Daw, op.cit., p.286

119. Ibid., p.287

120. Supra, pr.6.78

121. 1972 2 M.L.J. 46

122. Supra, pr. 6.61

123. (1975) 2 M.L.J. 276

124. (1977) 1 M.L.J. 39

125. Ibid., p.42

126. (1977) 1 M.L.J. 82

127. Ibid., p.84

128. Supra, pr. 6.62

129. (1970) 1 M.L.J. 101 ; 130. (1968) M.L.J. 148.
131. (1966) 2 M.L.J. 183 ; 132. supra, pr. 4.98 (esp. n.24(c) ) ;
133. Leslie Macfarlane, Violence and the State, p. 94 ; 134. supra, n. 48a.
135. see, Table A.

## CHAPTER 7

Section I (paras. 7.1 to 7.55; pages 57 to 87)

1. Y.P. Ghai, "Constitutions and the Political Order in East Africa", (1972) 21 ICLQ 403, 407

2. Martin Wight, British Colonial Constitution, p.17

3. Ibid., p.93

4. According to the definition at least half the members should have been "elected"by the inhabitants ofthe colony whereas only in Gold Coast in 1946 the "selected" African members out-numbered the official and nominated unofficials and the territory attained independence as Ghana in 1957. Nigeria which attained independence after it, in 1960, had first 'unofficial' majority (only 1/7th elected) in 1947. Although Kenya also obtained 'unofficial majority' in the same year, the first elected African representation was provided in 1957, although it did not equal European representation until the following year and got independence five years later. In Tanganyika which became independent in 1961, Africans were nominated for the first time in 1945, equalled Europeans and Asians in 1955 and got elected in 1958-59 but official majority continued until independence. Uganda, which attained independence in the following year, got elected African representatives in 1945. Northern Rhodesia and Nyasaland attained independence in 1964 also without unofficial majorities. In the former in 1959 and in the latter in 1955 elected representation was obtained but Europeans outnumbered the Africans.

   The picture depicted above lends weight to the argument that it was always a case of "governing without consensus" in Africa.

5. Y.P. Ghai, op.cit., n. 1, at p.409

6. Sir Kenneth Roserts-Wray, Commonwealth and Colonial Law, p.369

7. Supra, pr. 5.130, 134, 138

8. Supra, pr. 1.188

9. Supra, pr. 1.197 et seq

10. Supra, pr 1.180

11. Infra, pr 7.35

12. Supra, pr 4.190

13. The slow and insignificant participation of indigenous element in the legislative process (see Supra, n.4) enabled the colonial rulers to enact arbitrary laws with greater freedom.

14. Supra, prs. 4.3, 4, et seq

15. Art. 25(1)

16 and 17. Art. 25(1) in each case

18. Art. 33(1)

19. Published in the Supplement to Zanzibar Gazette dated 18.8.1897, vol. VI, No. 200

20. Supra, pr 7.8

21. Supra / Notes 15-18, Ibid.

22. Supra, pr. 4.4, 6

23. Art 15 of European Convention of Human Rights; see also Art. 4(1), International Covenant on Civil and Political Rights 1966

24. Supra, pr. 3.8, 14

25. Uganda, Ordinance No. 15 of 1908, cap 46 of 1951 Laws of Uganda. Tanganyika, Ordinance No. 18 of 1921, cap 38 of supp. 58, Laws of Tanganyika. Kenya, Ordinance No. 2 of 1923, cap 56 of 1948 Laws of Kenya.

26. Ibid., s. 5 (Tanganyika), s. 8 (Kenya), s. 10 (Uganda).

27. Ibid., ss. 6, 10 and 8, in the above order

28. Supra, pr. 7.9

29. Supra, pr. 7.5, 6

30. Deportation of Suspects Ordinance, No.20 of 1916, cap 38 of 1928 Laws

31. Ordinance No. 21 of 1914, cap 59 of 1951 Laws, discussed infra, pr. 3.7

32. S. 402, Criminal Code of 1916

33. Ordinance No. 42 of 1930, ss. 33 and 34

34. Supra, pr. 7.8, notes 15-18

35. Ordinance No. 26 of 1945, cap. 50 of 1951 Laws

36. Ordinance No. 37 of 1949: Deportation (Immigrant Br. Subjects) Ordinance 1949

37. Ordinance No. 20 of 1935, cap. 49 of 1951 Laws

38. Supra, pr. 7.11

39. See s. 3(2), sub-clauses (iii) and (iv) of the enactments cited at n. 30, Supra

40. Supra, n. 31, s. 7(6)

41. Ibid., ss. 4 and 5

42. Supra, pr. 1.187

43. Supra, pr. 1.173

44. Supra, pr. 1.187

45. Alan Miller, "The Sanctions of Customary Law: A Study in Social Control", (1964-65) 1 Nig. L.J. 173, 181

46. Infra, pr. 7.56 et seq

47. Infra, pr. 7.63 for discussion on the scope of the expression

48. [1928] A.C. 459; also see [1931] A.C. 662 where it was held that "barbarous" customs repugnant to "natural justice, equity and good conscience" must be rejected; see Supra, pr. 1.173

49. Supra, pr. 7.4-6

50. Act No. 14 of 1957, s. 4 (c)

51. Ibid., s. 3(2)

52. (1958) 3 W.A.L.R. 547; see also infra, pr. 7.139

53. Act No 19 of 1957: The Deportation (Othoman Larden and Ahmadu Baba) Act. For a discussion of the episode and provisions of the Act, see - D.C. Holland, "Personal Liberty in the Commonwealth", (1958) 11 Cur. Leg. Prob. 151, 159-60 and S.O. Gyndoh, "Liberty and Courts" in Essays in Ghana Law p. For colonial precedents, see, esp., cap. 37 of Laws of Gold Coast 1920 - Coomassie Political Prisoners Detention and Deportation Ordinance, No. 1 of 1896 which expressly suspended habeas corpus (vide s. 7); also see, caps. 35, 36, 39-42, ibid., for similar laws made for Ashanti, Togoland and Cameroon; see also see infra, pr. 7.19.

54. Supra, pr. 2.121-22

55. Supra, pr. 2.125

56. Political Removal and Detention of Natives Ordinance, No.1 of 1909, cap. 93 of 1946 Laws

57. Defence of the Gold Coast Ordinance, see Supra, n.31

58. Ibid., s. 2(1)

59. Ibid., sub-clause (i) of s. 2(1)

60. Ibid., s. 3

61. Ibid., s. 4

62. Ibid., s. 6 (for similar provision see n. 53 Supra, s. 7 of cap. 37 of 1920 Laws)

63. Supra, n. 56, at ss. 2 and 3

64. Ibid., s.4

65. Supra, pr. 7.8

66. Supra, n. 56, s. 6

67. Supra, pr. 7.4-7

68. Political Removal and Detention of Natives Rules made under s. 8 of the Act

69. Defence Regulations 1939, No. 25 of 1939 of Gold Coast Colony

70. The Nigeria Defence Regulations 1939, No. 32 of 1939 was repealed and re-acted as the Nigeria General Defence Regulations 1941, No. 75 of 1941, under E.P. (Colonial Defence) OIC 1939-40

71. In Gold Coast, s. 16; in Nigeria, s. 36 (1939), s. 57 (1941)

72. In Gold Coast, s. 17; in Nigeria, s. 37 (1939), s. 58 (1941)

73. Supra, pr. 4.47 et seq

74. Supra, pr. 6.16

75. L.S.B. Leakey, Defeating the Mau Mau, p.41

76. L.P. Mair, Br. Journal of Sociology, 1958, vol. 9, No. 2, p. 175

77. F.B. Welbourn, East African Rebels, p. 133

78. F. Majdelenary, State of Emergency, p. 70

79. F.D. Corfield, History of the Origin and Growth of Mau Mau, Cmnd 1030, p. 9

80. Donald L. Barnett and Karari Njama, Mau Mau from within, p. 199

81. J.M. Kariuki, Mau Mau Detainee, pp. 29-30

82. Corfield, op.cit. (supra, n. 79) at p. 273

83. G.N. No. 1103 of 1952 made on October 20, 1952

84. loc. cit. supra, (n. 75), at p. 100

85. loc. cit, supra, (n. 81) at p. 34

86. Statement by the Secretary of State for Colonies, see Parl Debates, Commons, vol. 607, 6 June 1959, col. 266

87. See (a) Documents relating to the deaths of eleven Mau Mau detainees at Hola Camp in Kenya, Cmnd. 778 (HMSO, London 1959)
(b) Administrative Enquiry into allegations of ill-treatment and irregular practices against detainees at Manyani Detention camp and Fort Hall District Works Camp (Govt. of Kenya, Nairobi, 1959).

88. By Amendment No. 26 of 1953

89. By Amendment No. 5 of 1954

90. Supra, pr. 6.27 : , Reg. 17D (A)(2),

91. By Amendment No. 6 of 1954

92. Supra, pr. 6.27.

93. Reg. 3A punished 'terrorism' with death

94. Reg. 8FA punished the offence with imprisonment for ten years

95. Margery Perham in her Foreword (at p. xiv) to Mau Mau Detainee by J.M. Kariuki, op.cit. (supra, n. 81)

96. Ibid., p. xv

97. Ibid., p. 37

98. Amendment Reg. No. 6 of 1955, G.N. No. 370 of 1955

99. Amendment Reg. No. 8 of 1954; originally Governor could delegate "all or any of the powers except Reg. 2", see Reg. 32(1)

100. Kariuki, op.cit., supra, n. 81, at pp. 126-7

101. Amendment Reg. No. 3A of 1953, G.N. No. 285 of 1953

102. Between 1953 and 1959 only 2571 objections were made and in 1088 cases the Committee recommended release which was granted in all cases; see Parl Debates, op.cit., supra, n. 86, 25 June 1959, col 152;

103. Kariuki, op.cit. (supra, n. 81), at p. 32

104. For an example of the good sense of the legislators at Westminster, who were the ultimate arbiters to check excesses in dependencies, see Parl Debates, Commons, vol. 600, 24 February 1959 - col. 1019 - "Secretary of State has responsibility to British Parliment for sound administration of justice in this colony and for abuses which may arise in connection with it ... all British subjects are entitled to enjoy the standards of justice and administration characteritics of the Codes of our country...", this notwithstanding the view that - " It was not only a civil war between European and Africans but in which the Africans suffered greviously..." (ibid., col. 1029-30)

105. The Emergency (Detained Persons) Regulations 1955 (G.N. No. 729 of 1953) repealed and re-enacted as The Emergency (Detained Persons) Regulations 1954 (G.N. No. 1142 of 1954)

106. Ibid., Reg. 22 and also Reg. 7

107. Ibid., Reg. 6

108. Supra, n. 87 (a), Cmnd. 778 at p.14 (Reg. 22 and s. 18 of the Prisons Ordinance was relied on for the justification)

109. Supra, n. 104, the last quotation

110. Supra, pr. 4.98, esp.n. 24(c) and pr. 6.75

111. (1953) 26 K. L.R. 97

112. (1953) 26 K.L.R. 100

113. (1953) 26 K.L.R. 98

114. 1955 22 EACA 478

115. (1954) 21 EACA 377

116. (1954) 21 EACA 410

117. Ibid., p. 414

118. (1954) 21 EACA 316

119. Ibid., p. 324

120. Ibid., p. 318

121. D.C. Holland, "Emergency Legislation in the Commonwealth", (1960) 13 Cur. Leg. Prob. 140, 165

122. Ibid., p. 165

123. Corfield, op.cit. (supra, n. 79), at p. 5

124. Report of Nyasaland Commission of Enquiry (herein after called Devlin Report), p.46, Cmnd. 814 (HMSO, London, 1959)

125. G.N. No. 31 of 1959

126. G.N. No. 99 of 1959

127. See Holland op.cit., (n. 121), for a full discussion at pp. 152-9

128. loc.cit., supra, (n. 124) at p. 91

129. Ibid., p. 130

130. Holland op.cit., supra, (n. 121) at p. 156

131. Ibid., p. 155

132. Supra, n. 121

133. Supra, n. 124

134. Supra, pr. 7.30

135. Holland, op.cit., supra, (n. 121), at pp. 157-8

136. loc. cit. (n. 124) at p. 137

137. Ibid., p. 132

138. Ibid., p. 142 (pr. 285)

139. (1956) R & N 617

140. (1958) R & N 710

141. Ibid., p. 716

142. Ibid., p. 717

143. [1960] 1 Q.B. 241

145. G.N. No. 132 of 1954

146. Infra, pr. 7.99, esp. n. 103

SECTION II (paras 7.56 to 7.67: pages 88 to 96)

1. James C.N. Paul, "Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa", (1974) 35 Ohio St. L.J. 851, 855

2. Zambia's case was an exception in that it got a 'Made in Westminster' Constitution with a republican status and its 1973 'autochthonous' Constitution made a straight drive for One-party state.

3. Nigeria (Constitution) Order in Council, S.I. 1960 No. 1652, had in its schedule the Independence Constitution; the 'autochthonous' Constitution creating a Republican status was enacted in 1963. Tanganyika had become independent in 1961 and a Republic in 1962 while Ghana was the first state to become independent as well as a Republic in 1957 and 1960 respectively.

4. For relevant provisions, see Constitutions: ss. 17-27 of 1960 Nigeria Constitution (supra) and ss 18-28 of 1963 Constitution; ss. 17-33 Sch of Uganda (Independence) Order in Council, S.I. 1962 No. 2175; ss. 14-30, Sch 2 of Kenya Independence Order in Council, S.I. 1963 No. 1968; ss. 11-27, Sch 2 of Malawi Independence Order S.I. 1964 No. 916; ss. 13-30, Sch 2 of Zambia Independence Order S.I. 1964 No. 1652.

5. Zambia alone retained substantially unaltered its Bill of Right; in the Malawi Republican Constitution it was deleted in toto whereas in Kenya the Constitution Amendment Act. No. 38 of 1964 did away with its special entrenchment.

6. See J.S. Read "Bills of Rights in the Third World: Some Commonwealth Experiences", (1973) 6 Verfassung Und Recht In Uberesee (Hamburg), 21.

7. R.B. Seidman, "Law and Economic Development in Independent English speaking Sub-Saharan Africa," (1966) Wis. L. Rev. 998, 1023. Prof Seidman appears to trace what he calls "nominal adherence to the tradition of submission to the Rule of Law" of the new leaders of Africa to their English education. This could perhaps be better stated in another way, namely, neither in British nor in colonial polity there was any tradition of a written Bill of Right. In the former's case however there was a strict and true adherence to the 'Rule of Law' but in the latter's case it was only nominal, as we have already seen. (see supra, pr. 7.1 et seq).

8. See A. Aguda and O. Aguda, "Judicial Protection of Some Fundamental Rights in Nigeria and the Sudan Before and During Military Rule", (1972) 16 J.A.L. 130.

9. The Nigeria (Constitution) (Amendment No. 3) Order in Council, S.I. 1959 No. 1772; it added a "Sixth Schedule" to the principal order embodying the "Fundamental Rights" which reappeared in 1960 and 1963 Constns in the same form.

10. The New Commonwealth and its Constitutions p. 178

11. Ibid., p. 185

12. Ibid., pp. 183-84

13. See paras 1-4 of the Sixth Schedule inserted by 1959 Order and ss. 17-20 of 1960 Constitution and ss. 18-20 of 1963 Constitution.

14. Ibid., para 10 and ss. 26 and 27 respectively

15. See de Smith, op.cit., supra, (n.10) ibid., p. 193

16. Ibid.

17. Arts 32 and 226 of Indian Constitution; see supra pr. 5.68, 70.

18. See relevant Constitutional provisions, supra, n. 4, and esp., s. 31(2), Nigeria (1960); s. 32(2) Uganda (1962); s. 25(2) Kenya (1963); s. 25(2) Malawi (1964); s. 28(2) Zambia (1964).

19. Art. 21 (India); Art. 5(1) of European Convention; s. 20 (Nigeria); s. 19(1) (Uganda); s. 16 (Kenya); s. 13 (Malawi); s. 15 (Zambia); Art. 5(1) in Malaysia and Singapore, see supra, pr. 6.40.

20. see, s. 32 (Nigeria); s. 4(5) (Uganda); s. 4(8) (Kenya); s. 4(5) (Malawi); s. 4(6) (Zambia). In East + Central Africa the relevant provision in each case was in the OIC (not in the Constitution) and it was different also from Nigerian.

21. AIR 1950 SC 27; see also supra, pr. 5.139.

22. Arts 20-22 (India); ss.17,20-21(Nigeria); ss. 18,19 + 24 (Uganda); ss.12,13-18 (Malawi); ss. 14,15 + 20 (Zambia); Arts. 5-7 of the European Convention.

23. s.20(1)(a)(Nigeria); s.19(1)(a)(Uganda); s.16(1)(a)(Kenya); s.13(1)(a) (Malawi); s.15(1)(e)(Zambia).

24. s.26(2) (Nigeria); s.28(3) (Uganda); s.25(3)(Kenya): s.22(3) (Malawi); s.24(3)(Zambia)

25. Clause (c) of Art 5(1) of the European Convention.

26. Arts. 8-11 of the European Convention.

27. Sir Kenneth Roberts-Wray, "Human Rights in the Commonwealth", (1968) 17 ICLQ 908, 922

28. See Aguda and Aguda, op.cit., (supra, n. 8 at p. 140)

29. See J.S. Read, op. cit., (supra, n. 6), at pp. 40-46 for an elaborate discussion.

30. See Supra, pr. 7.11

31. Supra, n.9; s. 244 inserted by 1959 Order dealt with "emergency".

32. See ss. 28, 65 and 66 of 1960 Constn. and Arts 29, 70 and 71 of 1963 Constn.

33. s.30(1) (Uganda); s.26(1) (Malawi); s.29(1) (Zambia)

34. s. 29 (Zambia)

35. See s. 246 inserted by 1959 Order (cf. supra, n.9); and Art 29 and 30 respectively of 1960 and 1963 Constn.

36. For Malaysia and Singapore, see Art 151 of Malaysian Constn and also see Art. 22 of Indian Constn.

37. Supra, pr. 6.78 and clause (1) (b) of Art 151 of Malaysian Constn and clause (4)(a) of Art 22 of Indian Constn.

38. Clause (5) of Art 22 of Indian Constn.

39. Loc. cit., supra (n. 10) at p. 197

40. Ibid.,

41. See s. 26 (Zambia, 1964); s. 24 (Malawi, 1964)

SECTION III (paras 7.68 to 7.102: pages 96 to 118)

1. Act No. 61 of 1963 of Uganda; also see U.K. Legislation, Uganda Act 1964.

2. See Chapter III of the 1967 Constitution, esp. Art. 10 in respect of personal liberty.

3. See Art. 3 (Uganda, 1967); s. 4(1)(Nigeria, 1963)

4. Chanan Singh, "The Republican Constitution of Kenya," (1965) 14 ICLQ 878, 940.

5. See Part VI, esp. ss. 53, 54 and 56 of Kenya (Constitution) Order in Council 1958, S.I. 1958 No. 600.

6. In re. AKOTO (see infra, pr. 7.142) the court laid undue emphasis on the word "should" and equated the declaration with the coronation oath of the English Monarch.

7. Cf. Ch. III, Uganda Constitution (1967) with Ch, IV of Ghana (1969).

8. Art 1, Uganda (1967); Art 1(2), Ghana (1969); see also s. 3, Kenya (1969)

9. See Art 21, Uganda (1967); Art 26, Ghana (1969)

10. Clauses (6) to (9) of Art 21, Uganda (1967); Art 27, Ghana (1969)

11. Art. 28, Ghana (1969)

12. (a) The Constitution of Kenya (Amendment) (No. 3) Act no. 18 of 1966;
    (b) Y.P. Ghai and J.P.W.B. Auslan, Public Law and Political Change in Kenya, p. 434, esp. f.n. 80

13. Ordinance No. 2 of 1960; ss. 3 and 4 were amended by s. 4 and Schedule II of Act. no. 18 of 1966; see also Ghai and McAuslan, op.cit., p. 434, esp. f.n. 79.

14. The Kenya Independence Order in Council 1963 was invoked after independence (in 1966) to make stringent "emergency" laws, see infra, pr. 7.88

15. See new s. 29 substituted by s. 3 and Schedule I of Act 18 of 1966.

16. See new s. 27(1) similarly substituted; it removed the original requirement "reasonably justifiable" and also otherwise expanded the scope of derogation by extending it to the freedom of movement among others.

17. s. 27(2)

18. Ordinance No. 2 of 1960 (Kenya); Ordinance No. 5 of 1960 (Zambia); Ordinance No. 1 of 1960 (Malawi); for reasons given in Kenya for discarding the term "emergency", see Ghai and McAuslan, op.cit., supra, (n. 12(b)) at p. 434, f.n. 80

19. s. 2, cap. 57 of 1967 Laws of Kenya; s. 2 of cap. 265 of 1965 Laws of Zambia; s. 2, cap. 14:02 of 1973 Laws of Malawi; (in all cases, the enactment was entitled, The Preservation of Public Security Act).

20. Ibid., see ss. 3 (Part II, "Public Security Measures") and 4 (Part III, "Special Public Security Measures"); s. 3, Zambia.

21. Ibid., s. 3, Malawi

22. Ibid., s. 4(1), Kenya

23. Ibid., s. 3(3), Zambia

24. Ibid., s. 5(a), Zambia; s. 4(a) Malawi; s. 7 (1) (c), Kenya

25. Ibid., s. 4(2)(1), Kenya; s. 4(c), Malawi; s. 5(c) Zambia

26. Ibid., s. 5(c), Zambia; s. 4(c), Malawi; see also s. 7(1)(f), Kenya

27. Supra, pr. 7.50

28. See enactments, supra, n. 19; ss. 4(m) 7(1) (g) Kenya; s. 5(f), Zambia; s. 4(f), Malawi

29. Ibid., s. 7(3), Kenya; s. 6(2), Zambia; s. 5(2), Malawi

30. Ibid., s. 5, Kenya; s. 6(3), Zambia

31. By an amendemnt in 1968 the power of appointment was vested in the President, see Legal Notice No 278 of 1968.

32. See clause (4) to (6) of Art 22 of Indian Constitution

33. see Reg. 9 and Constitution, s. 27 (3) of 1963 and s. 83(3) of 1969.

34. In 1969, by Act No. 5 of 1969, the Constitution was re-enacted to consolidate the various amendments made in the 1963 Constitution from time to time; Chapter V (ss. 70-86) of the new Constitution corresponded to Chapter II (ss. 14-30) of the1963 Constitution and carried the original caption, "Protection of Fundamental Rights and Freedoms of the Individual".

35. Reg 4(2) of Part III contained the list of matters but it had to be read with Reg 3(3) and the proviso thereof of Part II.

36. loc. cit., supra, (n. 12(b)) at p. 435.

37. See G.N. No 375 of 1964 etc and S.I. No. 8 of 1965 etc

38. Reg. 31A was renumbered later as Reg. 33 in the 1972 Revd Edn of Laws in which Reg. 15 was also renumbered as Reg. 16.

39. Supra, pr. 7.33

40. See clause (6) of Reg. 31A; it of course contained the usual requirement of "reason to believe" that was almost invariably included in such regulations in all territories during colonial rule.

41. Supra, pr. 7.77, see, however, infra pr. 7.88 for special provision.

42. Reg. 31C

43. e.g. see Reg. 20 as to "power of arrest".

44. Supra, pr. 7.80

45. The regulations were originally promulgated in July 1964, vide G.N. No. 375 before Zambia became independent in October, 1964.

46. See G.N. Nos 377 and 389 of 1964 and S.I. Nos 8 and 104 of 1965.

47. Supra, pr. 7.67

48. By Act No. 33 of 1969, the new s. 26A replaced the old s. 26, in turn, to be replaced by Art. 27 in the 1973 Constitution.

49. In India, the judiciary read into the neutral expression "representation" of Art. 22 (5), the dual right of making it to the detaining authority as well as the "advisory board".

50. Zambia Constitution, s. 26(3) of 1964; s. 26A(2) 1969; Art 27(2) of 1973.

51. See G.N. No. 412 of 1964 etc.

52. See esp. Reg. 6-8, 11-13.

53. See Regs. 3(7) and 4(8).

54. See Supra, pr. 7.63-64.

55. See Malawi Regulations, Reg. 3(9).

56. Ibid., Reg. 4(7)

57. Ibid., Reg. 3(8)

58. Originally enacted in 1960, the Act was amended in 1965 before the One-party State Constitution was enacted in 1966 deleting the Bill of Rights.

59. Cap. 14.03 of 1973 Laws: it was originally enacted as Ordinance No. 32 of 1954 but later amended in 1963, 1964 and 1967.

60. Ibid., see s.2 for definition of the terms

61. Supra, pr. 7.8

62. Supra, pr. 7.62

63. See ss. 5-7, cap. 14:03; also see for similar provisions the earlier laws of Gold Coast and Kenya, supra, pr. 7.15.

64. S.I. 1963 No. 1968

65. See Legal Notice No. 264 of 1966

66. s. 127 re-enacted s. 19(1) of the Order

67. See Ghai and McAuslan, op.cit. (supra, n. 12(b)) at p.

68. See the Regulations, supra, n. 105, esp. Reg. 2 (for definitions) and also Regs. 3-9 and 14-16.

69. Act No. 28 of 1957, Ghana; Act. No. 1 of 1961, Nigeria; cap. 307 of 1964 Revd. Laws of Uganda; cap. 268 of 1965 Edn of Laws of Zambia.

70. See ss. 2, 5-7, Ghana.

71. See s. 3, Ghana; for the other states, see supra, pr. 7.64.

72. See s. 5, Ghana; in the case of each of the other state, s.3.

73. See s. 6, Ghana.

74. See s. 7, Ghana, also see supra pr. 4.6

75. See s. 3(2)(a), Nigeria.

76. See s. 3(2)(a), Uganda.

77. See s. 3(2)(a), Zambia.

78. See s. 5(2)(a), Ghana

79. Ibid., s. 6(2)(a).

80. See Legal Notice No. 327 of 1958

81. See Supra, pr. 7.18 esp. n. 53

82. See Legal Notice no.54 of 1962 (Emergency Powers (General) Regulations), Legal Notice No. 64 of 1962 (Emergency Powers (Detention of Persons) Regulations); Legal Notice No. 65 of 1962 (Emergency Powers (Restriction Orders) Regulations).

83. See Supra, pr. 7.54

84. See B.O. Nwabueze, The Constituional Law of Nigerian Republic, pp. 137-38, 139.

85. s. 10, Act 28 of 1957; see supra, pr. 7.90.

86. Ibid., s. 15

87. Ibid., s. 11

88. Ibid., s. 12

89. See s. 5, Act No. 17 of 1958

90. Ibid., s. 2(1); compare with the requirement of s.5 for the proclamation of "state of emergency" under the 1957 Emergency Powers Act (see supra pr. 7.90-96).

91. Ibid., s.2(2).

92. See "Ghana's Preventive Detention Act", (1961) 3 Jrl of Internl.Comm. Jur. No. 2 p.65 at p. 66.

93. Act No. 240 of 1964 (The Preventive Detention Act 1964).

94. Ibid., s. 2(1)

95. See, s.7 of 1964 Act and sub-ss. (4) and (5) of s. 3 of 1958 Act.

96. See, s. 4 of 1964 Act.

97. Act No. 244 of 1964, see also infra., pr. 7. 135.

98. Act No. 60 of 1962, cap. 490 - supp. 62.

99. Ibid s.6; it allowed 15 days to inform the detainee of the "grounds" as against five days in Ghana, q.v., supra, notes 91, 96 and paras 7, 95, 97.

100. Ibid., s.5.

101. Ibid., s.2(1).

102. Ibid., s.2(2).

103. Ibid., s.3.

104. Ibid., s.7.

SECTION IV (paras 7.103 to 7.127: pages 118 to 135)

1. See Ulrich Scheuner, "Parliamentary Government in Modern Democracies", (1969) 1 Rev. of Ghana Law 105, 113-14.

2. R.B. Seidman, "Constitutions in Independent, Anglophonic Sub-Saharan Africa: Form and Legitimacy" (1969) Wisc. L.R. 83, 85.

3. In Ghana and Nigeria, the Independence Constitutions provided for the "House of Chiefs" and in Uganda, the chiefly "kingdoms" were given separate Constitutions despite being made parts of the federal set-up; in Zambia and Malawi, even in the One-party State Constitutions, the institution of "Chiefs" has found a place (see, Part VII (Arts. 95-106, Zambia; and s.6, Malawi).

4. John Hatch, Africa Emergent, p.36.

5. J.K. Nyerere, Freedom and Unity, p.195.

6. K. Nkrumah, I Speak of Freedom, pp.157-58.

7. Bob Fitch and Mary Oppenheimer, Ghana: End of an Illusion, pp.54, 57-58.

8. A.A. Afrifa, The Ghana Coup, p.130.

9. Ibid., pp.113-14.

10. Peter Barker, Operation Cold Chop, pp.25-28.

11. Afrifa, op.cit., at p.127.

12. J.K. Nyerere, Freedom and Socialism, pp.112-13.

13. J.K. Nyerere, Freedom and Unity, p.131.

14. The Critical Phase in Tanzania, p.244.

15. Two African Statesmen, p.180.

16. See supra, n.149, at p.312.

17. Loc.cit., supra, n.14, at pp.77-78.

18. Colin Legum, Zambia, Independence and Beyond, p.155.

19. Ibid., p.157.

20. John Hatch, op.cit., at p.214.

21. Ibid., p.238.

22. Ibid., p.242.

23. Ibid.

24. "Proposal for Republican Constitution of Malawi", presented to Parliament by the Prime Minister in November, 1965, at p.5.

25. Ibid.

26. Ibid.

27. See Constitutions: Tanzania, s.3 cap.596, as amended in 1975; Malawi, s.4 (1966), Second Schedule of Act No. 23 of 1966; Zambia, Art. 4 (1973), Schedule of Act No. 27 of 1973.

28. See Act No. 8 of 1975, The Interim Constitution of Tanzania (Amendment) Act 1975. In India also, the preamble was amended by the Constitution (Forty-Second Amendment) Act 1976.

29. See supra, notes 4 and 88.

30. See supra, pr. 7.69 for provisions of clause (iii) and sub-s.(2) of s.2 which was captioned "Fundamental Principles of Government".

31. See Statutory Instrument No 108 of 1974

32. Quoted at p.3 of the Report of the Presidential Commission on One-party State.

33. Ibid., p.31.

34. Ibid., p.32; TANU was Tanzania's sole political party.

35. Ibid., p.33.

36. Act No. 25 of 1966, Tanzania.

37. Act No. 23 of 1974, Zambia.

38. Robert Martin, "The Ombudsman in Zambia" (1977) 15 Jrnl. of Med. Afr. Studies, 239, 244.

39. P.M. Norton, "The Tanzanian Ombudsman" (1973) 22 ICLQ 603, 610-12.

40. See supra, n.38, ibid.

41. F.M. Chomba, An Explanation of the Functions of the Commission for Investigations (Ombudsman), p.3 (Govt. Printer, Lusaka).

42. See s.8, Tanzania and s.10, Zambia.

43. See however, E.A.M. Mang'enna, The Permanent Commission of Enquiry (Ombudsman), p.6 where the Tanzanian Ombudsman appears to suggest to the contrary relying on the words "conduct, procedure, act or omission" of s.15(1) and observes that "an enquiry could be made if an official acted wrongly or acted when he was not supposed to act or omitted to do what he is legally bound to do, or if he did not follow the standard procedure".

44. Ibid., p.3.

45. See P.M. Norton, op.cit., p.629.

46. See parallel provision in Zambia in the proviso to s.17(2).

47. See s.8, Zambia; in Tanzania, s.10(2) provided that the Commission was not bound to hear any person but u/s. 9(5) it could examine the complainant before exercising its discretion to make enquiry into the allegation and also, as the Tanzanian Ombudsman observes "take a case on its own initiative" on receiving information from other sources, e.g. Press (loc.cit., supra, n.43 at p.7).

48. s.10(1), Tanzania; s.15, Zambia.

49. See ss.10(3), 11 and 13, Tanzania; ss.12 and 13, Zambia.

50. See s.14, Tanzania; s.13, proviso, Zambia.

51. s.17(2), Zambia.

52. s.10(3), Tanzania.

53. E.A.M.Mang'enya, op.cit., supra, n.43 at p.13.

54. See s.20, Tanzania; s.19, Zambia.

55. s.18, Tanzania; s.22, Zambia.

56. See Annual Reports of the Permanent Commission of Enquiry (Government Printer, Dar-es-Salaam): (a) for June 1966 to June 1967, p.158; total number of cases of "detentions" shown as 76; (b) for July 1967 to June 1968, p.114; the figure shown was 30.

57. See especially the cases mentioned in the second report (supra, n.56(b)): Case no.646 at p.47; No. 647 at p.48; No. 1664/2 at p.51; No.1653/2 and No. 1656/2 at p.74; No. 2048/2 at p.92.

58. Ibid., at p.51, Case no. 1664/2.

59. See, s.7, cap. 461, Supp. 63, Laws of Tanganyika.

60. See Second Report (supra, n.56(b)), p.9, pr.26.

SECTION V (paras. 7.128 to 7.137: pages 135 to 141).

1. See infra, pr.8.40; see also, s.6(b), State-Security (Detention of Persons) Decree 1966 of Nigeria.

2. Dates of introduction of English law in the different territories and relevant enactments are as below:
(a) Ghana - 24th July, 1874; see, Supreme Courts Ordinance No. 4 of 1876 and also Courts Ordinance (s.83, cap.4, Laws of Gold Coast 1951), Courts Act 1960 (s.154(4));
(b) (i) Nigeria (Federation and Lagos) - see, Supreme Courts Ordinance (s.17, cap.211, Revised Laws 1948).
(ii) Northern Nigeria - see, High Court Law (s.28, Act No.8 of 1955) and District Courts Law (s.23, Act No. 15 of 1960).
(iii) Eastern Nigeria - see, High Court Law (s.14, Act no. 27 of 1955) and Magistrate's Courts Law (s.40, Act No.10 of 1955).
(iv) Western Nigeria - see, Law of England (Application) Law 1959; cap. 60, Revised Laws 1959.

(In all cases of (b), the date was - 1st January 1900).

(c) Uganda - 11th August, 1902; see, Uganda Order in Council 1902 and also Judicature Ordinance (s.2(b), Ordinance No. 62 of 1962).

(d) Malawi - 11th August, 1902; see, Malawi Independence Order 1964 (s.1

(e) Zambia - 7th August 1911; see Courts Ordinance (s.11, cap.3, Laws of Northern Rhodesia 1953) and also, The English Law (Extent of Application) Ordinance (No. 4 of 1963).

(f) Tanganyika - 22nd July, 1920; see, Tanganyika Order in Council 1920.

(g) Kenya - 12th August 1897.

(For all cases, see also, generally, Renton and Phillimore (eds.) Colonial Laws and Courts; T.O. Elias, British Colonial Law; A.N.Allott, Essays in African Law and New Essays in African Law; A.N.Allott (ed.), Judicial and Legal Systems of Africa.

3. Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law, p.556.

4. See, In re DUMOGA [1961] G.L.R.44; see also, infra, pr.7.144.

5. R.B. Seidman, "The Reception of English Law in Colonial Africa Revisited", (1969) 2 Ea.Afr.L.Rev. 47, 54.

6. See, A.E.W. Park, The Sources of Nigerian Law, p.114.

7. R.B. Seidman, op.cit., supra, p.54.

8. See supra, pr.5.7, 12.

9. See, for Uganda, s.349, cap.24 of Revised Laws 1951 (Ord.Nos. 13 and 43 of 1950); Tanganyika, s.348, cap.20, Supp.60 (Ord. No. 5 of 1945); Kenya, s.389, cap. 75 of Revised Laws 1968; Nyasaland (not in Malawi after 1967), s.385, cap.29 of Revised Laws 1946 (Ordinance No. 23 of 1929).

10. See supra, prs. 5.66; see also pr.5.65 on the general scope of the right.

11. See supra, pr.1.95 - the decision in the ELEKO case.

12. Cap. 8.01 of the Laws of Malawi 1973.

13. Act No. 27 of 1967, cap. 5.01 of the Laws of Malawi 1973.

14. Cap. 42, Laws of Western Nigeria 1959 (Act No. 24 of 1958).

15. See, W.C.E. Daniels, The Common Law in Africa, pp.205-06; Dr. Daniels observes: "The common law and statute law right to the writ of habeas corpus are in force in West Africa unless local laws have been made covering them."

16. See supra, pr.1.59.

17. See, as to Ghana, In re AGYEPONG [1973] 1 G.L.R. 326; as to Nigeria, the ADAMOLEKUN case (see infra, pr.8.58).

18. See, AGEYPONG (supra), at p.331.

19. See preamble, Act No. 244 of 1964; see also supra, pr.7.98 for the legislative background.

20. See supra, pr.1.82.

21. See s.2(1), Act No. 49 of 1961 which was made applicable, vide s.1(2), "throughout the Federation"; the Act therefore impliedly amended regional laws including cap. 42 of 1959 Laws of the western region.

SECTION VI (paras. 7.138 to 7.171: pages 141 to 160).

1. Peter Oluyede, Administrative Law in East Africa, p.7.

2. R.W. James and F.M. Kassam (eds.), Law and its Administration in One-party State (Selected speeches of the Chief Justice of Tanzania, Telford George), pp.12-13.

3. [1958] 3 W.A.L.R. 547; see also, supra, pr.7.18 and notes 52 and 53.

4. [1959] G.L.R. 1.

5. [1942] A.C. 206.

6. [1959] G.L.R. 1, 5.

7. [1960] 2 G & G 128.

8. [1960] 2 G & G 130.

9. See infra pr. 1.73 on the common law right of appeal in the case of refusal by the High Court to issue a writ of habeas corpus.

10. [1961] G.L.R. 523.

11. See supra, pr.7.56-59.

12. [1961] G.L.R.44.

13. See supra, paras 4.16, 56, 69, 72, 74 and 85.

14. [1961] G.L.R. 44, 56.

15. The Preventive Detention Order 1958 expressed to have been made under s.2 of the Act (in the OKINE case); The Preventive Detention Order (No. 5) 1959, similarly made and promulgated under Legal Notice No. 310 (in the AKOTO case); and in the DUMOGA case they were expressed as "Executive Instruments no. 69 and 70 of 1960 made under powers conferred by s.2 of the Act".

16. [1961] G.L.R. 44, 56.

17. Loc.cit., supra (n.6, sec. II), p.46.

18. [1960] N.R.N.L.R. 24.

19. AIR 1952 S.C. 196.

20. [1960] N.R.N.L.R. 24, 28-29.

21. [1961] 1 All NLR 269.

22. See supra, pr. 7.93.

23. Elias, op.cit. (supra, n.26, Ch. 1, Sec. II (2)), p.288.

24. Ibid.

25. [1962] 1 All N.L.R. 413.

26. Ibid., p.430.

27. Ibid., p.420.

28. See supra, pr.7.93 for provision of "oral" order.

29. [1962] 1 All N.L.R. 431.

30. [1966] E.A. 514.

31. Ibid., p.542 (paras. B, C, F and G).

32 and 33. Ibid., p.546.

34. [1966] E.A. 306.

35. Ibid., p.445 et seq.

36. [1970] E.A. 162.

37. Ibid., pp.167-68.

38. [1968-70] A.L.R. Mal. 207.

39. See supra, pr.7.85 for "control order".

40. See supra, pr. 2.38-39.

41. [1970] S.J.Z. 28.

42. [1971] S.J.Z. 12.

43. HARIBANDHU v DISTRICT MAGISTRATE, AIR 1969 S.C. 63.

44. Judgment No. 16 of 1972 of the Court of Appeal in Civil Appeal No. 4 of 1972, disposed of on 23.6.72.

45. See supra, pr.7.83.

46. Judgment No. 24 of 1972 of the Court of Appeal in Civil Appeal No. 7 of 1972: (1972) Z.R. 248.

47. PADFIELD v MINISTER OF AGRICULTURE [1968] A.C. 997; and SECRETARY OF STATE FOR EMPLOYMENT v A.S.L.E.F. (no.2) [1972] 2 W.L.R. 1370.

48. AIR 1951 S.C. 157; see also supra, pr.5.154.

49. [1973] Z.R. 133.

50. AIR 1953 S.C. 318; see also supra, pr. 5.159.

51. [1973] Z.R. 243.

52. Application No. 1974/HP/684, disposed of on 16.8.74 by Cullinan, J.

53. Application No. 1974/HP/313, disposed of on 18.4.74 by Doyle, C.J.

54. NARESH CHANDRA v WEST BENGAL, AIR 1959 S.C. 1335.

55. Application No. 1976/HP/94 disposed of on 22.4.76 by the High Court at Lusaka.

56. See supra, pr. 7.60.

57. Application No. 1975/HN/370, disposed of on 31.7.75 by the High Court at Ndola.

58. J.S. Read, "Judicial Power and the Constitution of Ghana", (1971) Rev. of Ghana Law 107, 128.

59. See infra, pr.852 et seq.

60. See Claire Palley, "Rethinking the Judicial Role" (1969) 1 Zamb.L.J. pp.1-35.

CHAPTER 8 (paras 8.1 to 8.72: pages 161 to 210)

1. See supra, pr. 3.108, also 102, 105-107.

2. See supra, pr. 3.101, also 102, 111.

3. S.E. Finer, The Man on Horseback, pp.203-4.

4. See Gazette of Pakistan, Extraordinary, dated 31.10.58; see also Roberts-Wray, op.cit., at p.707, esp. fn. 53 who observes that the "first proclamation" was not gazetted. This statement is apparently inaccurate but the fact remains that in the absence of any indication in the "proclamation" that it had to take retrospective effect notwithstanding the belated publication, it was doubtful if the actions taken thereunder during the interim period could be legally

valid, for under common law the incident of promulgation constituted as essential ingredient of validity of enacted law. This aspect of the matter was, it appears, either ignored or overlooked in the decisions in DOSSO and ASMA JILANI (both supra) of the Pakistan judiciary which was called upon to pronounce upon the validity of the new legal order.

5. See Alan Gledhill, Pakistan: The Development of its Laws and Constitution (vol.5 of Br. C.W. series), p.107.

6. Gazette of Pakistan, Extraordinary, dated 4.4.69 and 25.4.69; these were also ex post facto legislations (see note 4 above) but retrospective operation was expressly contemplated on this occasion.

7. M.A. Mannan, The Superior Courts of Pakistan, p.383.

8. See Gazette of Pakistan, Extraordinary, 21st December 1971.

9. In ASMA JILANI, Pakistan Supreme Court held General Yahya Khan to be a "usurper".

10. See supra, pr. 3.116.

11. See Gazette of Pakistan, Extraordinary, Part I, 5th July, 1977.

12. See supra, pr. 3.109.

13. KCA, p.27381 (October 13-19, 1975).

14. Ibid., p.27382.

15. Ibid., p.27381.

16. See, Bangladesh Gazettes (Extraordinary) of 8.11.75 and 29.11.76; the successor could be nominated under the newly inserted cl. (aa) in the proclamation in virtue of the power to amend the same reserved thereunder.

17. See Bangladesh Gazette (Extraordinary) of 23.4.77.

18. Ruth First, The Barrel of a Gun, p.284.

19. Ibid., p.287.

20. S.B. Finer, op.cit., at p.234.

21. B.O. Nwabueze, Constitutionalism in the Emergent States, p.220.

22. Ruth First, op.cit., at p.292.

23. Nwabueze, op.cit., at p.251.

24. See, supra, pr. 3.24 and infra, pr. 8.58

25. As to the proposed Draft Constitution of Nigeria, see African Contemporary Records 1976-77, p.B662. as to Art. 281, Pakistan Constitution, see supra, pr. 4.59

26. Finer, op.cit., p.236.

27. Ruth First, op.cit., pp.181-91.

28. Nwasueze, op.cit., p.248.

29. Anton Besler (ed.), Military Rule in Africa, p.68.

30. Ibid., p.69.

31. Ibid., p.70.

32. Ibid., p.80.

33. Nwabueze, op.cit., p.249.

34. Africa Contemporary Records, op.cit., p.B-392.

35. Ibid., p.B-373.

36. W.F. Gutteridge, Military Institutions and Power in the New States, p.55.

37. Ibid., p.57.

38. See, Pure Theory of Law, p.201 and General Theory of Law and State, p.115.

39. See cls.(d) and (e) of its Proclamation

40. See supra, pr. 8.5 for the Proclamations Amendment Order 1977.

41 and 42. See Gazette of Pakistan, Extraordinary, October 15, 1958.

43. See Proclamations, 1958 (pr.2(1)), 1969 (pr.3(1)), 1977 (pr.2(1)).

44. See Proclamations, 1958 (pr.2(2)), 1969 (pr.6(2)), 1977 (pr.2(3)).

45. See Proclamations, 1958 (prs. 2(5) and 3), 1969 (prs. 3(4) and 5), 1977 (pr.4(1) and (2)).

46. See Proclamations, 1969 (pr.3(3)), 1977 (pr.2(3)).

47. See Proclamations, 1958 (pr.4(1), 1977 (pr.5(1)).

48. See Proclamations, 1958 (pr. 7(2), 1969 (pr.7(2)), 1977 (pr.9).

49. See Proclamations, 1958 (pr. 2), 1969 (pr.1).

50. Loc.cit., (supra, n.5), p.110.

51. Loc.cit., (supra, n.21), p.252.

52. Ruth First, op.cit., p.76.

53. See, as to (A) Ghana, (1) "Proclamation for the Constitution of a National Liberation Council for the administration of Ghana and for matters connected therewith", vide clause 10, provided for publication thereof in the gazette "and in such other manner" as the Chairman of the National Liberation Council might direct. It was dated 26th February, 1966 and signed by the Chairman, Deputy Chairman and other members.

(2) "National Redemption Council (Establishment) Proclamation, 1972"; it was made on 14th January, 1972 and signed by the Chairman and the members of the National Redemption Council.

(B) Uganda - "Proclamation" (Legal Notice No. 1 of 1971): it was dated 2nd February, 1971 and signed by Major General Idi Amin Dada as Military Head of State, Head of Government and C-in-C of the armed forces.

54. Clause 1(2) of Decree No. 1 in respect of the Federal and clause 2(2) in respect of the Regional Constitutions, provided that except those provisions as were expressly "suspended" by their respective sub-cls.(1) and schedules, "subject to this and any other decree", the other provisions "shall have effect" subject to "modifications" specified in the schedules.

55. See supra, pr.3.24 see also infra, pr. 8.58

56. (a) In Nigeria, under s.3(4) of Decree No. 1, provisions not only of a Decree but also of an existing Federal Law could prevail over an Edict but decree no. 28 constricted its scope and provided by s.1(2) (b) that a court could declare the "invalidity" of an Edict only on the ground that it was "inconsistent with the provisions of a Decree", by s.1(3)(b) the protection against judicial review was extended also to "any instrument" made under any Decree or Edict.

(b) In Ghana, under sub-cls.(2) and (3) of cl.3 it was provided that "subject to any Decree" the existing law shall continue in force until repealed or amended by a Decree and that in the case of a "conflict" between the two, the Decree shall prevail; in sub-cl.(4) it was laid down that a Decree "shall be deemed to be duly made if it purports to be signed by the Chairman. . . etc."; in 1972, clause 3(5)-(11) of the Proclamation introduced additional requirements.

(c) In Uganda, except the implied inhibition embodied in clauses 3 and 4 of the Proclamation, there was no similar provision to secure the supremacy of the Decree.

57. See Nwabueze, op.cit., pp.249, 250; see also, Aguda and Aguda, op.cit. (supra, n. 8 of Ch. 7, sec.7 ).

58. See supra, prs. 8.19, 22.

59. See supra, pr. 8.5.

60. Loc.cit., (supra, n.21), pp.249, 250; it is noteworthy that in Bangladesh the writ jurisdiction of the High Court under art102 of the Constitution was altered as respects "interim orders" only (vide M.L. Regn. No. XXXIV of 1977, see, Bangladesh Gazette, Extraordinary, dated 9.3.77).

61. Nwabueze, op.cit., pp.249, 250.

62. See Afrifa, op.cit.(supra, n. 8 Chapter 7, sec.IV ) and Peter Barker, op. cit. (supra,n. 10 , Chapter 7, sec.IV ) who describe in detail the oppressive manner in which the Preventive Detention Acts were enforced there and also how the independence of the judiciary, which was a fundamental principle of Rule of Law, was undermined; see also supra,

prs. 7.107.

63. See, however, for a pessimistic view, Abiola Ojo, "The Search for a Grundnorm in Nigeria" (1971) 20 ICLQ, 117, 136; it is doubtful if the author could canvass support for his view "it is possible to abolish the judiciary by Constitution", even under the Soviet legal system in the modern context, despite the philosophical commitment of the Russian insistence on the "fading away" of the law.

64. See supra, n.53(a).

65. See supra, n.42.

66. See (a) Ghana, Proclamations, (i) 1966, cl.3(4); (ii) 1972, cl.3(5)-(11).
(b) Nigeria, Decree No. 1, ss. 4 and 5.
(c) Uganda, Proclamation, cl. 4.

67. Decree No. 28 was in fact enacted to nullify the effect of the LAKANMI case: in s.1(2)(b) it was stated that any decision of the court made before or after the commencement of the Decree shall be null and void if it purported to declare "the invalidity of any Decree or of any Edict. . . or the incompetence of any of the governments in the Federation to make the same. . ." [emphasis added]

68. See s.4, Jurisdiction of Courts (Removal of Doubts) Order, 1960 in Gazette of Pakistan, Extraordinary, 30.6.69; and C.M.L.A's Order No.10(a), in Gazette of Pakistan, Extraordinary, 10.7.77.

69. See Martial Law Regulations, No. 1 of 1975, Bangladesh Gazette (E.O.) dated 22.8.75.

70. It was made on 30th January 1966 and numbered as NLCD 109; during the second coup a similar Decree was made on 6th December 1973 which was numbered as NRCD 236 and entitled, Armed Forces (Special Powers) Decree.

71. See ss. 1 and 2 of Decree No. 24, made on 21st June 1967.

72. See s.5, which defined other terms but not "offence".

73. See supra, pr. 7.90 for detention under "oral" orders under 1962 Emergency Regulations and for a colonial precedent see pr. 7.52; see also infra, pr. 7.181 for further discussion on s. 3.

74. See s.1(1) and Schedule 1; the relevant provisions of the Constitution were s.21 (personal liberty), s.30 (special derogation) and ss.70 and 71 (emergency).

75. See supra, pr. 7.146 et seq., esp. pp150-; see however, G. Ezejiofor, "Judicial Interpretation of Constitution: The Nigerian Experience" (1967) 2 Nig.L.J. 70, who is unduly critical of two particular decisions "on merit" and does not take note of the judicial approach in general on the Bill of Rights.

76. Decree No. 13 was made on 15th March 1971 and later re-enacted on 4th October 1972 as Decree No. 26 but it was repealed by Decree No. 21 of 1973.

77. Decree No. 19 of 1973 made on 24th August 1973.

78. ... See supra, pr.8.13 and notes 4, 6 (Gaz.notfn. of 25.4.69) and 14.

79. As to Bangladesh, see supra, n.14; as to Pakistan: 1958, M.L. Reg. No. 1-A (Pak.Gaz., E.O., 15.10.58); 1969, M.L. Reg. No. 2 (Pak Gaz. E.O. 25.3.69); 1977 - C.M.L.A's Order No. 4, paras 2.4 and 6 (Pak Gaz. E.O. 10.7.77).

80. See Pak.Gaz.E.O.; 15.10.58 (M.L.Reg. No. 2); 25.3.69 (M.L. Reg. No. 3); 5.7.77 (C.M.L.A.'s Order No. 1, pr.2(2) and 10.7.77 (C.M.L.A.'s Order No. 4, pr. 3).

81. See Pak. Gaz. E.O., supra, n.79, M.L. Reg. 1-A (1958), No. 2 (1969) and paras. 5 and 7 of C.M.L.A.'s Order No. 4 (1977).

82. Ibid., C.M.L.A's Order No. 5 (1977), paras 1(a) and (e).

83. Ibid., paras 5(c) and 7(c) of C.M.L.A.'s Order No. 4.

84. Ibid., para 7(d).

85. Ibid., 25.3.69.

86. See supra, pr.8.19, esp. n.42.

87. See supra, n.14.

88. See Bangladesh Gazette (E.O.) dated 22.8.75.

89. See ibid., dated 8.1.76 (Seventh Amendment).

90. See ibid., dated 14.6.76 (Martial Law Regn. No. XVI of 1976).

91. Decree No. 12 of 1973, made on 25th June, 1973.

92. In respect of "any person", s.25 of the Penal Code, according to s.2 of the Decree and in the case of "any member of the armed forces", ss.117, 183, 212, 213, 235, 236, 272 and 279 of the Code, according to s.3.

93. By Decree No. 5 of 1971 (The Constitution (Modification) Decree) made on 12th March 1971, it was provided that the designation of the "Military Head of the State" be changed to "President" and that the President should be the Head of the State as well as of the Government and also the C-in-C of the armed forces.

94. It enlarged the meaning of "sedition" accepted in legal parlance

95. For judicial response to "Military Tribunals" in Pakistan, see MIR HASAN (at paras 3.113, 8.46)

96. See supra, pr.8.13.

97. See, for example, Decree No. 7 of 1971, s.1, discussed below, cf. n.99.

98. Decree No. 7 of 1971, made on 12th March, 1971.

99. Ibid., see preamble and also s.1 which spoke of "detention as a result of military operations consequent upon or incidental to the take-over of the power of the Government on the 25th day of January, 1971".

100. By s.1(1) of Decree No. 31 of 1971, made on 11th September 1971 the "six months' time-limit" was substituted by "up to the 12th day of December 1971."

101. Decree No. 15 of 1971, made on 7.5.71; it substituted the existing ss.2-4 by new ss. 2-4.

102. Decree No. 3, made on 8.2.66.

103. The persons detained under the various Decrees made from time to time possibly remained in detention for almost the whole period in most cases while in some cases there might have been premature releases as authorised under s.3(f). This inference follows from the fact that both State Security (Detention of Persons) (Restricted Revocation) Decree (Decree No. 53 of 1966) and the State Security (Detention of Persons)(Revocation)(No.2) Decree (Decree No. 54) were made almost six months after the detention decrees were made. The released persons could be detained afresh for any further term according to s.3(f).

104. See supra, pr.8.30.

105. It was numbered as N.L.C.D. 2 and signed by the Chairman of the National Liberation Council, as happened in the subsequent cases also.

106. See, for example, N.L.C.D. 37 and N.L.C.D. 41.

107. It was numbered as N.L.C.D. 81.

108. It was numbered as N.L.C.D. 111 and was amended by N.L.C.D. 144 which provided additionally for restrictions on intra-state movement of the released persons; there were also further amendments of N.L.C.D. 111 by which more persons were taken into custody by inserting new names at the end of its schedule (see schedule of N.L.C.D. 386).

109. No. N.L.C.D. 161; it was made on 22nd September 1967 but by s.3 "deemed to have come into effect on 17th day of April 1967", the Decree was a classic example of the extensive misuse of the power of retroactive legislation by the military rulers.

110. No. N.L.C.D. 386; s.1(a) provided that all persons held in custody immediately before the commencement of the Constitution under any of the Decrees repealed by it and specified in its schedule.

111. See N.L.C.D. 30; The Preventive Detention Act 1964 was repealed on 5th April, 1966.

112. No.N.R.C.D. 2, made on 17th January 1972 and signed by the Chairman of the National Redemption Council; s. 1 stated that each of the persons specified in the schedule should be taken into "Preventive Custody".

113. For example, see supra, n.109.

114. See supra, pr.9.19, esp. n.42 and n.63.

115. See supra, pr.3.

116. See supra, pr. 8.28, esp. n.63.

117. PLD 1970 Lah. 741.

118. PLD 1960 Lah. 583.

119. PLD 1959 Lah. 243.

120. See supra, pr. 3.117.

121. PLD 1977 Lah. 1337.

122. PLD 1977 Lah. 1414.

123. See supra, pr.8.19, esp. n.45.

124. See supra, pr. 8.32, esp. n.90.

125. See D.O. Aihe, "Fundamental Human Rights and the Military Regime in Nigeria" (1971) 15 J.A.L., 213, 217.

126. See D.I.O. Ewelukwa, "The Constitutional Aspect of Military Take-over in Nigeria", (1967) 2 Nig.L.J. 1, 14-15; the author takes note of the fact that the new regime was anxious to sustain public confidence in the judiciary by ensuring the independence of the judiciary by vesting the power of appointment and removal of the judges in the "Advisory Judicial Committee" but strikes a pessimistic note about the role of courts in the new set-up.

127. See, Africa Contemporary Record, 1976-77, Colin Legum (ed.), pp. as to Nigeria; and at pp. B 372-373, details are given of the "killings" including that by firing squad of persons tried by the Military Tribunal in Uganda; at pp. B 575, 578, 579-80, details are given of similar cases in Ghana and also of cases of torture and ill-treatment of detainees and it is also mentioned there were many intellectuals among them.

128. [1974] E.A.1; the claim in respect of the period covered by the "detention order" passed by the Minister under the Regulations was rejected holding that the relevant provisions of the Constitution had not been violated.

129. (1969) 1 Nig. Monthly L.R. 137; discussed by Aguda and Aguda, op.cit., supra, . . at p.141 and by Aihe, op.cit., supra, . . . at pp.217-18; the author unfortunately refers to the decision in the LIVERSIDGE case as "settled law" which, according to us, has been misunderstood and misapplied in almost all Commonwealth courts except, significantly, those of Zambia.

130. See supra, pr. 8.31, 41.

131. (1969) 1 Nig. Monthly L.R. 137, 139.

132. See supra, prs. 4.16 & 4.56 et seq. respectively.

133. (1969) 1 Nig. Monthly L.R. 137, 139-40.

134. See supra, pr. 7.170.

135. [1969] 2 All N.L.R. 298.

136. See supra, pr. . 4.69.

137. [1969] 2 All N.L.R. 298, 305.

138. Ibid., p.303.

139. Earl Jowitt, The Dictionary of English Law, at p.1439.

140. Halsbury's Laws of England, 3rd edn., vol.39, at p.84 (pr.74) and p.85 (pr. 75).

141. [1969] 2 All N.L.R. 298.

142. Ibid., p.308.

143. Ibid.

144. [1970] 2 All N.L.R. 169.

145. See supra, pr. 8.23 esp. n.56(a).

146. Cap. 89 of 1954 Laws of the Federation of Nigeria and Lagos.

147. [1972] 1 E.C.C.S.L.R. 1.

148. [1967] 1 All N.L.R. 213.

149. Unreported; Supreme Court Case No. 58 of 1969; see also, for comments on the decision, Abiola Oja, op.cit. (supra, n.63) who speaks of "the duty of the courts to keep the rules of law in harmony with the enlightened commonsense of the nation", at p.135 of the article.

150. See supra, pr. 8.22.

151. [1974] 10 S.C. 77.

152. [1967] 2 G. & G. 285.

153. See supra, pr. 8.29, esp. n.79.

154. [1968] 2 G. & G. 374.

155. Ibid., p.378.

156. No. NRGR 236; see also, supra, pr. 8.29, esp. n.79.

157. [1976] 1 G.L.R. 394.

158. [1976] 2 G.L.R. 25.

159. [1976] 1 G.L.R. 394, 399.

160. [1976] 2 G.L.R. 25, 31.

161. Ibid., p.34.

162. Ibid., p.39.

163. Ibid., p.40.

164. [1977] 1 G.L.R. 7.

165. See supra, pr. 8.45.

166. [1977] 1 G.L.R. 7, 12.

167. See supra, pr. 7.133 et seq.

CHAPTER 9 (paras 9.1 to 9.77: pages 211 to 256)

1. See Cranston, What are Human Rights, op.cit., pp.31-32.

2. During the Stuart regime Coke frequently and vigorously invoked Natural Law, see,
See also, SHIPMONEY, supra, pr.3.9 and CALVIN [1608] 4 Co. Rep. 1.

3. Supra, pr. 1.19, 30 et seq.

4. Supra, pr. 1.54 et seq.

5. Supra, pr. 1. 60

6. Supra, pr. 1.41.

7. Supra, prs. 3.3, 4.90.

8. Supra, pr. 4.14.

9. Supra, pr. 3.46, 73, 75-85.

10. Supra, pr. 1.188, 195.

11. Supra, pr. 7.1 et seq.

12. Supra, pr. 1.142, 217.

13. Supra, pr. 2.95, 102.

14. Supra, pr.4.22 et seq.

15 Supra, pr. 4.24.

16. Supra, pr 4.22, 86.

17. See supra, pr.1.219; see also Minogue and Molloy, op.cit., (supra, n.245, Ch.1, sec.II(2)), pp.331-40, 372.

18. Supra, pr.1.101-103, 144.

19. Supra, pr.1.131.

20. See Table A (infra).

21. See Table A (infra).

22. See India News, 26.2.76, pp.3-4 (Bulletin No. 16/76 of the Indian High Commission, London, reproducing the interview of the Indian Prime Minister Indira Ghandi with the representative of the French journal Le Figaro).

23. Supra, pr. 3.121, 5.215.

24. See supra, pr.1.142, 217; see also, generally, Minogue and Molloy, op.cit. (supra, n.245, Ch. 1, sec. II(2)), esp. Parts I and II of the Book, and David Selbourne, op.cit. (supra, n.57, Ch. 5, Sec. III), esp. Chapters 7 and 8.

25. See infra, pr. 9.73.

26. See India News, op.cit., p.6.

27. See supra, Ch. 7, sec. IV, Ch. 8, sec. I(2), generally, on the gradual decline of the importance of western democratic institutions as evidenced in one-party states and military rules in Africa.

28. Supra, prs. 1.236, 242-50.

29. Supra, pr. 1.56-57.

30. Supra, pr. 1.31.

31. Supra, pr. 1.245, 248.

32. Supra, pr. 4.136, 147, 162 et seq.

33. Infra, pr. 9.36-38.

34. Supra, pr.1.46-47.

35. Supra, pr. 5.53 et seq.

36. See Art. 9(3) and (4) of the International Covenant of 1966 and Art. 5(3) and (4) of the European Convention.

37. Supra, pr.1.82.

38. Supra, pr. 5.73-77.

39. Supra, prs. 5.65, 6.36 and 7.131.

40. Supra, pr.7.171.

41. Supra, pr. 5.54 et seq.

42. Supra, pr. 5.61-64.

43. Supra, prs. 7.130, 132.

44. Supra, prs. 1.82 and 7.133 et seq.

45. Supra, pr. 1.56.

46. Supra, prs. 5.7, 13, 17.

47. Supra, prs. 4.2.

48. Supra, pr. 4.87.

49. Supra, prs. 5.215, 6.87, 7.140-42.

50. Supra, pr. 2.26 (esp. n.43a).

51. Supra, pr. 2.52.

52. Supra, pr. 5.27.

53. In GOPALAN, Kania, C.J. held that the expression "procedure established by law" used in Art. 21 of the Indian Constitution were borrowed from Art. 31 of the Japanese Constitution (see pr.19 of the judgment in GOPALAN, op.cit.)

54. Supra, pr. 5.91.

55. The 1962 Constitution was "enacted" by General Ayub Khan. It introduced a Presidential form of government which was not adopted in 1973. The first (1956) and also the last (1973) Constitution generally conform to the Indian model.

56. The Constitution reflects a desperate attempt to balance conflicting views and values; it contains provisions which make a positive discrimination in many matters in favour of Malays and on the other hand the confidence of the strong ethnic minorities is gained by the "fundamental rights" provisions.

57. Supra, pr. 7.57.

58 and 59. Supra, pr. 7.69.

60. See Minogue and Molloy, op.cit. (supra, n.245, Ch.I, sec. II (2)), pp. 370-71.

61. The Indian and "Nigerian" Bills of Rights in common with the International Covenant and European Convention stressed the importance of "procedure". On the other hand, Malaysia, Pakistan and Bangladesh provisions used a different phraseology.

62. Supra, pr. 5.139 et seq and 5.185 et seq.

63. Supra, pr.1.242, 245, 248, 252.

64. Supra, pr. 5.143, 199.

65. Supra, pr. 5.193.

66. In all national Bills of Rights of the New Commonwealth and also in the International Human Rights Documents (International Covenant and European Convention).

67. PLD 1974 Lah. 120; BEGUM SHAMIM AFRIDI v PROVINCE OF PUNJAB: the court held that it had to satisfy itself whether the "manner" of detention was "lawful" and observed that solitary confinement of the detainee was a punishment; use of manacles was also deprecated and the executive was warned that the detainee would be released on bail if the maltreatment continued.

68. In the above case the court relied on Art.201 of the 1972 (Interim) Constitution, corresponding to Art.98 of the 1962 Constitution; these provisions embodied the concept of habeas corpus although the writ was not expressly named as in 1956 Constitution.

69. supra, pr. 1.257 ; 70. See UN Year Book on Human Rights ; (see below for nos.71-2)

73. Ray, C.J., held that the remedy in tort can be availed after the expiry of the Presidential Order made under Art. 359(1), see [1976] 2 S.C.C. 521, 575; see however, opinion of Chandrachud, J., ibid., p.678.

71. supra, pr. 5.45 et. seq., 6.28, et. seq. and 7.128 et. seq.

72. supra, pr. 5.195.

74. Supra, pr. 5.201.

75. See Art.9(4) of International Covenant of 1966.

76. English Law - the New Dimension, pp.

77. Ibid., p.74.

78. Michael Zender, A Bill of Rights ? p.61.

79. Do We Need a Bill of Rights ? (1976) 39 Mod.L.R. 121.

80. Ibid., pp.124, 125.

81. See, Minutes of Evidence taken before the Select Committee on Bill of Rights, House of Lords, Session, 1976-77, 1977-78), p.11.

82. Ibid.; indeed, in Northern Ireland, the "Unionists" legislation was patently discriminatory against Catholics, see, sec.II of Chapter 4, supra.

83. During the 1975-77 emergency, Parliament dominated by the Congress Party amended the Constitution and also the "MISA" to whittle down the safeguards against "preventive detention" when the opposition leaders were in detention; see, supra, pr. 5.97 and esp. n. 57.

84. Supra, pr. 7.117.

85. Supra, pr. 7.110.

86. Supra, pr. 1.118, 187.

87. Supra, pr. 1.187, 7.8, 16.

88. Supra, pr. 7.18, 92

89. Supra, pr. 2.123

90. (1976) 2 SCC 521, 613 (pr. 225)

91. Supra, pr. 2.50 et seq.

91a. pr. 3.42

92. Supra, pr. 8.26, 72

93. Supra, pr. 2.93, 95, 98, 101-2

94. Supra, pr. 2.90.

95. Supra, Ch.1, sec. I(7).

96. See Part III of this study.

97. Supra, pr. 2.26.

98. Supra, pr. 2.84, 86-87.

99. Supra, pr. 2.103 (esp. n.65).

100. Supra, prs. 5.92, 98, 100; 6.40; 7.

101. Supra, prs. 1.248, 252.

102. Supra, prs. 2.108-09.

103. Supra, prs. 2.111-12.

104. Infra, notes 164-66.

105. Supra, pr. 2.109, 120.

106. Supra, pr. 2.120.

107. Supra, pr. 2.121-22.

108 to 110. Supra, pr. 2.122.

111 to 112. Supra, pr. 2.123.

113. Supra, pr. 2.125.

114. Supra, pr. 5.183.

115. Supra, pr. 3.46, 70, 73, 75.

116. Supra, pr. 4.3, 41.

117. Supra, pr. 5.194.

118. Supra, pr. 6.87, 7.146, 159 et seq.

119. Supra, pr. 7.160.

120. Supra, pr. 7.160, 8.41.

121. Supra, pr. 8.25 et seq.

122. Supra, pr. 8.27

123. Supra, pr. 8.46-50, 71.

124. Supra, pr. 3.11.

125. Supra, pr. 3.5, 8, 42.

126. Supra, pr. 3.15.

127. Supra, pr. 3.28, 32.

128. Supra, pr. 4.98 (esp. n.24(a))

129. Supra, pr. 3.42.

130. Supra, pr. 3.19, 21, 22, 24-25.

131. Supra, pr. 3.43 et seq.

132. Supra, pr. 3.58, 75.

133. Supra, pr. 3.70, 73, 75.

134. Supra, pr. 3.54, 55. 78.

135. Supra, pr. 3.77, 80, 82, 98.

136. Supra, pr. 3.43, 47-49.

137. Supra, pr. 8.2-5, 17.

138. Supra, pr. 3.113.

139. Supra, pr. 5.7, 13, 17; 7.8 et seq.

140. Supra, pr. 5.41, 1 34.

141. Supra, pr. 5.32, 7.2. (esp. n.4)

142. Supra, pr. 5.41 et seq; 7.28, 42, 47, 52-53.

143. Supra, pr. 5.39-40; 7.34.

144. Supra, pr. 7.28 et seq.

145. Supra, pr. 4.14, 51; 5.39.

146 and 147. Supra, pr. 4.86.

148. Supra, pr. 4.63, 5.142, 198.

149. Supra, pr. 4.68, 5.95, 152.

150. Supra, pr. 4.68.

151. Supra, pr. 5.152.

152. Infra, pr. 9.73.

153. Supra, pr. 7.64 et seq.

154. Supra, pr. 5.92-93.

155. Supra, pr. 5.93, 98, 100; 6.46.

156. Supra, pr. 5.106.

157. Supra, pr. 5.102; 105-106; 6.45; 7.71.

158. Supra, pr. 5.28, 93-94.

159. Supra, pr. 5.96, 171, 186.

160. Supra, pr. 5.147. Common law rules of statutory interpretation evolved through the decisions of the English courts were apparently inadequate for the interpretation of Republican Constitutions. For, the English courts had no occasion (except in the case of Malaysia) to interpret a Republican constitution and they subjected all statutes (without distinguishing between a Constitution and an ordinary statute) to a two-fold general limitation which was inappropriate in the context of a Republican Constitution, namely, the object of a statute had to be gathered from the language used therein and Parliamentary Debates could not be consulted.

161 Supra, prs. 4.72, 5.18, 35-36, 41, 97, 113, 152.

162. Supra, pr. 6.75.

163. Supra, pr. 5.97, 113 and 6.78. (Note the distinction between the two "subjective satisfactions" ignored by courts).

164. Supra, pr. 5.117 for SPA (relevant provision s.3(1)(a)); 9.97 for Ghana.

165. See s.3(1), Public Security Ordinance.

166. Supra, pr. 7.74 et seq.; see also, pr. 7.87.

167. Supra, pr. 7.92.

168. Supra, pr. 5.109.

169. Supra, pr. 4.147, 185.

170. Supra, prs. 4.119, 128; 6.24; 7.31, 43.

171. Supra, pr. 4.147 et seq., esp. pr. 4.153.

172. Supra, pr. 4.98, esp. n.24(c).

173. Supra, pr. 4.185 et seq.

174. Supra, pr. 4.162 et seq.

175. Supra, pr. 4.173.

176. Paul Wilkinson, Political Terrorism, p.

177. See pp.72-74, 76-78, 79-81, 104-07, 109-110, 113-115, 169-72, 198, 202-08, 211, 217-19.

178. See KCA, p.28433, dated 8 July 1977.

179. See, J.D.M. Derrett, "Indian Tradition and the Rule of Law among Nations" (1962) 11 I.C.L.Q. 266, 66-67.

180. See, The Statesman Weekly, Calcutta/New Delhi, 20 May 1978 for the summary of the Constitution (Forty-fifth Amendment) Bill introduced in the Lok Sabha (House of the People) on 16th May 1978. Besides the proposals mentioned in pr. 9.74, the Bill also provides for a "referendum" in the case of amendment of any "basic feature" of the Constitution among which is listed "independence of judiciary".

181. See Louis Kutner, "World Habeas Corpus: The Legal Ultimate for the Unity of Mankind" (1965) 40 N.D.R. 570; see also Justice Goldberg's letter in (1967) 53 Am. Bar Assn. Jn. 586.

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1354 Statute of Westminster of the Liberties of London (28 Edw. III, c. 3)
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1554 Statute of Treason (1 & 2 Phil & Mar., c. 10)
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1700 Act of Settlement
1704 Riot Act
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1833 The Insurrection Act
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1847 The Town Police Clauses Act
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1865 The Colonial Laws Validity Act
1870 The Extradition Act
1871 The Prevention of Crimes Act

1872 The Licensing Act
1879 The Army Discipline & Regulation Act
1887 The British Settlement Act
1890 The Foreign Jurisdiction Act
1908 The Prevention of Crime Act
1913 The Foreign Jurisdiction Act
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1922 The Civil Authorities (Special Powers) Act (Northern Ireland)
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1967 The Fugitive Offenders Act
1967 The Criminal Justice Act
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1726 Charter establishing Mayor's Courts in Calcutta, Bombay and Madras

1774 Charter establishing the first "Supreme Courts" in India (at Calcutta)

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1804 Bengal Regulation No. X
1818 Bengal Regulation No. III
1819 Madras Regulation No. II
1827 Bombay Regulation No. II
1827 " " No. XXV

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1919 Martial Law Ordinance
1943 Ordinance No. XIV
1943 Martial Law (Indemnity) Ordinance No. XVIII

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1850 State Prisoners Act (No. 34)
1858 State Prisoners Act (No. 3)
1860 Indian Penal Code (Act No. 45)
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1865 High Courts Criminal Procedure Amendment Act (No. 13)
1871 Criminal Tribes Act (No. 27)
1872 Code of Criminal Procedure (Act No. 10)
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1898 Criminal Procedure Code (Act No. 5)
1915 Defence of India Act
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1939 Defence of India Rules 1939
1946 Indian (Proclamation of Emergency) Act

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1923 Goonda Act (Bengal)
1932 " (United Provinces)
1943 Habitual Offenders Act (Madras)

### (b) Independence Era

Central

1947 Bengal State Prisoners Regulation (Adaptation) Order 1947 made by the Governor General under the Indian Independence Act 1947)

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1950 Preventive Detention Act (No. IV)

1950 Ordinance No. 19

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1952 The Repealing & Amending Act (No. 48)

1971 The Constitution (Twenty-fourth Amendment) Act 1971

1971 The Maintenance of Internal Security Act (No. 26)

1971 The Defence of India Act (No. 42) - renamed as The Defence and Internal Security of India Act 1971 by Act No. 32 of 1975

1974 The Conservation of Foreign Exchange and Prevention of Smuggling Act (No. 52)

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1975 The Constitution (Thirty-eighth Amendment) Act

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1975 The Maintenance of Internal Security (Amendment) Act (No. 39)

1976 The Constitution (Forty-Second Amendment) Act

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1947 Bombay Habitual Offenders Restriction Act

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1948 The Emergency Regulation (Detention Order) Rules
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1956 Civil Law Ordinance
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1960 The Internal Security Act
1964 Courts of Judicature Act
1964 The Emergency (Essential Powers) Act
1964 The Emergency (Internal Security and Detention Order) Regulations 1964
1964 The Internal Security (Detained Persons Advisory Board) Rules 1964
1969 The Emergency (public Order and Prevention of Crime) Ordinance
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1954 Govt of India (Amendment) Act
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1958 East Pakistan Public Safety Ordinance (No. LXXVIII)
1958 The Security of Pakistan (Amendment) Act (No. XIII)
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1959 Ordinance No. XXXIX
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1799 North Proclamations

1801 Royal Charter of Justice

1810 " "

1811 " "

1830 Order in Council dated 11th November

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1878 Courts Ordinance

1907 Courts Ordinance (No. 30)

1948 The Emergency Regulations Ordinance (No. 17)

1965 Singapore Independence Act

1955 The Preservation of Public Safety Ordinance (No. 25)

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1927 Native Administration (colony) Ordinance (No.18), cap 76, Laws of Gold Coast 1936

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1932 Native Authority Ordinance (No. 2) (Northern Territories)

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1963 Punishment of Habitual Criminals Act

1964 The Preventive Detention Act (No. 240)

1964 The Habeas Corpus Act (No. 244)

1966 "Proclamation" dated 26th February by the National Liberation Council

1966 The Courts Decree (No. N.L.C.D. 84)

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1966 The National Liberation Council (Protective Custody) (Amendment) (No.8) Decree (N.L.C.D. 81)

1966 The National Liberation Council (Protective Custody) (Consolidation Decree (N.L.C.D. 111)

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1967 Decree No. 24, dated 21st June

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1973 The Armed Forces (Special Powers) Decree (N.R.C.D.236)

1975 Executive Instrument No. 155

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1960 The Preservation of Public Security Act (Ordinance No. 2 of 1960)

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TABLE A (Some statistics)

| COUNTRY | AREA (sq.mls.) | POPULATION | LITERACY (%) | DIVISIVE FACTORS (D.F. |
|---|---|---|---|---|
| BANGLADESH | 55,126 | 78 million (1975 estimate) | 22 | D F. negative: 80% Muslims; and unilingual |
| GHANA | 91,843 | 8,545,561 (1970 census) | 65 | D.F positive: 75 different tribal groups; multilingual; 42% Christians, 38% Animists 12% Muslims |
| INDIA | 1,269,346 | 548 million (1971 census) 610 millions (1976 estimate) | 30 | D.F. positive: multilingual (15 constitutionally recognised languages). Although Hindus form 80% of the population there is a noticeabl cultural divergence regionally. |
| KENYA | 224,960 | 10,956,501 (1969 census) 13.85 million (1975 estimate) | - | D.F. positive: 70 different tribal groups; multilingual; multiracial (Africans, Asians Arabs, Europeans). |
| MALAYSIA | 129,308 | 10,439,530 (1970 census) | 39 | D.F. positive: multiracial - Malays (Muslims) 46.8%, Chinese (Buddhists) 34.1%, Indians, 9%. |
| MALAWI | 45,747 | 4,039,583 (1966 census) 5,175,000 (1976 estimate) | 78 | D.F. positive: 9 main tribal groups; 20 Christians, rest Animists; racial minority groups - Asians & Europeans |
| NIGERIA | 356,669 | 55,654,000 (1963 census) 70 millions (1977 estimate) | 20 | D.F. positive: half the population Muslims, concentrated in the North and West main ethnic groups are: Hausa/Fulani, Yoruba and Ebo. |
| NORTHERN IRELAND | 5,462 | 1,536,065 (1971 census) | - | D.F. positive: 35% Roman Catholics and rest of other denominations. |
| PAKISTAN | 310,403 | 64,979,732 (1972 census) 72,368,000 (1976 estimate) | 15 | D.F. negative: 97% Muslims; multilingual but differences not pronounced. |
| SINGAPORE | 230 | 2,294,000 | 31 | D.F. positive: multiracial - Chinese, Malays and Indians in the ratio of 5:3:2 |
| SRI LANKA | 25,332 | 12.7 millions (1971 census) 13.6 millions (1975 estimate) | 87 | D.F. positive: Sinhalese, 71% (of whom 67% Buddhists; Tamils (Ceylonese and Indians), 20.5% (of whom 17.6 Hindus; Christians, 7.7% |
| TANZANIA | 363,708 | 12,313,469 (1967 census) | - | D.F. positive: 120 different tribal groups: Muslims and Christians 31% each. |
| UGANDA | 91,076 | 11.5 millions (1975 estimate) | | D.F. positive: multilingual 24 tribal groups; 66% Christians, 16% Muslims. |

/continued....

TABLE A (Some statistics) continued

| COUNTRY | AREA (sq.mls.) | POPULATION | LITERACY (%) | DIVISIVE FACTORS (D.F.) |
|---|---|---|---|---|
| ZAMBIA | 290,586 | 4,054,000 (1969 census) 5,138,000 (1978 estimate) | 52 | D.F. positive: 73 tribes: 75 Animists, 25 Christians; other racial minority groups - Europeans and Asians. |

NOTE: For detention figures, please see text, paras 4.185 and 9.73)

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