PROTECTION OF PERSONAL LIBERTY

UNDER ~~IN~~ THE

PAKISTAN CONSTITUTION.

by

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A B S T R A C T

The study deals with one of the crucial fundamental rights in the Pakistan Constitution, the right to personal liberty, which is comprehensive. In an era of centralised and totalitarian rule in Pakistan, by the head of the Central Executive before 1958, with little of parliamentary Government or by the head of the armed forces after 1958, this right has been more under attack from bureaucrats, than any other. The constitutional provisions for the protection of personal liberty in Pakistan are as comprehensive as in other modern constitutions, but they are not so extensive as to cover all kinds of arbitrary deprivation of personal liberty. The role of the judiciary in protecting personal liberty has, therefore, been more difficult.

It is necessary to maintain a proper balance between the security of State, the public safety and the maintenance of law and order, on one hand and the right to personal liberty on the other. This problem has inspired me to undertake this study.

The work is divided into eleven chapters. It begins with the interpretation of the terms 'liberty' and 'personal liberty', the scope of personal liberty in this present age and its historical development from the time of Magna Carta to the French and American Bills of Rights. It is followed, in the next chapter, by an account of the development in the 19th and 20th centuries, the Dutch and Belgian Constitutions, the American 14th Amendment, the development after the World War I and II. The Universal Declaration of Human Rights and European Convention of Human Rights are dealt with.

A comparative study of the provisions regarding personal liberty in the various constitutions of the world is attempted in the third chapter. The fourth chapter generally deals with development in Pakistan from 1947 to the Proclamation of Martial Law in 1969. A detailed analysis of the constitutional provisions relating to personal liberty, including protection against retroactive punishment, is made in the fifth chapter. Procedural safeguards, such as protection against double jeopardy and self incrimination, are discussed in the sixth chapter.

The crucial problems of preventive detention, the satisfaction of detaining authority, the detaining authority's privilege of withholding certain facts in the general public interest and the right of the alien enemy, find place in the seventh chapter. It is followed in the eighth chapter by the freedom of movement and the question of reasonable restrictions on the right in the general public interest. The remedies for violation of the right to personal liberty, in particular the writ of habeas corpus, is comparatively and analytically discussed in the nineth chapter.

In the tenth chapter the difficulties of ensuring the protection of the rights of the people when martial law is in force are discussed. Various kinds of martial law and state of seige, are considered and the role of judiciary analysed. Finally, conclusions are drawn and some suggestions as to the solution of certain problems in the field of personal liberty, are made in the eleventh chapter.

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CONTENTS

ABBREVIATIONS

A.

A.	=	Abdul.
A.D.M.	=	Additional District Magistrate.
Ad. & E.	=	Adolphus & Ellis (K.B.).
All.	=	Allahbad.
All.E.R.	=	All England Reports.
A.C.	=	Appeal Cases.
App.Cas.	=	Appeal Cases.
Art.	=	Article.

B.

Back.Abr.	=	Bacon's Abridgement.
Bal.	=	Baluchistan.
Beng.L.J.	=	Bengal Law Journal.
Beng.L.R.	=	Bengal Law Reports.
Bom.	=	Bombay.
B.Y.B.I.L.	=	British Year Book of International Law.
Bur.L.R.	=	Burma Law Reports
Burr.	=	Burrow (sett.)

C.

Cal.	=	Calcutta.
C.W.No.	=	Calcutta Weekly Notes.
Car. & P.	=	Carrington and Payne.
Ch.	=	Chancery.
Ch.D.	=	Chancery Division.
C.J.	=	Chief Justice.
C.M.L.A.	=	Chief Martial Law Administrator.
Ch.Sec.	=	Chief Secretary.
Cl.	=	Clause.

C.

Cro.Jack.(2)	=	Corke (K.B.).
C.B.	=	Common Bench.
C.L.R.	=	Commonwealth Law Reports.
Commr.	=	Commissioner.
Const.	=	Constitution.
C & P.	=	Craig & Phillips, temp.Cottenham.
Cr.L.	=	Criminal Law.
Cr.App.Cas.	=	Criminal Appeal Cases.
Cr.L.J.	=	Criminal Law Journal.
Cr. P.C.	=	Criminal Procedure Code.

D.

Dac.	=	Dacca.
D.L.R.	=	Dacca Law Reports.
Dall.	=	Dallas (U.S.).
D.I.	=	Defence of India Act.
D.I.R.	=	Defence of India Rules.
D.P.O.	=	Defence of Pakistan Ordinance.
D.P.R.	=	Defence of Pakistan Rules.
Dy.Commr.	=	Deputy Commissioner.
D.B.	=	Division Bench.
D.M.	=	District Magistrat.
Dow.	=	Dowling's Practice Cases (P.C.)

E.

E.A.R.	=	East African Reports.
E.P.	=	East Pakistan.
E.Punj.	=	East Punjab.
E & A.	=	Ecclesiastical and Admiralty Reports.
Ed.	=	Edition.
E & B.	=	Ellis and Blackburn.
E.R.	=	English Reports.
Ex.	=	Exchequer.

F.

Fed.Cas.	=	Federal Cases.
F.C.	=	Federal Court.
F.2d	=	Federal Reporter Second Series (U.S.).
F.Supp.	=	Federal Supplement (U.S.)
F.C.R.	=	Frontier Crimes Regulation.
F.B.	=	Full Bench.

G.

Gen.	=	General.
Goa.D.D.	=	Goa, Daman & Deo.
G.G.O.	=	Governor-General in Council Order.
Govt.	=	Government.

H.

Harv.L.Rev.	=	Harvard Law Review.
H.C.	=	High Court.
H.L.	=	House of Lords.
How.	=	Howard.
Hyd.	=	Hydrabad

I.

Ind.	=	India.
I.A.	=	Indian Appeals.
I.L.R.	=	Indian Law Reports.
I.C.J.	=	International Commission of Jurists.
I.R.	=	Irish Reports.
Ir.Rep.	=	Irish Reports.

J.

J & K.	=	Jammu and Kashmir.
Jhone's T.	=	Jhone's, Sir Thos.(K.B.).
Jhons	=	Jhonson's Report (U.S.).

J.

J.Cr.L.	=	Journal of Criminal Law.
J.	=	Justice.
JJ.	=	Judges.

K.

Kar.	=	Karachi.
Keb.	=	Keble (K.B.)
Kent L.J.	=	Kentucky Law Journal.
Ker.	=	Kerala.
K.B.	=	Kings Bench (L.R.)

L.

Lah.	=	Lahore.
L.C.F.O.	=	Laws Continuance in Force Order.
L.Ed.	=	Lawyer's Edition (U.S.).
L.Ed.2d.	=	Lawyer's Edition Second Series (U.S.)
L.J.Q.B.	=	Law Journal Queen's Bench.
L.R.	=	Law Reports.
L.Rev.	=	Law Review.
L.T.	=	Law Times.
L.C.J.	=	Lord Chief Justice.

M.

Mad.	=	Madras.
M.L.J.	=	Madras Law Journal.
M.L.	=	Martisl Law.
M.L.A.	=	Martial Law Administrator.
M/S	=	Messrs.
Mich.L.Rev.	=	Michigan Law Review.
Minn.	=	Minnisota.
M.	=	Mohammad.
Mohd.	=	Mohammad.

N.

Nag.	=	Nagpur.
Nig.Bar.J.	=	Nigerian Bar Journal.
N.W.F.P.	=	North West Frontier Province.

P.

P.	=	Page.
PP.	=	Pages.
Pak.	=	Pakistan.
Pak.Bar.J.	=	Pakistan Bar Journal.
Pat.	=	Patna.
Pa.L.Rev.	=	Pennsylavania Law Review.
P.C.	=	Privy Council.
P.R.	=	Practice Reports

Q.

Q.B.	=	Queen's Bench (L.R.).

R.

Raj.	=	Rajasthan.
R.	=	Rex.
Roll.	=	Rolle (K.B.)
r.	=	rule.
rr.	=	rules.

S.

S.	=	Section.
Sec.	=	Section.
S.S.	=	Sub section.
St.Tr.	=	State Trials.
S.C.	=	Supreme Court.
S.C.M.R.	=	Supreme Court Monthly Reports (Pak).
S.C.R.	=	Supreme Court Reports (India.)

U.

U.P.	=	Uttar Pradesh.
U.S.	=	United States.
U.S.R.	=	United States Reports.

W.

W.L.R.	=	Western Law Reports.
W.P.	=	West Pakistan.
W.L.R.	=	Weekly Law Reports.
Wheat.	=	Wheaton (U.S.)

Y.

Ya.L.J.	=	Yale Law Journal.

CHAPTER 1.

CONCEPT OF LIBERTY.

In legal science 'liberty' is a relative term. 'Liberty' in the sense of acting without stay or hindrance according to one's free will, is unknown to jurists. 'Liberty' in the legal sense means the degree of freedom presented by the law to act according to one's free will. A limit is always placed, beyond which the enjoyment of 'liberty' is not allowed. In short 'liberty' is a restricted right to exercise one's freedom of will.

Roscoe Pound seems realistic when he says that "in the nineteenth century there was no difficulty in answering the question. Kant's idea of liberty of each - limited only by the like liberty of all, , was generally accepted. Liberty was a condition in which free exercise of the will was restrained only as far as necessary to secure a harmonious co-existence of the will of each and the free will of all others. But I am not speaking of the Kantian idea of liberty, in which my generation was brought up. Whatever 'liberty' may mean today, the liberty granted by our bills of rights is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of power and authority of those who are designated or chosen in a politically organised society to adjust relations and order conduct, and so are able to apply the force of that society to individuals. Liberty under law implies a systematic and orderly application of that force, so that it is uniform, equal and predictable, and proceeds from reason and upon understood grounds, rather than caprice or impulse; or without full and fair hearing of all affected and the understanding of the facts on which

official action is taken"[1].

It is obvious that, in this sense liberty connot be said to be the absolute freedom to act according to one's free will, because, if liberty is enjoyed unrestrictedly and without control, it will culminate in anarchy. But again the power which controls the enjoyment of liberty by individuals should not be unreasonable or arbitrary; otherwise it would itself be an impediment to the enjoyment of liberty, in the legal sense, as explained by Roscoe Pound. The degree of liberty one can enjoy and the amount one has to surrender for the sake of the liberty of others, as well as the power demanding such surrender, is organised and designed in modern society by the body of laws.

Woodrow Wilson, in his speech in New York[2], in 1912 defined 'liberty' in a comphrehensive and precise sense. He said:-

> "The History of 'liberty' is the history of limitations on Governmental power and not the increase of it. When we resist... concentration of power, we are resisting the powers of death, because concentration of power is what always preceeds the destruction of human liberties."

It follows that the concept of liberty comprises both restriction on the exercise of free will by an individual for the sake of the liberties of others and limitations on the arbitrary exercise of the power of the government to establish equilibrium between them.'Liberty' in this sense is a double edged sword, which defends the individual from the hostility

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1. Roscoe Pound, 'The Development of the Constitutional Guarantees of Liberty'

2.Woodrow Wilson 'Speech in New York' (1912)

of other people and the government.

Lord Acton defines 'liberty' as "the motive of good deeds and common pretext of crime." He continues "So gross have been the abuses, misinterpretations and disappointments of liberty, that it is pertinent to ask whether, in fact, it is universally sought by men and whether it is self evident good"[1].

When we come to the question of what we mean by 'Liberty', we might indulge in a great deal of metaphysical speculation and discuss such fascinating questions as whether a person should be forcibly prevented from crossing a bridge which, it is known, will break under him, and so forth. But if, like Edmund Burke, we detest the very sound of these metaphysical things, in order to define 'liberty' we will ask ourselves; What are the characteristics of a free society? One of the negative characteristics is that it is not a society based upon uniformity imposed from above. A perennial positive characteristics of any society is that there are tensions within it. If we feel that we want to live in the kind of world, where there are no disputes or none which cannot easily be settled by a straight forward administrative organ, we shall not want to live in a free society. If we want to live in a free society, we have to reconcile ourselves to an apparently never-ending series of perpetual tensions. It will be the business of government to hold the reins and to see that these tensions are properly and peacefully managed and that one group or class does not establish its ascendancy over the rest[2].

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1. Lord Acton 'History of Freedom'
2. See T.E. Utley 'Liberty or Equality' in 'Liberty in the Modern State'.

The dictionary definitions of 'liberty', though less significant from the juristic point of view, require some attention, while dealing with the concept of liberty. The word 'liberty' is defined by Webster's Dictionary in the following senses:-

> "The state of freedom; exemption from subjection to the will of another claiming ownership of the person or the services; freedom opposed to slavery, serfdom, bondage or subjection;
>
> A privilege conferred by a superior power, permission granted, or leave, such as 'liberty' given to a child to play or to a witness to leave a court and likewise, privilege, exemption, franchise, immunity enjoyed by prescription or by grant, as the liberties of the commercial cities of Europe.
>
> Freedom from imprisonment, bonds of other restraints upon locomation, a certain amount of freedom, or permission to go freely within certain limits, also the place or limits within which such freedom is exercised, the power of choice, freedom from necessity, freedom from compulsion or constraint in willingness.
>
> 'The idea of liberty, is the idea of power in every agent to do or forbear any particular action, according to determination or thought of mind, whereby either of them is preferred to other,'
>
> The liberty of judgement does not necessarily lead to lawlessness"[1].

The Dictionary of English Law defines 'liberty' as an authority to do something which otherwise is wrongful or illegal[2].

The Judicial Definition of 'Liberty':

'Liberty' has received a most comprehensive interpretation at the hands of the judiciary. It has been rightly said to embrace every form and every phase of the individual's rights, that is not necessarily taken away by some valid law for the common good. The right to liberty includes the right

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1. See Webster's International Dictionary (1903) p.848.
2. See Earl Jowith (edit) 'Dictionary of English Law' Vol.2. p.1088.

to exist and the right to enjoyment of life; it is invaded, not only by deprivation of life but also by deprivation of those things, which are vital to the enjoyment of life, according to the nature, temperament and lawful desires of the individual.

The Common Law concept of liberty implies the right to do or say everything, which is not prohibited by the law or statute. But, in general, 'liberty' is a complex of rights. The Law of England itself has been said to be the law of Liberty[1].

The word 'liberty', standing by itself, has been given very wide meanings by the Supreme Court of the United States of America. It includes, not only personal freedom from physical restraint but also the right to free use of one's own property and enter into free contractual relations[2].

Mr. Justice Reynolds defines 'liberty' in wide terms by observing:- "While this Court has not attempted to define with exactness the 'liberty' thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of individual to contract, to engage in any of the common occupations of Life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God, according to the dictates of his own conscience, and generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness by free men[3].

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1. R.V. Cobbett (1804) 29 St.Tr.1 at p.49.
2. See American Jurisprudence, Vol.II at p.329.
3. Meyerv. Nebraska, 262 U.S. 390.

The American concept of liberty may be summarised as follows: "The term 'liberty', as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen but embraces the right of men to be free in the enjoyment of the faculties, with which they have been endowed by the Creator, subject only to such restraints as are necessary for the common welfare. As the Supreme Court has stated, it includes, among others, the right to entertain the belief and to teach the doctrine that war, training for war and military training are immoral, wrong and contrary to the percepts of Christianity; the right to Worship God according to the dictates of one's own conscience, and the right to acquire useful knowledge; to marry; to establish a home and bring up children; and generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit for happiness by free men. It includes the right of a man to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation; and for that purpose to enter into all contracts which may be necessary and essential to his carrying out these purposes to a successful conclusion. Within the meaning of term 'liberty' is also included the right to buy and sell; to select freely such tradesmen as the citizen may himself desire to patronise; to manufacture; to acquire property; to live in a community; to have a free and open market; the right to free speech, of self-defence against unlawful violence; and, in general, the opportunity to do those things which are ordinarily done by free men.."[1].

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1. See American Jurisprudence Vol.II, para.329, at p.1135.

It can be added here that 'liberty' is not a right which can be either completely restricted or left absolutely uncontrolled in all the circumstances. It has been rightly said that a society, based on the rule that each one is a law unto himself, would soon be confronted with disorder and anarchy. 'Liberty' implies the absence of arbitrary restraint and not immunity from reasonable regulations and prohibitions imposed in the interest of society.

It is a cardinal principle of the English Constitution that a subject may say or do what he pleases or move about anywhere he likes and form associations and act in concert with his fellow-men, provided he does not trangress the substantive law nor do acts which invade the legal rights of others. Similarly, the authorities charged with the duty of maintaining public order or performing any other governmental duties cannot do anything to the prejudice of individual rights, unless they can show that they were authorised to do that act by some rule of common law or some provision made by the statute[1].

Liberties of the Subject:

The so called liberties of the subject are really implications drawn from the principle, a subject may do or say what he pleases, provided that he does not transgress the substantive law or infringe the legal rights of others. The liberties of the subject are not expressly defined under any law or statute[2]. Where public authorities are not authorised to interfere

1. See Entick v. Carrington, (1765) 19 St.Tr. 1030.
2. See Halsbury's Laws of England, 3rd ed. Vol.7, p.195.

with the subject, he has liberties[1]. It follows from the general provisions ensuing the peaceful enjoyment of the rights of property and freedom of the subject from illegal detention, duress, punishment or taxation, contained in the four great Charters[2] or Statutes, which regulate the relations between the Crown and the people, but the liberties of the subjects are not expressly defined in any law or code.

The liberties of the subject culminate in general welfare and happiness of the members of the state. The main purpose of the state being all round development of its members, it is essential that they must be free to choose their own way of life and what they should do with it. The development of the individual's personality leads to mass development and, as such,it is the duty of the state to create an atmosphere in which certain standards and rules of conducts for individuals prevail , so as to make 'Liberty' enjoyable by all equally.

The term 'liberty' has not been expressly defined in any of the constitutions of the world. What the constitutions of the world contain are guarantees of the liberties of the people. But the British constitution, instead of defining and guaranteeing the liberties of subject, designs procedure to protect the fundamental liberties. Liberty is residual and presumed to exist in Britain, unless a specific rule of common law or statute encroaches upon it. It is, therefore, always incumbent on every one, be he private individual or official, who seeks to intrude upon the freedom of another, to justify his conduct. In pressing a criminal charge, the prosecution must establish the /precise ingredients of the offence

1. See Hatscheck's Englishces Staatrecht, pp.547-548.
2. Namely, Magna Carta (1215) 25 Edw.1; The Petition of Right.,(1627) 3 car. 1.Cl. The Bill of Rights (1688) 1 Will & Mar.Sess.2.C.2. & The Act of Settlement (1700) 12 and 13 will. 3.C.2.

beyond doubt. Only then can a person be imprisoned, fined or otherwise punished[1].

Dicey, discussing the scope of liberty in England, pointed out, 'Since Parliament is sovereign, the subject cannot possess guaranteed rights, such as are guaranteed to the citizens in many constitutions. It is well understood that certain liberties are highly prized by the people (the absence of the constitutional guarantees makes necessary and perhaps stimulates a strong public opinion on this subject) and that in consequence Parliament is unlikely, except in emergencies, to pass legislation constituting a serious interference with them'[2].

The scope of these liberties which have been given general recognition, has differed from time to time but there are some today to which almost all civilized countries pay at least lip service. Peaslee's 'Constitutions of the World' sets out the constitutions of eighty countries, in all of which there is some recognition of some of the fourteen liberties of people. Eighty-four countries recognise the right to personal liberty, fair legal process and freedom of expression. Eighty-three recognise freedom of assembly and association and inviolability of correspondence and domicile. Eighty recognize the right to property; seventy-nine the right of freedom of education; seventy-seven the right to equality before law; seventy-six the right to freedom of labour; sixty-three the right to petition government authorities; sixty the

1. See R.H.Jones 'Constitutional and Administrative Law' p.112.
2. See Dicey's 'Law of Constitution' 9th ed. p.197. 'This was done without trouble during 1914-1918 War, by the Defence of Realm Acts, but the right of the subject to trial by Jury was, after a short period of supression, restored. Similarly very wide powers were given by the Emergency Powers (Defence) Act, 1940, to make Defence Regulations, requiring subjects 'to place themselves, their services, and their properties' at the disposal of the Crown. These Powers expired on 24th February,1946. Reg.18B of the Defence (General, Regulations,1939, which empowered the Home Secretary to intern suspected persons without-trial, was revoked by Order in Council, dated 9th May,1945 (S.R.& O,1945)as soon as hostilities in Europe ended).

rights relating to health and motherhood, fiftynine the right to social security, sixtysix the right to freedom of movement within the nation and fortynine the right to protection against retroactive punishment[1].

Professor Gledhill further points out that 'There are normative consitutions of politically mature countries in which the Supreme Court interprets the Constitution; and the executive and legislature abide by the interpretation; the formal constitutions found for instance in South America only partially enforced in practice but which it is hoped will be normative constitutions when political maturity is achieved. And there are constitutions devised to throw dust in the eyes of the observers, while the ruling clique or party does as it likes; here the fundamental rights like bikinis are important only for what they conceal. Again some constitutions provide effective legal process for enforcing Fundamental Rights. India for instance makes the right to effective judicial process a Fundamental Right itself; other constitutions are silent on this point; but there may nevertheless be a judicial remedy for infringement, and this may be speedy or not. There may be effective protection by convention, as in this country (England) where it would be impracticable to initiate legislation permitting detention without trial in the interest of public safety, except in time of war, legislation expropriating without compensation and legislation to suppress an effective political opposition. On the other hand there may be no effective protection of Fundamental Rights. The degree to which any particular liberty is enjoyed in a particular country depends on a large number of factors of which a constitutional provision is but one[2].

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1. Prof.Alan Gledhill, 'Fundamental Rights' in 'Changing Law in Developing Countries' by Prof.Anderson, p.81.
2. Prof. Alan Gledhill, op cit. p.81.

It could be added that the important question is not whether Fundamental Rights exist on paper, but to what extent do they in practice limit the powers of the ruling class in favour of the individual. According to Jennings' 'What are regraded as Fundamental Rights by one generation may be considered to be inconvenient limitation on legislative powers by another generation. For example, the Fifth and Fourteenth Amendments to the Constitution of United States prevented the United States Congress and the Legislatures of the States from depriving any person of life, liberty or property, 'without due process of law'. This has been used by the Supreme Court to limit very seriously the entrance of the social legislation dealing with matters as, hours of labour, minimum wages and workmen's compensation[1].

American constitutional liberty is juridical in nature; it is regarded as a legal rather than a political limitation upon governmental power; and looks to judicial review as the means of effectuating constitutional limitations. The concept of liberty is a concept of limitation and affirmation[2]. It is observed that there are stages in the history of nations, when the request for liberty concerns itself predominently with the affirmation of power and there are other stages when it is concerned predominently with the limitation of power. The high point in the stage of affirmation is in one of those revolutionary movements in history, when frustrations and oppressions of old society become so intense, that men yearn for some sharp and sovereign instrument which will clear it away and liberate them from it. The age of Cromwell in England was such an era. The French Revolution was surely another

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1. See W.I. Jennings 'The Law and the Constitution' p.257.
2. Arthur E.Sutherland, edit.,Government Under Law p.107. See. The distinction made between civil liberty and constitutional liberty and between political and judicial guarantees of Constitutional liberty in CORWIN - -,'Liberty Against Government', pp 7-8, (1948).

one. After these upheavals, when the worst of the ancien regime is cleared away, men begin to tame these giants of power, that they have created for their own liberation and the age ispredominently one of limitation, the age when liberty is defined in terms of control of power begins. The old revolutionary memories are in many ways buried, repudiated and forgotten[1].

Both America and England have for a long time been living in what might be described as predominently the age of power limitation, And America almost from its outset, having fled from those struggles prevalent in Europe, has lived with this perspective on power[2].

The question is: how are societies, in different phases of this power-liberty cycle, to judge each other and how are they to communicate with each other? The irony is in part this: that these stages above mentioned are never clear cut. Both exist together. In times of revolutionary upheaval, the men who have fashioned sharp power instruments for their liberation never completely forget that these instruments also involve a potential threat to liberty and are obliged to come to terms with their consciences. In the affirmative movements, so to speak, they are forever struggling with the limitational side of their personalities; they are trying to suppress it, to rationalise it, and in some sense, the whole history of revolutionary thought can be interpreted in terms of this pre-occupation[3].

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1. A.E. Sutherland op.cit. p.502
2. Ibid.
3. See Arthur E. Sutherland op.cit. p.503.

Just as the old constitutions had their own political theories, new theories have to be evolved to explain and defend the new organisation in England as well as in other countries. Whether a society is conservative or progressive in its economic aspects, it has to achieve a balance between the rights of the community as a whole and the rights of the individual. In the welfare state the word 'liberty' has changed its meaning; the most important kind of liberty is no longer liberty to manage one's own affairs but liberty to combine with others or to join associations.

With this new concept of liberty, it is not surprising that the old idea of Rule of Law, has been neglected, if not deliberately dropped, because the Rule of Law is essentially concerned with individual rights. Blackstone derived the Constitution itself from these rights, and was followed in this instance by Dicey. As Professor Wade points out, no one would suppose this to be true of modern constitutions and nearly twenty years ago he referred to it as, 'the difficulty which any literal acceptance of Rule of Law causes today, because of system of law, which like the common law, is based on the protection of individual's right is not really compatible with legislation which has for its object the welfare of the country or a large section of it as a whole'[1].

It may be that the idea of liberty in the sense of freedom of the individual was an illusion or was never a really essential element in any form of democracy. It is undeniable that all the conditions of modern life work against it and seem to make it an anachronism. For many people it is sufficient that, if there are strong tendencies in any direction, it should be the duty of any government to strengthen it further; anything else is

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1. Prof. Wade 'Introduction to Dicey's Law of Constitution'

putting back the clock, trying to sweep away the Atlantic with a broom, or some such metaphor. It seems more reasonable to argue that the purpose of government, once it extends beyond defence and enforcement of the criminal law, is to offer some counterweight to the prevailing forces; otherwise results would be much the same as if it did not exist[1].

The arguments advanced by Jhon Stuart Mill,[2] in the context of liberty of the individual, include an element of well-being. He contends that men should be free to act upon their opinions and according to free will, without hinderance, either physical or moral, from their fellow men, so long as it is at their own risk. This last proviso is of course indispensable. No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute a positive instigation to some mischievous act. Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases, must be controlled by disapproval, and, when necessary, by the active interference of mankind. The liberty of the individual must be limited, to the extent that he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgement in things which concern himself, the same reasons for holding that opinion should be free, support the view that he should be allowed, without molestation, to carry his opinions into practice at his own cost. That mankind are not infallible, that their truths, for the most part, are only half-

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1. See Mrs. Diana Superman's Article 'Democracy and Liberty', in, Liberty in the Modern State, pp.39-40.
2. See 'Liberty'.

truths, that unity of opinion, unless resulting from the fullest and free comparison of opposite opinions, is not desirable, and diversity is not an evil, but a good, until mankind is much more capable than at present of recognising all sides of truth, are principles applicable to men's modes of action, no less than to their opinions. As it is necessary that, while mankind is imperfect, their should be different opinions, so it is that there should be different experiments in living, that free scope should be given to varieties of character, short of injuries to others; and that the worth of different modes of life should be proved practically. It is desirable, in short that in things which do not primarily concern others, individuality should assert itself. Where, not a person's own character, but the traditions of customs of other people are the rule of the conduct, there is wanting one of the principle ingredients of human happiness, and the quite chief ingredient of individual and social progress.

It is rightly argued that, without the liberty of individual being constitutionally guaranteed (in developing countries), it is impossible to hope for any progress and it is the individual who is given the freedom of thought and action, in order that society may be able to adjust itself in the changing needs of the time. But the liberty of the individual must not be allowed to go so far as to stultify itself. The individual must not be allowed to make a nuisance of himself to his fellowmen. In a civilized society a line has to be drawn somewhere in order to confine, by means of regulations and control, the actions of the individual in such a way that they do not come in conflict with the overall interests of the society as a whole. The common good can only be realised by imposing certain limits on individual liberty. How and where this line is to be drawn, so as to confine the conflicting

interests and desires to the sphere of their legitimate expression, is the matter of practical dealings[1].

To summarise, there are no absolute rights and no uncontrolled liberties in the modern state, for the collective interest of the society, the peace and security of the State and the maintenance of public order are of vital importance; fundamental rights can have no meaning, if the State is in danger or disorganised, for not only the state but also the liberties of its subjects are endangered. There must be equilibrium between the rights of individual citizens and the collective good of the society[2].

Personal Liberty:

The concept of personal liberty is not specifically defined in English Law. The right to personal liberty is assumed in various declarations of human rights; charters and statutes. Under the English Constitution there are no formal guarantees of the right to personal liberty, apart from the declarations of rights contained in the ancient charters and the restrictions on the arbitrary use of power by the Crown or servants of the Crown, imposed by the Act of Settlement, 1688. The citizen may go where he pleases and do or say what he pleases, provided that he does not commit an offence against the criminal law or infringe the rights of others.

According to Dicey, the right to personal liberty as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of

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1. See A.K. Brohi, 'Fundamental Law of Pakistan' p.365.
2. See Prof. Alan Gledhill 'Pakistan', p.196. (See also Nasurallah Khan v. D.M., P.L.D.1965, Lah.813.

legal justification[1].

Denning tries to elaborate the concept of personal liberty in a very comprehensive way. According to him personal liberty means the freedom of every law-abiding citizen to think what he will; to say what he will and to go where he will on his occasions without let or hinderance from any other person. Despite all the changes that have come about in other freedoms, this freedom has, in England, remained intact. It must be matched, of course with social security, by which is meant the peace and the good order of the community in which we live. The freedom of the just man is worth little to him, if he can be preyed upon by a thief or murderer. Every society must have the means to protect itself from marauders. It must have powers to search, to arrest and to imprison those who break the laws. So long as those powers are properly exercised, they are themselves the safeguards of personal freedom. But powers may be abused, and, if those powers are abused, there is no tyranny like them. It leads to a state of affairs when the police arrest any person and throw him into prison without cause assigned. It leads to search of his home and belongings on the slightest pretext or on none. It leads to a hated Gestapo and the police state. It leads to extorted confessions and to trials which are a mockery of justice. The moral of it all is that a true balance must be kept between personal freedom on the one hand and social security on the other[2].

'Personal liberty is', as Harry Street advocates, "Our most vaunted freedom against the realities of police and follows the police from

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1. See A.V.Dicey, 'Law of the Constitution' 10th ed. by C.E.Wade, Chap.5.
2. See Sir Alfred Denning, 'Freedom Under the Law' pp. 5-6.

their powers of arrest to the restrictions imposed on the searching and entering of premises, to the police questioning, then to bail and habeas corpus, and finally to an extended discussion of controversial power of telephone taping and intercepting mail"[1].

So we come to the vital part played by the police in the preservation of freedom. If liberty must be circumscribed in order to preserve it, so must the laws which set the limits to freedom be fully and fairly enforced. Oppressive enforcement can be just as intolerable as harsh laws; while, without enforcement, there might as well be no laws at all. The dilemma seen by Dr. Johnson - how to find the golden mean between anarchy and totalitarianism - requires an effective but properly controlled police force as part of its solution. In the conditions of the modern world the existence of such a force is a fundamental condition of a free society. Consequently, the study of a society's police can be as revealing as the study of other organs of the government - the legislative, the executive and the judiciary - and is just as essential, if we are to understand the nature and the basis of the freedom, which we in this country (England) are fortunate to enjoy[2].

There can not be a specific definition of personal liberty. 'Personal Liberty', in general, means that the citizen may do what he pleases or go where he likes, provided he breaks no law and does not infringe the rights of others by e.g. committing nuisance or a trespass. It means further that, if he is prevented from doing what he likes or from going where he pleases, those who prevent him must justify their action before the courts and pay

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1. See Harry Street, 'Freedom, The Individual and The Law' p.13.
2. See the Rt. Hon. Gwilym Lloyd-George 'Arm of the Law' in Liberty in the Modern State' p.12.

damages for assault, trespass or other civil wrong, and in the last resort the citizen may use reasonable force in defence of his personal liberty[1]. And if he is imprisoned or punished for what he does, it can only be by process of law, which will normally be executed by ordinary criminal or civil courts; exceptionally he may be dealt with by some other form of tribunal and in times of emergency even detained by order of the Home Secretary, - but these cases are strictly limited and zealously watched. Thus a soldier may be tried by court-martial but the power to hold a court-martial, like the power to detain in war-time, is statutory and depends in the last resort upon parliamentary sanction. Since the abolition of Court of Star-Chamber in 1641, and the failure of James II's attempt to revive the Court of High Commission in 1685, there has been no attempt to imprison or to punish the citizen, outside the ordinary process of the court. There are, however, occasions when the public interest demands interference with the individual's freedom; it may be necessary to arrest him, to search his house, to hold him in custody pending trial, or require him to desist, by finding sureties for his future behaviour, on account of a course of conduct on which he has embarked. But all these interferences with the individual's freedom are, as we shall see, hedged round with safeguards[2].

Lord Atkin observed, 'It is one of the pillars of liberty that in English law every imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify his act[3].

The justification is generally that the person is arrested and detained without bail - pending trial in court on a charge of crime - or that

1. R.V.Hussey (1925) 18 cr.app.Cas.160.
2. G.A, Forest 'Constitutional Law' 8th ed. pp.371-372.
3. Liversidge v. Anderson (1942) A.C.206.

after trial by a court of competent jurisdiction he has been convicted and sentenced to imprisonment,or some other kind of detention provided by the Statute. Other kinds of lawful detention under Statutory safe-guards are those of mentally disordered persons, children in need of care and protection, committal for contempt of court or Parliament, imprisonment for failing to satisfy a judgement debt in spite of having had the means to do so and custody pending extradition or deportation.

Under the English constitution there is no formal expression of the guarantees of personal liberty. The citizen may go where he pleases and do or say whatever he likes, provided that he does not commit an offence against criminal law or infringe the rights of others. If his legal rights are infringed by others e.g. by trespass or defamation, he may protect himself by invoking the remedies provided by law. It is in the laws of crime and tort, part of the ordinary law of the land, and not in fundamental constitutional law, that the citizen finds the protection for his personal liberty, whether it is infringed by officials or by fellow citizens. In times of emergency the Executive is accorded special powers by the Parliament, but there are no formal guarantees - such as are to be found in a constitutional code, formally enacted, which have to be suspended[1].

Dicey says that there is an absence of declarations and definitions of the personal liberty in the English Constitution, which are generaly found under other constitutions of the world. He takes the example of the Belgian Constitution and compares it with that of England. He observes that the Belgian constitution is the result of legislative action, whereas the English

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1. Wade & Phillip's 'Constitutional Law' p.488.

Constitution is mainly based on legal decisions. According to him, in Belgium the rights of individuals to personal liberty flow from or are secured by the Constitution itself, but in England the right to personal liberty is not part of the Constitution; instead it is secured by the decisions of the courts through the Habeas Corpus Acts.

Dicey further points out that this difference is merely formal and that personal liberty is as well secured in Belgium (or in any other country) as in England and as long as this is so, it matters nothing whether we may say that individuals are free from all sorts of risk of arbitrary arrest because liberty of the person is guaranteed by the constitution, or that the right to personal liberty, or in other words the protection from arbitrary arrest, forms part of the constitution, because it is secured by the law of the land. The question how far the right to personal liberty is likely to be secured depends a good deal upon the answer to the question whether the Constitution framers consciously or unconsciously begin with definitions or declarations of rights or with contrivances or remedies, by which the right to personal liberty may be enforced or secured. As more stress has been laid on defining or declaring the rights, in most of the foreign constitutions, insufficient attention has been given to the necessity for the provision of adequate remedies for safeguarding these rights. It is, therefore, evident that, throughout the history of individual's rights, no country except England could claim that there has been an inseparable connection between the means of enforcing a right and the right to be enforced, which indicates the strength of judicial legislation. This can well be illustrated by the Habeas Corpus Acts, which declare no principles and define no rights but, for the

practical purposes, they are worth a hundred constitutional articles guaranteeing personal liberty. This connection between rights and remedies is lacking in many other constitutions of the world; and one cannot find as much co-ordination between personal liberty and its enforcement in other countries as is found in England[1].

The fact again that in many foreign countries the rights of the individual, including the right to personal liberty, depend upon the constitution, whilst in England the law of the constitution is little lessthan a generalisation of the rights which the courts secure to individuals, has an important result. The general rights guaranteed by the constitution may be, and in foreign countries are, constantly suspended. They are something extraneous to and independent of the ordinary course of the law. The declarations of the Belgian constitution that individual liberty is guaranteed, betrays a way of looking at the rights of individuals very different from the way in which such rights are regarded by English lawyers. We can hardly say that one right is more guaranteed than another. Freedom from arbitrary arrest, for instance, seems to Englishmen to rest upon the basis, of the law of the land. In the Belgian Constitution the words have a definite meaning. They imply that no law invading personal freedom can be passed without a modification of the constitution, made in the special way in which alone the constitution can be legally amended. This, However,is not the point to which our immediate attention should be directed. The important point is that, if the right to personal freedom is derived from a constitutional declaration

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1. See A.V.Dicey 'Law of Constitution' 10thed. pp.197-199.

it suggests that the right is capable of being suspended or taken away. If, on the other hand, the right to personal freedom is part of the constitution, because it is embodied in the ordinary law of the land, it is a right which cannot be destroyed without subverting the whole body of legal institutions of the nation. The so called suspension of the Habeas Corpus Acts bears, it is true, a certain similarity to what is called in foreign countries, 'suspending the Constitutional Guarantees'. But, after all, a statute suspending the Habeas Corpus Act falls short of what its title seems to imply, for though a serious matter indeed, it is, in reality, nothing more than a temporary suspension of one particular remedy for the protection of personal liberty. The Habeas Corpus Act may be suspended and yet Englishmen enjoy almost all the rights of citizens. The constitution, being based on the rule of law, the suspension of the Constitution, as far as it can be conceived as possible, would mean with us nothing less than a revolution[1].

According to Justice B.K.Mukhergea, 'personal liberty' in ordinary language means liberty relating to or concerning the person or body of the

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1. A.V.Dicey, 'The Law of Constitution' 10th ed. pp.200-202.
'The Petition of Right, and The Bill of Rights, and also the American Declaration of Rights, contain,it may be said, proclamation of general principles which resembles declaration of rights known to foreign constitutionalists, and specially the celebrated Declaration of Rights of Man of 1739. But English and American Declarations on one hand, and foreign declarations of rights on the other, though bearing an apparent resemblance to each other, are at bottom remarkable rather by way of contrast than of similarity. The Petition of Right and The Bill of Rights are not so much, 'declarations of rights' in the foreign sense of the term, as judicial condemnation of claims or practices on the part of the Crown, which are thereby proclaimed illegal. It will be found that every, or nearly every, clause in the celebrated documents negatives some distinct claim made and put into force on behalf of the prerogative. No doubt the Declaration contained in the American Constitutions have a real similarity to the Continental declarations of rights. They are the product of Eighteenth Century ideas; they have, however, it is submitted, the distinct purpose of legally contradicting the action of the legislature by the Articls of the constitution.

individual and 'personal liberty' in this sense is the antithesis of physical restraint or co-ercion. 'Personal liberty' means a personal right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. This negative right of not being subjected to any form of physical restraint or coercion constitutes the essence of 'personal liberty' and not mean freedom to move to any part of Indian Territory. In the Indian Constitution the expression 'personal liberty' has been deliberately used to restrict to freedom from physical restraint of a person by incarceration or otherwise[1]".

Justice Fazle Ali interpreted that the expression 'personal liberty' and 'personal freedom' have a wider meaning and also a narrower meaning. In the wider sense, they include not only immunity from arrest and detention but also freedom of speech and freedom of association etc. In the narrower sense they mean immunity from arrest and detention. The juristic conception of 'personal liberty' when these words are used in the sense of immunity from arrest, is that it consists in freedom of movement and locomotion[2].

Pitanjali Sastri J. construed,'personal liberty' in the context of Part II of the Indian Constitution is something different from the freedom to move freely throughout the territory of India and Article 21 presents an example of the fusion of the procedural and substantive rights in the same provision. The right to live, though the most fundamental of all, is also one of the most difficult to define and its protection takes the form of

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1. Goplan v. State of Madra, AIR 1950 S.C.27, per Mukherjea J.
2. AIR 1950 Madras S.C.27, per Fazle Ali J.

declaration that no person shall be deprived of it save by 'due process of law' or 'by authority of law'. Process of procedure in this context connotes both the act and the manner of procedure to take away a man's life or - 'personal liberty'[1].

In the Pakistan constitution, the word 'liberty' is used without qualification. The adjective 'personal' is omitted. It is apparent that 'liberty' in Pakistan Constitution has been used in a wider and more comprehensive sense and it could be construed in the wider sense of 'liberty' as in the American Constitution. In fact, in the original draft of the Indian Constitution, the word 'liberty' was used without qualification but the Drafting Committee recommended the insertion of the word 'personal' before 'liberty', so as to limit it and distinguish it from the broader and more sweeping concept of 'liberty'. They had already, in Article 19[2], dealt with the several aspects of the liberty of individual and were anxious to avoid giving an impression that the word 'liberty' used in Article 21[3] had any reference to the same matters as they had provided for in Article 19. But it is doubtful whether the word 'liberty' will receive the wide meaning as it has received in America and this, for the reason that the liberties in general have, in the Pakistan Constitution, been separately dealt with in much the same manner as in Article 19 of Indian Constitution[4].

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1. Ibid, [illegible] per Pitanjali Sastri J.
2. Indian Constitution.
3. Ibid.
4. See Blackstone's commentary on Laws of England, 4th Ed. Vol. 1. p.134 - See A.K. Brohi, op.cit. p.396.

It could be argued that the word 'liberty' in Pakistan Constitution means 'personal liberty' and something more. 'Personal liberty' consists in the power of locomotion[1], of changing situation, or moving one's person to whatever place as one's own inclination may direct, without fear of restraint or punishment unless 'according to law.'[2]

Personal liberty is guaranteed by Right No.1 of the Consititution of Pakistan, 1962, but instead of 'personal liberty', Pakistan Constitution uses only 'liberty'. The word 'liberty' in Right No.1 means 'personal liberty', which in its widest sense, includes freedom of movement and residence in any part of Pakistan. But Right No.1 comes under the caption 'security of person' the word 'security' in the caption is plainly used in the sense of protection, so as to guarantee freedom from physical restraint. What is sought to be protected by Right No.1 is loss of 'life and liberty' or loss of personal liberty, that is to say, freedom from physical restraint of person and from incarceration[3]. In other words it guarantees the protection of personal liberty against its arbitrary deprivation, or provides safeguards against loss of personal liberty at the instance of Government or any other organ of the society[4].

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1. On this point there is a difference of opinion between one of the two judges of the Division Bench of Lahor High Court; according to Akram J. it does include powers of locomotion while in the opinion of Gul J. it does not; the latter's view is correct; discussed in Chapter VII, see Abul Ala Maudoodi v. State Bank, infra.
2. See Blackstone's,Commentary on Laws of England,4th Ed.Vol.1, p.134; See A.K. Brohi, op.cit. p.396.
3. See Gul,J.'s observation in Abul Ala Maudoodi v. State Bank of Pakistan, P.L.D., 1969, Lah.908.
4. As one above.

Historical Development of Concept of Personal Liberty - Magna Carta 1215:

The history of the concept of 'personal liberty' may be said to begin with the Magna Carta in 1215. Before this first and famous Charter of Rights of People, there was no statutory document, which could be said to speak about the principles of 'personal liberty'. Magna Carta is, therefore, regarded as to be the first 'Great Charter of Liberties'. Bracton described it as 'Carta Liberatum'. Holdsworth said -

> "It (Magna Carta) stands on the heads of those two or three documents which contain, or are supposed to contain, some of the fundamental principles of the British Constitution. Lawyers, historians and politicians of every period of our history have interpreted it from the standpoints of every period of that history. From this point of view, we compare it to the 'Twelve Tables'. In the same sense as they were regarded as the 'fons et origo civilis', Magna Carta is the fount and source of our Constitutional Law..[1]".

McKechnie contemplating the dignity and importance of Magna Carta says:

> "The greatness of Magna Carta lies not so much in what it was to its framers in 1215, as what it afterwards became to the political leaders, to the judges and the lawyers, and to the entire mass of the men in England in later ages.....[2]".

The importance of Magna Carta lies, no doubt, in introducing the principles of 'personal liberty', its safeguards in the form of writs and its protection against imprisonment without trial. The various interpretations of this first charter of personal liberty lead to the same two-fold protection of

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1. William Holdsworth, 'History of English Law' Vol.II. p.207.
2. McKechnie, 'The Magna Carta' p.436.

rights of the people, namely the exposition of the principles of personal liberty and its safeguards.

Holdsworth comments on these interpretations in these words:

> "There is a sense in which these interpretations are true. The clauses do embody a protest against arbitrary punishment and against arbitrary infringement of personal liberty and rights of property; they do assert a right to a free trial, to a pure and unbought measures of Justice.
>
> ....,this is the real sense in which the trial by Jury and the writ of Habeas Corpus, may claim descent from the clauses of the Charter... [1].

It is generally understood that Clause 39 of Magna Carta, is the foundation Stone upon which the structure of the English Common Law, protecting personal liberty, rests. This clause provides that no freeman shall be taken or imprisoned or deceased or exiled or in any way destroyed except by the lawful judgement of his peers or by the law of the land 'Nisi legale judicium parium vel per legem terrae'. Clause 40 lays down, 'To no one will we sell, to no one will we refuse or delay the right or justice'.

The precise meaning of these critical words has been the subject of much debate among scholars, but whatever meanings their author attached to them, they have been used as a background to develop and support two institutions, which, probably more than all else, have been the safeguards in England of personal liberty, namely the jury system and the Writ of Habeas Corpus. In the days of Magna Carta, trial by Jury in the modern sense of the term was non-existent, and the phrase probably referred to tribunals of old type, where those whose duty it was to attend the court (commonly called the

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1. William Holdsworth, op.cit. p.207.

suitors) were judges both of law and fact, and was intended to secure that the freeman should not be judged by a tribunal in which the suitors were his inferiors[1].

The phrase 'by the law of the land', 'per legem terrae' is regarded as founding or declaring the right of personal liberty for the protection of which the Writ of Habeas Corpus has become the remedy. Upon the meaning of these words the commentators are least of all agreed - one school reads them as referring only to the test by which only at that date issues were usually determined, that is compurgation, ordeal or trial by battle. Upon this view of the words, the clause is retrogressive and has no constitutional significance. Others interpret them as referring to the general law of the land and thus gives to them some constitutional significance. The truth is that from the constitutional standpoint it matters not which is right, because Parliament from time to time confirmed the Charter and the common lawyer, acting in this respect in alliance with Parliament, soon put upon the words a meaning which gave them high constitutional importance. The words were construed as meaning 'by due process of the common law'. In order to appreciate what was meant by due process of the common law, it is necessary to distinguish between the common law and the law in more general sense. The common law practised by the common-law courts only, whereas the law, in the general sense was the laws which were enforced by the Council, the local and franchise courts and the Chancery. Thus, the phrase 'the law of the land'

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1. The Right Hon.Lord Tomlin of Ash, 'Liberty under the Common Law' pp. 7 and 8

might be regarded as a much wider phrase than the phrase 'the common law' ie. the law as administered by the common law courts[1].

In time the common law courts proceeded to extend and magnify their own jurisdiction. Their attack on other Tribunals was two-fold. They started limiting the jurisdiction of the local and franchise courts and they attempted to minimise and restrict the activities and jurisdiction of the Chancery and the Council. This claim to priority of the common law courts over other tribunals, has been well expressed by Holt C.J. in 1691 in these words:

> "The common law is the over-ruling jurisdiction in this realm and you ought to entitle yourselves well to draw a thing out of jurisdiction of it....."[2]

In the course of the struggle the Common Law Courts discovered a powerful instrument in the Writ of Habeas Corpus and established a principle which has given to personal liberty its present security. The common law courts never denied outright the jurisdiction of the Chancery or the Council, but construeing 'law of the land' in Magna Carta as referring to the common law, they sought to magnify their own jurisdiction and limit the powers of the Chancery and the Council in regard to interference with personal liberty. But the important point is that, whatever the motive which led the common law courts to adopt the construction in question, they established a general principle which influenced both the Parliament and the judges in their dealing with the problem of personal liberty. The judges, by the use of the Writ of Habeas Corpus, with assistance of Parliament brought a maturity to what is

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1. Ibid, pp.12-13
2. Shermailin v. Sands. 1.ld. Raymond 271, p.272.

today the main safeguards of personal liberty[1].

Sir William Holdsworth describes the situation in these words:

> "...Without the inspiration of a general principle with all the prestige of Magna Carta behind it this development could never have taken place; and equally without the translation of that general principle into practice by invention of specific writs to deal with cases of its infringement the protection of personal liberty could never have taken the practical shape ".[2].

The Petition of Right 1628 and The Habeas Corpus Acts, 1640 and 1679:

Sir Edward Coke, on 21st March, 1628, introduced in Parliament his famous 'Petition of Right'. In this document he reaffirmed that the principles in Magna Carta had been grossly violated by the Stuarts and recited that certain subjects of His Majesty had been cast into prison, without just cause on no more authority than the King's command and that such acts could no longer be tolerated. Among other guarantees he proposed that no person should be deprived of his personal liberty for more than three months without trial. Coke[3] succeeded in pursuading Parliament to declare that in future no man

1. The Right Hon.Lord Tomlin of Ash, op.cit. pp.13-14
2. Sir Wm. Holdsworth 'History of English Law', Vol.IX, p.104.
3. Sir Edward Coke, after a brilliant start at the bar, entered politics. In 1606 he was appointed Chief Justice of Common Pleas, and in 1613 Chief Justice of the King's Bench. In 1616, having displayed too independent a spirit towards James I, he was replaced. To the King's declaration that it was treason to say that King was not above law, Coke replied by quoting Bracton, the famous thirteenth century lawyer, "The King should be subject to no man. He is always subject to God and the law, because the law has made him King." This answer showed that no agreement was possible between the King and Coke, since Coke held that the common law was the supreme law of the realm, and that the judges, independent except in regard to the law itself, were its sole interpreters. James on the other hand, thought that judges were no more than the Crown's officials and that he had the power of his violation, to adjudicate when he though fit; according to him the final arbiter was the King and not the courts. In 1620, Coke re-entered Parliament and became a champion of personal liberties. He played an important part in drawing up the Petition of Right. It was Coke who once said to James: "Your Majesty may be very gifted but you do not know the law of this Kingdom, which is a subject a man must study deeply for many years before he can become proficient in it".

should be imprisoned without just cause and consequently Darnell[1] and other four men were set free.

The preamble to the Petition of Rights lay down that it concerns the subjects regarding their 'diverse rights and liberties', namely:

(i) That no man could be compelled to pay any tax without common consent by the Act of Parliament,

(ii) That no man should be imprisoned or detained accept in accordance with the laws and statutes of the realm,

(iii) That the billeting of soldiers and sailors should be abolished.

(iv) That commission for proceeding by martial law shall be revoked and annulled.

The object of these provisions, as the Act itself provides, was to safeguard the 'rights and liberties according to the laws and the statutes of the realm'. In the words of Holdsworth, the Petition of Right was a declaratory Act and the result of the declaration was to vest jurisdiction over civilians, in times of riots and rebellion, in the hands of the Ordinary Courts of common law; in the Petition of Right certain fundamental rights of Englishmen were declared in language which admitted one interpretation; and the declaration was not weakened by any ambiguous saving of prerogative right of the sovereign power[2].

Twelve years later by the enactment of Habeas Corpus Act 1640, Parliament abolished the court of Star Chamber and confirmed existing legal safeguards of personal liberty. Anyone unlawfully imprisoned could, on payment of the prescribed fee, avail himself of the Writ of Habeas Corpus.

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1. See Darnell's Case, infra

2. Sir Wm.Holdsworth, op.cit. Vol.V, p.453.

The Habeas Corpus Amendment Act of 1679, though it set forth no new rights, nevertheless proved to be a landmark in the way of improving the means of asserting rights and speeding up a procedure which was still too slow. The assertion of right is meaningless, unless it is provided with a quick remedy and strong sanctions against all violation.

Henceforward it was no longer possible for a scandalous case, such as that of the five members to recur. No longer could the highest courts rule that it was not open to them to inquire into the reasons for an arrest. A person could no longer be apprehended per speciale mandatum momini regis. Hence a jury could no longer, as in Throgmorton's Case[1], be imprisoned for having acquitted a person charged with high treason. There is no doubt that the Act of 1679, taken in conjunction with the existing guarantees, which it confirmed, went a long way towards guaranteeing personal liberty[2].

The Bill of Rights 1689:

Magna Carta, the Petition of Right, the Habeas Corpus Act 1640, and the Habeas Corpus Amendment Act 1679, were all patiently assembled parts of an edifice not yet completed. The famous Bill of Rights 1689 was designed to complete it. This (Bill) contained a list of rights, which,as Lord Chatham[3] once said, formed along with Magna Carta and Petition of Right, 'The Bible of the British Constitution'.

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1. (1954) State Tr. 869.
2. J.Duhamel, 'Some Pillars of English Law' p.51.
3. William Pitt, First Earl of Chatham (1708-78), father of the famous adversary of Napoleon, driving force in England's effort in seven years war, and the firm-imperialist - who opposed the taxation of American colonies which provoked the War of Independence.

The revolution that resulted in the execution of Charles I, the exile of James II and the troubles that shook England in the seventeenth century all sprang from the conflict between the Royal claims of absolutism and the will of the people jealous of all its liberties. The principal object of the Bill of Rights was to perfect and crystallise safeguards already claimed by Parliament at different times, but which were not adequate in themselves. The effect of the statute was to put an end to royal interference with the course of justice. James II had pretensions to the power to dispense with the law and, in some cases, to cancel it altogether. The Bill of Rights made short work of such pretensions; it declared illegal the power of dispensing with or suspending the law, as 'it hath been assumed of late' and affirmed a return to the constitutional guarantees trampled on by the Stuarts. Furthermore, the Bill declared to be mischievious and illegal any jurisdiction above the law or having an inquisitorial procedure, such as the Star Chamber which had been abolished in 1640. Besides other measures directed towards the evolution of the right of personal liberty, freedom of expression was also assured. Though the Bill of Rights dealt with rights of individuals, it did not speak of any natural or imprecriptible rights of man;it referred to the positive sights of persons who owed allegiance to the Crown[1].

The Virginia Declaration 1776:

The Virginia Declaration was made by the Assembly of the Colony of Virginia in 1776, for the British settlers in the colonies. Seeing the evolution of the rights of individuals in England through Magna Carta and

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1. See J. Duhamel, op.cit. p.50.

the Bill of Rights, the British settlers in the colonies claimed the same rights as were enjoyed by their fellow citizens in Great Britain under the common law. The Declaration laid down that all persons in colonies, "shall have and enjoy all liberties as if they had been abiding and born within our realm of England'. It was provided by the Declaration that whenever the liberty of the colonist was threatened by the Act, actions and policy of British Government, they could assert their fundamental rights not only as British subjects but also as human beings and Christians by virtue of the immitable law of nature and on the basis of their own colonial constitutions".

An analysis of the Virginia Declaration clearly shows in the first place, that it reiterated two of the provisionsof the British Bill of Rights; its Article 7, provided that the power of suspending laws or their execution by any authority without the consent of the representatives of the people was an infringement of the rights of the people; Article 6 similarly followed the British precedent and stipulated that all elections were to be free. The Declaration also repeated the provisions of Bill of Rights against excessive bail as well as against standing army in times of peace. Secondly, some of the provisions of Bill of Rights regarding the doctrine of natural rights were incorporated in the Declaration; for instance Article 1, provided that "all men are by nature equally free and independent, and have certain inherent rights such as the right to life and liberty and the right of property."

French Declaration of Rights 1789:

This famous Declaration was made by the French Constituent Assembly on August 27, 1789. It is, as far as the rights of the individuals are

concerned, a document of great historical importance. It came to be regarded as the most important source of charters of liberties, not only for the European Continent but also for the other nations of the world.

Professor Colliard while speaking about its importance, remarks,

> "The Declaration passed beyond the Cadre of purely juridicial work of the Assembly. It is an expression of a world-wide conception of human rights and summarises the philosophy of eighteenth century France. The Assembly considered it necessary to re-organise and declare fundamental rules valid for all human societies. The rights simply declared and established were natural rights; they belonged to man as a human being and partaking of his character they were sacred and inalienable..[1]".

Most European jurists regard the spirit of the Declaration as derived from the Virginia Declaration and ultimately from the British Bill of Rights. The provisions of the Declaration, no doubt were a step forward towards the evolution and protection of the Liberties of the individual, especially personal liberty. Article 9, of the Declaration defines the 'liberty' in the sense that it is the power to do anything which is not prejudicial to another and that the exercise of the natural rights has no other limitations but those which ensure the enjoyment of the same right by other members of the society. The Article 1, is just a paraphrase of Article 1, of the Virginia Declaration, which declares that "all men are born free; they should live free and should be equal before law." Article 7, is similar to the provisions of Article 39 of Magna Carta, which provides that "no man should be accused, arrested or detained except in cases determined by law and according to the procedure established by law."

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1. Prof. Colliard, 'Libertes Publiques' Chap.II.

Again Article 8 is taken from the Article 9 of the Virginia Declaration and reproduces the prohibition of cruel punishments. The adoption of principles of common law is found throughout the Declaration, specially in Article 9, which lays down that every person is presumed to be innocent, until he has been declared culpable according to law.

American Bill of Rights 1791:

The American Bill of Rights are the sum of the first ten amendments to the 1789 Constitution of the United States of America, which were passed by Congress and the Legislatures of the Constituent States in 1791. The importance of these Amendments have been referred to by Frankfurter J. in these words -

> "The first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government but simply to embody certain guarantees and immunities which we have inherited from our British ancestors....."[1].

It should, however, be added that the two of the Amendments - Ninth and Tenth - have nothing to do with the rights and privileges to citizens.

Of all these Amendments, the Fourth, Fifth, Sixth and Eighth, are important in regard to the evolution of rights and promotion of safeguards of the right to personal liberty. The Fourth Amendment declares that the right of people to personal liberty should be secured in their persons, houses, papers, effects against unreasonable searches and seizures. In Bell v. Hood[2] it was held that the right to be free from unreasonable searches and seizures is a common law right and that the Amendment IV did not create a new right,

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1. Dennis v. United States, 341 U.S. 494.
2. (1947) 71F. Supp.813

but merely gave constitutional protection to a pre-existing common law right.

The Fifth Amendment re-affirms the provisions of Article 39 of Magna Carta. It provides that no person shall be subjected for the same offence to be twice put in jeopardy of life or limb. This constitutional guarantee against double jeopardy stems from the ancient please of autrefois acquit and autrefois convict. It was held in U.S. v. Sabella[1] that resort should be had to the common law to ascertain the meaning of the clause, as the prohibition of double jeopardy is the recognition of maxim, "imbedded in the very elements of the common law." The Amendment also guarantees the other provisions of Magna Carta that no person shall be deprived of life, liberty or property without the "due process of law". It also provides the famous rule of common law that no person shall be compelled in a criminal case to be a witness against himself.

The Sixth Amendment protects the common law rights of the accused in criminal trial, namely, the right to speedy trial, and public trial by an impartial jury, the right to be informed of the nature and the cause of accusation, the right to be confronted with the witness against him, the right to have compulsory process for obtaining witness in his favour, and the right to have the assistance of counsel. The Supreme Court in Patton v. United States[2] held that right to trial by jury under this Amendment meant, "a trial by jury, as understood and applied at common law, and includes all the essential elements as they were recognised in

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1. United States v. Sabella. (1959) 272F. 2nd 206.
2. (1930) 281 U.S. 276

this country when the Constitution was adopted and also that the right of confrontation did not originate with the provision in the Sixth Amendment but was a common law right, having recognised exceptions, and the purpose of that provision was to continue and preserve that right and not to broaden it and disturb exceptions.

The Eighth Amendment re-asserts the fundamental right to bail and provides that excessive bail shall not be required, nor excessive fine imposed, nor cruel or unusual punishments inflicted. This clause has been borrowed from the Article 9 of the Virginia Declaration which basically borrowed it from the Bill of Rights of 1689.

CHAPTER 2.

DEVELOPMENT IN THE 19th AND 20th CENTURY.

The Dutch and Belgian Constitutions:

Though in England the right to personal liberty was constituted in Magna Carta in the 13th Century, it was then intended to protect the nobles against the King, but Magna Carta, clearly required the nobles to act towards their retainers as the King was required to act towards them and the Courts interpreted the provisions of Magna Carta as of general application. The development of Habeas Corpus in the 17th Century provided a means of enforcing the right so that in many ways it was better protected in England than elsewhere but, for economic reasons, the poor man could not easily find protection for his liberty. The French Revolution and the French Declaration of Rights were the work of bourgeois or middle classes, who regarded the right to property as of equal importance with the right to personal liberty. But the American Founding Fathers, though regarding property rights as important, also emphasised the right of equality. These two documents of rights have influenced all subsequent declarations, though they are both essentially bourgeois documents.

In the 19th Century the innovation of nation in Arms was introduced by Napoleon and the subsequent propogation of socialist doctrine called for attention to the interest of working classes. There were many revolutions in the 19th and 20th centuries, and a written constitution with a Bill of Rights became a status symbol for state emerging from a revolution. The sufferings endured

in the two World Wars encouraged claims for protection of working class rights. The post First World War Constitutions, like those preceeding them, were bourgeois documents and optimistic but the ease with which they were repudiatedmade the post World War II documents pessimistic; the old bourgeois rights were retained but the Constitution makers seek to make provisions for preventing the subversion of the Constitution to the violation of the Rights.

The French Declaration of 1789 was a source of inspiration to the people of the European Continent. Most of the European Constitutions borrowed the principles of the French Declaration and incorporated them in their respective constitutions in the form of the rights of the people or fundamental rights. The most noteworthy of them is the Dutch Constitution of 1815, which carried the concept of personal liberty still further. The Dutch Constitution is famous for its three-fold characteristics; namely, the declaration of rights has been embodied in the constitution itself; the basic principles of the French Declaration have been converted into the rights of the individuals guaranteed by the Constitution; and the constitution not only gives a clear specification of the fundamental rights, and specially personal liberty but also provides for their enforcement and protection.

The Belgian Constitution of 1831, made another step forward in the evolution of the concept of personal liberty. Article 7 is an advance on the French Declaration of 1789 and provides that no man shall be prosecuted, except in cases provided by the law and in accordance with the procedure laid down by it. The Belgian constitution provided the model of a Bill of Rights for many European countries. In particular, the following constitutions adopted the Belgian pattern, namely, the Italian

Constitution of 1848, the Greek Constitution of 1864, the Danish Constitution of 1886, the Austrian Constitution of 1867, and the Spanish Constitution of 1876. The declarations embodied in the Belgian Constitution had the same principal characteristics and purported to convert the concept of personal liberty as proclaimed by French Declaration into positive and actionable rights.

The South American Constitutions:

The concept of personal liberty laid down by Magna Carta and promoted by the French Declaration was adopted in many constitutions. Most of the Latin American countries incorporated it in their respective constitutions; the Argentina Constitution of 1853 is the best example. The Argentina declarations of rights, although Argentina adopted United States pattern of government, differ from the American Bill of Rights. The constitution gives the individual the right to petition the state authorities. It also guarantees that no personal service can be exacted except by virtue of law or a judgement founded upon law. Article 18 of the constitution provides that no person shall be punished, except under a judgement in accordance with an interior law. It also provides safeguards against self-incrimination and prohibits arrest, except by virtue of a written order from a competent authority in accordance with law. It abolishes the penalty of death in political cases and provides protection against every sort of torture. In furtherance of these provisions, section 617 of the Code of Criminal Procedure provides for a writ of Habeas Corpus against an order or process of a public authority, which unlawfully restricts the liberty of a person. The Supreme Court of

Argentina in the famous case of re Isabel v. Elortondo[1] interpreted the concept of personal liberty in the light of principles laid down by the United States Supreme Court in its various decisions, as well as by eminent European jurists.

The American Forteenth Amendment 1862:

The original American Bill of Rights applied only to laws made by Europeans. This had enabled the Southern States to maintain the institution of slavery, though the Northern States generally disapproved and the Civil War of 1861-1865 was the result of apprehension of the slave owners of the Southern States that they would have anti-slavery laws thrust upon them. By 1862 it was clear that the Southern cause was doomed. The way was open for emancipation of the slave and an amendment of the Bill of Rights so as to restrict State powers of legislation was enacted.

The 14th Amendment enshrined higher ideals of personal liberty. It imposed restrictions on the authority of the State to interfere with the rights of the individuals. Class 1, of the Amendment lays down -

> "No State shall make or enforce any law which shall abridge the privileges or immunities of the individuals of the United States, nor shall any State deprive any person of life, liberty or property without the 'due process of law', nor deny to any person within its jurisdiction the 'equal protection of law'."

The Supreme Court signified the characteristics of the provisions of this clause in express words -

> "..while this provision of this Amendment is new in the Constitution as a limitation upon the power of the states, it is as old a principle of civilised government. It is found in Magna Carta, and, in substance, if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union".[2]

1. Fallos 33, p.162.
2. Nunn v. Illinois,(1876) 94 U.S.123.

Development after the First World War:

The First World War was represented in the countries of the victorious allies as a war to stop aggression and defend human liberties and after its conclusion, efforts were made in various countries to ensure personal liberty by various bills and Charters of human rights, because the very existence of some nations, particularly in Europe had been endangered by the Central powers. But the authors of these documents had to face the question whether individuals should be allowed, in accordance with the famous principles of the great British, European, American and Latin American Bills of Rights, to enjoy the maximum and unrestricted liberty in order to seek opportunities for the free development of personalities and activities; or whether in the interest of the security of the States, some of which had only recently emerged, the liberty of the individual must be controlled and restricted. During the war the British Parliament and the Legislatures of the European States had been obliged to pass Emergency Acts and Regulations, putting restrictions on the personal liberty of citizens, to ensure the effective prosecution of the War and to maintain internal and external security. These enactments enabled Parliament or the Legislatures to give arbitrary and unrestricted powers to the Executive to frame regulations for the arrest and detention of persons, to search for and seize their property, if their origin or activities raised suspicion that they might act to the prejudice of public order or the safety of the State. These delegated powers were arbitrary, in as much as they could not be challenged in any court of law.

The question before the British judiciary in the case of The King v. Haliday[1], was whether the Emergency Acts and Regulations, should be interpreted as implying power to impose arbitrary limitations and restrictions on the right to personal liberty in war time, on the assumption that the security of the State, being the highest of all purposes, should be maintained even at the expense of personal liberty or whether to hold that personal liberty, being the essence of life and personality, should not be dispensed with or taken away, without juridical justification.

Lord Shaw[2], dissenting from the majority, observed that personal liberty should be safeguarded at every cost as, according to him, the Defence of Realm Act, 1914, should not be given such a violent and strained construction as demanded complete subversion of personal liberty, because the Act itself did not explicitly make such drastic provision.

The growing acceptance of the socialist theory of State involved a devaluation of the right to unrestricted personal liberty. Restrictions on individual liberty were permissible to secure the general interests of the community. Since the First World War, the right to personal liberty has been subjected to an increasing interference by the State, but the scope of 'personal liberty' has been extended to embrace most fields of human activity. The modern consitutions were framed at a time when social and economic justice were coming to be regarded as more important than personal liberty.

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1. (1917) A.C. 260
2. Ibid.

But in post-war period the protection of personal liberty was regarded as an essential feature of the fundamental rights incorporated in the post-war constitutions, but limitations on personal liberty were deemed to be necessary in the interests of the security of the State, public order and peace. The Mexican Constitution of 1917, the Irish Constitution of 1937, and the constitutions of other countries of the world are the best illustrations of the fact.

Development after the Second World War:

In Second World War, the danger to the existence of the States at war with Germany was so great that a large number of emergency enactments and regulations were made, which bore heavily on the right to personal liberty, and the judiciary was always faced with the difficulty of balancing the security of the State against the right to personal liberty.

In Liversidge v. Anderson[1], the dissenting judgement of Lord Atkin laid down principles for the interpretation of preventive detention legislation, which the majority, though unwilling to accept as applicable to a war-time statute, were prepared to accept it as applicable to preventive detention in time of peace.

The West-German Constitution of 1949, the Italian Constitution of 1948, the Indian Constitution of 1950, the Pakistani Constitution of 1956 and post Second World War Constitutions of Commonwealth countries and other countries not only include in its classic form, the right to personal liberty, but they also have provisions to meet emergency which involve restrictions on the right.

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1. (1942) A.C. 206.

The Universal Declaration of Human Rights:

The Universal Declaration of Human Rights, passed by the General Assembly of U.N.O. on 10th December, 1948, is the most remarkable development in respect of the Charters of human rights and the evolution of the right to personal liberty. As a matter of fact it was not intended to be a constitutional document, but, having received the recognition by most nations, its principles have been incorporated in most of the post-1948 constitutions. It has been rightly described as the 'International Magna Carta'. Notwithstanding statements by eminent jurists of the United States and other countries, that the declaration is not an authoritative guarantee of legal obligations of the member states of U.N.O. and that the document is not a statute, having no legally binding force, being merely a statement of principles, devoid of any obligatory character, the fact remains that its importance in safeguarding human rights, especially the right to personal liberty is obvious.

Lauterpacht[1] has pointed out that, though not a legal instrument, the Declaration is of great importance, and the fact that it is not an instrument of legal binding force does not deflect from its importance. In 1959, when considering compacents of constant infringement of the rights of the people of Tibet, the General Assembly passed a resolution, affirming its belief that respect for the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights is essential for the evolution of a peaceful world-order based on the rule of law and called upon the Chinese authorities to respect the fundamental rights of the Tibetan people

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1. B.Y. B.I.L. (1948) pp. 354-81.

and their distinctive culture and religious life[1].

The Declaration contains important clauses regarding the protection of personal liberty. Article 3, lays down that every one has right to life, liberty and security of person; Article 4, prohibits slavery or servitude, in all its forms; Article 5, provides that no man shall be subjected to torture, or to cruel or inhuman or degrading treatment; Article 9, prohibits arbitrary arrest and detention, or exile; Article 10, provides for fair and public trial by an independent and impartial tribunal; and Article 11, lays down the primary principles of criminal justice. The Declaration declares some rights which are not found in any national constitutional charter; Article 14, provides that everyone has the right to seek and enjoy in other countries asylum from persecution but the right cannot be invoked in cases of persecution for non-political crimes or for acts contrary to the purpose and principles of the United Nations. The Declaration also imposes certain limitations on the free enjoyment of personal liberty, as do other Bills of Rights. Clause (3) of Article 29 lays down that, in the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law solely for the purpose of securing due respect for the rights and freedom of others and meeting the just requirements of morality, public order and the general welfare in a democratic state. Article 30, lays down that nothing in the Declaration may be interpreted as implying, for any state, group or person, any right to engage in an activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the Declaration.

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1. Tibet and Chinese People's Republic, International Commission of Jurists p.4.

The European Convention of Human Rights:

The Covention was signed in Rome in 1950 by fifteen members of the Council of Europe. The Convention was designed, as is apparent from its preamble, to take the first steps for the collective enforcement of certain rights in the Universal Declaration of Human Rights. The Convention is not merely a declaration of rights, as it provides machinery for the enforcement of those rights by legal process. Article 19, provides for the establishment of a European Commission of Human Rights and a European Court of Human Rights, in order to s ecure the observance of the engagements undertaken by the high contracting parties. The Commission has competence to receive a petition from any citizen of the signatory states. The Commission, well as the signatory states, have the right to bring a case before the European Court of Human Rights. Under Article 45 of the Convention, the Court has jurisdiction in respect of all cases concerning the interpretation and application of the Convention which a signatory state or commission may refer to it. Under Article 46 the signatory state may declare that it recognises as compulsory the jurisdiction of the court in all matters referred to it. So far this declaration has been made only by nine states. As far as the municipal laws/ are concerned, the states are not bound to follow the Convention, but in the states, which have agreed, the Convention has become part of the law of the land. So far in six of the signatory states, the Convention has not beem made part of the national law and cannot, therefore, be enforced by their respective courts. The Supreme Court of Eire in re Lawless[1] held that, so far the Irish Parliament had not accepted the Convention, as part of the law of the land, the court could not give effect to the Convention, if it contravened the national law or purported to grant rights or impose/ obligations additional to those of the law of the land.

1. (1958) I.L.R. 420.

CHAPTER III

PERSONAL LIBERTY IN THE WORLD'S CONSTITUTIONS

The Old Commonwealth Countries

The object of the Candian Bill of Rights, 1960, was to define and protect certain human rights or fundamental freedoms. It declares, among other rights, the existence and continuance of the right of individuals to life, liberty and security of the person. It lays down that these rights cannot be taken away except by "due process of law". It lays down that no law shall be so construed or applied as to authorise or effect arbitrary detention, imprisonment, or exile; or to impose or authorise cruel and unusual treatment; or to deprive a person, arrested or detained, of the right to be informed promptly of the grounds of such arrest or detention; or to deprive him of the right to retain counsel and apply for the writ of habeas corpus or of the right not to be compelled to give evidence or of the right to the presumption of innocence or of the right to fair trial and hearing, in accordance with fundamental justice or of the right to have an interpreter, when needed, in judicial or quasi-judicial proceedings.

It may, however, be noted that, in the Canadian Bill of Rights, the rights are not entrenched, in the sense that they can only be repealed by a difficult legislative process. It is merely provided that, as a rule of construction, Canadian statutes shall be interpreted, so as not to abridge these rights.1

1. See Canadian Bar Review (1959) 1, et. seq.

In Australia, there is no formal expression of fundamental freedoms in the Australian Constitution, but English law and custom generally prevail in practice. Moreover there is no Federal Bill of Rights in Australia, as there is in the United States. Though the law of each Australian State is based on English law, there are variations between the laws of the various States. Only a few States have introduced Bills of Rights, designed on the pattern of Canadian or American Bills of Rights, in their respective Parliaments. The introduction of Bills of Rights into State laws raises problems in Australia. A state Parliament could at any time adopt legislation, purporting to bind future Parliaments and the administration to preserve fundamental liberties. But in order to tie the hands of future Parliaments, there should be in the Constitution, provisions against repeal or amendment of the fundamental liberties by ordinary legislative process. Towards the end 1959, a Bill was introduced in the Queensland Legislative Assembly - the Constitutional (Declaration of Rights) Bill - which was aimed at securing certain fundamental freedoms and included a clause requiring every proposed law inconsistent with the Declaration of Rights Act to be approved by a majority of electors at a referendum before being submitted for the Royal assent. The Bill was withdrawn and consequently never passed into law, but it did raise the interesting question, whether the entrenching clause would have had the effect its framers claimed for it.

As regards personal liberty, though the common law rules generally apply in States, in none is the present law defining the powers of the police exactly the same as in England, nor is the law uniform throughout the different Australian States. Under the constitution, the States alone have authority to decide what facilities shall be provided for the enforcement of state laws and what powers shall be given to state police as regards arrest of offenders against state law and searches and seizures etc. in connection with such offences. The Federal Constitution simply provides some safeguards against the arbitrary deprival of personal liberty. It lays down that the trial for indictable offences against Commonwealth law must be by jury; there must be freedom of movement between the States and no State may single out residents of another State for discriminatory treatment.

In New Zealand as in Australia there is no formal statement of rights of the people but English law and customs prevail. In August 1963, a Bill of Rights based on the Canadian model was introduced in the New Zealand Parliament and was carried.

Asian Countries

The Malaysian Constitution of 1963, gives comprehensive recognition and protection to the right to personal liberty. Article 5, lays down that no person shall be deprived of his life or personal liberty save in accordance with law; that where complaint is made to High Court or to 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; that where a person is arrested he should 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; that a person, arrested and detained shall be produced before a magistrate within twenty four hours (excluding the time of any necessary journey) and shall not be further detained in custody without the magistrate's authority. Article 6 states that no person shall be held in slavery; that all forms of forced labour are prohibited but Parliament may by law provide for compulsory service for national purposes; that no person shall suffer greater punishment for an offence than what was prescribed by law at the time it was committed. Article 7 provides that no person shall be punished for an act or omission, which was not punishable by law when it was done or made; that a person who has been acquitted or convicted of an offence shall not be tried again for the same offence, except where the conviction or the acquital has been quashed and a retrial ordered by court superior to that by which he was acquitted or convicted. Article 9 provides that no citizen shall be banished or excluded from the Federation, except for prescribed reasons.

The constitution of Singapore, 1963, does not mention the rights of people. There are provisions regarding citizenship and a Singapore citizen, who becomes a citizen of Malaya by operation of

law, will enjoy the same rights and liberties as a citizen of Malaya[1].

In the constitution of Union of Burma[2], the provisions regarding the protection of personal liberty are found in declaratory as well as generalised form. It lays down that no citizens shall be deprived of his personal liberty nor shall his dwelling be entered save in accordance with law. The exercise of the rights is subjected to law, public order and morality. The rights to reside and settle in any part of the union are granted, and traffic in human beings, forced labour in any form and involuntary servitude, except as a punishment for a crime whereof the party has been duly convicted, are prohibited. But this does not prevent the union from imposing compulsory service for public purposes. No person can be convicted of a crime, except under a law in force at the time of commission of act charged as an offence; no person shall be subjected to a penalty greater than that applicable at the time of the commission of the offence[3]. As regards safeguards of personal liberty it is provided that only the Supreme Court has the power to issue directions in the nature of habeas corpus to protect the right of personal liberty guaranteed under the Constitution and that the right to enforce this remedy shall not be suspended unless in times of war, invasion, rebellion, insurrection or grave emergency, may so require[4].

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1. Singapore ceased to be a state of Federation of Malaysia and became independent in 1965.
2. Constitution of Union of Burma, 1947, as amended upto 1961.
3. Ibid. Arts. 16,19,24.
4. Ibid. Art.25.

The main Constitutional document in Ceylon, hamely, the Order in Council,[1] is silent about the recognition and protection of the rights of people, except in respect of religion. But English law and customs form the basis for the Judiciary to decide the cases regarding the fundamental freedoms.

Other Commonwealth Countries

The Nigerian Constitution of 1960[2] includes a declaration of rights largely drafted on the pattern of the European Convention on Human Rights. Though some differences are found, the similarities between the Chapter III of Nigerian Constitution and the European Convention are more obvious than the points of difference. Both the European Convention and the Chapter III of the Nigerian Constitution include the classical liberal freedoms. Provisions corresponding to the Nigerian Constitution in respect of fundamental freedoms and personal liberty in particular are found in most of the Constitutions of the Commonwealth Countries, especially those in Africa. A list of justiciable guarantees is preceeded by a general section setting out the purport of what is to follow; for instance Article 14 of the Constitution of Kenya states;

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1. Ceylon (Const.) O. in C. May 15, 1946.
2. The Constitution of Nigeria as amended October 1, 1963.

> "Whereas every person in Kenya is entitled to fundamental Rights and freedoms of the individuals, that is to say, has the rights, whatever his tribe, race, place of origin, or residence or other local circumstances, political opinions, colour, creed or sex, but subject to respect for the public interest, to each and all of the following, namely to;
> (a) life, liberty, security of the person and the protection of law;
> (b) of conscience; of expression; of assembly and association; and
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation".

In Nigerian Constitution it is also laid down in the general section that these rights and protections can be enjoyed equally by the people, subject to limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. Such a provision serves the useful purpose of setting out the general purport of the guarantees, lifting them above the austerity of tabulated legalism, and helping to spread awareness of their implications - and indeed of their existence - among the community at large.[1] After this provision, the general safeguards regarding personal liberty are found. It is provided that a person who is arrested on a criminal charge must be promptly informed in a language that he understands, of the reasons for his arrest. He must be brought before a court without undue delay and if not tried within a reasonable time, he must be released either unconditionally or subject to reasonable conditions. One who is illegally detained or arrested is entitled to

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1. See Prof. S.A. De Smith "New Commonwealth and Its Constitutions" p 194.

compensation. A person charged with a criminal offence must be given a fair hearing within a reasonable time by the court. He is to be presumed innocent, unless proved guilty, He must be given adequate time and facilities to prepare his defence in person or by a legal representative of his own choice, to cross examine prosecution witnesses, to have the free assistance of an interpreter if need be, and to obtain copies of record of the proceedings. Retroactive penal legislation and double jeopardy are prohibited. The accused can not be compelled to give evidence at his trial. Every person is guaranteed the right not to be deprived intentionally of life, not to be subjected to torture or to inhuman or degrading treatment and not to be held in slavery or to be required to perform forced labour.

But these provisions are so qualified as to amount to little more than constitutional entrenched treatment of the existing law. It is lawful for the state to take life for the execution of a death sentence or by the use of reasonably justifiable force for the maintenance of public order. No punishment authorised by pre-existing laws is deemed to be inhuman or degrading. "Forced labour' is narrowly defined. However the protection of the pre-existing laws by constitutional entrenchment is not valueless. It has beeen rightly observed by the Supreme Court of Nigeria that a commission of inquiry cannot be validly granted power to imprision a person, because imprisonment by order of such a body is not one of the enumerated grounds on which a person may be deprived of constitutional right

to personal liberty[1].

A somewhat elusive guarantee of respect for private and family life, home and correspondence is also assured to all persons. But the guarantees of freedom of movement and freedom from discrimination extend only to citizens of Nigeria. No citizen may be expelled from or refused entry into Nigeria; the guarantee however does not cover freedom to leave the country.

Preventive detention of political opponents and security suspects is still unconstitutional in Nigeria, save in a period of emergency, but an order restricting movement or residence may lawfully be made for prescribed purposes even in normal times. A person detained during an emergency or a Nigerian citizen upon whom a restriction order has been served, is entitled to have his case referred within one month (and thereafter at intervals of not more than six months) to an advisory tribunal, established by law and so constituted as to secure its independence and impartiality; the chairman of the tribunal is required to be a lawyer appointed by the chief justice of the Federation[2].

In practice, these provisions regarding personal liberty in particular as well as other Fundamental Rights have had little effect and there have been very few cases before the courts to enforce these rights[3].

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1. Doherty v. Baleva, 4 Nig.Bar. Jl.48 (June 1962) - affirmed Sub.Nom. Baleva v. Doherty (1963) WLR. 949.
2. See Constitution of Nigeria 1963, Art.15-18,22,25,26,27.
3. The list of cases and decisions, based on these clauses is given in "Digest of Decisions on Nigerian Constitution" by Sir Lionel Brett, in Journal of African Law, Autumn 1964, Vol.8.No.3.

Out of the cases arising out of the Declaration of a state of emergency in Western Nigeria in 1962, Mackintosh[1] cites two significant cases. He says that the clauses 64 and 65 in the 1960 Constitution (69 and 70 in the 1963 version) empower the Federal Parliament to declare a state of emergency, when there is war or danger to domestic institutions. A scuffle in the House of Assembly led the Federal Government to declare such an emergency, suspend the Government of the Region, install an Administrator and restrict most of the leading politicians. In the first case, Chief F. R. A. Williams contended that the Emergency Powers Act, 1961, the Emergency Powers (Restriction Orders) Regulations, 1962, and the restriction order served upon him, were all ultra Vires[2]. He argued that there was no emergency, that Parliament had no right to delegate legislative power to the Governor General, who could not therefore delegate them in turn to the Administrator, and that the powers were used in a manner contrary to some of the Fundamental Rights. The Court refused to consider the question, whether an emergency existed, and passed over the difficult question what powers, sections 64 and 65 (legislation for peace and order and in time of emergency) conferred on the Federal Government. They agreed that, under either section, a law or regulation to restrict a person was subject to the control set out in section 28 on Fundamental Rights, in that it must be 'reasonably justifiable' for the purpose of dealing with the situation that exists. They concluded that, as Chief

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1. John P. Mackintosh, 'Nigerian Government and Politics' pp.47-49.

2. Judgement of Federal Supreme Court of Nigeria in F.R.A. Williams v. M.A. Majekodunmi; July 7, 1962.

Williams was chairman of the 'peace committee' set up by the A.G., there was not adequate evidence to warrant his restriction. As soon as Chief Williams was released, a new restriction order was issued, confining him to his house in Ibadan. He was unable to appeal against this order, as he was restricted and could not go to Lagos to plead on his own behalf. (In the first case he had been at large long enough to obtain a court order allowing him to contest the case in person in Lagos). He considered it too risky to send a Junior member of the Bar to plead on his behalf and, in addition, the Supreme court was on vacation from July to September. [1]

In the second case, Alhaji Adegbenro appealed against his restriction order but not on the grounds that it was unjust to him but on the ground that the entire declaration of emergency and the emergency regulations were unconstitutional and vaid.
The Court agreed that his case was ' much more fundamental', but refused to consider whether the Emergency powers Act, 1961, was unconstitutional, whether Parliament could delegate the power to declare an emergency to the Governor General, whether the power to remove the Governor, Premier, Minister and Legislature of the Region, or whether the emergency regulations were 'reasonably Justifiable' ... for dealing with the situation ' in the terms of the chapter on

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1. Mackintosh, J.P. op. cit. P.48 gives note saying that he is indebted to Chief Williams for a letter of December 31,1963, in which he gave his explanation of his failure to take legal action against the second restriction order served on him.

Fundamental Rights. The Justices brushed aside these questions and based their decision on one point: that the only requirement for establishing a state of emergency is a resolution of both Houses of Parliament.[1] Thus the impression was created that the clauses on Fundamental Rights were no check on Parliament's use of its emergency powers.[2]

Modified versions of Nigerian model are found in the Constitution of Kenya, Uganda, Sierra Leone, Noth-Rodhesia (Zambia) Nayasaland, Malta, British Guiana, Aden and Jamaica.

The provisions in the latest Commonwealth Countries Constitutions make it clear that a person may be deprived of a guaranteed freedom in accordance with law, and that derogations from the rights are permissible not only by law but also by actions done under the authority of law.

Turkey

Though the Turkish Constitution is said to have incorporated[3] the Europrean Convention on Human Rights, the provisions regarding personal liberty are more akin to those in the Indian Constitution. The general clause declares that every individual shall have the right to improve himself materially and spiritually and shall have the benefit of personal freedom; and this right can only be restricted by "procedure established by law" and through the judgements of the Courts. But it differs

1. Judgement of the Federal Supreme Court of Nigeria in Adegbenro V. Attorney General and others, June 7, 1962.
2. See also Mackintosh, J.P. op. Cit. p. 48.
3. Constitution of Turkish Republic, 1960

from the provisions of the Indian Constitution in that the Indian Constitution allows complete deprivation of personal liberty by the legislature, in accordance with the 'procedure established by law', whereas the Turkish Constitution only authorises restrictions on personal liberty in the interest of the nation[1].

It prohibits ill-treatment, torture or punishment incompatible with human dignity; it provides that the privacy of personal life or the home shall not be violated; search for papers may not be made except by order of the Court or by an order of an authority made in accordance with law. It gives to individuals the rights of communication, of travel and residence, subject to restrictions by order of the court, duly passed in accordance with law, for maintaining national security[2].

As regards detention, it lays down that no person can be detained except by the Judgement of the Court, for the purpose of preventing escape or tampering with evidence, if there exists a strong case for indictment, or in similar cases when detention and its length is authorised or specified by law. It is provided that no person can be detained except in accordance with law. When such detention is permitted by law; the detained person must be notified in writing of the reason for his detention, disclosing the charges against him; he must be brought before the Court nearest to the place of detention

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1. Ibids. Art.14.
2. Ibid, see Arts.17-19.

within twenty-four hours excluding the time for 'journey'; after the lapse of that time, he cannot be deprived of his liberty without judgement of Court; and the detainee's next of kin must be immediately informed of the reasons thereof. The detainee has the right to be indemnified by the State according to law, if he is treated in a manner other than specified by law. He also has the right to litigate and present his case to the Judicial authorities, availing himself of all legitimate methods and procedure. The court cannot abstain from hearing any case within its jurisdiction, and no person shall be compelled to appear before any agency other than the Court having jurisdiction. No agencies shall be be vested with extra-ordinary powers to pass Judgement and no person shall be compelled to appear before an agency other than a Court normally empowered to try him[1].

Like other constitutions, it gives protection against retroactive laws and punishments, and lays down that no person shall be punished for an act which was not considered as an offence under the law in force at the time the act was committed, that punish-ments and penal measures must be laid down by law, and no person shall be punishable with a penalty heavier than that provided by law for that offence at the time the offence was committed[2].

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1. Ibid, see Arts.30-32
2. Art.33.

It also protects the individual from self-incrimination and states that no person shall be compelled to make a statement or give testimony liable to incriminate him or his legally defined next of kin; criminal responsibility is personal.[1]

But the Constitution is silent about double jeopardy, emergency provisions and preventive detention; it does not give the legislature any extra ordinary power to deprive anyone of personal liberty. Every kind of arbitrary deprivation of life and liberty is illegal. In this sense,it can be said that it differs from the constitutions of most Common-wealth Countries' and many modern constitutions, which authorise the arbitrary deprivation of personal liberty for the purpose of national security, public order and maintenance of peace.

Other Asian Countries.

In the Constitution of Indonesia,[2] the right to personal liberty is given expression in a very generalized form. Art. 27 states that all citizens shall have equal Status in law and government, and shall be obliged to uphold the law and Government, and that every citizen shall have the right to work and live a life befitting human beings. The protection against unlawful deprivation of personal liberty is expressed in the words that every sort of arbitrary arrest or detention is prohibited.

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1. ibid.
2. Constitution of Indonesia, 1945.

The Japanese Bill of Rights drafted by Americans seems to have influenced those in the Indian and Turkish Constitutions. The Constitution of Japan,[1] like most modern constitutions, gives comprehensive expression to the right to personal liberty and its protection against arbitrary deprivation. A declaratory clause is found in Art. 13 that all of people shall be respected as individuals; their right to life, liberty and pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Articles 31-40 provide for the protection of the right to personal liberty, laying down the procedural safeguards against the arbitrary deprivation of the right. It is laid down that no person shall be deprived of life and liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law,[2] which resembles the corresponding provision in the Indian and Turkish Constitutions. It is further laid down that no person shall be denied the right of access to the courts, or be apprehended except upon a warrant issued by a competent Judicial officer, which must specify the offence alleged to have been committed;[3] no person shall be arrested or detained without being at once informed of the charges against him and allowed the immediate assistance of counsel; nor shall he be detained without adequate cause and, upon demand of any person, such

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1. Constitution of Japan 1946
2. ibid. Art. 31
3. Art. 33.

cause must be immediately stated in open Court in his or his counsel's presence[1]. It is submitted that these provisions of the Japanese Constitution go beyond those in most commonwealth Constitution, including Indian as well as those of the European countries, in that the right to be informed of reasons for arrest or detention is given in unqualified terms and unlike the Indian or Pakistan's Constitution[2], no reservation is made as regards withholding of the facts by the detaining authority in the public interest; the objectivity of satisfaction of the ground or arrest or detention is articulated by the Constitution itself; detention is permissible for adequate cause, which must be disclosed in open court on any one's demand.

It also gives the right to all persons to be secure in their homes, papers and effects against entries, searches and seizures, and lays down that it shall not be impaired, except upon warrant issued for adequate cause, particularly describing the place to be searched and the things to be seized[3]; a separate warrant issued by a competent Judicial officer is necessary for each search or seizure. The infliction of torture by any public officer and cruel punishments are absolutely forbidden; in all criminal cases the accused is entitled to a speedy and public trial by an impartial tribunal, full opportunity to examine all witness, to compulsory process for obtaining witnesses on his behalf at public expense and to be represented at all times by

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1. Ibid. Art.34.
2. See Safatullah Khan's case, AIR 1954 Cal. 194. Supra.
3. Constitution of Japan, Art.35.

competent counsel.

The right against self-incrimination is protected by Art. 38 which lays down that no person shall be compelled to testify against himself; a confession made under compulsion, torture or threat or after prolonged arrest or detention, shall not be admitted in evidence; this is equivalent to the provisions of Indian and Pakistani Evidence Acts,. It is also laid down that no person shall be convicted or punished in cases where the only proof against him is his own confession.

The protections against retroactive punishment and double jeopardy are also found in Art. 39 which lays down that no person shall be held criminally liable for an act which was lawful at the time it was committed or of which has has been acquitted, nor shall he be placed in double jeopardy. It is also provided by Art.40 that any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

The Constitution also differs from most of the Commonwealth and European Countries' Constitutions in relation to the preventive detention - provisions; it does not mention preventive detention at all, nor does it give power to the legislature to infringe the right to personal liberty under any condition whatsoever, except that criminal penalties can be imposed according to procedure "established by law". It is said that Japanese Constitution is designed on the pattern of American Constitution but it appears that the provisions regarding

personal liberty are mid way between those in the American and some of the Commonwealth or European Countries Constitutions.

The Provisions as to the right to personal liberty and its protection against arbitrary deprivation in the Philipines' Constitution[1] seem to be a modified version of those in the American Constitution; they are laid down in Article 3. Art. 3, Section 1, declares that no person shall be deprived of life, liberty and property without "due process of law"; nor shall any person be denied equal protection of law. Sec.1. (3) gives the people the right to be secure in their person, houses, papers and effects against unreasonable searches and seizures and requires that warrants shall not be issued except upon probable cause to be determined by the Judge after examination under oath or affirmation of the complainant and the witnesses; such an order must particularly describe the places to be searched and the persons or things to be seized. Sec. 1. (4) guarantees the liberty of abode and of changing the same within the limits prescribed by law. Sec. 1 (5) lays down that the privacy of communication and correspondence shall be inviolable, except upon lawful order of the court or when public safety and order required otherwise. Protection against retroactive laws is found in Sec.1(11), which states that no ex post facto law or bill of attainder shall be enacted. Sec. 1.(13) gives the right to be protected against involuntary servitude in any form, except as a punishment for crime, whereof the party shall have been duly convicted.

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1. Constitution of Philipines 1935, as amended 1946.

Sec.1 (14) provides safeguards against arbitrary deprivation of personal liberty and lays down that the right of an arrested or detained person to the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection or rebellion, when the public safety requires it and during such period when necessity for such suspension exists. The Phillipines Constitution, instead of giving the legislature extra ordinary and arbitrary powers to enact laws regarding preventive detention, like most of the modern Constitutions, keeps alive the right to personal liberty and simply suspends the remedy for the enforcement of the right against deprivation during the relevant period. It is submitted that more effective protection is given to the right than is afforded by other Constitutions, in that it does not permit the suspension of remedy beyond the period of emergency.

It is further provided by Sec.1 (15) that no person shall be held to answer for a criminal offence without 'due process of law,' and that all persons shall, before conviction, be released on bail on furnishing sufficient securities, except those charged with capital offences, when evidence of guilt is strong, that excessive bail shall not be required, and that in all criminal prosecutions the accused shall be presumed to be innocent until the contrary is proved; he shall enjoy the rights to be heard himself and by his counsel, to be informed of the nature and cause of the accusation against him and to have a speedy and public trial, meeting the witness face to face; he is entitled to secure

the compulsory attendance of witnesses in his behalf; excessive fines must not be imposed and cfuel and unusual punishment may not be inflicted.

The protection against double jeopardy is found in Sec.1 (20) which lays down that no person shall be twice put in jeopardy of punishment for the same offence and that if an act is punishable by a law or an ordinance, the conviction or acquittal under either will constitute a bar to another prosecution for the same offence.

But the Constitution is silent about the protection against self-incrimination. Lastly, it is provided by Sec.1 (21) that free access to the court shall not be denied to any person by reason of poverty.

In the Constitution of China[1] the protection of the right to personal liberty is in generalised and unqualified terms. Art. 89 declares that the freedom of the person of citizens of People's Republic of China is inviolable and provides for the protection of this right by laying down that no citizen may be arrested, except by a decision of people's court or with the sanction of a people's procuratorate. Art. 90 states that the homes of the citizens are inviolable; privacy of correspondence is protected by law; freedom of residence and of changing the same is guaranteed. No provisions as to preventive detention and the use of arbitrary power by the legislature or Government during an emergency are incorporated in the

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1. Constitution of Peoples Republic of China, 1954.

Constitution. It is clear that detention or arrest cannot be made, without the order of court, after the decision or without the sanction of a people's procutorate; no executive authority can exercise arbitrary powers for the arrest of any person.

Other Countries:

The right to the personal liberty and the protection thereof, as in the Chinese Constitution, are found, to a greater extent and in an unqualified manner, in the United Arab Republic's Constitution[1]. The declaratory clause - Art.25 - lays down that there is no crime or penalty except by virtue of law; a penalty may be inflicted only for the acts committed subsequent to the promulgation of a law prescribing them, this is equivalent to the right of persons to be protected against retroactive punishments or laws in the constitutions of other countries.

Protection against arrest and detention is guaranteed in the same manner as in the Pakistan Constitution, no person may be arrested or detained 'except in conformity with the provisions of law'[2]; the Pakistan Constitution says... save in accordance with law[3]. It is further laid down that the right of private defence is guaranteed by law, and that every person accused of a crime must be

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1. Constitution of United Arab Republic, 1964.
2. Ibid. Art.26.
3. See Constitutions of Pakistan 1956, Art.5(2), and 1962 Right No.1.

provided with the counsel for his defence.[1]

Egyptians may not be deported from the country or prevented from entering into it; they may not be prohibited from residing in any place or forced to reside in a particular place except in the circumstances defined by law.[2] It is also provided that homes have their sanctity and they may not be entered, except in cases and in the manner prescribed by law.[3]

Provisions regarding preventive detention and arbitrary deprivation of personal liberty by legislature are not found in the Egyptian Constitution. It is therefore, submitted that the safeguards against the deprivation of personal liberty by arrest, detention, punishment, search, seizure or restrictions on movement and residence are found in a very comprehensive form, in as much as the deprivation of the right can only be effected by procedure in conformity with the provisions established by law.

The provisions for protection of the right to personal liberty in the Constitution of Iraq [4] seem to have been borrowed from the Egyptian Constitution, though the language has been modified here and there. As in the Egyptian Constitution, it is declared by Art. 20 that there will be no offence or penalty, except by 'virtue of law'

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1. Constitution of U.A.R. Arts. 27-29.
2. ibid, Arts. 30-31
3. ibids, Art. 33.
4. Interim Constitution of Iraq 1964 as amended 1965.

and that no penalty shall be imposed, except on actions following the issue of the law in which they are prescribed.[1]

As regards arrest, detention, punishment and search, it is laid down that no one shall be arrested or detained or imprisoned or searched, except in accordance with the provisions of law.[2] It also gives the accused the right to be regarded as innocent, unless his conviction is proved by legal trial, in which he must enjoy the right of defence in person or through agency. It is also laid down that the torture of the accused, physically or morally, is forbidden, and that every person accused for a crime shall have a defender to defend him in accordance with his agreement.[3]

It requires that no Iraqi shall be denied residence anywhere nor shall he be compelled to reside in specified places, except in circumstances defined by law,[4] and that dwellings shall be safeguarded and shall never be entered, except in such circumstances and in such manner as is prescribed by law.[5]

The expression of the guarantees of the right to personal liberty is comprehensive, but there are no provisions regarding preventive detention, retroactive punishment, double jeopardy or self-incrimination. No authority is given to the legislature to

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1. ibid, Art. 21.
2. ibid, Art. 21.
3. ibid, Arts 23-24.
4. ibid, Art. 25.
5. ibid, Art. 27.

deprive Iraqis of the right to personal liberty in the national or public interest. Unlike the Egyptian Constitution, it is silent about the provision of counsel by the State to the accused.

Provisions regarding the right to personal liberty and its protection from arbitrary deprivation are found in the most generalized and briefest form in the Constitution of the Union of Soviet Socialist Republic.[1] Only two Articles, deal with the right. Art, 127 guarantees the U.S.S.R's citizens the inviolability of person and requires that no person shall be placed under arrest, except by a decision of court of law or with the sanction of a procurator. Art. 128 assures the in violability of the homes of citizens and provides that privacy of correspondence is protected by law.

There are no provisions regarding double jeopardy, retroactive punishment, self-incrimination or preventive detention. Though it is clear that any sort of arrest or detention, if not supported by the order of a court of law or the sanction of the procurator, is illegal, but it is difficult to say how far this is effective.

It is, however, submitted that the U.S.S.R's Constitution, in a modified form, has been adopted by the framers of the Chinese Constitution. Some minor changes in language or phraseology are

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1. Constitution of Union of Soviet Socialist Republic, 1936 as amended 1965.

found; for instance, instead of the U.S.S.R. Constitution phrase "by the court of law", the Chinese Constitution says "by the people's Court".

The Brazilian Constitution [1] recognizes the right to personal liberty and provides the safeguards against its deprivation. Clauses 20 and 22 of Art. 141 require that no person shall be arrested, except in flagrante delicto or by a written order of a competent authority in cases prescribed by law, and that imprisonment or detention of any person shall be immediately communicated to the competent Judge, who shall cancel, if it is illegal and consider, if so provided by law, the responsibility of the authority ordering the detention.

Protection against retroactive punishment is given by clause (27) of Art. 141, which lays down that no one shall be tried or sentenced, except by a competent authority under the provision of a law, which was in force prior to the commission of the offence. But the Constitution is silent about double jeopardy and self incrimination.

The protection against the deprivation of personal liberty, in the Constitution of Argentine,[2] is provided by Art.18, which requires that no inhabitant of the Nation may be arrested, except by virtue of a

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1. Constitution of Brazil 1946.
2. Constitution of Argentine, 1853.

written order of a competent authority. It is further provided that no punishment may be imposed except under a Judgement, founded upon a law prior to the commissions of the act; no person may be Judged by a special commission; and no one may be compelled to testify against himself.

Though,in addition to protection against retroactive[1] punishment, the safeguards against self incrimination and double jeopardy are available, the Constitution does not touch preventive detention at all.

In the Mexican Constitution of 1917, the protection of the right to personal liberty is afforded by the Art.14(2) which requires that no person shall be deprived of life, liberty, possessions or rights without a trial by a duly created court, in which the essential elements of procedure are observed, and in accordance with laws issued prior to the act.

Art.3 of the Cambodian Constitution[2] declares that freedom is the right to do whatever does not threaten the rights of others, the conditions whereof will be defined by law. The protections against deprivation of personal liberty are found in Articles 4,5,6,15. Art 4 requires that no one may be forced to do anything not required by law, that no one may be prosecuted, arrested or detained, except in the cases and manner prescribed by law; no one

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1. ibid
2. Constitution of Cambodia 1947 as amended 1964.

may be kept in detention, unless the Judge has approved the legality of his arrest by a decision containing the reasons therefor issued within the time limits prescribed by law; illegal arrest or unnecessary harassment or coercion or any form of ill-treatment during arrest or detention is forbidden by law and the doer will be personally responsible for the wrong done. Art. 5 gives the accused the right to bepresumed innocent, until he has been declared guilty and requires that every penalty, restricting personal liberty must be directed to the re-education of the guilty person. It is further provided by Art. 6, that Cambodians may not be expelled from Cambodian territory nor be forbidden nor obliged to remain in a particular place, except in cases stipulated by law.

As regards a state of emergency and subsequent suspension of rights, it is laid down that the exercise of the rights guaranteed by the Constitution may not be suspended, except when the nation has been proclaimed to be in danger, and that such a measure may not be taken for a period longer than six months, subject to renewal declared with the same formalities, and that whosoever abuses such a measure in order arbitrarily to damage the material or the moral rights of another, shall be personally responsible. Although the Constitution guarantees the right to be protected against prosecution, arrest or detention; to be presumed innocent pending proof of guilt, to freedom of residence and to

protection against exile, there is no protection against retroactive punishment, double jeopardy and self incrimination. Notwithstanding that the Constitution provides for the suspension not only of the foresaid rights but also the remedy thereof during a state of emergency, the protection against the continuance of the emergency for a period longer than six months is however qualified in the sense that it is subject to periodical renewal for six months at a time. The powers of government to suspend the rights are not subject to overriding restrictions in as much as Government has complete discretion to decide when the nation is in danger.

The Iranian Constitution[1] guarantees the individual's right to be protected and safeguarded against deprivation of life and liberty. It is further laid down that no one may be molested 'except in accordance with the law of the land'. Art.10 provides that no ome may be summarily arrested without an order signed by the President of a Court of Justice in conformity with laws except in cases of crimes, misdemeanors and serious offences, and that even in such cases, the accused must immediately or at least within twenty-four hours be informed and notified of the charges against him. Art.11 lays down that no one may be removed from the Court, which must render Judgement on his case, and be forced to appear before another tribunal. Art.12 provides that no penalty may be declared or carried

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1. Supplementary Constitutional Law (Iran) 1907, as amended in 1957

out, except in accordance with the law. Art 13 gives protection against forcible entry into a house or dwelling, except by order of a Judge and in conformity with the law. Art. 14 gives protection against exile and orders to live in a particular place, except in cases specified by the law restricting the residence or authorising exile. But the Constitution is silent about emergency provision, neither does it authorise suspension of the right in the interest of the nation.

It is, therefore, clear that the Constitution is drafted on the same pattern as that of Cambodia except for the absence of emergency provisions.

Art 7 of the Jordanian Constitution [1] declares that personal freedom shall be safeguarded. Art 8 requires that no one shall be detained or imprisoned "except in accordance with the provision of law". The protection against exile and compulsion to reside or not to reside in any specified place in circumstances prescribed by law, is afforded by Art. 9. Art. 10 gives protection against unlawful entry into an individual's house or dwelling. Compulsory labour is forbidden, except work or service in circumstances prescribed by law in the case of an emergency or on conviction by a Court, when such work or service is carried out under the supervision and control of an official authority; the person convicted must not be hired to or placed at the disposal

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1. Constitution of Jordan (Hashemite Kingdon) 1951.

of any private individual, company or association[1].

Differing from the Cambodian and Iranian Constitutions, there is no provision for preventive detention or the suspension of the aforesaid rights during an emergency. Moreover, the consitutional fetters on the discretion of the Government appear to be having binding force.

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1. Ibid Art.13.

CHAPTER 4

THEEVOLUTION OF FUNDAMENTAL RIGHTS IN PAKISTAN.

The Dominion Constitution:

The first constitutional document of Pakistan, after the nation came into being on 14th August, 1947, may be referred to be 'The Pakistan Provisional Constitution Order, 1947, (hereinafter referred to as 'The Order')' which lays down that, except in so far as other provision is made by or in accordance with the law made by the Constituent Assembly, the Dominion and provinces and other parts thereof shall be governed, as nearly as may be, in accordance with the provisions of Government of India Act, 1935, with such omissions, additions, adaptations and modifications as may be specified in the order of Governor General in accordance with the provisions of the Order.

The Government of India Act, 1935, like the other previous Government of India Acts[1], did not guarantee the fundamental rights except some property rights, concerning land, grants and pensions[2] which were incorporated on the recommendations of the Joint Parliamentary Committee[3].

Prior to the enactment of the Government of India Act, 1935, the political leaders of the Indo-Pakistan sub-continent had become conscious of the need of getting fundamental rights incorporated in the proposed Constitution[4]. In December 1926, at its Eighteenth Annual Session at Delhi, the Muslim League adopted a resolution demanding revision of The Government of India Act, 1919, so as to incorporate, along with other demands such as

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1. Govt. of India Acts; of 1858, 1909 and 1919
2. See SS 297, 298, 299 and 300 of Govt. of India Act, 1935
3. See Report of Joint Parliamentary Committee (1933-1934)
4. Govt. of India Act, 1935.

the establishment of responsible government, the fundamental principles of full religious liberty, ie. liberty of belief, worship, observances, propaganda and association.

The Nehru Committee Report (1928) stated,

> "Our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."

The report also reproduced the resolution of the Madrass Congress Session on Fundamental Rights which demanded that, in view of the unfortunate existence of communaldifferences in India, certain safeguards as to ensure security in such an atmosphere were necessary.

The Simon Commission Report, 1930, while rejecting these demands for the incorporation of fundamental rights in the Constitution, made the following observations which reflect the attitude of English lawyers;

> "..Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many Constitutions, notably in those of European States formed after the war of 1914-18. Experience, however, has not shown them to be of any great practical value. Abstract Declarations are useless, unless there exists the will and the means to make them effective..".

The matter was then represented to the Round Table Conference. The Report of Round Table Conference, Third Session, 1932, seems to have realised the importance of inclusion of fundamental rights in the Constitution and recommended that some of the provisions discussed in the Conference should appropriately and fully find their place in the Constitution, and that His Majesty's Government should undertake to examine them most carefully for the purpose. The Report states;

> "The Government have not in any way failed to realise and take account of the great importance which has been attached, in so many quarters, to the idea of making a Chapter of Fundamental Rights a feature in the new Indian Constitution as a solvent of difficulties and a source of confidence; nor do they under-value the painstaking care which has been devoted to framing the text of the large number of propositions which have been suggested and discussed. The practical difficulties which might result from including many, indeed most of them as conditions which must be accomplished as universal rule by executive or by legislative authority were fully explained in the course of discussion and there was substantial support for the view that, as the means of securing fair treatment for majority and minorities alike, the course of wisdom will be to rely, insofar as reliance cannot be placed upon mutual goodwill and mutual trust, on the 'special responsibilities' with which it was agreed; the Governor General and the Governors are to be endowed in their respective spheres to protect the rights of minorities."

The representation was also made to the Joint Parliamentary Committee which, in its report[1], having expressed satisfaction with the genuineness of the demand for Fundamental Rights, made the following remarks in response to the observations of the Simon Commission Report in respect of non-inclusion of fundamental rights and pointed out the practical difficulties in the way of implementation of the English concept.

The Report says:

> "With these observations we entirely agree: and a cynic might indeed find plausible arguments in the history during the last ten years of more than one country for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or 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, because they are inconsistent with one or other of the rights so declared. An examination of the lists to which we have referred shows very clearly indeed that this risk would be far more negligible.."

1. See Joint Parliamentary Committee Report (1933-34) Vol.1.para.366.

On the recommendations of the Joint Parliamentary Committee, some property rights, such as rights to land , grants, titles and pensions, were guaranteed under SS.297 to 300 of the Government of India Act, 1935, which provided safeguards against discrimination on the basis of race and religion, as well as against deprival of property, such as the provision that land should only be acquired for a public purpose by authority of law on payment of compensation.

Though there was no declaration of the right to personal liberty under the Act, habeas corpus under S.491 of the Code of the Criminal Procedure Code, 1898, would issue, if a person was deprived of his liberty except in accordance with law. And though S.45 of the Government of India Act, 1935, empowered the Governor General and S.93 the Governors of Provinces to issue proclamations of emergency, in their discretion, whenever the security of the state was threatened, whether by war or internal disturbances, the issue of a writ of Habeas corpus would not be affected by it. Section 93 of the Government of India Act, 1935 was, however, omitted in the schedule to Provisional Constitution Order, 1947.

It can be added that in 1948, the Governor-General of Pakistan was empowered by the Constituent Assembly of Pakistan to proclaim a state of emergency, not only on account of internal disturbances or threat of war but also on a threat to the security of economic life of any part of the country, arising from the possibility of war, internal disturbances or mass movements of population. S.92A was inserted in the Government of India Act, 1935, and empowered the Governor General to direct a Governor of Province to assume, on his behalf, the government of the Province, if the security of

Pakistan was endangered or if the provincial constitution could not work.

As regards the judiciary, the High Court at Lahore in Punjab, the Chief Court at Karachi in Sind, and Judicial Commissioners in North-West Frontier and Baluchistan, were already existing and exercising the powers of High Courts; a new High Court at Dacca[1] in East Bengal and a new Federal Court of Pakistan[2], were, however, created. The Privy Council (Abolition of Jurisdiction) Act, 1950, brought to an end all the appellate Jurisdiction of Privy Council in Pakistan[3].

Though the adapted Government of India Act, 1935, was to be promulgated by the Governor-General of India, there was an understanding that his approval was purely formal, and that the interim Constitution for Pakistan, in the form recommended by Mr. Mohammad Ali Jinah, the first Governor General of Pakistan, would be brought into force. Mohammad Sharif,J. was entrusted with the task of amending the Government of India Act, 1935, and he worked, for the most part, directly under the guidance of Mr. Jinah.

The interim Constitution was federal, being based on the same pattern as those of Indian Union, Canada and Australia. The provinces of Pakistan were declared to be five: East Bengal, West Punjah, Sind, Nort-West Frontier Province and Baluchristan. The division of power between the central and provincial governments was the same as in the Government of India of India Act, 1935, and as in the older Dominions, the Governor General of Pakistan was the constitutional head. The Pakistan Cabinet, consisting of the

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1. The High Courts (Bengal) Order, 1947.
2. The Federal Court Order, 1947.
3. The appellate jurisdiction of Privy Council in civil cases had already been abolished by the Federal Court (enlargement of Jurisdiction) Act, 1950.

Prime Minster and other ministers, was responsible to the Federal Legislature. The Pakistan Constituent Assembly was to function in a dual capacity - as the Constitution - making body as well as Federal Legislature. The strength of the Constituent Assembly was initially 69, but on the accession of the States was later raised to 79.

But, the Interim Constitution, like the Pakistan Provisional Constitution Order, 1947, did not touch the question of fundamental rights at all.

Constitutional Objectives:

In March, 1949, the Objective Resolution was proposed in the Constituent Assembly by the Prime Minister Liaqat Ali Khan. The resolution provided that the principles of democracy, freedom, equality and social justice, as unuciated by Islam, should be fully observed. The rights of minorities freely to profess and practice their religions and develop their cultures were, however, safeguarded. The Resolution further provided that the Fundamental Rights of the people as to equality of status and opportunity, equality before law, economic, social and political justice, freedom of thought, expression, belief and fath, worship and association, subject to law and morality should be guaranteed. But the Resolution was silent about the right to personal liberty and protection thereof from arbitrary deprivation.

As early as in 1947, a Committee on Fundamental Rights and matters relating to minority communities was set up, An Interim Report of the Committee was presented to the Constituent Assembly on September, 28, 1950, and for the first time, the right to personal liberty was given attention. Among recommendations for other Fundamental Rights of the people, the Report

provided that all persons should be given equal protection of the law, and that no one should be deprived of his life or liberty, save in accordance with law, or punished for an act not declared punishable by law when it was committed. It was also provided that habeas corpus should not be suspended, except in grave emergency. The Interim Report was adopted by the Constituent Assembly in October, 1952.

In November 1953, the Report of the Basic Principles Committee was considered by the Constituent Assembly and it was resolved that, in order to draft a new Constitution for Pakistan for submission to the Assembly, a drafting Committee, consisting of eight members, should be appointed.

The drafting Committee, despite the assurances given by Prime Minister, Mr. Mohammad Ali, that no impediment to the drafting of the Constitution could be allowed, did not make any progress and the evolution of a Constitution seemed to be unlikely.

Finaly, the Basic Principle Committee submitted the Report. There were no recommendations as to the Fundamental Rights; it was recommended that the Federal Court should become the Supreme Court of Pakistan; there should be High Courts at Karachi in Sind with jurisdiction in Baluchistan and Karachi, at Lahore in Punjab, at Peshaware in North-West-Frontier and at Dacca in East Bengal, which should have jurisdiction to issue prerogative writs.

There were many objections to the proposals of the Basic Principles Committee from minorities and from East Pakistan, but they were accepted in September 1953, with little amendment and sent to the drafting Committee with intent they should be finally revised in October,1954.

Dissolution of the First Constituent Assembly:

Like the Government of India Act, 1935, the Interim Constitution had given vast powers to the Governor General to make ordinances, irrespective of the control of the federal legislature. The powers of the Governor General were brought under the control of the Federal Legislature through an amendment in 1950[1]. In order to enhance the powers of the Constituent Assembly and diminish the powers of the Governor General, a succession of Act were passed by the Assembly in 1954. The Indian Independence Act, 1947, was amended retrospectively to empower the Assembly to make Constitutional laws for any part of Pakistan, challenge to the validity whereof was excluded from the jurisdiction of the courts.[2] Later the Governor General's power to create new provinces was transferred to the federal legislature[3].

On July 6, 1954, the Constitution Assembly passed an important Act amending the Government of India Act, 1935, by which a new section 223A was inserted which empowered every High Court in Pakistan to issue the 'prerogative writs' of habeas corpus, quo-warranto, mandamus, prohibition and certiorari[4], as explained by A.K.Brohi, the Law Minister, to the House. Provisions of a similar nature had been recommended in the Report of the Basic Principles Committee and were intended to be incorporated in the new Constitution. The Law Minister explained that the writs are bulwarks which guarantee and maintain the liberties of citizens; some members of the Constituent Assembly felt that the provision of these constitutional rights were premature.

1. Government of India (2nd Amendment) Act, 1950.
2. The Constitution (Amendment) Act, 1954.
3. Government of India (3rd Amendment) Act, 1954.
4. Government of India (3rd Amendment) Act, 1954.

On September 20, 1954, the Constituent Assembly repealed The Public and Representative Offices (Disqualification) Act, 1949, which had empowered the Governor General and Governors to examine, punish and, if necessary, disqualify public and representative officers found guilty of maladministration. On the next day, the 21st September, 1954, the Assembly amended the Sec.10 of the Government of India Act, 1935, under which the Governor General had summarily dismissed Khwaja, Nazimuddin's Government . The Governor General, Mr. Ghulam Mohammad, was then at Abbotabad on summer-vacation. Under the amendment the Governor-General was required to appoint as Prime Minister a member of the federal legislature, who enjoyed the confidence of the majority and to appoint other ministers on the Prime Minister's advice; he could not dismiss the Prime Minister and Ministers so appointed; they could be removed from the office only on a vote of non-confidence in the federal legislature; and only the Prime Minister could dismiss the other Ministers[1].

This put the Governor General in an intolerable situation, because there was no provision in the Interim Constitution for the dissolution of the federal legislature and so no means whereby the Governor-General, when at issue with the Assembly, could appeal to the electorate. Had he accepted the position, he might have been indefinitely subservient to the will of a perpetual legislature, which was losing the confidence of the people[2].

Hence, on October 24, 1954, the Governor General proclaimed an emergency throughout Pakistan, declaring that the constitutional machinery

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1. Government of India (5th Amendment) Act 1954.
2. Prof. Alan Gledhill, op.cit p.78.

had broken down, and that the constituent Assembly had lost the confidence of the people. It was also announced that fresh elections to the Constituent Assembly would be held as soon as possible and the Ministry reconstituted; the Prime Minister was invited to re-form his Cabinet in order to give the country a vigorous and stable administration.

The new Government started its career with intent to be firm and stable, and the new Ministry of Interior declared in a press statements that for years to come Pakistan would have to be governed as a 'controlled democracy'. It was also added that the attempts to work democracy on British lines made during the preceeding seven years had led to disaster. It was, therefore, suggested that the Constitution should take a form other than British. General Iskandar Mirza was also reported to have expressed the same view by declaring that Pakistan was not then ripe for democracy - as the word is understood in the United Kingdom and the Unites Stages. He, however, suggested a flexible constitution, maintaining parity between East and West Pakistan.

The expression 'controlled democracy' was explained by the Secretary to Government in the Ministry of Information at a press-conference on December 5, to mean the system of government then prevailing in the United Kingdom and the United States. It seems impossible to reconcile the existing system of government in these two countries with the concept of 'controlled democracy', unless 'control' means control by the public or by law[1]. The remarks of General Mirza about the nature of Pakistan's future constitution was comparatively clear, when he said that, as Pakistan's efforts to utilize the British political system had proved unsuccessful, the American constitutional

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1. See Constituent Assembly Debates 1955, Vol.I. Note 2. p.40.

system, with some modifications, should be adopted[1]. It could, however, he added that, in Pakistan, the Governor General had exercised greater control than Prime Minister, so that the idea of a head of the State, who would be the Chief Executive, might be considered likely to offer prospects of a workable solution to some of Pakistan's difficulties.

The dismissal of the Constituent Assembly by the Governor General was challenged in cases before the Superior courts, The President of Assembly, Maulvi Tamizuddin Khan, himself filed a petition in the Chief Court of Sind, at Karachi, challenging the action of the Governor General[2].

The proclamation of emergency and the dismissal of the Constituent Assembly was challenged by a petition to the Chief Court of Sind, under the newly inserted Sec.223A of the Government of India Act, 1935, for the issue of writs of mandamous and quo-warranto with a view to:

(i) restraining the respondents from giving effect to the proclamation and from obstructing the petitioner in the exercise of his functions and duties as President of the Constituent Assembly; and

(ii) determining the validity of the appointment of the new Ministers under the recently amended Sec.10 of the Government of India Act.

The Central Government raised preliminary objections:

(a) That any constitutional provisions made under Sec. 6(3) of the Indian Independence Act had not only to be passed by the Constituent Assembly but had also the assent of the Governor-General; the newly inserted Sec.223A, which empowered the High Courts to issue prerogative writs, was not valid for want of the required assent and consequently the Courts had no jurisdiction to issue the writs prayed for by the petitioner;

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1. Pakistan Standard, Karachi, 27 January, 1955.
2. PLD. 1955 Sind .96

(b) that some objection was also applied to the recent amendments to Sec.10 of the Government of India Act, which purported to limit the discretion of the Governor General in his choice of Ministers.

The Chief Court of Sind, rejecting all contentions of the respondents, held that the Sec.10 of the Government of India Act, substituted by the Government of India (5th Amendment) Act, 1954, was a valid enactment, in as much as the Constitutional laws enacted by the Constituent Assembly need not be validated by the assent of the Governor-General; this also applied to Sec. 223A, inserted by the Government of India (Amendment) Act, 1954; so the petitioned writs should be issued.

On appeal the decision of the High Court was, however, reversed; the Supreme Court by a majority held that the assent of the Governor General was necessary under Sec.6(3) of Indian Independence Act, 1947, to all legislation of the Constituent Assembly, including provisions for the Constitution of the Dominion; Sec.223A and Sec.10 (as amended) of the Government of India Act were declared invalid for want of the required assent of the Governor General[1]. Cornelius J., in his dissenting judgement, observed that the Constituent Assembly being designed to be a sovereign body and intended to exercise sovereign power, including power to alter the Constitution, subject to which the Governor General had to act, it would clearly be inconsistent with that design and purpose if its constitutional powers were qualified by the necessity of assent by the Governor General.

Six days after the judgement given by the Federal Court in Malvi Tamizuddin Khan's case, the Governor General promulgated the Emergency Powers Ordinance (IX of) 1950 under Sec.45 of the Government of India Act, 1935,

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1. Federation of Pakistant v. Maulvi Tamizuddin Khan - PLD.1955 F.C.240

whereunder certain Acts which had not been assented to, were validated and given retrospective effect.

Section 223A of Government of India Act was also validated with effect from the 2nd October, 1955 by the Validation of Laws Act, 1955.

In Usif Satel v. Crown[1], which came on appeal before the Federal Court, challenging the validation of aforesaid Acts with retrospective effect, it was held that the Governor General could not validate by Ordinance any unassented constitutional legislation since such legislation could only be effected by the Constituent Assembly, to which the Governor General could assent.

In a reference[2] by the Governor General as to the Constitutional position of his act, the Federal Court, exercising its advisory jurisdiction, held that in relation to the dissolution of the Constituent Assembly where provision was made by the Indian Independence Act, compliance with it was compulsory; but to meet a situation for which no provision was made in the Act, the Common law would apply.

The question whether the Governor General could set up new Assembly was also governed by the same principle that a case not provided for in the Statute, was governed by the common law. The Governor General could exercise the prerogative of the Crown to summon an assembly and, in doing so, he was entitled to take into consideration, the changes which had occured since 1947[3].

But in Pakistan v. Ali Ahmad Shah[4] a contentious case, it was held that a constitutional law not assented to by the Governor General could be given

1. PLD. 1955 F.C. 387.
2. Reference by the Governor General, (Special reference No. 1 of 1955).
3. See Prof. Alan Gledhill, op.cit. p.81.
4. PLD. 1955 F.C. 522.

temporary retrospective validity by proclamation; as to the question of validation of the legislation of the old Assembly, the principle of State necessity was applied; the Governor General was responsible for preventing the breakdown of the Government and the disruption of the Constitution. If there was imminent danger of extreme mischief, and it was impossible to wait for a legal remedy, he might do what would otherwise be unlawful, provided he went on further than the situation demanded. The Governor General would be justified in issuing a proclamation giving retrospective validation to constitutional laws to which assent had not been accorded until such time as the new Constituent Assembly could decide upon their validity[1].

On April, 1955, the Governor General summoned a Constituent Convention for May, 1955, for the purpose of making provision as to the Constitution of Pakistan. On the next day the Governor-General issued a further proclamation assuming to himself, until such other provision as should be made by the Constituent Convention, such powers as were necessary to validate and enforce laws needed to avoid a breakdown of the Constitution and the administrative machinery of the country. These powers were to be exercised by the Governor General, subject to the opinion of the Federal Court on certain questions which had, in the meantime, been submitted to it[2]. The Federal Court expressed the view that the correct name of the Constitution Convention would be Constituent Assembly; the Governor General would summon a fresh Constituent Assembly; as there was no reference to this in the Indian Independence Act, the common law applied.

There still remained the question of the validation of the enactments

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1. See Prof. Alan Gledhill, op.cit, p.81.
2. Reference made by Governor General under S.213 of Government of India Act.

of the first Constituent Assembly and, until this problem could be solved, which was only possible when a new Constituent Assembly came into being, many difficulties would remain and many people would be seriously affected; the prisoners under sentence in the Rawalpindi Conspiracy Case had been convicted when a statute was passed specifically to meet the circumstances, but the statute, among others, still required to be validated. It was a question involving the most precious right to life and liberty[1].

The second Constituent Assembly was set up and, working deligently and laboriously, completed the task within one year and a quarter. The draft Constitution Bill appeared in the newspapers on January 8, 1956. The Bill was passed by the Constituent Assembly on February 7, 1956 and it came into force on March, 23, 1956[2].

The Constitution of 1956:

The Constitution of Pakistan, 1956, except for some significant additions and changes, including a Bill of Rights and powers of the higher judiciary to enforce them, was drafted mainly on the lines of Government of India Act, 1935. But the fundamental rights seem to have been designed on the pattern of Indian Bill of Rights in the Constitution of 1950, with a few variations as regards rights to personal liberty and equality. These rights were enumerated in the Part II - Arts. 3 to 21 - of the Constitution of 1956. They were mostly couched in absolute terms in the sense that in few cases meant the powers of the legislatures and executives to restrict the rights specifically declared.

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1. Dawn, Karachi, 10 August, 1955.
2. See Herbert Feldman 'Pakistan Constitution' pp. 69-76.

In Jibendra Kishore v. Province of East Pakistan[1], elaborating the importance of the incorporation of fundamental rights in the 1956 Constitution, the Supreme Court pointed out that 'The very conception of fundamental right is that it, being a right guaranteed by the Constitution, cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by law[2]. In State v. Dosso fundamental rights were held to be of a permanent nature. It was observed that the very essence of fundamental right is that it is more or less permanent and cannot be changed like an ordinary law.

The Pakistan judiciary seems to have followed the views of American Supreme Court. According to the American Supreme Court, one of the main objects of the Government is to protect the life, liberty and property of the individual citizen. To this end and, in order that the Constitutional system may be a government of laws and not of men, it is customary to limit the powers of government and thereby operate as bulwarks of liberty for the protection of private rights[3]. Justice Jackson in West Virginia State Board of Education v. Barnette[4] observed:

> "The very purpose of a Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections.."

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1. PLD 1957 S.C. (Pak) 9.
2. PLD 1958 S.C. 533
3. (1935) Edward Jones v. Saud C.Commission, 298 U.S.1.
4. (1942) 319 U.S. 638.

The reason for the incorporation of fundamental rights in the 1956 Constitution seems to have been twofold, firstly to give protection to the rights of the minorities when the Constitution required legislation to be bases on the principles of Islam, and secondly to provide safeguards to the people at large, against the legislative and executive arbitrariness at a time when the people of Pakistan were too immature to comprehend and practice the democratic system of government.

Like other modern Bills of Rights, the 1956 Constitution of Pakistan guaranteed the rights to equality before law, to life and liberty, to property, to freedom of speech, to freedom of assembly, to freedom of religion, to freedom of association, to freedom of trade, education, profession and to freedom of movement, etc. It also provided protection against forced labour, slavery, untouchability, discrimination in the public service, discrimination in respect to access to public places, taxation for purposes of any particular religion, and against arrest or detention and conviction or punishment under retrospective legislation.

The principle of rule of law was maintained, as it was provided in respect of most of the rights that they could not be infringed 'save in accordance with law', as in the case of the right to life and liberty, and the right to property -; or that every citizen would have the right to exercise the guaranteed rights 'subject to any reasonable restriction imposed by law in the interest of public order or public interest', as in the case of freedom of assembly, or association, or movement, or speech. It was the duty of the courts to see whether or not laws enacted by the legislatures or actions taken by the executive, infringing, abridging or restricting the latter rights,

were reasonable, directed to the prescribed object and within the competence of the legislature or executive. Rule of law in respect of personal liberty is maintained by limitations on the making of laws with retrospective effect or penal laws providing a penalty greater than prescribed by law at the time of commission of the offence.

The right to personal liberty was guaranteed by Art.5(2) and the protection was given by Art.. 6 and 7. It was laid down that no person should be punished under an ex post facto law, nor should he be subjected to punishment greater than that prescribed by law at the time of the commission of the offence[1]. The detained or arrested person had the right to be informed, as soon as possible, of the grounds for his arrest or detention; to be consulted and defended by a legal practioner of his choice; to be produced before the nearest magistrate within twenty-four hours of his arrest or detention and not to be detained in custody beyond the said period without the authority of a magistrate. These protections were, however, not available to an alien enemy or a person detained under preventive detention law. But a person under reventive detention law could not be detained for a period exceeding three months without having his case referred to an Advisory Board before the expiry of the said period. He could be detained further only if, in the opinion of the Board, there was sufficient cause for his detention. The Advisory Board in this context consisted, in the case of a person detained under a Central Act, of persons appointed by the Chief Justice of Pakistan; or if he was detained under a Provincial Act, a Board consisting of persons appointed by the the Chief Justice of the High Court concerned. It was further provided that

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1. Constitution of 1956 Art.6.

the detaining authority could refuse to disclose the facts regarding detention, if he considered it to be against the public policy or interest to disclose them.

Differing from the Indian Constitution, protection against double-jeopardy and self-incrimination were not provided in the 1956 Constitution, but they were available under theCode of Criminal Procedure and Evidence Act.[1]

There were limitations on the law-making power of the State[2]. It was laid down that any existing or pre-constitutional law, if repugnant to the Fundamental Rights, and any new law made by the legislatures, contravening these rights, should be void to the extent of the repugnancy contravention. But laws relating to the Defence Service or the Armed forces, charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or maintenance of discipline among them were immune from being declared void on account such repugnancy or contravention.

The Supreme Court and High Courts were empowered to prescribe appropriate procedure to enforce the Fundamental Rights. Art. 22 conferred the right to move the Supreme Court for their enforcement. The Supreme Court had the right under this Article to issue the order or writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights, which could not be suspended, except by the provisions of the Constitution of 1956. This article was, however, not applicable in relation to the Special Areas. 'Special Areas' meant the areas of West Pakistan, which, immediately before the commencement of the Establishment

1. See Sec. 403 of Cr. P.C. and Sections of Evidence Act, (see chapter on Double jeopardy and self incrimination).
2. Const. of 1956, Art.4.

of West Pakistan Act, 1955, were: (a) the tribal areas of Baluchistan, the Punjab, and North-West Frontier; and (b) The States of Amb, Citral, Dir and Swat[1].

High Courts were also empowered to issue aforesaid write of habeas corpus, manadus, prohibition, quo-warranto and certiorari not only for the enforcement of Fundamental Rights but also for any other purpose[2]. As far as a writ of habeas corpus is concerned, a High Court has also the right to issue it under S.491 of Code of Criminal Procedure.

It was provided that a right to an adequate remedy for the protection of fundament right was itself a right[3]. Except on a petition for a writ of habeas corpus or quo-warranto, a petitioner could only plead his own Fundamental Right. Habeas corpus was designed to secure the release of a person illegally deprived of his right to personal liberty. It could issue, if any of the provisions laid down in Arts. 6 and 7 of the Constitution of 1956 were contravened, as well as if rules of natural justice were not followed, while detaining or arresting a person.

As regards the emergency provisions, Professor Gledhill[4] commends that these provisions were intended to make specific provision for emergencies, not provided for in constitutions of other countries, which had to be met by straining the language of their constitutions. The various kinds of emergencies and the vast powers given to the head of the Central Executive were, no doubt, unique.

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1. See Ibid. Art.218.
2. See Ibid. Art.22.
3. - do -
4. Op.cit. p.82.

The Constitution of 1956 set out three kinds of emergencies. Firstly, an emergency arising out of war, or external aggression, or internal disturbances beyond the control of the provincial government, or a threat to the security or economic life of Pakistan. The President, if satisfied that any of the aforesaid circumstances existed, could issue a Proclamation of Emergency. The Proclamation had to be laid before the National Assembly as soon as possible, and; if approved by the Assembly, it would remain in force until the President himself revoked it; if the Assembly disapproved, it would cease to have effect from the date of disapproval[1]. So long as the Proclamation remained in force, the National Assembly was empowered to legislate on provincial subjects; that did not affect the provincial legislature's power to make any law under the Constitution, but provincial laws repugnant to the Federal laws made during the emergency, would be deemed void to the extent of repugnancy with the Federal laws and the Federal laws would prevail over provincial laws for the period of six months after the Proclamation ceased to operate[2], The Federal laws made during the emergency, which the National Assembly was, otherwise incompetent to make, would cease to have effect on the expiration of the period of six months from the date of the withdrawal of the Proclamation, except as respects the things done or omitted to be done[3]. The executive authority of the Federation would extend to the giving of directions to the provinces as to the manner of exercising the executive authority of the Province. The President by order, could assume to himself or direct the Governor of a province to assume on behalf

1. Ibid. Art. 191 (1) and (6)
2. Ibid. Art. 191 (3) and (4)
3. Ibid. Art. 191 (5).

of the President or on his own behalf the powers of any organ of the government in the province, except the legislature and High Court[1].

Secondly, on receiving a report from a Governor that the government of his province could not be carried on in accordance with the provisions of the Constitution, the President could issue a proclamation, assuming all executive powers of the provincial government and declaring that the powers of the Provincial Legislature would vest in Parliament. But the powers vested in the High Court, were not to be affected at all by this kind of proclamation, nor was the operation of any constitutional provision relating to the High Court suspended. The proclamation had to be laid, as soon as possible, before the National Assembly and, if approved by the resolution of the Assembly, would remain in operation for a total period of six months, except in case of dissolution of National Assembly when it should cease to operate after the expiry of thirty days from the date on which the National Assembly first met. The Assembly could confer on the President the powers of the provincial legislature to make laws but all such laws made by the President would cease to have effect after the expiry of six months from the date of the withdrawal of the Proclamation[2].

Thirdly, arising out of a threat to financial stability or the credit of Pakistan or any part thereof, the President could, after consultation with the Governor of the province concerned, issue a Proclamation of financial emergency, declaring that the executive authority of the Federation would extend to the giving of directions to observe such principles of financial propriety as

1. Ibid, Art. 191 (2)(c)
2. Ibid. Art. 193.

were specified in the directions, in order to maintain the financial stability or credit of Pakistan or any part thereof; the directions could include orders to reduce the pay of government servants and federal officials, including the judges of the Supreme Court and High Courts. But such a Proclamation was to be subject to the same parliamentary control and would remain in force for the same length of time as that of an emergency of the second type[1].

It was further provided that, when a Proclamation of emergency was in force under Art.191, the President could by order, declare that the right to move any court for the enforcement of such of the fundamental rights as were specified in the order, and all proceedings pending in any court for the enforcement of the rights so specified, would remain suspended while the Proclamation remained in force. This order had also, as soon as possible, to be laid before the National Assembly[2].

The Proclamation of emergency could not be challenged in the Courts. Moreover, the Proclamation could be varied or revoked by a subsequent Proclamation of the President.[3] The President was the sole judge of the circumstances and the necessity to issue proclamation. The National Assembly was empowered to make laws indemnifying any person in the service of Federal or 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 where martial law was in force, or validating any sentence passed, punishment inflicted or any other act done under the martial law in such area[4]. The impact of this provision

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1. Ibid. Art. 194.
2. Ibid. Art. 192.
3. Ibid. Art. 195.
4. Ibid. Art. 196.

would fall mainly on the rights to personal liberty. A person illegally deprived of his personal liberty or unlawfully punished when martial law was in force would not have any remedy to invoke but the wrong done to him would not be justifiable after martial law had been withdrawn, unless covered by an Act of Indemnity.

It is submitted that, even though the 1956 Constitution gave vast powers to the Federal executive during an emergency, the Federal legislature could not, like the Indian Constitution, make laws infringing, abridging, or even taking away the fundamental rights; only the remedies to enforce the specified fundamental rights were suspended. Art.358 of the Indian Constitution authorises the State to make any law or take any action, regardless of the Constitutional limitations on its law making power relating to fundamental rights under Arts.13 and 19; Parliament can, during an emergency, by legislation infringe, abridge or abrogate any or all fundamental rights. Basu J.[1], while commending the vast and unfettered powers given to Indian Parliament during an emergency quotes Dr. Ambedkar's[2] speech in the Indian Constituent Assembly in favour of such provision as follows:-

> "There can be no doubt that, while there are certain Fundamental Rights which the State must guarantee to the individual in order that the individual may have some security and freedom to develop his own personality, it is equally clear that in certain cases, where, for instance, the State's very life is in jeopardy, those rights must be subject to a certain amount of limitation. In times of emergency, the individual himself will be found to have lost his very existense. Consequently, the superior right of the State to protect itself in times of emergency, so that it may survive that emergency and live to discharge its functions in order that the individual under the aegis of the State may develop, must be guaranteed as safely as the right of the individual."

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1. Basu J. 'Commentary on the Constitution of India', Vol.1 p.282.
2. ibid

Abrogation of the Constitution of 1956:

The Constitution of 1956 which was evolved after nine years of hard efforts by the Constitutional Assembly, passing through dire political ups and downs, did not continue long. After a very short period of two years, the Constitution was abrogated by the President Iskander Mirza on October 7, 1958; the central and provincial governments along with the legislatures were dismissed; and Martial Law was declared throughout the Country. Reasons for issuing the Proclamation were also pronounced. General Aiyub Khan was appointed as Chief Martial Law Administrator by the President[1].

On the same day, October 7, 1958, the Chief Martial Law Administrator issued a proclamation declaring that martial law orders and regulations for the purpose of restoring peace and order would be issued, whereby heavy penalties would be imposed; punishments under the existing laws would be enhanced; and special courts would be set up to try the offences in contravention of these orders and regulations, as well as offences under ordinary law. On October, 10, 1958, the President promulgated the Laws (Continuation if Force) Order, 1958, whereunder the laws which were in force at the time of the Proclamation were to be continued in force during the martial law period; the existing jurisdiction of the Courts was maintained, and it was provided - omitting the word 'Islamic' - that Pakistan would be governed 'as nearly as may be in accordance with the late Constitution.' It can be said that the Laws (Continuation in Force) Order actually constituted a new legal order or an interim constitutional document.

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1. See the Chapter on Martial Law.

But the Order was silent about the fundamental rights. In State v. Dosso[1] the Supreme Court held that the Laws (Continuance in Force) Order, 1958, constituted the 'new Constitution' and that all things could be determined under this new legal order; even the jurisdiction of the Supreme Court. The words 'shall be governed as nearly as may be in accordance with the late Constitution', were interpreted as referring to the structure and outline of the government and not to laws and parts of the late Constitution which had been expressly abrogated by the Art.IV of the Order; these words did not have the effect of restoring the fundamental rights as the 'so-called fundamental rights' were no longer a part of the National Legal Order; no writ could be issued to protect them. It was observed that the Supreme Court, deriving its jurisdiction under the new national order, could only be moved for a writ when a right, preserved by the Laws (Continuation in Force) Order, had been infringed[2]. In Province of East Pakistan v. Mehdi Ali Khan[3], re-affirming the view in Dosso's case, it was held that Fundamental Rights did not exist in the new legal order of Pakistan. But in a later case the Supreme Court seems to have realized that it still had a duty to protect the rights of the people and to be willing to reconsider its earlier decisions. The Supreme Court in Mian Iftekhar-uddin v. Mohammad Sarfraz[4] observed that, if Dosso's case required reconsideration, the question should be reserved for a more appropriate occasion.

During the martial law regime a number of regulations and orders were issued, creating new offences, imposing penalties and enhancing punishments

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1. PLD. 1958, S.C. 533.
2. Ibid.
3. PLD. 1959, S.C. 387.
4. PLD. 1961, S.C. 585.

for some existing offences. Military Courts, along with the ordinary courts were set up, to try ordinary and martial law offences. On November, 16, 1958, the armed forces were withdrawn and on February 4, 1959, a reconstituted martial law regulation was promulgated, which provided that trials by the military courts should not be held, except on the orders of a zonal martial law administrator[1]. When President Mirza told foreign journalists that martial law would soon be lifted, General Ayub Khan, on October 17, 1958, in a press statement, flatly contradicted the President. The President had no alternative but to resign. On October 27, 1958, General Ayub Khan became President.

On January 13, 1960 the Presidential(Election and Constitution) Order was issued, under which, after the elections under Basic Democracies Order, 1959, the elected members of local government boards were to be called on by the Election Commission to declare by vote in secret ballot whether or not they had confidence in President Ayub Khan by majority; the result was in his favour.

On February 17, 1960, a Constitution Commission with Mr.M.Shahabuddin, the former Chief Justice of Pakistan, as its Chairman, was set up by the President to report on the causes of the failure of the 1956 Constitution and also to suggest proposals for thenew Constitution of Pakistan. The Commission, on the analysis of the answers to the questionnaire by 6,429 people and interviews with 565, presented its report to the President on April 29, 1961. Among other questions, such as whether Pakinstan should become a Federal or Unitary form of Government, or, whether it should follow the Presidential or Parliamentary pattern, whether legislatures should be unicameral or bicameral, whether election should be indirect or direct to the National Assembly, and the provincial

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1. See Chapter on Martial Law.

assemblies, whether there should be separate or joint electorates, the commission recommended the first alternatives. The majority of the replies to the questionnaire were of the same opinions, except that the opinions were equally divided on the question of Presidential or Parliamentary government. Having the support of 97.23 per cent of the replies, the Commission recommended that, in order to bring the existing law in conformity with Islamic Principles, the relevant provisions of 1956 Constitution, be re-enacted.

As to the question whether the provisions of the late constitution enumerating the Fundamental Rights should be re-enacted in the new constitution, or whether the maintenance of such rights could safely be left, as in the United Kingdom, to the fundamental good sense of the legislature and the operation of recognised principles through the wisdom and experience of Courts, 98.39 per cent of the answers to the questionnaire favoured the first alternative The Commission, therefore, recommended that the Art. 4 to 22 of the late Constitution, enumerating the Fundamental Rights should be incorporated in the new constitution. The Commission, however, suggested that Martial Law Regulation No.64, (The West Pakistan Land Reforms Regulation, 1959) and the Frontier Crimes Regulation of 1901, should be given special protection from avoidance for violation of any constitutional limitations; while the power to issue prerogative writs vested in High Courts by the Constitution of 1956, it should be withheld from the Supreme Court, as appeals would lie to Supreme Court from the High Courts. 97.14 per cent of the answers demanded the incorporation of directive principles of State policy in the Constitution.

Regarding the method of amendment of the Constitution, the Commission recommended that an amendment should require the approval of two-thirds of the

total membership of the National Assembly, and that a veto of President could be over-ruled by three-fourths; the provisions in the late constitution for ratification by provincial assemblies should be restored[1].

President Ayub Khan considered the recommendations of the Commission in his Cabinet and on March 1, 1962, he announced a Constitution which was to come into force on June 8, 1962.

Constitution of 1962:

The Constitution of 1962 was drafted mainly on the lines of the recommendations of the Constitution Commission, but the fundamental rights, though strongly recommended by the Commission, did not appear in it; instead, on the strength of the mandate given to Ayub Khan by the Basic Democrats on March 1, 1961, the 'principles of law making' were incorporated in the Constitution. These principles could not be pleaded in a court against any law; it was clearly laid down that the validity of a law could not be called in question on the ground that the law disregarded, voilated or was otherwise not in accordance with the 'Principles of Law making; they were not enforceable in a court of law.

Demands were raised throughout the country for the incorporation of the fundamental rights in the Constitution. Consequently a Bill was introduced in National Assembly in March, 1963, to insert the provisions of the 1956 Constitution relating to fundamental rights, in the 1962 constitution and to restore the power of the Courts to declare laws, repugnant to or in contravention of the fundamental rights, void. One of the clauses of the Bill demanded that

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1. See Prof. Alen Gledhill, op.cit. pp.84 to 120.

any law, passed or made, on or after October 7, 1958, and being in force immediately before the coming into force of the proposed Amendments to the Constitution (First Amendment) Act, 1963, would not be subject to judicial review. The clause was strongly criticised and the bill was referred to the Select Committee to report on it. The Committee submitted its report in April, 1963, but it was not accepted, and the Bill was referred back to the Committee. In the final report, submitted in December, 1963, the majority of the members of the Committee strongly supported the incorporation of the aforesaid clause in the Bill, with the amendments that, instead of nine hundred laws which Government wanted to exclude from the scope of the examination by the Courts in the light of proposed fundamental rights, only thirtyone laws, which were a bare minimum, should be protected from judicial review; as these were made during the interregnum between the two Constitutions and radical reforms were made to remove existing inequalities, and put the economic and social structure of the country on a better footing. It was also pointed out that, from the draftman's point of view, it would be better to limit entrenched legislation to the thirtyone laws specified in the Schedule. Finally, on the aforesaid recommendations, the Constitution (First Amendment) Act, 1963 was passed by the National Assembly and the Fundamental Rights were incorporated in the Constitution of 1962.

The Proclamation of October 7, 1958, was revoked, and the martial law orders (including orders amending orders) such as the laws (Continuation in Force) Order, 1958, the Government (Presidential Cabinet) Order, 1958, the Legislative Powers Order, 1959, the State Arrangements Order, 1954 - all martial law regulations, except the West-Pakistan Land Reform Regulation 1959, Rawalpindi (Requisition of Property) Regulation 1959, Pakistan Capital

Regulation, 1960, Scrutiny of Claims (Evacuee Property) Regulation, 1961, and West Pakistan Border Area Regulation, 1959, were repealed; other existing laws (including Ordinances, Orders-in-Council, orders, rules, bye-laws, regulations and Letters Patent constituting a High Court, and any notifications and legal instruments having the force of law) in force in Pakistan or any part whereof or having the extra-territorial validity were continued in force. All other martial law enactments were further repealed with effect from the Constitution day by the Martial Law Orders (Repeal) Order, 1962, with the saving clause providing for the validation of anything done under them, as well as for the continuation of investigation and proceedings already started under them. Provisions were also made for the purpose of bringing any existing law into accord with the 1962 Constitution's provisions and the President was authorised to delegate his powers in this respect to the governors. The President was empowered to order such adaptations, whether by way of modification, addition or omission, as in his view necessary; but it was specified that they would not have retrospective effect[1].

In Mohammad Afzal v. Commissioner, Lahore[2] Division it was contended that the courts had no power to examine the validity of martial law orders; the Supreme Court pointed out that there was nothing in the Laws (Continuance in Force) Order which, then or during any time, could prevent a martial law order from being called in question. It was further observed that the Constitution of 1962 and the Martial Law Orders (Repeal) Order could protect only things duly done or suffered under the martial orders or regulations.

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1. Ibid, Art. 225.
2. PLD. 1963, S.C. 401.

As regards Fundamental Rights, an important provision was added; Art.2 proclaimed the rule of law. It laid down that, to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, was the inalienable right of every citizen; no action detrimental to life, liberty, body, reputation or property of any person could be taken except in accordance with law and that no person could be prevented from or be hindered in, doing that which was not prohibited by law and that no person could be compelled to do that which the law did not require him to do. Murshed, C.J. in Haji Ghulam Zamine v. Khondkar[1], while evaluating the significance of Art.2, remarked it "is a codification of the ever-growing and elastic concept of 'due course of law' as conceived in the American Constitution and is now embedded in our Constitution as a doctrine which cannot be altered by the ordinary machineries of legislation."

As regards the restriction or limitations on the law making power of the legislatures, Art.4 of the 1956 Constitution was re-enacted and it was provided that any law, existing or enacted, other than the Constitutional Law, or any custom having the force of law, so far as it was inconsistent with or in contravention of Fundamental Rights, should be declared void to the, extent of inconsistency or contravention; but as under the 1956 Constitution, laws relating to the armed forces and forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them, were immune from the aforesaid limitations[2]. One important clause was added to the Constitution, whereunder thirtyone laws as specified in the Fourth Schedule, consisting of Presidential orders, ordinances and regulations of the martial law period were excluded

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1. P.L.D. 1965, Dac. 156.
2. " " Art. 6(1), (2) and (3). of 1962 Constitution

from judicial review[1], in as much as they could not be called in question for contravention of or repugnancy to the Fundamental Rights.

Though these limitations applied to pre-constitution laws or laws enacted before the Fundamental Rights came into force, they did not affect anything done or suffered under these laws, because of the Constitution (First Amendment) Act, 1963, which was not retrospective[2]. Only actions, taken under a law before the Fundamental Rights became operative and continued afterwards, if in conflict with the Fundamental Rights, would be affected by the aforesaid limitations[3].

It was further provided that these constitutional limitations on the law-making power of the Government, could not prevent the Central Legislature from making any law indemnifying a government servant or any other person in respect to anything done in connection with the maintenance or restoration of order in any part of Pakistan where martial law was in force or validating any sentence passed, punishment inflicted or anything done under martial law in such areas[4].

The provisions regarding the Fundamental Rights[5] were similar to those in the 1956 Constitution, except that the order of these rights was changed and every right was provided with a separate title. The provisions relating to personal liberty were exactly the same as those in the 1956 Constitution except in regard to Advisory Board in the provisions dealing with preventive

1. Ibid Art. 6(4).
2. Jibendra Kishore v. Province of East Pakistan P.L.D. 1957, Dac 1. See also Keshawa Madhava Menon v. State of Bom, AIR, 1951 S.C. 128.
3. Abul Ala Maududi v. West Pakistan, PLD, 1964, S.C. 673. See also Prof. Alan Gledhill, op.cit. at p.194-195.
4. Constitution 1962, Art. 223A.
5. Constitution (First Amendment) Act, 1963.

detention. It was now provided that, in the case of a person detained under a Central Law, the Board would consist of a Judge of Supreme Court, appointed by the Chief Justice of that court and a senior officer in the service of Pakistan, nominated by the President; if he were detained under a Provincial Law, the Board would consist of a Judge of High Court, nominated by the Chief Justice of that Court and a senior officer in the service of Pakistan, nominated by the Governor of that province. Protection against double jeopardy and self-incrimination was not guaranteed, as had been the case under the 1956 Constitution[1].

The emergency provisions differed from those in the 1956 Constitution in many respects. Instead of the three kinds of emergency enumerated in the 1956 Constitution, there was only one kind of emergency, which could be declared (a) when Pakistan or any part thereof was threatened by war or external aggression, or (b) when the security of economic life of Pakistan was threatened by internal disturbances beyond control of Provincial Government. But the scope of the powers given to the President during the period in which the proclamation of emergency was in force, was so wide as almost to make the President a dictator. The President was empowered, if satisfied that a grave emergency, of the kind specified above, existed to issue a Proclamation of Emergency[3] which, was required to be laid, as soon as possible, before the National Assembly[4], but the Assembly had no power of control over the President, as it had under the 1956 Constitution, for its authority to disapprove the President's actions or enactments was taken away[5]. A President's

1. See S.403 Code of Criminal Procedure & some sections Evidence Act. See Chapter on Procedural safeguards.
2. Constitution of 1962 - as amended up to 1966 - Art.30.
3. Ibid. Art.30(1) (2) and (3).
4. Ibid. Art. 30(5)
5. Ibid. Art. 30(6) as substituted by the Constitution (7th Amendment) Act, 1966, for the original clause (6)

Ordinance could not be rendered inoperative by resolution of the Assembly but before it ceased to have effect, the Assembly could, with or without amendment, by resolution approve it, in which case it would become an Act of the Central Legislature[1]. The President was empowered, while a Proclamation of Emergency was in force, to make ordinances, if satisfied of the need to do so - whether the National Assembly was dissolved or in session or not - but such ordinances were required to be put before the National Assembly as soon as practicable; these ordinances would have the same force of law as an Act of the central legislature[2]. The ordinances, thus made, if not approved by the Assembly or repealed by the President, would cease to have effect after the Proclamation had been revoked[3]. The President was authorised to revoke the Proclamation, whenever satisfied that the circumstances creating the emergency had ceased to exist[4]. It was, however, provided that the ordinance-making power of the President was subject to the same constitutional limitations as that of the Central Legislature[5].

Though previously the 1962 Constitution, like the 1956 Constitution, provided only for the suspension of the remedies to enforce Fundamental Rights, while the Proclamation of Emergency was in force, and did not touch the Fundamental Rights themselves, an important clause was added in 1965 by the Constitution Fifth Amendment Act, which removed the bar of restriction under Art.6 on the law making power of the state, in relation to some of the Fundamental Rights. The new clause provided that the rights to

1. Ibid. Art. 30 (6A).
2. Ibid. Art. 30 (4).
3. Ibid. Art. 30 (7).
4. Ibid. Art. 30 (3).
5. Ibid. Art. 30 (8).

freedom of movement, assembly, speech association, travel, business or profession, and the right to hold, acquire and dispose of property, contained in paragraphs 5, 6, 7, 8, 9 and 13 of Chapter I of Part II of 1962 Constitution, while the Proclamation of Emergency was in force, did not restrict the legislative or executive power of the State, but any law so made, should, to the extent to the repugnancy to Art.6, should cease to have effect and should be deemed to have been repealed after the Proclamation was revoked[1]. This clause resembled the Art.358 of the Indian Constitution at least in respect of the aforesaid rights; it gave unfettered law making power to the State during an emergency, inasmuch as the State could infringe or abrogate any of the above mentioned Fundamental Rights. But it is notable that the clause itself did not annul or abrogate these Fundamental Rights, but temporarily removed the constitutional limitations on the law making power of the State in relation to these rights.

The right to personal liberty, along with other Fundamental Rights was not included in the aforesaid list. In other words the State was not authorised to make laws infringing or abrogating the right to personal liberty, and the other rights so saved from the application of clause (9) of Art.30, even during an emergency. In Gopalan v. State of Madra[2], it was observed by the Supreme Court of India that the Indian Constitution has accepted preventive detention as the subject matter of peace time legislation as distinct from emergency legislation; there is no such provision in the Constitution of any other country; the Indian Constitution has deliberately and plainly given power to Parliament and the State legislatures to enact preventive detention

1. Ibid. Art.30(9), as substituted by the Constitution (5th Amendment) Act, 1965, S.2., for original clause (9) which was added by the Constitutional (1st Amendment), Act, 1963, S.5. NB. This original clause (9) is now reproduced in clause (10).
2. A.I.R., 1950, SC.27,

laws, even in peace time, which is a novel feature of the Indian Constitution, which it is not for the Court to question. The Pakistan Supreme Court held in Ghulam Jilani, and Abdul Baqi cases[1] that the right to personal liberty cannot be infringed or taken away, even during an emergency; deprivation of personal liberty arbitrarily, without sufficient or reasonable grounds, could not be justified in any circumstances; in a case of preventive detention the detaining authority had to prove, beyond any doubt that he was satisfied with the grounds on which an authority empowered by law could have issued a detention order to deprive a person of personal liberty; and that such 'satisfaction' by the detaining authority should never be subjective, whether in emergency or peace time; it should always be 'objective' in the sense that the laws or actions depriving a person, of so precious a right as personal liberty, could never be immune from scrutiny by the Courts on juridical review.

Lastly, like the 1956 Constitution; the President was empowered to suspend, by order, the remedy or the right to move the Courts for the enforcement of any or all such Fundamental Rights as specified in the Order; or the proceedings which 'invoke the determination of any question as to the infringement of any of such rights as specified', for the period the Proclamation was to be in force[2]. The words in inverted commas were added by the Constitution (Fifth Amendment) Act, 1965, and were intended to prevent even the initiation of proceedings to question the violation of any of the Fundamental Rights so specified. In other words, they were meant to give arbitrary power to the

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1. PLD., 1967, S.C. 373; PLD., 1968 S.C. 518.
2. Original Clause (9) of Art. 30 of the Constitution of 1962 as amended by the Constitution (Vth Amendment) Act, 1965, was reproduced in clause (10) of Art. 30.

executive to infringe the Fundamental Rights, without being called in question. Moreover, this clause did not make any distinction between those Fundamental Rights saved by clause (9) of Art. 30 and others which were not so protected. But, as has been already said, the Supreme Court of Pakistan in Malik Ghulam Jilani's case[1] held that the right to personal liberty could not be restricted arbitrarily, even during an emergency, and any infringement of the right to personal liberty would be subject to judicial review.

It is submitted that these clauses in the 1962 Constitution, like the corresponding provision in the 1956 Constitution do not authorise the State to annul or abrogate the Fundamental Rights, but simply empower the President to suspend the remedy to enforce such Fundamental Rights as are specified in the Order of the President, while the Proclamation of Emergency is in force. Though the State is empowered to make laws affecting some of the Fundamental Rights - paragraphs 5,6,7,8,9 and 13 of Chapter 1 of Part II of 1962 Constitution - regardless of Constitutional limitations on its law making power, the provision is not so absolute as to make the State's authority arbitrary in this respect; it simply removed the incompetency of the State to make laws affecting some of the aforesaid Fundamental Rights, and, it was expressly laid down that the moment the Proclamation of Emergency was revoked, the laws so made should cease to have effect to the extent of their repugnancy to the relevant Fundamental Rights and should be deemed to be repealed to that extent. Moreover, it was not laid down that the laws so made could not be called in question; they were liable to be challenged in a Court of law, unless the right to move the Court to enforce

1. Malik Ghulam Jilani v. Govt. of West Pakistan, Supra.

such Fundamental Rights was suspended by the Presidential Order under the aforesaid clause. It is also to be noted that the removal of the constitutional bar from the law making power of the State in respect of these Fundamental Rights under clause (9) of Art. 30, applied to all part of Pakistan or Pakistan as a whole, whereas the order of the suspension of the right to move the Court to enforce such Fundamental Rights as specified in the order, by the President under Art.30(10) would have force either in whole of Pakistan or any part thereof only.

As regards the judiciary, unlike the 1956 Constitution, original jurisdiction to issue the prerogative writs no longer vested in the Supreme Court. Under the 1962 Constitution only the High Courts were empowered to issue the writs[1] but an appeal lay to the Supreme Court from the High Courts. The Supreme Court had also appellate jurisdiction when a person had been sentenced to death, or transportation for life or punished for contempt of court by a High Court. But Art.98 of the 1962 Constitution, while conferring original jurisdiction on the High Courts to enforce the Fundamental Rights, did not mention the word 'writ' but instead used the words 'make an order'; secondly, unlike the 1956 Constitution, the names of five prerogative writs were not mentioned but five categories of conditions for the issue of the orders under Art.98, were prescribed. These conditions were generally the same as those applicable to the prerogative writs but it was provided to issue orders corresponding to certiorari and prohibition to quash non-judicial order. As

1. Constitution of 1962, Art.98.

regards the order to enforce personal liberty, it was provided that, on the application of any person, a High Court would make an order directing that a person in custody in the Province be brought before the High Court so that the Court would satisfy itself that the person was not being held in custody without lawful authority or in an unlawful manner; this is similar to the conditions applicable to the writ of habeas corpus.

Cornelius C.J., in a speech at the Civil Service Academy, explained the importance of provisions regarding writs in the 1962 Constitution. He said that in Art.98 the ancient names of the writs had been eliminated but the categories (of provisions) distinguished themselves easily under those names; in Art.98 the true content of each of the major writs had been set out in the long form of the words. The object probably was to attain certainty as to the limits within which the courts could act. Previously, in each case the Courts used to refer to precedents from England, the U.S.A., India and several other countries to determine their writ jurisdiction, which was no longer necessary, as the powers were expressed not by label but by full expression. The Superior Courts had the power and duty to interpret the words of the Constitution but it was not likely that the earlier precedents would lose their value as guidance. In Art.98 there were verbal changes in respect of the availability of the writ to protect the rights of public servants. Except habeas corpus, the true purpose of the writs was to maintain discipline in the administrative and judicial fields and therefore the writs were available to the maximum extent[1]. In Mehboob Ali Malik v. Province of West Pakistan[2] it was observed

1. PLD. 1964, 'Journal Section' 73 at pp.78-79.
2. PLD. 1963, Lah, 575

that, whereas in the 1956 Constitution the scope of the writs was not defined but had to be gathered from the text books on the subject, as well as from cases decided in England and other countries, Art.98 of the 1962 Constitution attempted to reduce into self-contained propositions the substance of the writs, with the exclusion of such incidents which, in the course of their evolution, had been attached to some of those writs but were not of the essence of the remedy; and that in some cases the field covered by the earlier writ had been enlarged and in others it had been somewhat curtailed, and the conditions of exercise of jurisdiction in relation to various writs had thus become more uniform; any order passed in excess of lawful authority could be declared without legal effect. It was enlarged in some cases and curtailed in others in comparison with the writ jurisdiction in the 1956 Constitution. In Shaukat Ali v. Commissioner Lahore Division[1], it was observed that Art.98 of the 1962 Constitution afforded a new method of an extraordinary character for the enforcement of legal rights. A very wide and new jurisdiction had been conferred on the High Court to remedy all possible kinds of injustice, where there was no adequate remedy under the ordinary law. The Article had created no substantive right but only provided a new form of remedy through the High Court.

In Muhammad Bachal v. Dy. Rehabilitation Commissioner[2] the High Court, comparing Art.98 of the 1962 Constitution with Art.2(4) of the Laws (Contination in Force) Order 1958, observed that no one would deny that the Constitution of 1962 did not confer precisely the same writ powers on High Courts as existed

1. PLD., 1963 Lah.127.
2. PLD., 1962 Kar.889.

under Art.2(4) of the Laws (Continuation in Force) Order. The powers were not the same and one noticeable difference was that Art.98 did not mention the prerogative writs referred to in Art.2(4) of the aforesaid Order.

An important addition was made in clause (2) of Art.98 - paragraph (C) to Art.98)2) - by the Constitution (first Amendment) Act, 1963, whereunder every aggrieved party was entitled to move the High Court to make an order to any person or authority, including Government, within the territorial jurisdiction of the Court, by giving such directions as would be appropriate for the enforcement of any Fundamental Right - as conferred by Chapter I of Part II of the 1962 Constitution. By this amendment the remedy to enforce the Fundamental Right was itself given the Status of a right[1]. The Constitution (First Amendment) Act, 1963 also added a very valuable clause - clause (3) - to Art.133, whereunder this newly added limb (c) of clause (2) of Art.98, was given protection from the law making power of the legislatures - which, except in relation to making of laws as to Fundamental Rights, was unchallengeable in a Court of law; the validity of such laws could not be called in question[2] - and it was provided that the law making power of the legislatures under Art. 133 should never be construed to have effect in respect of the right afforded by paragraph (c) of Art.98(2) and that the power of a High Court exercisable under Art.98(2)(C) could never be taken away, limited or restricted by the legislatures' enactments. It can be added that this clause Art.133(3) , raised the position of the remedy to enforce Fundamental Right under Art.98(2)(c) to the status of a Fundamental Right in the sense that it could not be

1. Abul Ala Maudoodi v. Govt. of West Pakistan, PLD.,1964, S.C.673 (782)
2. Constitution of 1962, Art.133.

abrogated, infringed or restricted by the legislatures. The only limitation on the right to an order to enforce a Fundamental Right was the availability of an adequate alternative remedy under the ordinary law.

As regards habeas corpus to enforce the right to personal liberty, Art.98 (2)(b)(i) laid down that on the application of any person, not necessarily the detenu, asserting that a person was held in custody without lawful authority or in an unlawful manner, a High Court should make an order directing that the person in the custody should be brought before that court, so as to enable it to determine whether the assertion was correct; the writ would issue if any of the provisions in Right No.1 or paragraph 2 of Chapter I of Part II - provisions regarding the protection of personal liberty - was violated. The petitioner could represent his own case before the High Court, if he was not in a position to be defended by the legal practitioner, or to communicate with the court. The writ was also available to a person who had been in custody but was subsequently released on bail.

On September 6,1965, President Ayub Khan, issued a Proclamation of Emergency, on account of the war with India, under Art.30(1), declaring that he was satisfied that a grave emergency existed, in which Pakistan was in imminent danger of being threatened by war. On the same day, he issued an order under clause (10) of Art.30, suspending,while the Proclamation was in force, the right to move a High Court for enforcement of the Fundamental Rights enumerated in paragraphs 2,3,5,6,7,8,9,13,14 and 17 in Part II of the Constitution of 1962 and all proceedings pending in Court for the enforcement of the said rights. Safeguards against arrest and detention were suspended, although the right to life and liberty was not touched but, if a man could

not be protected against detention, his personal liberty would no longer exist. The emergency was not revoked, till quite recently when Martial Law was reimposed throughout Pakistan, on 25th March, 1969. A number of defence and security enactments were made during this period, such as the Defence of Pakistan Ordinance, 1965, under which the Defence of Pakistan Rules,1965, were promulgated. But in Ghulam Jilani's[1] case, though the Emergency Proclamation had not been revoked, it was held that a person could not be deprived arbitrarily of his personal liberty ; the detaining authority's 'satisfaction' in r.32 of the D.P.R. of the sufficiency of the ground for making an order for the detention of any person could not be subjective, whether in emergency or peace time; it was always subject to scrutiny by the Courts in judicial review, and that the principle of objective satisfaction should always be followed by the Court[2]. It was a very bold decision, given when there was an emergency, declared and continued by a strong Presidential regime. This principle was applied in later cases, such as Baqi Baloch and Gorish Kashmiri.

Abrogation of the 1962 Constitution:

President Ayyup Khan, faced with the wave of killing and looting which had plunged wide areas of Pakistan into near anarchy, on March 25,1969, relinquished the reins of power to the armed forces. In a brief radio broadcast, which he called his 'last speech', he announced that he was standing down as President and was handing over the administration to General A.M.Yahya Khan, the Commander-in-Chief of the Army. President Ayyub Khan said that the country's condition was 'deteriorating day by day'; its economy had been

1. Supra.
2. Malik Ghulam Jilani v. West Pak. PLD.1967 S.C.373
see also Baqi Baloch v. Dy. Commissioner Karbchi, P.L.D.1968 S.C.313 and Govt. of West Pakistan v. Begum A.K. Gorish Kashmiri, PLD.1969 S.C.14.

shattered; administrative institutions were being paralysed; self-aggrandisement was the order of the day; people were circling the places in Gharaos and looting or murdering at will; oppression and duress on civil authorities and the public at large was prevalent; no one had the courage to speak the truth. Lastly, he referred to the letter, which he had written to General Yahya Kan the day before, in which he said that, with profound regret, he had come to the conclusion that the civil administration and constitutional machinery in the country had become ineffective and, if the situation was allowed to continue to deteriorate, economic life and civilized existence would become impossible; he had been left with no other option but to step aside and leave it to the Defence forces, which, according to him represented the 'only effective and legal instrument' to take over full control of the affairs of the country; the situation had gone out of the control of the Government and there could be no recourse except to the Armed Forces.[1]

Immediately after F.M. Ayub Khan, General Yahya Khan broadcast a Proclamation, placing the country under Martial Law, announcing the abrogation of the Constitution of 1962, dissolving the National and Provincial Legislative Assemblies, dismissing the President's Council of Ministers as well as the two newly appointed Governors of East and West Pakistan, and declaring himself the Chief Martial Law Administrator. He said that a situation had arisen in the country, in which the civil administration could not effectively function and that, in the interest of National security, it had become necessary to place

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1. See 'Dawn' Karachi, March 26 1969

the country under Martial Law. The Proclamation, on the lines of 1958 Proclamation, stated that Martial Law Regulations and Orders would be promulgated by the C.M.L.A. or by any authority empowered by him, and punishment would be inflicted in the manner convenient to the M.L.Administrators, contravention of Martial Law Regulations and Orders would be dealt with such penalties as would be prescribed by the Regulations; military Courts would be set up for the trial and punishment of any offence under Martial Law as well as under the ordinary law; special and enhanced penalties for offences under ordinary law would be prescribed; ordinary courts would be authorised to try and punish contraventions of Regulations and Orders; the ordinary courts could, however, be barred from trying any offence prescribed in such Regulations or Orders; and that, notwithstanding the abrogation of the Constitution of 1962 and subject to Regulations and Orders made by the C.M.L.A., all laws, including Ordinances, M.L. Regulations, Orders, Rules, by-Laws, notifications and other instruments having the force of law, in force immediately before the abrogation of the Constitution would continue to be in force; all the Courts and Tribunals in existence immediately before the Proclamation would continue in existence and would exercise all the powers and jurisdiction as previously, except that no Court could call in question any M.L. Regulations or Orders or any finding or judgement or order of a military court, and that no writ or other order could be issued against the C.M.L.A. or any authority working under him.

Unlike the 1958 Proclamation, the Proclamation of 1969 placed the C.M.L.A. and all persons in authority under him above criticism or challenge; the acts of such authorities could not be impugned and no order made by them could be called in question. A significant difference from the 1958 Proclamation

is that the jurisdiction of the superior Courts to issue writs against any of M.L. Authorities, has been expressly and completely taken away. The Laws (Continuance in Force) Order, 1958, provided that writs could not issue to M.L. Administrator, but would be sent to M.L. authority that had succeeded, but would not be binding on them. The restriction on the writ jurisdiction in the Proclamation of 1969 was reinforced by the Jurisdiction of Courts (Removal of Doubts) Order, No.3/69, which declared that no writ whatever would issue against the Martial Law authorities and all pending proceedings would abate. The Supreme Court and the High Court judges would continue in their offices and would exercise the same power of jurisdiction as prior to the Proclamation, except as provided in the Proclamation and subject to the further orders of the C.M.L.A.[1].

On April 1969, the C.M.L.A. issued the Provisional Constitution Order, which seems to have been drafted on the lines of L.C.F.O., 1958. It was to come into force at once, with retrospective effect from the date of the Proclamation, March 25, 1969. It announced, unlike the L.C.F.O., 1958, that the C.M.L.A. would be the President of Pakistan, and, like the latter, it provided that, notwithstanding the abrogation of the 1962 Constitution, the country 'will be governed as nearly as may be' in accordance with the Constitution, subject to any Regulation or Order, made, from time to time, by the C.M.L.A. The most significant feature of the Provisional Constitution Order is that, whereas the L.C.F.O., 1958, was silent about the Fundamental Rights, it specifically abrogated and annulled most of the Fundamental Rights,

1. Martial Law Proclamation Order, see 'Dawn' Karachi, March 26, 1969.

those enumerated in paragraphs 2,4,5,6,7,8,9,13,14,15 and 17 of Chapter I of Part II of the 1962 Constitution, which included the right to protection against arrest and detention, freedom from retrospective punishment and freedom of movement and residence. It lays down that all proceedings pending in the Courts for the enforcement of any of the rights, enumerated above, shall abate.

No ordinance promulgated by the President or theGovernor of a Province, and no ordinance in force before the Proclamation could be called in question, no writ judgement, decree, order or process could be made or issued against the C.M.L.A. or any authority exercising power under him. There were similar provisions in L.C.F.O., 1958.

The Courts, subject to the President's Orders and M.L. Regulations and Orders, would have the same jurisdiction and powers as before the Proclamation but no appeal would lie to theSupreme Court from a High Court, except when the High Court on appeal reversed an acquittal and imposed a sentence of death or transportation for life, or imposed such sentence in a case withdrawn from a subordinate Court for trial or where the High Court certified that a substantial question of constitutional law was involved or the High Court committed a person for contempt of itself.

Other provisions of the Provisional Constitution Order are similar to those of L.C.F.O., 1958. It is, however, provided that any regulation, made by C.M.L.A. or any authority exercising power under him, which comes into conflict with any existing law or ordinance, will prevail. For purposes of this study, the most remarkable effect of the Provisional Constitution Order is that it deprives a person, preventively detained, of the right of recourse to an advisory board, if it is proposed to detain him for more than three months,

for it lays down that paragraph 2 of Chapter I of Part II of the 1962 Constitution shall be of no effect[1]. There was a similar provision in Art.7 of L.C.F.O., 1958 which laid down that any provision in any law providing for the reference of a detention order to an Advisory Board, should be of no effect.

It is submitted that the right to move the Courts to issue writs to enforce the specified Fundamental Rights has been suspended and the jurisdiction of the Superior Courts to issue writs for this purpose has been taken away. The Provisional Constitution gives arbitrary powers to the Martial Law authorities to deprive a person of personal liberty, in as much as the power of judicial review of the actions of the Martial Law authorities has been annulled; no action of the Martial Law authorities can be called in question in any Court of law.

Shortly after the Proclamation of Martial Law, 1969, a petition on April 28, 1969 was filed in the Lahore High Court[2] under S.561-A of the Cr. P.C. to quash the proceedings, instituted against the petitioners in 1967, long before the imposition of Martial Law, under SS.420 and 468 of the Penal Code read with S.5(2) of the Prevention of Corruption Act, 1947, on the ground inter alia that no criminal offence had been disclosed and that the continuance of theproceedings against them amounted to an abuse of the process of the Court. The proceedings were transferred to the Special Military Court by the M.L. Administrator, Zone A, for trial from the Court of the Special Judge (Central) Rawalpini, A single judge of the High Court, on the application of the petitioner's counsel,referred the matter to the Chief Justice for constituting a larger Bench for decision of the questions raised, as they were of general public interest.

1. See Provisional Constitution Order, 1969.
2. Mir Hassan v. State, PLD., 1969, Lah.786.

The questions before the High Court were; (a) whether the cases of the petitioners, which had not only been pending in the Court of the Central Special judge, but had also been instituted before the imposition of Martial Law, had been properly transferred to the special Military Court by the Zonal M.L. Administrator for trial; (b) whether the Provisional Constitution Order preserved all the powers and jurisdiction of the High Court, including their inherent powers under S.561-A of the Cr.P.C., when there was no other provision comparable to it; and (c) what was the effect of Art.2 of the Constitution, 1962, which was preserved by Art.3 of the Provisional Constitution Order vis-a-vis Art.6(2) of the said Order.

As to the question of the Zonal Martial Law Administrator's power, under Martial Law Regulation 1969, No.42, to transfer pending cases under the ordinary law, from criminal courts, the Court held that the power has been completely taken away by the later and reconstituted Martial Law Regulation No.45 - previously Martial Law Regulation No.3 - and therefore, Martial Law Regulation No.42 could not be invoked to transfer cases; and secondly that cases which were pending before the promulgation of Martial Law Regulation No.42 itself, could not be transferred from the ordinary Courts.

As regards the second question, whether the Provisional Constitution Order, 1969 preserved all the powers and jurisdiction of the High Courts, including their inherent powers, the Court held that except as provided by the Provisional Constitution Order, all the powers of a High Court enjoyed by it immediately before the abrogation of the Constitution of 1962, continued to vest in it.

As to the question of the effect of Art.2 of the 1962 Constitution,

the Court made very comprehensive observations. It pointed out that Provisional Constitution Order, by virtue of its Art.2, is an addition to the Proclamation of Martial Law and is neither in derogation of it nor subject to it. In other words, it has the same status as the Proclamation of Martial Law; and since the Proclamation itself is not subject to Martial Law Orders or Regulations, the Provisional Constitution Order cannot be subject to them. As the Provisional Constitution Order, while abrogating most of the Fundamental Rights, has purposely preserved Art.2 of the 1962 Constitution, and as the Provisional Constitution Order is not subject to Martial Law Regulations or Orders, its provisions and the rights preserved by it cannot be derogated by the Martial Law Regulations and Orders; it cannot, therefore, be amended by a Martial Law Regulation or Order but only by the amendment of the Provisional Constitution Order itself. Whether the President and the Chief Martial Law Adinistrator, who is not himself above the law, can now amend it is a question to be answered when the time comes to do so. Art.2 of the 1962 Constitution, which entitles citizens to the protection of law and to be treated in accordance with law and only in accordance with law, provides that no person shall be deprived of life, liberty, reputation or property without due process of law. It further declares that no public functionary can take any action affecting life, liberty, reputation or property without lawful justification. It was therefore, held that, the action of any authority, including a Martial Law Authority, howsoever high he may be, without the backing of a Constitutional provision, is not immune from being struck down by the Courts of the country.

It is submitted that the Lahore High Court was wrong in holding that the Provisional Constitution Order is not subject to M.L. Regulations or Orders, and that, as the Provisional Constitution Order has preserved Art.2 of the

Constitution of 1962, no Martial Authority, even the C.M.L.A., can take an action against any person which has no justification under law, as required by the aforesaid Art.2. When the C.M.L.A., himself is law-giver, the promulgator of the Provisional Constitution Order 1969, itself, and especially when the Martial law Proclamation of 1969 has specially laid down that no acts or orders made by the C.M.L.A. or any authority exercising power under him, can be challenged by any person or called in question by the Courts, it was not correct to hold that the C.M.L.A. or any authority exercising power under him was subject to the Provisional Constitution Order.

The reaction from the C.M.L.A. to the findings of the High Court was very prompt. Being conscious that this decision of the High Court would restrict the discretion of the Martial Law Authorities, circumscribe their legislative power and render their orders and regulations, their executive acts and the decisions of the Military Courts liable to scrutiny by the Superior Courts, the C.M.L.A. promulgated the jurisdiction of Courts (Removal of Doubts) Order, 1969[1]. It states that, as doubts have arisen as to whether the Supreme Court or a High Court has power to issue a writ, order, notice or other process to or against a Military Court or Summary Military Court, or in relation to any proceedings of or any jurisdiction exercised by any such Military Court or any Martial Law Authority, the President directed, with retrospective effect from the Proclamation Day - March 25, 1969, and with paramount effect over the Proclamation of Martial Law, any Martial Law Regulation or Order, the Provisional Constitution Order or over any law for the time being in force, that no court, tribunal, or any other authority, including the Supreme Court and a High Court, should receive or entertain any complaint, petition,

1. Presidents Order III of 1969, see Gazette of Pakistan (Extraordinary) June 30, 1969.

application or any other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by any Special Military Courts, Summary Military Courts or any Martial Law Authority or any person exercising jurisdiction or power derived from Martial Law Authority or call or permit to be called in question in any manner, whatsoever , any finding, sentence, order, proceeding or any other action of,by or before the aforesaid Courts or Authorities; or issue or make any writ, order, notice or other process to or against, or in relation to the exercise of any power or jurisdiction by such Courts or Authorities; or any judgement given, sentence passed, writ, order, notice or process issued or made, or thing done in contravention of the above clauses by the ordinary courts - including a High Court and the Supreme Court - would be of no effect; and if any question arises as to the correctness, legality or propriety of the exercise of any powers or jurisdiction by such courts or authorities, it should be referred to the Chief Martial Law Administrator, whose decision thereon should be final. Any question,which arose as to the interpretation of any Martial Law Regulation or Order, should be referred to the Martial Law Authority issuing the same for decision, and the decision of such Martial Law Authority should be final and not be questioned in any Court, tribunal or other authority, including the Supreme Court and a High Court.

By the aforesaid Order, the powers and jurisdiction rested in the Superior Courts[1] to see that Martial Law Authorities do not transgress the provisions of the Provisional Constitution Order, to interprete the Regulations and Orders issued by these Authorities, and to scrutinize actions of Martial Law Authorities and decisions of the Military Courts, have been

1. Mir Hasan v. State, supra.

completely taken away. The most crucial aspect of the Order is that laws made by the Martial Law Authorities cannot be called in question nor can any Regulation or Order be interpreted by the Courts; the Martial Authorities have themselves assumed these powers and jurisdiction of the Superior Courts.

CHAPTER 5.

PROTECTION OF PERSONAL LIBERTY.

Constitutional Guarantees

The right to personal liberty is guaranteed by Right No.1 in the Pakistan Constitution of 1962 and safeguards against its deprivation are provided by Rights No.2,4 and 5, in Chapter 1 of Part II of the Constitution of Pakistan 1962. Analogous provisions, in the Indian Constitution, are found in Arts. 20, 21 and 22 in Part III of the Indian Constitution. In Pakistan Right No.1 lays down that no person shall be deprived of life or liberty, save in accordance with law. Most constitutions of the world, while guaranteeing the right to personal liberty[1], enunciate that no person can be deprived of the right to personal liberty except in accordance with 'law'[2]; or 'a legal judgement of his peers or the law of the land'[3]; or 'due process of law'[4]; or 'procedure established by law'[5].

The Indian Constitution borrowed from the Japanese Constitution the phrase 'in accordance with procedure established by law', but, following the Irish Constitution added the adjective 'personal' before the word 'liberty', so as to restrict its interpretation to a specific and narrower sense[6]. On the other hand the Pakistan Constitution adopted the Irish expression 'in accordance with law', but did not use the adjective 'personal' before the word 'liberty', which can therefore be interpreted in a more general and wider sense.[7]

1. See Chapter II.
2. Constitution of Pakistan, Right No.1; Irish Constitution Art.40.4.1; Burmese Constitution, S.16;
3. Magna Carta, Clause 29;
4. Fifth and Fourteenth Amendments - U.S.A. Constitution
5. Indian Constitution, Art.21, and Japanese Constitution Art.31
6. Gopalan v. State of Madras, AIR. 1950, S.C. 27.
7. See Abul Ala Maudoodi v. State Bank of Pakistan, Supra.

The expression 'by the law of the land' in the Magna Carta is regarded as the foundation stone of the principle of protection of personal liberty, on which the writ of habeas corpus is based. It is accepted that the notion of the writ of habeas corpus developed to enforce the aforesaid phrase. Earlier the words of the phrase were construed as meaning 'by due process of the Common Law'. But this construction gave a very narrow meaning to it, namely, 'by the law as administered by the common law Courts', as opposed to the wider interpretation 'by the general law, as practised by the Council, the local and franchise Courts and the Chancery.' Coke C.J., for the first time maintained that the expression should be interpreted in the wider sense, so as to include the general law as administered by common law and other courts. He dropped the words 'common law' and laid down that the expression 'by the law of the land' must be taken to mean 'by due process of law'[1].

The 'institutes' of Coke C.J. are regarded as the foundation of the American Constitutional theories. Originally, the framers of the American Constitution has adopted Magna Carta's phrase 'by the law of the land'. But later on, being influenced by Coke's idea, the expression, 'by due process of law' was introduced in the Fifth Amendment, which was followed in the Fourteenth Amendment to the Constitution of America.

In England the liberty of a subject is not protected against the enactments of Parliament[2]. If Parliament, by express legislation, authorises the deprivation of the liberties of the subject, then such law is not subject

1. See Coke,C.J., Institutes. Part II 292, (1669)
2. See Chapter IV.

to judicial review. The expressions 'by the law of the land' and 'by due process of law,' in England, provide safeguard for the protection of personal liberty against the executive. It connotes that, if an authority, by any action, deprives a person of his liberty, that action should be justified by law of the land. To put it differently, a subject cannot be deprived of his personal liberty, without lawful justification. It was observed in Liversidge v. Anderson that 'all the Courts today and not least this House, are jealous as they have ever been upholding the liberty of a subject. But that liberty is a liberty - confined and controlled by law,' whether common law or Statute[1]. The passage which Lord Atkin quoted from Lord Wright[2] - which was cited by Lord Wright from a dictum of Pollock, C.B.[3] - is of great importance on this context. It states:-

> "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the Statute. In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has been always one of the pillars of freedom, one of the principles of liberty... that judges are no respectors of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law...."[4].

As regards the construction of the words, 'if there is in fact reasonable cause for A.B. so to believe', it was observed that 'after all, words such as these are commonly found, when a legislature of law-making authority confers powers on a minister or an official. However read, they must be intended to

1. (1942) A.C. 206
2. Barnard v. Gorman (1941) AC. 378
3. Bowditch v. Balchin (1850) AC. ; (1850) Ex.387.
4. Liversidge v. Anderson, Lord Atkin's dissenting opinion.

serve, in some sense, as a condition limiting the exercise of an otherwise arbitrary power...[1]'.

In America the expression 'due process of law' is interpreted as meaning that both the Legislative and Executive acts should conform to the Constitutional guarantees of the liberties of the people. The Courts' power of judicial review is not confined to executive acts but also extends to Statutes. Not only the procedure by which a person is deprived of his liberty but the substance of the statute authorising such deprivation must be established and justified by the law of the land and the Constitution. It was observed in the Slaughter House Case that, 'liberty is freedom from all restraints but such are imposed by law. Beyond that line lies the domain of usurpation and tyranny... One process of law is the application of law as it exists in the fair and regular course of administrative procedure[2]'. The aforesaid expression is regarded as a restraint, not only against legislative and executive but also against the judicial power of the Government. In Murray's Lessee v. Hoboken Land and Improvement Co., it was observed -

> "That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. But is it 'due process of law'? The Constitution contains no description of the process which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The Article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will..."[3]

1. Nakkuda Ali v. M.F. De.S. Jayaraute (1951) A.C.66.
2. 83 U.S. 36, (127) (1872).
3. 59 U.S. (18 How) 272 (276)

" 'By law of the Land' is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgement only after trial. The meaning is that every citizen should hold his life, liberty, property and immunities, under the protection of the general rules, which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of land...[1]".

In India the expression, 'procedure established by law' was interpreted by Das J. as meaning procedure established by Statutory legislation. It was pointed out that words 'established by law' mean 'enacted by law' and consequently the word 'law' must mean State-made law and cannot possibly mean the principles of natural justice, for no procedure can be said to have ever been enacted on those principles. Mukhergea J., however, interpreted it in a comprehensive way and said "that, on a plain reading of the Article, the meaning seems to be that a person cannot be deprived of his personal liberty, except when the action is taken against him in accordance with the law which provides for such deprivation, and that the expression 'procedure' means the manner and form of enforcing the law." He concluded that "the group of Articles 20-22 embodies the entire protection guaranteed by the Indian Constitution, in relation to deprivation of life and personal liberty, both with regard to substantive as well as to procedural law[2]."

The phrashe 'in accordance with law' in the Irish Constitution was construed to mean 'in due course of law' and 'law' to mean 'law then in force'. An order of detention conforms to the provisions of the Statute authorising

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1. Dartmouth College Case (1819) 4 Wheaton (U.S.) 518. per argument of David Webster.
2. Gopalan v. State of Madras, Supra.

detention, it cannot be said to be not in accordance with law. It was, pointed out that the aforesaid expression cannot be interpreted to mean 'in accordance with rules of natural justice' but it means 'in accordance with the law in force'.[1] It is true that a person can be deprived of his personal liberty by an express enactment of the Legislature authorising such deprivation[2] but this provision - 'no citizen shall be deprived of his liberty save in accordance with law' - cannot be used to validate an enactment conflicting with the constitutional guarantees[3].

As to the meaning of 'law' in the expression 'save in accordance with law' in S.16 of the Burmese Constitution, it was held that 'law' means an enactment by Parliament or other competent legislative body. It was, however, pointed out that the word 'law' was, before the framing of the Constitution of Burma, construed to mean only the enacted law, and that even after the commencement of the Constitution, the customary laws, theCommon Law of England, the principles of Justice, equity and good conscience, if they are not enacted in the statute, cannot be contemplated to be included in the term 'law' which means 'enacted law.'[4]

In Pakistan the expression 'save in accordance with law' is interpreted to mean 'except according to the provisions of a law duly enacted by Legislatures'. The provision that 'no person shall be deprived of life or liberty save in accordance with law' in Art.5(2) of the 1956 Constitution -

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1. R.V. Military Governor of Hare Park Camp. (1924) (2) I.R.104.
2. Ryan's Case. (1935) I.R. 170.
3. State (Burke) v. Lennon and A.G., (1940) 12.136.
4. Tinsa Maw Naing v. Commissioner of Police, Rangoon, 1950 Burma,L.R.(SC) 17.

- Right No.1 of the 1962 Constitution - was held to afford no protection against an express enactment of Legislature authorising the deprivation of personal liberty, and the word 'law' in the aforesaid expression cannot be construed to mean the principles of natural justice outside the realm of positive law; it is equivalent to State-made law[1].

The expression implies that a person cannot be deprived of personal liberty except by lawful authority. Relying on Ghulan Jilani v. Govt. of Pakistan[2] it was observed in Abdul Baqi Baluch v. Govt. of Pakistan that power is expressly given by Art.98 to Superior Courts to probe into the exercise of public power by executive authorities, how high soever, to determine whether they have acted with lawful authority. Not only laws made by Legislatures but also rules made under the delegated legislative power, and the actions taken thereunder, must conform to the provisions of the Constitution. It was further observed that the power of judicial review will be reduced to a nullity, if laws are so worded or interpreted that the executive authorities may make what Statutory rules they please and may use this freedom to make themselves the final judges of their own will in imposing restraints on the liberties of persons. Art.2 of the Constitution of 1962 would be deprived of all its content through this process and the courts would cease to be guardians of the nation's liberties[3].

In Government of West Pakistan v. Begum Agha K.Sorish Kashmiri, it was contended on behalf of the Government that Courts should not be unmindful of the fact that emergency legislations must be interpreted with due regard to the consideration, that being comes before well being; it was observed that the Courts cannot go behind the emergency, the contention that the laws must be

1. Sakhi Daler v. Superintendent, PLD. 1957, Lah.813
2. PLD. 1967 SC.373
3. PLD. 1969 Kar.87.

interpreted differently during an emergency cannot be accepted. It was, pointed out that Lord Atkin had said in Liversidge v. Anderson that -

> "Admidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war and peace."[1]

It was, therefore, held that, whilst laws cannot be interpreted differently at different times or in different circumstances, the existence of an emergency will have a material bearing, if the Courts are to decide upon the reasonableness of the action, for what is reasonable in time of an emergency may well not be reasonable in ordinary circumstances, when the emergency has ended. But this consideration does no exclude the consideration that action, taken by the authority, which deprives a person of his liberty, must stand the test of judicial review by the Courts[2].

The expression 'in accordance with law' should be interpreted as meaning 'According to the manner prescribed by theConstitution or by any valid law made under the Constitution by any competent Legislature.' The detaining authority should exercise the power of apprehension and detention bona fide and in accordance with the procedure prescribed by a valid law authorising detention, as envisaged by Art.2 of the Constitution of Pakistan,1962 and not arbitrarily or perversely[3].

The words 'in an unlawful manner' in Art.98(2)(b) of the Constitution of Pakistan, have been used, it was observed, deliberately to give meaning and content to the solemn declaration under Art.2 of the Constitution itself, in the sense that it is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining

1. Supra.
2. P.L.D.1969 SC.14; see also Abdul Baqi v. Govt.of Pakistan,P.L.D.1968 SC.313
3. Ghulam Jilani v. Govt.of West Pakistan,P.L.D.1967,SC.373.

how and in what circumstances a person would be detained in an unlawful manner, one would inevitably look first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. The word 'law' in the expression 'in accordance with law' is not confined to Statute law alone but is used in its generic sense as connoting all that is treated as law in Pakistan, including even the judicial principles laid down, from time to time by the Superior Courts. It means 'according to the accepted forms of legal process' and postulates a strict performance of all the functions and duties laid down by law. It may well be said that, in this sense, it is as comprehensive as the American 'due process clause', as now interpreted in a new garb. It is in this sense that an action which is mala fide or colourable is not regarded as an action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not an action in accordance with law. Action taken upon no grounds at all or without proper application of the mind of the detaining authority or by exercising power in excess of his jurisdiction, would not qualify as action in accordance with law and would, therefore, have to be struck down as being action in an unlawful manner[1].

The term 'liberty' in the expression 'no person shall be deprived of life or liberty save in accordance with law' is comprehensive and, in its widest sense, it includes 'freedom of movement and residence in any part of Pakistan[2]. It was observed that Fundamental Right No.1, connotes the 'security of person.' The word 'security' in this connotation must be understood in the sense of protection of an individual from physical restraint by incarceration.

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1. Govt. of W.Pakistan v. Begum A.K.S. Kashmiri, PLD.1969, S.C.14.
2. Ghulam Jilani v. Govt. W.Pakistan, Supra; see also Kent v. Dulles,357 U.S. 116.

In other words it guarantees the protection of personal liberty against its arbitrary deprivation, or provides safeguards against complete loss of personal liberty at the instance of the Government or any other organ of the society. It was further observed that 'liberty' in Fundamental Right No.1 must be understood in its generic sense so as to comprehend, within its connotation, freedom to move and reride in any part of Pakistan[1].

The word 'deprived' in the operative part of Right No.1 qualifies both 'life' and 'liberty.' According to Blackstone, 'deprivation' means total loss of freedom[2]. Therefore what is sought to be protected by Right No.1 is loss of life or liberty[3]. A.K. Brohi has comprehensively dealt with the subject of 'liberty and personal liberty[4].

The expression 'no person shall be held to answer for... nor be deprived of life or liberty or property, without due process of law' in the American Constitution, has been interpreted by the American Supreme Court in Alleger v. State of Louisiana. The word 'liberty' has been given a very wide meaning as including not only the right of a person to be free from the physical restraint on his person as by incarceration but also freedom to enjoy all his faculties, that is to say, right to live and work where he will, to acquire useful knowedge, to marry to establish home, to worship God according to his conscience, and generally to enjoy all privileges long recognised at Common Law as essential to orderly pursuit of happiness by freeman[5].

Brohi comments that it is doubtful whether the term 'liberty' would receive the wide meaning it has received in America. The reason, according to

1. Abul Ala Maudoodi v. State Bank of Pakistan, PLD.1969 Lah.908.
2. Blackstone Commentaries, Vol.1 p.134.
3. Abul Ala Maudoodi v. State Bank of Pakistan.
4. 'Fundamental Law' op.cit. See also Chapter 1 for detailed analysis.
5. 165 U.S. 576 (1897); See also Mayor v. Nebraska, 262 U.S.390.

him, is that, the liberties in general, have, in the Constitution of Pakistan, been dealt with separately in Arts. 8 to 12 of the Constitution of Pakistan, 1956 - Right Nos. 1, 5, 6, 7, 8, 9, 10 and 12 in Part II of the Constitution of 1962 - much in the same manner in which they have been dealt with in Art.19 of the Indian Constitution. Referring to the provisions of the Indian Constitution, corresponding to Right No.1 of the Pakistan Constitution, 1962, the learned author opined that the framers of the Indian Constitution qualified the expression 'liberty' in Art.21 by prefixing the adjective 'personal' merely by way of abundant caution, so as to avoid the impression that the word 'liberty', used in Art.21, has any reference to the same subject matter as is provided in Art.19. In reaching the conclusion the learned author[1] based himself on the judgement of Kania C.J. in Gopalan case wherein he observed that 'personal liberty' is the anti-thesis of physical restraint[2].

In Abul Ala Maudoodi v. State Bank of Pakistan. Gul J., pointed out that Right No.1 comes under the caption 'security of persons' and Right No.5 under 'Freedom of movement'. 'Security' means protection from 'physical restraint', 'Deprived' means 'total loss'. Right No.1 protects a person from physical restraint by incarceration - as distinguished from partial control of the right to move freely.

If liberty in Right No.1 is understood in its generic sense so as to mean 'universal locomotion', then Right No.5 is redundant. No anomally arises

1. A.K. Brohi, op.cit.
2. Copalan v. State of Madra, AIR. 1950 S.C.27.

if 'liberty' in Right No.1 is understood as meaning freedom from incarceration. This interpretation is in accord with the principle that a Statute must be read as a whole giving some meaning to every part. It was further observed that, if the broad and sweeping concept of 'liberty', as laid down by theAmerican Judges, is followed, then Fundamental Rights No.5,6,7,8,9,10 and 12, will become unnecessary appendages to the Chapter relating to Fundamental Rights. It is, therefore, essential to bear in mind the general arrangement in Part II - Chapter 1 - of the Constitution of Pakistan, which is wholly different from the Fourteenth Amendment to the Constitution of America; there being no catalogue, separately listing the various freedoms, as guaranteed by the Constitutions of Pakistan, 1956 and 1962, and the Indian Constitution. In the absence of such a catalogue, the American Supreme Court has taken advantage of the generality of the word 'liberty' in expanding the scope of the 'due process clause'. Though, that Court has never defined the word - 'liberty', it has been often reiterated that it 'is not confined to mere freedom from bodily restraint' and that 'liberty' is interpreted as extending, under law, to full range conduct which an individual is free to pursue[1].

The question how far the decisions of the American Supreme Court, based upon the interpretation of the 'due process clause' should be persuasive in Pakistan, came up for the consideration of the Supreme Court of Pakistan in Jibendra Kishore v. Province of East Pakistan. In that case the question arose with reference to the provisions of Art.5 of the Constitution of 1956, which guaranteed equality before law and equal protection of law. The argument before the Supreme Court was that the impugned Act offended against the equality clause of the Constitution. In support of the argument

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1. PLD. 1969, Lah. 908; See also Bolling v. Sharp, 347 U.S. 497, 499.

certain American decisions, proceeding on the interpretation of the 'due process clause' were cited. Agreeing with the contention of the respondent's counsel, the Chief Justice repelled the aforesaid argument and observed:

> "There is considerable force in this contention, because our Constitution does not use and could not have used the 'due process of law' clause in guaranteeing primary rights, in the sense in which that clause has been interpreted by the Supreme Court of the United States. That Court has scrupulously avoided giving an exact definition of 'due process of law' and all that can be gathered from the leading decisions on the subject is that no law can be said to be 'in accordance with due process of law', if it contravenes certain basic principles of Justice and liberty, which are above the lawthat may be made by the Congress or by the State Legislature.[1]".

The same view was expressed in a later case, East and West Steamship Company v. Pakistan that:-

> "...In the United States a grant of power is often invalidated on the ground that it offends against 'due process' provisions of the Constitution, or that it delegates excessive legislative powers or that it denies equal protection of law to the citizens;[2] as pointed out in Jibendra Kishore's case nowhere in our Constitution is the concept of 'due process of law' to be found, in the sense in which it has been understood in the American jurisprudence....[3]".

It will be seen that the decisions, proceeding on the interpretation of the 'due process clause' by the American Supreme Court, would not offer any guidance for the interpretation of the Constitution of Pakistan. As has been rightly pointed out in Abul Ala Maudoodi v. State Bank of Pakistan[4] the

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1. PLD. 1957, S.C. (Pak) 9.
2. Jibendra Kishore v. Province of East Pakistan, Supra.
3. PLD. 1958, S.C. (Pak) 41.
4. Supra.

judgement in Kent v. Dulles[1] was generally influenced by an article entitled 'Passport Refusal for Political Reasons.'[2] The article proceeded mainly on the basis of Art.13 of the Universal Declaration of Human Rights, adopted by the United Nations in 1948, which guaranteed freedom of movement within one's country and the right of exit therefrom and return thereto, and secondly on the interpretation of the 'due process clause' in the Fifth Amendment to the Constitution of America by the Supreme Court of America, but the right to freedom of movement in Pakistan, is regarded as a necessary corallary of the provision of Right No.1 of the Constitution of Pakistan, 1962, in the sense that it cannot be restricted 'save in accordance with law' authorising such restriction[3].

Though the words used by Pakistan Constitution are not 'personal liberty' but only 'liberty' and instead of the expression in the Indian Constitution 'according to the procedure established by law,' the Pakistan Constitution uses the expression 'in accordance with law', these expressions are not to be construed as significant textual changes that will radically alter the interpretation of these Articles when read in conjunction with other articles[4].

Personal liberty is a basic human right of every individual. An invasion of that right is a matter of most earnest and anxious concern. To repel such invasion and set a person at liberty is the duty cast on the High

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1. Supra.
2. See 'Yale Law Journal' Vol.61 (1952) pp.171-203.
3. Abul Ala Maudoodi v. State Bank of Pakistan, Supra.
4. A.K. Brohi, op.cit. p.396.

Courts under Art.98 of the Constitution of 1962[1]. The power of a High Court extends to every case where a person has been unjustifiably or wrongly detained, that is to say, to every case where a person has not been detained bona fide, in accordance with a provision of a statute authorising detention; where he has been detained under an invalid law; or where the safeguards afforded by the Constitution against the arbitrary deprivation of personal liberty have been violated.

Safeguards against Arrest and Detention:

Safeguards against the arbitrary deprivation of personal liberty are provided by Rights No.2,4, and 5, in Chapter I of Part II of the Constitution of Pakistan, 1962, which correspond to Arts.22,20 and 19(1)(d) and (e), in Part III of the Indian Constitution, respectively. If the liberty of a person is restricted in contravention of the provisions laid down by Rights No.2, 4 or 5, the aggrieved person will be given relief under Art.98 of the Constitution of Pakistan, 1962.

Right No.2 of the 1962 Constitution lays down safeguards as to 'arrest' and 'detention'; it provides protection against wrongful deprivation of personal liberty. The words 'arrested' and 'detained' in the expression 'no person who is arrested shall be detained...' in Right No.2(1) have not been defined. The question, therefore, arises as to what is the exact meaning of these words. The Constitutions of Pakistan and India do not prescribe conditions justifying arrest or detention; it is left to the discretion of the legislature.

In India, it was held that arrest or detention under the order of a court of competent jurisdiction does not come within the purview of Art.22(1)

1. Mohd. Anwar v. Govt. of West Pakistan, PLD., 1963 Lah, 109.

nor does arrest on a warrant. Art.22 was designed to give protection against arrest by any non-judicial authority. It was, however, observed that the arrest and detention referred to in Art.22 can only mean taking a person into custody on the ground of suspected or apprehended commission of a criminal offence or of any act prejudicial to the State or public interest[1].

In Pakistan, relying on Ganga Saran v. Firm Ram Charan Gopal[2], it was held that word 'arrest' in the Code of Civil Procedure does not fall within the purview of Art.7 of the Constitution of 1956-Right No.2 of the Constitution of 1962 -[3]. But in Bazal Ahmad Ayyubi v. Province of West Pakistan, Rahman J., observed that whatever may be the position with regard to arrest under orders of civil Courts, he was disposed to hold that Art.7 of the Constitution is concerned with all arrest affected in criminal or quasi - criminal proceedings, including those made under the orders of the criminal courts[4]. The expression 'arrest' is not confined to arrests, other than those affected on a warrant issued by a Court of Judicial Tribunal. The argument that a particular arrest, in criminal or quasi-criminal proceedings, does not fall within the purview of clauses (1) and (2), or (3) to (5) of Art.7, cannot be sustained[5]. However, steps taken or physical force applied for securing compliance only with a legitimate order of a Court, to deport the accused persons from the country, is neither such arrest nor detention as is contemplated by Art.7 of the Constitution of 1956. As to the contention that removing persons from a particular area and prohibiting them from entering a particular area is not detention

1. Jit Bahadur Singh v. That State, AIR. 1952 ALL.753; and State of Punjab v. Ajaib Singh, AIR. 1953, SC.10.
2. AIR, 1952, S.C.9.
3. Jimma Khan v. Pakistan, PLD.,1957, Kar.339.
4. Supra.
5. Ibid.

within the purview of Art.7,[1] it was observed that it is more than 'akin to detention' and would amount to internment and would attract Art.7 and 11 of the Constitution[2]. Similarly, the custody of an adbucted woman for restoration to her kins-folk or the physical restraint placed before judgement on a defendant in a civil suit or after judgement on judgement - debtor by a civil court in execution of a decree, is neither an arrest nor detention for purposes of Art.7 of the Constitution. Such physical restraint as might result; merely from action taken for the aforesaid purposes, would neither be punitive nor preventive detention nor malicious nor otherwise illegal detention[3].

What should be deemed to be detention for the purposes of S.491 of the Code of Criminal Procedure and Art.98 of the Constitution of 1962 has not been defined either in S.5 (1)(b) of the West Pakistan Maintenance of Public Order Ordinance, 1960 , or in the aforesaid Code and it would be for the Court to determine what restraint on the liberty of a person would amount to detention for ending which the powers of the Court could be exercised under S.491 of the Code of Criminal Procedure. Where an order was passed by the Government of West Pakistan directing the petitioner to reside and remain within the revenue limits of a particular village, it was contended on behalf of the Government that this did not amount to detention, within the purview of Art.7, so as to entitle him to invoke the jurisdiction of the High Court under S.491 of the Code of Criminal Procedure Art.98 of the Constitution. It was held that,

1. Inderjit Singh v. State AIR, 1953, Pnng. 52.
2. Liaq Ahmad v. D.M.Karachi, PLD., 1958, Kar. infra; see also Rao Nahrez Akhtar V.D.M. Dera G. Khan, infra.
3. Jumma Khan v. Govt.of Pakistan, Supra; see also State of Punjab v. Ajaib Singh, AIR., 1953, S.C.10.

on principle, there is very little difference between a place which is walled on all sides and one within which, though it has no walls around it, a person is directed to remain, not to go away from it without permission of someone or without the risk of some inquiry to himself and it amounts to detention. The reasoning of the Court was that, if a person were detained in a room, the position would not alter materially, if the walls of that room were moved from their original place and constructed at a very great distance from the place where they originally stood. To put it differently, it should be considered whether the position would have been different, if the village in which the detenus were to remain and which they could not leave without the permission in writing of the Superintendent of Police in whose jurisdiction it was situate, if the village were a jail, because, when a person is in jail, he cannot come out of it without the permission of a person who is in charge of the jail, in which he is confined.[1] Where the petitionerwas confined in the C.I.D. office for three days, after he was arrested, for the purpose of interrogation, it was held to be an unlawful detention. It was, however, observed that detention in a C.I.D. office, as distinct from a police station or jail, cannot be construed to be 'detention in legal custody' or 'detention in a lawful manner'[2].

Where a father did not allow his children, who were minors, to go to their mother, who had been divorced, it was held to be an unlawful detention of the Children by the father. It was observed that, as the children were minors, the question of their consent did not arise and that the detention of the minor children by the father, against the wishes of the lawful guardian, the mother, was illegal and improper[3].

1. Mohammad Anwar v. Govt. of West Pakistan, PLD., 1963, Lah. 109
2. Aishya Begum v. Crown, PLD., 1955 Sind 375.
3. Magsood Begum v. Mohd. Aslam Khan, PLD., 1970, A.J&K.13.

But the Supreme Court of America in Philip v.William held that a high-ranking officer of one of the armed forces, who had been informed that he was under arrest and was not to leave a certain place, could not be regarded as under detention[1]. It is submitted that this decision appears to have been influenced by the fact that he was a member of one of the armed forces and could be directed to remain at a particular place, so that he would be available for trial as soon as preparations had been made. Whatever might have been the consideration before the learned Judges of the Supreme Court of America, it makes no difference, as far as the interpretation of the words 'arrest' and 'detention' goes, whether a man has been actually arrested and kept in custody, or is simply said that he is under arrest; or whether, after arrest, he has been taken to the place, which he is directed not leave, or merely he has been asked not to leave the place where he is at the moment.

The principle laid down by the aforesaid judgement of the Supreme Court of America, seems to have been followed by the Single Bench of Lahore High Court in a number of decisions. In Muhamd Aslam v. Crown[3] and Muhamomad Umar v. Crown[4] it was held that confinement of a person to a particular place or particular village did not amount to detention. A similar view was taken in Ghalam Haider Shah v. Govt. of Azad J and K, in which it was pointed out that the definition of the word 'detention' has neither been given in the Code of Criminal Procedure nor in the Public Safety Act, 1948, under which the action was taken. The Court relied on the dictionary meaning afforded to the word 'detention', by the'Concise Oxford Dictionary', according to which 'detention' means;-

1. 114 U.S.R. (L.ED.) 277.
2. Muhammad Anwar v. Govt. of West Pakistan, Supra.
3. PLD., 1954, Lah.720.
4. PLD., 1955, Lah.180

"Arrest, confinement - House of Detention, lock up - compulsory delay; (at Schools - keeping in a punishment, barracks, military prison"

and 'Custody' means imprisonment.

It was, therefore, observed that words 'detention' and 'custody' imply some sort of confinement or physical restraint on theliberty of movement of a person. It was however, pointed out that the expression 'be set at a liberty' in cl.(b) of subsection (1) of 2.491 of Code of Criminal Procedure also leads to the inference that the above interpretation of the words 'detained' and 'custody' is correct; as there could be no question of 'setting a person at liberty', unless the person concerned was in confinement or under arrest. It was, therefore, held that restriction of movement beyond certain areas does not constitute detention in custody and as such it is not sufficient to attract the provision of S.491 of the Code of Criminal Procedure[1].

But these judgements of a Singl Bench of the Lahore High Court have been overruled by the Division Bench decisions in Rao Mehroz Akhatar v. D.M. Dera G. Khan[2], and Muhammad Anwar v. Government of West Pakistan[3], wherein it was held that confinement of a person whether it is in a walled room or in an open place, which he is directed not to leave, amounts to 'detention'.

To arrest a person, it is sufficient if the arresting officer confines the body of the accused person or the accused himself submits to the custody of the arresting officer. It is not necessary that he should be handcuffed. It is by no means necessary that the arresting officer should, in effecting

1. PLD., 1959 Azad, J. and K.15.
2. PLD., 1957 Lah. 676.
3. Supra.

arrest, immediately proceed to handcuff the accused person. Handcuffs are used as a restraint and their use can only be justified on the grond that they were indispensable for effecting the arrest. Where the facts were that 'A' had been sent for by the investigating officer on the 19th October, that he joined the investigation, that the same day he made a detailed confessional statement in the Criminal Branch Office at Peshawar, that the same evening he was removed by the Police to Cambellpur, where he was lodged and detained in the Police Post (Central Investigation Agency), that he remained there in police custody until 21st October, and that for the first time he was produced before the Magistrate on the 21st October, it was held that, even if he had submitted himself to the custody of the police by his action and words, when he made a detailed confessional statement in the Criminal Branch Office, it did not change the position, that he had been under detention since 19th October,[3].

Under the Punjab Public Safety Ordinance[2], the arrest and detention of a person is to be preceeded by a reference to the Government. Where no such reference to the Provincial Government was made and permission obtained as to the arrest of the detenu,his arrest and detention was held to be illegal[3]. In a case where a person was placed in jail under a warrant of commitment, which was not within the purview of the impugned Act, the detention was held to be void ab initio[4].

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1. Qadir v. State, P.L.D.1958,Lah.38.
2. Infra.
3. Sharifuddin v. Government of West Pakistan, P.L.D.1955,Lah.
4. Muhammad Anwar Bajwari v. Crown, P.L.D.1955,Lah.585.

The first-limb of Right No.2 (1) lays down that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest. Hence a person, who is arrested and detained in the custody without being informed of the grounds for such arrest within a period which cannot, under the circumstances of the case, justify the requirement laid down by the expression 'as soon as may be', will be set at liberty or released on bail by a High Court, in exercise of power conferred on it by Art.98(2)(1)(b) of the Constitution of 1962.

A detenu, was first arrested under SS.55 and 110 of the Criminal Procedure Code[1] but was, by a subsequent order, detained under SS.13 and 14 of the W.P.Control of Goondas Ordinance, 1959, without being informed of the latter order; the detenu was released on bail; the order of subsequent detention was made by the D.M., after the City Magistrate, before whom the accused was brought for the verification of the sureties to be furnished for his release, had adjourned the case to the next day, demanding sureties for an enhanced amount which were unreasonable in the High Court's opinion[2].

Where the D.M. passed an order detaining the accused in the custody, under S.40 of the Frontier Crimes Regulation without communicating the grounds for such detention, it was held that the order was illegal, being in violation of S.42 of the F.C.R.[3]. Where the petitioner was arrested by the police and detained in C.I.D. office for three days and neither the reasons for the arrest nor the place of the detention were disclosed to the relations of the petitioner[4],

1. S.55 Cr.P.C. provides for arrest of vagabonds, habitual robbers etc.; and S.110 Cr.P.C. lays down provisions for security from habitual offenders for keeping good behaviour.
2. Abdus Sabur v. D.M., PLD., 1969, Pesh.167.
3. Ali Mohd. v. Commr., PLD., 1964, Quetta.1.
4. State v. Mohd. Yusuf., PLD., 1965, Lah.324.

and where there was nothing with the police to indicate what crime had been committed by the accused, the detention of the accused was held to be illegal; they were set at liberty[1].

Delay in the communication of the grounds for arrest or detention is a violation of the Constitutional requirement; unreasonable delay in informing the detenu of the grounds of detention will invalidate any arrest or detention and the detenu will be set at liberty[2]. The circumstances under which the delay in communication of the grounds for arrest or detention becomes unreasonable, will be discussed in the following chapter.

Right to Counsel and Production in Court:

The second limb of Right No.2(1) of the Constitution of 1962 affords to an arrested person a right to consult and be defended by a legal practitioner of his choice; Art.22(1) of the Indian Constitution corresponds to it. The right to be defended by a pleader is also given by S.340 of the Code of Criminal Procedure. From the moment of his arrest, an arrested person has the right to consult and be defended by counsel of his own choice and also at such times, at such stages and in such circumstances as are necessary and are convenient to the authorities and other persons involved[3]. If a trial is fixed for a date, which is not communicated to the accused, so that he is denied the opportunity to communicate with his counsel, the right is infringed and the conviction is liable to be set aside.[4]

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1. Aishya Begum v. Crown, PLD., 1955, Sind.375.
2. Fazal Ahmad Ghazi v. State, PLD.,1957, Kar.190; see also - Tarapada Dev v. State of W.Bengal., A.I.R. 1951,S.C.174.
3. Moti Bai. AIR., 1954, Raj.241.
4. Hans Raj. AIR., 1956, All.641.

In a case where the detenus were tried by a Jirga, without having been provided with the opportunity for defence, it was observed that the very essence of the Jirga trial is that it is unencumbered by the law of Evidence, the rules of procedure and cross examination by a legal practitioner, which amounts to denial of the right of the accused to be defended by the counsel. It was, therefore, held that such a trial, so far as it is conducted without the presence of the detenu's counsel, is violative of Art.7(1) of the Constitution of 1956[1].

Where the detenu was arrested under S.6 of the East Pakistan Food (Control and Distribution) Ordinance, 1956, and was produced before a Special Magistrate, the contention was that the petitioner made a prayer for defence by counsel, which was refused but the contention on behalf of the Government was that no such prayer was made. It was held that, as the trial was conducted in a manner and under circumstances which amounted to a denial of a fundamental right of the detenu to consult and be defended by a lawyer of his choice, guaranteed by the Constitution, the trial must be rendered void and, as such, the conviction and sentences were declared illegal. It was, however, observed that, even though the petitioner had not, in terms, asked for defence by a counsel, it was the duty of the Special Magistrate to provide for the same[2].

If a statute, expressly or by necessary implication, authorises a trial without representation by counsel for the accused, such statute is deemed to be void, and trials conducted under it and sentences inflicted will

1. Khair Mohd. v. Govt. of West Pakistan, PLD.,1956, Lah.668.
2. Muslemuddin v. Chief Secretary, PLD., 1957, Dac.101.

be illegal. The procedure to be followed by the tribunal, under Ss.6,7 and 29 of the Punjab Control of Goondas Act, enables the Tribunal to keep certain portions of the information against the person proceeded against secret and to exclude the person concerned and his counsel, at the instance of the officer laying information, and also to record evidence of some of the witnesses in their absence; they were declared void, as being inconsistent with Art.7 of the Constitution of 1956, and the convictions and sentences, in as much as the proceedings resulted in the denial of the constitutional right of the accused to consult and to be defended by the counsel of their choice, were held illegal.[1]

Where witnesses were examined in camera, behind the back of the persons complained against and their counsel, and the record of their statements was kept secret from them, it was held that the procedure was wholly illegal and, as such, the orders passed under the illegal procedure were void abinitio.[2] Provision by which proceedings can be conducted in the absence of councel for the person complained against, on the ground only that such person is deliberately evading appearance, is in violation of clause (1) of Art.7 of the Constitution of 1956 and, as such, void[3].

Recording a statement in camera does not mean exclusion of the parties and their counsel. It only means the exclusion of the public or unconcerned persons. Thus where it amounted to the exclusion of a party and his counsel, it was held to be void[4], but where it amounted to the exclusion

1. Waryam v. State, PLD., 1958, Lah, 151
2. Liaq Ahmad v. D.M. Karachi, PLD., 1958, Kar.92, Bazal Ahmad Ayyubi's case infra.
3. Ibid.
4. A. Baqi Baluch's case PLD.,1969, Kar.87; also Begum Agha S. Kashimiri v. Govt. of West Pakistan, PLD.,1969, Lah.,438.

of the public and unconcerned persons, in the public interest, and not the accused and his counsel, the proceedings were held valid.

Right No.2 of the Constitution 1962 - Art.7 of the Constitution of 1956 - guarantees every arrested or detained person the right to be produced before a Magistrate within twenty-four hours of such arrest or detention, excluding the time necessary for the journey from the place of arrest to the Court of Magistrate which corresponds to Art.22(2) of Indian Constitution. A similar provision is found in the Code of Criminal Procedures under S.61; a person arrested without a warrant can not be kept in police custody for a period exceeding twenty four hours, in the absence of a special order of a Magistrate under S.167 of the Code. The object of requiring an accused person to be produced before a Magistrate for the purposes of remand under S.167 of the Code, obviously is to enable the Magistrate to see that the remand is necessary and also to enable the accused to make any representation he may wish to make in the matter. Legal assistance may, therefore, frequently be useful on each occasion.

In order to ascertain whether a remand to police custody or judicial custody, under S.167 of the Code is legal, a duty is cast on the Magistrate himself, irrespective of whether or not any objection is raised by the accused, to decide whether there exists any reasonable grounds to order a remand.[1] A Magistrate performs judicial functions and the preliminary requirement of the performance of judicial functions is to look into the evidence and to determine as to the sufficiency of the grounds of passing an order[2]. In all

1. Farooq Badar v. I.G.Police., PLD., 1969, Lah.1020; Bal Krishna v. Emperor AIR.1931, Lah.99.
2. Ibid.

cases where remands are granted, it is the duty of the Magistrate to inform the accused that he is a Magistrate, that a remand is applied for, and to ask the accused how long has he been in the police custody and whether he has any objection to the grant of a remand[1]. It is well settled that the law views with disfavour detention in the police custody, and that such detention can be allowed only in special cases and for reasons to be stated in writing and not as a matter of course[2].

It is not enough to walk past the cell where the accused is confined and to announce the order of remand, which is subsequently written at home. If the accused wishes to have counsel to represent him, it is the duty of a Magistrate to allow him time for counsel to appear and argue the matter before him[3]. Where the prisoner was not produced before the Magistrate, and the remand order was passed behind his back, it was held that the remand was clearly illegal[4]. Where the detenus were in the lock-up and they were not produced before the Magistrate, when the remand orderwas passed in a room in the police station, it was held that the orders of their remand were clearly in violation of the law[5]. In another case the act of the Additional District Magistrate in remanding the accused to custody in the Central Intelligence Agency Office was held illegal and against the spirit of S.61 of the Code of Criminal Procedure[6]. In Nazir Ahmad v. State it was held that a thing must be done

1. Jahangiri Lal v. Emperor, AIR., 1935, Lay,230
2. Khairati Ram's case AIR.,1931, Lah.476.
3. Farooq Badar v. I.G.Police, Supra. Jahangiri Lal v. Emperor Supra.
4. Crown v. Shera (1867) P.R.39; and in re Venkata Raman IIR.1948, Mad.297.
5. Farooq Badar v. I.G.Police, supra. See also in re Llewelyn Evans AIR. 1926,Bom.551. Sundar Singh v. Emperor, AIR.,1930, Lah.945; Balkrishna v. Emperor, 1931, Lah.99; In re Khairati Ram, AIR.,1931, Lah.476, and Amolok Ram v. Emperor, AIR.,1932, Lah.13.
6. State v. Mohd.Yasuf, PLD., 1965, Lah.324.

according to law or not at all. In this case a Magistrate had taken certain notes of the confession, which had been made by the accused in the police station. It was held by their Lordships of the Privy Council that a confession had to be recorded in the Court under S.164 of the Code of Criminal Procedure and that a confession recorded by the Magistrate in the aforesaid manner was vitiated by an illegality[1]. Where two constables were taking an arrested person to a Magistrate and the Magistrate met them in the street and sent the prisoner back to the lock up and asked the constables to bring him up for examination nextday, it was held that the Magistrate was liable to an action for trespass for sending the accued back to the lock up and hence infringing his right to personal liberty[2].

But where, shortly after a person was arrested by a Police Officer, a Magistrate arrived at the spot and the accused was produced before him, it was held that there was sufficient compliance with the rule laid down by Art.22(2) of the Indian Constitution[3]. But Basu J., did not agree with the decision and expressed doubt about its correctness, on the grounds that the aforesaid clause specifically says 'the Court of a Magistrate' and as the arrested person was not taken to the Court, he did not get the opportunity to consult a lawyer[4]. Professor Alan Gledhill, with due respect to the aforesaid authority, did not sustain the criticism and contended that reference to the Magistrate's Court is only relevant to the estimate of the period in excess of the twenty four hours,

/which may lapse before the arrested person is brought

1. A.I.R.1937,P.C.253.
2. Edwards v. Ferris (1836) 7 C.& P.542.
3. Ram Mano Har's case, A.I.R.1955, All.193.
4. D.D. Basu, J. 'Shorter Constitution of India,' 2nd Ed.p.100.
5. Op.cit.p.143.

before the Magistrate[1]. He, however, seems to have agreed with the later decision of the Supreme Court of India in Punjab v. Ajaib Singh, in which it was held that the object of the Cl.(2) of Art.22 of the Indian Constitution is to ensure that a judicial mind is applied to the authority of person making the arrest and the regularity of the procedure; there seems no obvious reason why this should not be secured by the fortuitous appearance of a Magistrate on the scene of the arrest. As for the opportunity to consult a legal advisor, there seems no reason why that should not be given at the lock up[2].

S.11 of the Frontier Crimes Regulation, which excludes the provisions in the Code of Criminal Procedure for the purpose of trying 'the guilt or innocence of any person' by Jirga - the Council of Elders - lays down that, for this purpose, the Council of Elders may make any inquiry. Where cases of detenus were referred to the Jirga by the Deputy Commissioner and the objection was that the Deputy Commissioner was not a Magistrate, in the sense contemplated by S.61 of the Code of Criminal Procedure, empowered to remand the accused to custody pending the trial by the Jirga, it was held that, under the scheme of the Regulation, the Deputy Commissioner's function is envisaged to be that of a Magistrate and, as such, the remand of the persons proceeded against, while the trial was being conducted by the Jirga, was under the orders of a Magistrate. As to the question whether, after the reference of the case to the Jirga, any lawful authority still existed with the Deputy Commissioner for their detention, it was held that such authority was inherent in the Deputy

1. Op.cit. p.143.
2. AIR., 1957, SC.10.

Commissioner under the Regulation. It was, however, observed that accused persons will be under detention, while a special trial goes on under the Regulation, unless the Deputy Commissioner, a s a District Magistrate, releases them on bail. So far as the Regulation is not an unlawful measure, detention for its purposes will not be unlawful, provided it has a lawful origin[1].

This view of the Lahore High Court finds support in the judgement of the Supreme Court of Pakistan in State v. Dosso in which the contention was that after a case is referred to the Council of Elders under S.11 of the F.C.R., theDeputy Commissioner ceases to have jurisdiction to remand or detain any person in the custody. The contention was rejected. It was further observed that every Deputy Commissioner, acting in criminal proceedings under the Regulation, is necessarily a Magistrate and, as such, is competent to issue directions as to the custody of the accused persons. As to the contention that the reference to the Council of Elders was bad, in as much as the Deputy Commissioner did not state in his order that 'it was expedient that the question of guilt or innocence of the accused person should not be determined by the Ordinary Courts, as contemplated by S.6 of the Code of the Criminal Procedure,' it was held that what is required by S.6 of the Code is not that the aforesaid words should be reproduced in the reference order but that the Commissioner or Deputy Commissioner should be satisfied and form an opinion that, 'it was expedient that the question of guilt or innocence of the accused person should not be determined by the Ordinary Courts'[2]. Where neither the Commissioner nor the Deputy Commissioner was satisfied in the aforesaid manner and the case was referred to the Council of Elders, the detention of the accused in the remand custody was held to be illegal[3]. As to the contention

1. Khair Mohd. v. Govt. of West Pakistan, P.L.D. 1956, Lah. 668.
2. P.L.D. 1958, S.C. 583.
3. Hamesh Gul v. Crown. P.L.D. 1955 Pesh. 1.

that the remand to a second Council of Elders was illegal, after the original order had become infructuous, it was held that the Deputy Commissioner was entitled to make the second reference and extend the remand[1].

Under the Code of Criminal Procedure, a person who is arrested should not be kept in police custody for more than twenty-four hours[2]. During the investigation a Magistrate may, from time to time, remand him to custody for a period not longer than fifteen days[3], and during the trial similar remands may be made for similar periods, if the proceedings cannot be completed before that period for any reason[4]. In a trial under theCode, therefore, the petitioner must have an opportunity of seeing a Magistrate at least once a fortnight, and since this may not happen in jirgah trial, it may be inferred that custody of the accused becomes illegal on the sixteenth day following the reference to the jirgah. So far as Art.7 of the Constitution of 1956 - Right No.2 of the Constitution of 1962 - goes, all that is required is that detention beyond twenty-four hours shall not be without the authority of a Magistrate. It does not say at what intervals, if any, the accused should be remanded. It was, therefore held that, since a trial by jirgah is not a trial under the Code of Criminal Procedure, the fortnightly remand custody is not a compelling provision[5].

Where the Deputy Commissioners or Nazim-e-Zilas were appointed as Additional District Magistrates by the Governor of West Pakistan for the purposes of Para.2(b) of the Foreigners Act, 1951, and the detaining authority

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1. State v. Dosso, Supra.
2. S.61 of the Code of Criminal Procedure.
3. Ibid S.167.
4. Ibid.S.344.
5. Khair Muhammad v. Govt. West Pakistan, Supra.

was one of the Nazim-e-Zilas of Kalat Division, it was contended that he was not the District Magistrate in terms of S.10 of the Code of Criminal Procedure. The contention was rejected and it was held that the Nazim-e-Zila is a District Magistrate for the purposes of the aforesaid Act. It was, however, observed that the Code of Criminal Procedure of Kalat recognises as one of the Courts acting under it, the 'Nazim-e-Zila', which literally means the administrator of a district and, as such, the Nazim-e-Zila, according to that Code, is an Officer-in-Charge of a district, which means that the Nazim-e-Zila is a Magistrate-in-Charge of a district. It was, therefore, held that, in this sense, he is a District Magistrate for the purposes of the Foreigners Act[1].

In a case where the petitioner, who had been previously arrested, and released on bail by the District Magistrate, Manipur, but later was ordered to appear in the Court of the Assistant Commissioner - Magistrate First Class - with intent that he should be handed over to the Karachi Police for extradition proceedings, on a simple message from the Karachi Police, it was held that the handing over of the petitioner to the Karachi Police, on a mere message and without any proceedings, was preposterous and, as such, the District Magistrate of Manipur was directed not to hand over the petitioner to the Karachi Police[2].

It is not necessary that a remand should be granted or extended by a Magistrate, who has territorial jurisdiction to try that case. In one case the accused was remanded to police custody for a number of days by the Ilaqa Magistrate but, due to exigencies of investigation, he was removed to another place, sixty two miles distant. On the expiry of the earlier remand, he was

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1. Jumma Khan v. Govt. of Pakistan, PLD.,1957, Kar.939.
2. Mohammad Bota v. Sarkar, PLD., 1959, Azad J & K.72.

produced before a Magistrate, who had no jurisdiction to try the case but who remanded the accused to police custody for a further period. It was held that the second order of remand was not illegal[1]. Relying on the judgement of the Federal Court in Basanta Chandra v. Emperor, it was observed that, if at the time, before the Court directs the release of the detenu, a valid order directing his detention is produced, the court cannot direct his release, on the ground that, at some prior stage, there was no valid cause for detention[2]. The person proceeded against should not be detained in custody, without any reasonable cause, for more than twenty-four hours, without being produced before a Magistrate. Where petitioner's husband was placed in custody in the C.I.D. office for three days for purposes of interrogation, without being produced before a Magistrate, it was held that it was a violation of the Constitutional requirement; it was an illegal action on the part of the police authorities[3].

While clauses (3) to (5) of Right No.2 of the Constitution of 1962 - Art.7 of the Constitution of 1956-deal, with preventive detention, clauses (1) and (2) apply to most other cases of arrest and detention; they confer the right to adequate hearing in a specified manner. They embody the principle of natural justice that no body will be condemned without being heard, audi altrem partem, It is in this sense that a proper hearing, before depriving a person of his Constitutional right of personal liberty, should be afforded. This principle of natural justice may silently be read into every statute, in the absence of any provision to the contrary[4].

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1. Ali Akbar Khan v. Azad J. & K., PLD., 1959, Azad J.&.K.12.
2. AIR., 1945, F.C.18.
3. Aishya Begum v. Crown, PLD., 1955, Sind.375.
4. Abul Ala Maudoodi v. State Bank, PLD.,1969, Lah,910

The rules of natural justice apply to all tribunals, whether judicial, quasi-judicial or administrative, who are called upon to pass orders depriving a citizen of his personal liberty; they must be persons with a mind which is not biased, in the sense that they are prompted by personal motives to pass the order, but should act on the maxim that not only should justice be done but it should be manifestly seen to be done[1].

The common law maxim that no one should be the judge in his own cause, which was boldly declared by Coke, C.J., is designed to eliminate bias or mala fides on the part of administrators of justice.

In the opinion of Robson:-

> "..But it is not only the holders of justicial offices, who are required to be free from the sort of bias, which is presumed to arise when a man has a personal interest in the subject matter of a case that he is called upon to decide or otherwise dealt with. 'Even administrators' the late Lord Atkin remarked in a modern sense 'have to comport themselves within the bounds of decency."

He further says:-

> "..The courts have, in the recent decade, shown a tendency to apply to administrative authorities the principles designed to eliminate the possibility of bias, which are applicable to judicial tribunals.....!"[2].

Hence,in a case where the District Magistrate was proved to have shown bias in passing the detention order against a detenu, it was held that the impugned order was vitiated for violation of the rule of natural justice[3]. In another case where the Police Superintendent had investigated the charges against the petitioner and also tried the case himself, it was held that order passed by the Superintendent of Police was violative of the principles of natural justice[4]. In Muhammad Mohshin Siddiqui v. Govt.of West Pakistan the

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1. Sher Mohd Khan v. Sibghatullah Khan, PLD., 1967, Pesh.196.
2. Justice and Administrative Law, p.62.
3. Sher Mohd Khan v. Sibghalullah Khan, PLD., 1967, Pesh.167.
4. Mohd.Mohsin Siddiqui v. Govt.of West Pakistan, PLD.,1964, S.C.64.

Supreme Court of Pakistan observed that, to require same man to serve both as prosecutor and as judge not only undermines the judicial fairness, but it also weakens public confidence in that fairness. In the instant case, an administrative authority, composed of a single person, within the frame - work of the judiciary had been consciously allowed to operate as prosecutor as well as judge and finally punishing authority in the same cause. No ground in justice could be advanced in support of the proceedings before the Court, and every principle of jurisprudence required the proceedings to be set aside[1]. In Abul Ala Maudoodi v. Government of West Pakistan it was held that the rule of natural justice, of affording an opportunity of hearing, is also applicable to administrative acts[2].

Retroactive Legislation:

The fourth Fundamental Right of the Pakistan Constitution, 1962, like the corresponding Article in the Indian Constitution[3], provided that no law shall authorise the punishment of a person for an act or omission that was not punishable at the time of act or omission, or the imposition of a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed. The expression 'ex post facto' legislation is not used in the Indian Constitution, or in the Pakistan Constitution, the provisions of which are narrower in scope than the American Constitution. Art.1.S.9(3) of the U.S.A. Constitution provides that 'no bill of attainder or ex post facto laws shall be passed'; it does not prohibit legislatures from making retrospective laws generally[4]. In Pakistan

1. PLD.,1964, SC.64.
2. PLD.1964, SC.673
3. Art.20(1)
4. See Cadler v. Bull, /supra /per Chase J. infra.

or India, if legislatures make any law which retrospectively takes away or abridges any fundamental right, it will be void to the extent of such inconsistency[1].

The struggle for protection against ex post facto laws is an ancient one; it was recognised in ancient Greece. The objection to ex post facto legislation in ancient Greece is illustrated by the case of Timokrates and the Athenian Ambassador, where the Ambassadors had withheld money owed to the city-state and were condemned to repay twice the amount. Timokrates succeeded in securing the enactment of a law to relieve the Ambassadors of the penalty, but, as a consequence of the efforts of the Demontheses, the law was held to be invalid because it was retrospective[2].

The Roman law also included the principle against ex post facto legislation. The Digest, Corpus Juris Civilis, includes a rule that the law giver should not change his course of action to the injury of another person, 'Nemo potest mutare consolium suum in alterius injurium'[3]. The principle of the Roman law found its way into the English common law through Bracton[4]. Lord Coke took it from Bracton, developed it and gave it authencity by creating for it a legal maxim, 'Nova constitutio futuris imponere debet non praeteriatis'[5]- a new law ought to deal with the future and not with the past; in other words, no Act of Parliament should have retrospective operation. The principle thus laid down by Lord Coke was later developed into the maxim of common law and subsequ-

1. See Pakistan Constitution, Art. 6 and the Indian Constitution, Art.13.
2. Cited by Elmer & Smead in his article 'The Rule Against Retrospective Legislation'. 'A Basic Principle of Jurisprudence', 20 Minn.L.Rev. p.775, See also Sir Paul Vinegradoff, 'Outlines of Historical Jurisprudence', pp. 139-140.
3. See Corpus Juris Civilis, Digest, 50,17,75; see also Smead Op.cit.775.
4. See Bracton, De Legibus et Consetundinibus Angliae, b.4,c.38, f.228, edition by Sir Travers Twiss,III, p.530; The Translation by Twiss, p.531.
5. 2 Inst. p.292.

ently carried to America. It was read into the Constitution by way of interpretation; the Courts have read 'higher-law' principles into the provisions of the United States Constitution[1]. The principle was, for the first time, recognised as a rule of construction in Dash v. Van Kleeck[2]. It was Justice Chase who afforded the definition of ex post facto legislation in Cadler v. Bull[3], and pointed out that the American Constitution does not prohibit legislatures from passing retrospective laws generally but only ex post facto laws.

Ex post facto laws have been described by Blackstone as 'those by which, after an action, indifferent in itself, is committed, the Legislature then, for the first-time, declares it to have been a crime and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by subsequent law; he had therefore, to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust'[4]. The definition of ex post facto legislation has been afforded by Justice Chase in Cadler v. Bull as meaning; (1) every law that makes an action, done before the passing of law and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed; and (4) every law that alters the legal rules of evidence, and

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1. See Corwin, The Doctrine of Due Process of Law before the Civil War,(1911) 24 Harv.L.Rev.pp.366,460, and the Basic Doctrine of the American Constitutional Law (1914),12 Mich.L.Rev.p.247; also The Higher Law: Background of the American Constitutional Law (1928-29),42 Harvard.L.Rev.pp.149,365; See also Haines, The Law of the Nature in the State and Federal Judicial Decisions (1916) (25 Yale,L.Rev.p.617).
2. (1811) T.Johns.(N.Y.) 477, 5 Am.Sec.291.
3. (1798) 3 Dall.(U.S.) 386, 1 Law ed.648.
4. Blackstone J. 1 Commentary p.46.

receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. He further elaborated the definition by saying:

> "..I do not consider any law ex post facto within the prohibition, that molifies the rigour of the criminal law, but only those that create, or aggravate the crime, or increase the punishment, or change the rule of evidence.... Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to same time from the statutes of limitations, or to excuse actswhich were unlawful when committed, and the like, is retrospective. But such laws may be proper or necessary as the case may be."

He further pointed out that -

> "..Every ex post facto law must necessarily be retrospective, but every retrospective law is not ex post facto; the former only is prohibited....."[1].

Corpus Juris Secundum puts forth that:-

> "While an ex post facto law has been broadly said to be one that has a retrospective effect, under the authority there is difference between an ex post facto law and a mere retrospective law, and not all retrospective laws are ex post facto laws....."[2].

The nature of ex post facto laws was explained to be:

> "An ex post facto law is one which makes criminals and punishes an act which was done before the passage of the law and which was innocent when done; aggravates a crime or makes it greater than what it was when committed; changes a punishment and inflicts a greater punishment than what was prescribed when the crime was committed; or alter the legal rules of evidence and receives a lesser or different testimony than was required to convict at the time the offence was committed. Further an ex post facto law may be one which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or causes deprivation of a right for something which, when done, was lawful; deprives persons accused, of some lawful protection or defence previously available to them, such as the protection of a former conviction or acquittal, or of a proclamation of amnesty in relation to the offence or its consequences, alters the situation of an accused to his material disadvantage"[3].

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1. See Calder v. Bull, (1798), 2 Dall.386, per Justice Chase.
2. Corpus Juris Sacundum, See under Constitutional Law, Vol.16-A,Art.435.
3. Ibid

Statutes, which do not alter the character of a earlier offence, do not create new punishment for that offence, do not take away defence which was formerly available to the accused, but simply bring change or amendment in the procedure, formerly provided for the trial of that offence, are not hit by the doctrine against ex post facto laws[1],

It has been pointed out by Professor Gledhill that the protection against ex post facto legislation applies to substantive penal laws[2]; it does not operate against procedural law[3]. A person is liable by the procedure, existing at the time of the trial, not that in force when he committed the offence[4]. People do not mind changes in law, if only procedure is altered without changing the substance of law[5]. There is basic difference between restrospective and ex post facto laws; the former expression is used in respect of civil matters, while the latter applies to penal laws. The protection against ex post facto legislation is invoked if an erstwhile innocent act is converted into an offence, or a lesser crime is converted into a more serious one, or the rules of evidence made unfavourable to the offender or an un-objectionale monetary device is converted by the legislature into tax-evasion[6]. Such retrospective penallegislation is also forbidden by the Convention for the Protection of Human Rights and Fundamental Freedoms which was signed by members of the Council of Europe and later ratified by the United Kingdom[7].

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1. Nabi Ahmad v. Home Secretary, PLD.,1969, SC.599.
2. Op.cit., India, p.198.
3. Nabi Ahmad v. Home Secretary, Supra.
4. Prof.Alan Gledhill, Op.cit.,p.198, see also Shive Bahadur v. State of U.P., A. I.R., 1953, SC.394.
5. Nabi Ahmad v. Home Secretary, Supra.
6. Ibid.
7. See Chapter on 'Historical Development of Personal Liberty'.

It is not easy to draw a line between substantive and procedural laws, but the task is not impossible, if the essential difference of these two categories of law is kept in mind. According to Salmond's jurisprudence:-

> "The law of procedure may be defined as that branch of the law which governsthe process of litigation.... All the residue is substantive law, and relates, not to the process of the litigation, but to its purposes and subject matter. 'Thus' a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, rules defining the remedy.... as those which deal, not with crimes alone but with punishment also, as the measure of liability, and many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law"[1].

and as such must be treated as falling within the classification of substantive law. If in the process, any existing rights are affected by the change or giving of the retrospective operation causes inconvenience or injustice[2], it would amount to an infringement of the existing substantive right and would be guarded against by the Courts on the basis of objection to ex post facto legislation. It is, therefore, submitted that the full significance of the objection to ex post facto laws is easily grasped; if the abcve basic difference between procedural and substantive law is followed.

In one case the Governor of the East Pakistan, by an order under r.52(2) of the Defence of Pakistan, Rules,1965, declared a printing press, belonging to the petitioner, to be forfeited to the Government, alleging it to have been used in the publishing of offensive materials, in violation of earlier orders made under r.52(1)(b) of the D.P.R.,prohibiting the petitioner from publishing materials contained in the schedule attached to each of the prohibiting orders. The petitioner approached the High Court with a writ

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1. See 12th Ed.1966 p.128.
2. See Colonial Sugar Refining Co.Ltd. v. Irving (1905) A.C.369, and in re Joseph Sache & Co.Ltd., (1875) 1,Ch.D.48.

petition and a Special Bench of five Judges decided that as the Order of the Governor was without lawful authority, the printing press should be restored to the petitioner and the forfeiture order made by the Governor should be withdrawn. Meanwhile, r.52 was amended by the Amendment Ordinance of 1966 and Cl.(4), providing for the constitution of a Tribunal for adjudication of the forfeiture, along with other new clauses, was added to r.52 of the D.R.R.[1]. The next day, a fresh order r.52,D.P.R. was passed, forfeiting once again the printing press, and the following day, the Governor, under the newly added Cl.(4) of r.52, issued a notification constituting a Tribunal for the adjudication of forfeitures. It was, contended that the Order under the newly added Cl.(4) of r.52 contravened Right No.4, in as much as it imposed a liability on the petitioner, which did not exist when the impugned action was taken. It was held that the provision of Cl.(4) of r.52 was procedural and did not affect any existing substantive right; it did not create an offence; it did not provide a new punishment for the commission of an act whichwas innocent at the time of its commission. The subsequent amendment of r.52,D.P.R. with retrospective effect, not being a substantive penal provision, did not come within the constitutional inhibition regarding ex post facto legislation embodied in Right No.4. The essence of the protection against ex post facto legislation is that the particular act must be innocent at the time of its

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1. Previously there were only three clauses in r.52 of the D.P.R.; Cl.(1) requires the material to be submitted to the Government before publication and provides for prohibiting and regulating publication; Cl.(2) provides for forfeiture on contravention of an order under Cl.(1); and Cl.(3) lays down punishment for contravention of r.52 which amounts to imprisonment, or fine, or both. r.52,as amended by the Ordinance of 1966; clauses (1) and (2) are retained in the same manner, Cl.(3) is reproduced in Cl.(7); new Clause (3) authorised police officers to seize any copy of the objectionable document after forfeiture, Cl.(4) provides for the Constitution of a Tribunal for the adjudication of the forfeiture and Clauses (5) and (6) deal with the procedure before and the powers of such Tribunal.

commission[1]. It is submitted that r.52(4) did not attach any criminality to an act which was innocent when it was committed; it does not come within the scope of Right No.4.

By the Code of Criminal Procedure (West Pakistan Amendment) Act, 1964, S.268 of the Cr.P.C. was amended so as to abolish the provisions in the Code relating to trial by a Court of Sessions 'with the aid of assessors.' It was contended, in the instant case, that the abolition of the provision 'with the aid of assessors' vitiated the trial in the Court of Sessions. The real question which fell for determination before the Supreme Court was whether the new law manifests an intention to affect pending cases, and if so, to what extent. It was pointed out that the intent of the new law was to provide for more expeditious trials, and with that object in view, the new law ought to do away with certain procedural provisions. It was in the light of this dominat intention that the point raised in the case was to be resolved. The question of failure of justice, in the circumstances of the case, did not, therefore, call for consideration, as the only right that accrued to the accused by the committment order of the Trial Court, was to be tried by a Court of Sessions and that right had not been interfered with, though the mode of the trial of the Court had been changed, due to abolition of the provision for trial with 'assessors'. It was, therefore, held that the amended law did not violate the rule against ex post facto legislation; it was even

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1. Tofazzal Hussain v. Province of East Pakistan, PLD., 1969, Dac.589, see also (1925) 269 U.S.,S.C.R., (2 law Ed.), 170; Craise on Statute Law, 6th Ed. p.388 and Calder v. Bull, supra.

applicable to pending cases[1]. Right No.4 cannot be attracted to the circumstances of the case, as no change in the penal structure of the matter was brought about, in substance, by the amendment.

Ss.256 and 257 of the Code of Criminal Procedure were amended by the Criminal Procedure Code (West Pakistan Amendment) Act,1964. Under the amended S.257, an accused person is debarred from recalling a prosecution witness who has already been cross-examined by him. The result is that, now, under the amended S.256, no witness, who has already been cross-examined before the charge, can be called for further cross-examination; and S.257 no longer entitled the accused to recall such a witness, whether the first cross-examination was made before or after the charge. If the witness had not been cross-examined at all, though he had been examined before the charge was framed, he could be called for cross-examination under S.257. The effect of the amendment was that a witness for the prosecution, could be subjected to cross-examination only at one stage of the case, either before or after the charge was framed. It was contended, in the instant case, that the right of the accused person to defend himself includes the substantive right of cross-examination, and the right to call witnesses, already cross-examined before the charge, really matures into a vested right only when a charge is framed.

1. Mohd Alam v. State,PLD.,1967,SC.259; see also Khursheed Ahmad v. State, PLD., 1957, Kar. 359; see for the change in the Procedural Law. Mohd. Sajjad v. State, PLD., 1961, SC.13; Raj Bahadur v. Emperor, AIR.,1934, Oudh.409; Colonial Sugar Refining Co.Ltd., Case supra.,; Akhtar v. State, PLD.,1961, Lah. 1049; Srinivasa Chari v. Queen, 6 ILR., Madras,336; Sreekant v. Emperor, AIR.,1943, Bom.169; State v. Ex.Mayor, AIR.,453 Mad.451; Sungi Chand v. Pakistan, PLD.,1961,SC.523; Venugopala v. Krishnaswami, AIR.,1943, FC.24; Ramsingh V. Crown, AIR.,1950, E.Punj.25; and KalipadaShahav. State, PLD. 1959 SC.322. But Banwari v. Emperor, AIR., 1943, Pat.18 and A.M.Bepari v. State, 12.D.L.R. (Pak.) 100, are however, distinguishable from the above cases.

In the instant case, the prosecution witnesses were cross-examined before the charge and the question was whether the accused, in view of the aforesaid amendments, which were enacted during the pendency of trial, would be debarred from recalling such witnesses for cross-examination. It was held that the amended law does not violate the provisions of Right No.4, as it does not interfere with the right of cross-examination in substance; it is even enforceable in pending cases, and the accused would not be allowed to recall the witnesses, who had already been cross-examined before the charge. As to the contention that the right of the accused to reserve certain questions, while cross-examining the prosecution witnesses, to be put after the charge, would be jeopardised, and that the accused was likely to suffer prejudice, if, according to the amended law, he was not given an opportunity to cross-examine such witnesses after the charge, it was pointed out that, though such a possibility could not be ruled out, in a proper case, the provisions of S.540[1] of the Code of Criminal Procedure, could properly be invoked[2]. It is, therefore, submitted that, on the facts of the case, the amended law cannot be said to have jeopardised the right of the accused to cross-examine the prosecution witnesses in substance,.

In another case where the petitioners were tried before a General Court Martial, for offences committed under S.71 of the Air Force Act, 1963, read with S.4 of the Pakistan Official Secrets Act, 1923, the main contention was that the Defence Services Laws (First Amendment) and (Second Amendment) Ordinances,1967, in accordance with which the petitioners were produced before

1. S.540 of the Cr.P.Code empowers the Court to summon, examine and re-examine any material witnesses at any stage of enquiry, trial or proceeding under the Code, if essential for a just decision of the case. See also Waheed Hussain v. State., AIR., 1954, Hyd.204.
2. State v. Mohd. Jamil, PLD.,1965, SC.681.

the Court Martial, were ex post facto enactments. By S.3 of the First-Amendment Ordinance, Ss.2 and 3-A of the Air Force Act were amended; in S.2. sub-clause (dd) was added, whereby persons, who were previously not subject to the Air Force Act, if now accused of committing an offence in relation to a 'work of defence.... or in relation to the naval, military or air force affairs of Pakistan- an offence previously to be dealt with under the Official Secrets Act,1923 - were rendered subject to the Air Force Act, as amended. By S.3 of the Second Amendment Ordinance, subsection (2) was inserted in S.71 of the Air Force Act with the result that persons who had been made subject to the Air Force Act by the First Amendment Ordinance, under the aforesaid clause (dd) of Sec.2 - became liable to be tried or otherwise dealt with under the Air Force Act, 1963, for such offences, as if they were the offences under the Air Force Act and were committed at a time when such persons were subject to the Air Force Act. It was, argued that in 1964, when the offences were committed, the petitioners were not subject to the Air Force Act and, if, by the First and Second Amendment Ordinances, they were made amenable to trial by Court Martial, it would be a violation of Right No.4. It was held that the amendments did not contravene Right No.4, in so far as the punishment under the Air Force Act to which the petitioners were made subject, is neither greater than, nor of a kind different from the penalty prescribed by the Official Secrets Act; the amendments have the cumulative effect of providing a new forum; a court martial for the trial of offences which is a procedural matter[1].

S.5 of the Anti-corruption Act, 1957, for the first time, laid down that 'a person, who has in possession any property which, there is reason to

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1. Gul Akbar v. Dy.Secretary, PLD., 1968, Pesh.114.

believe to have been acquired by improper means and which is proved to be disproportionate to his known sources of income, shall, if he fails to account for such possession to the satisfaction of the Court, be punished with imprisonment. The expression 'if fails to account' clearly indicates that the legislature has required that the accused should in certain circumstances give an account of how he obtained possession of property. It is no doubt the duty of the prosecution to prove the guilt of the accused beyond a reasonable doubt, but, though Section 5, required the accused to prove how he acquired the property, this does not mean that the accused has to prove his innocence. If the explanation given by the accused appears to be true and creates no suspicion of the commission of an offence, the accused has discharged his burden and it is for the prosecution to prove its case beyond reasonable doubt. The provision was, therefore, held not to be violative of Right No.4 in the sense that it creates retroactively an offence, or prescribes a new punishment or greater punishment, or even alters the legal rules of evidence or allows a lesser or different testimony that was required to convict the accused at the time when the act was committed[1].

S.10 of the West Pakistan Co-operative Societies and Co-operative Bank (Repayments of Loans) Ordinance, 1960, which inter alia punishes failure to pay the instalments due on loans, was enacted after the petitioner had received two loans from the respondent Bank. It was therefore, contended that it created an ex post facto penalty, which Right No.4 of the Constitution prohibits. It was pointed out that what S.10 of the impugned Ordinance provides, is the penalty for default, if any, committed, by the petitioners in respect of any provisions of the Ordinance after it came into force and not in respect of any

1. Badsha Mian v. State, P.L.D., 1966, Dac.1.

act or omission committed prior to the coming into force of the Ordinance. On this view of the matter, it was held that S.10 of the aforesaid Ordinance is not violative of Right No.4[1].

Subsection (3) of S.12 of the Frontier Crimes Regulation, as amended by F.C.R.(West Pakistan Amendment) Ordinance, 1962, lays down that, in cases of conviction for murder or dacoity under SS.302 or 396 of the Penal Code, in addition to the sentence under the aforesaid sections, the immovable property of the accused shall be liable to forfeiture. The amendment came into force after the commencement of the Constitution. It was contended that as the amendment imposed a retroactive penalty for an act done before the Constitution's commencement, also that, as it prescribed a greater penalty than was prescribed by the law at the time of the commission of the offence, it violated the protection guaranteed by Right No.4. It was pointed out that the amendment of the aforesaid section 12 had already been made by S.9 of the Criminal Law and Procedure (N.W.F.P. Amendment) Act, 1950, long before the commencement of the Constitution. It was, therefore, held that, under the aforesaid S.12(3) of the F.C.R., there was no question of retroactive punishment or imposition of a greater penalty than prescribed by law at the time of the commission of the offence, in as much as the added penalty of the forfeiture of the accused's property could be legally ordered under aforesaid S.9 of the Act of 1950, even if subsection (3) had not been added to S.12 of the F.C.R. by the Amendment of 1962[2].

S.3(2) of the W.P.Criminal Law (Amendment) Act,1963, which was enacted during the pendency of the instant case, provided for the reference of certain

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1. Ghulam Mohd. v. Dy. Registrar, P.L.D. 1968, Lah.758.
2. Alam Sher v. State, P.L.D.,1966, Pesh.19.

offences set out in a schedule, whether along with an offence specified in the Schedule or otherwise, to a Tribunal at any time before the charge is made and for the purpose of such reference, authorises the Commissioner to requisition the record of the case from the Court concerned, provided that a reference in respect of an offence specified in Cl.(a) of Part B of the First Schedule could be made at any time before the judgement was pronounced. The petitioners' case did not come within the proviso. They were charged under subsection 148 and 149 read with S.109 of the Penal Code with rioting, armed with deadly weapons and abetment of rioting. S.109 was included in the Schedule to the aforesaid Amendement Act,1963, but SS.148 and 149 were added to the Schedule by an amending Ordinance in 1966. It was, therefore, contended that the provisions of the 1966 Ordinance could not be applied retrospectively to the instant case, as the offences had been committed in 1964; they should be tried according to the provisions of the Code of Criminal Procedure, which was applicable to the offences when they were committed. It was pointed out that Right No.4 only prohibits ex post facto substantive penal laws; the right to be tried by the ordinary courts and the right of appeal cannot be regarded as substantive rights so as to attract the provisions of Right No.4. Furthermore the Criminal Law (Amendment) Act, 1963, itself provides for the reference of the schedule offences, which are tried along with non-scheduled offences, to the Tribunal at any time before the charge is framed. In the instant case, where the charge was not made before the reference, the plea of retrospective application of the provisions of the 1966 Ordinance, could not be invoked. Finally the Ordinance of 1966 made it expressly clear that its provisions were applicable to pending cases[1].

1. Nabi Ahmad v. Home Secretary, (Supra, see also same case PLD.,1969,Lah.966; see also Mohd.Ishaque v. State, PLD.,1956 SC.(Pak)236; State v. Mohd.Jamil Supra. Mohd.Ibraheem v. Province of W.Pakistan,PLD.,1968,SC.1; Mst.Shorat Bano v. Ismail,1968,(Pak),SC.MR.574.

In one case where the Central Government had referred a dispute between the parties to a Tribunal before the definition of 'appropriate Government' in S.2(a) of the Industrial Dispute Act, 1947, was amended in September 1958 by SS.1(2) and (3) of the Industrial Dispute (Amendment)Act, so as to declare the Central Government as the 'appropriate Government' for the purpose of a reference 'in relation to any industrial dispute within the Federal Capital' and gave retrospective effect to the ammended definition from 14th October, 1955, it was contended that the reference of the dispute before amendment to the Tribunal contravened the prohibition of ex post facto laws. It was held that the reference did not violate the constitutional guarantee. it was held that the amending Act could not be held void because of a mere possibility, after the amendment, of a prosecution being launched against a person, who had disregarded a direction given in the earlier award[1].

In another case, the petitioner had been sentenced to transportation for life on a charge of murder which would amount to 20 years rigorous imprisonment in effect, subject to remissions. In 1961, the West Pakistan Government passed an order that all persons, sentenced to transportation for life, would be imprisoned for 14 years and remission would not exceed 4 years. It was contended that a person sentenced before the order to transportation for life could not, in fact, serve less than the new minimum of 10 years, so that he would be liable to undergo a longer period of imprisonment than at the time of committing the crime. It was held that there was no violation of Right No.4. The sentence imposed by the law remained the same - transporation for life. The exercise by the excutive of the prerogatives of mercy was not subject to

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1. Sai Gas Transmission Co.Ltd., v. Islamic Republic of Pakistan, PLD.,1959 SC.66.

control by law or the constitution.[1]

In State v. A.Ghaffar, the accused was charged with sedition and promoting enmity between classes. The accused promoted a protest against the establishment of West Pakistan and founded the Anti-One-Unit-Party. He made speeches about the creation of an independent territory for the Pathans, known as 'Pakhtoonistan', to be carved out of the territories of Pakistan. The charge against the accused was that he had not only made attacks against the Government established by law but had also attempted to create enmity and hatred between Pathans and Pungabis. The prosecution wanted to lead the evidence of his speeches made before 14th August,1947, when he opposed the creation of Pakistan and the partition of India. When the creation of Pakistan became inevitable, he advocated the creation of 'Pakhtoonistan'. The prosecution also wanted to give evidence of the speeches made by him between 1948 and 1956, to show what he meant by the word 'Pakhtoonistan' which he used in the writing and speeches made by him subsequently which were the subject matter of the instant trial. It was contended that such evidence was relevant under SS.14 and 15 of the Evidence Act. The provisions of Art.6 of the Constitution of 1956, corresponding to Right No.4 of the 1962 Constitution, were invoked on behalf of the petitioner; it was contended that an act which was not an offence when it was committed should not be made subject matter of the trial subsequently. It was pointed out that what Art.6 of the 1956 Constitution prohibits, is, inter alia the punishment of a person for an act, which was not an offence at the time it was done, and that it could hardly be doubted that, if some speeches or writings of the accused were brought on the record as pieces of

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1. Farid Khan v. State, PLD.,1965, Pesh.31.

evidence for the purposes mentioned in SS.14 and 15[1] of the Evidence Act, it would not amount to punishing him for making those speeches, in the sense contemplated by Art.6, because such speeches, if allowed to be brought on the record, would be used only as evidence with regard to the matters in question and no offence would be attached by reason of taking those speeches into evidence. It was, therefore, held that bringing of such speeches on the record of evidence under SS.14 and 15 of the Evidence Act is not hit by Art.6 of the Constitution of 1956[2].

Under Cl.(e) of subsection (1) of S.4 of the West Pakistan General Clauses Act, 1956, which is analogous to Cl.(e) of S.6 of the General Clauses Act, 1897, the repeal of an Act or statute 'shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment' which 'may be imposed as if the Repealing Act had not been passed'. In one case the accused was convicted of murder under the Frontier Crimes Regulation, but, before the sentence could be confirmed by the Commissioner, the West Pakistan Criminal Law (Amendment) Act, 1963, repealed the Frontier Crimes Regulation. The sentence was confirmed subsequently, after the Fundamental Rights had been incorporated in the

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1. See for explanation of purposes of S.14 and 15 of the Evidence Act, Mumir J.S. Law of Evidence, pp.134-135, under the heading 'Treason and Sedition and defamation etc. S.14 of Evidence Act lays down that facts showing existence of State of mind or of body or bodily feeling are relevant when the existence of any such state of mind or body-feeling is in issue or relevant and S.15 of Evidence Act states that facts bearing on question whether the Act was accidental or incidental are relevant; the facts that such act formed part of a series of similaroccurances in each of which the person doing the act was concerned, is relevant.

2. PLD.,1957, Lah, 142.

Constitution of 1962. It was contended that, as the Frontier Crimes Regulation was repealed before the confirmation of the sentence, and as, due to incorporation of the Fundamental Rights, SS.11 and 12 of the Regulation, under which the sentence was passed and confirmed, were rendered void, on account of their inconsistency with Right No.15 - Equality of Citizens - the retrospective confirmation of the sentence under the repealed and invalid law was violative of Right No.4. It was pointed out that subsection (2) of S.34 of the aforesaid Amendment Act, 1963, expressly provided that the 'provisions of S.4(1)(e) of the West Pakistan General Clauses Act, 1956, shall apply on the repeal of the F.C.R.' The aforesaid S,4(1)(e) applies to all laws of the West Pakistan; it is also provided in the Act that it applies to all laws 'unless a different intention appears'. Hence the Legislature has, to obviate any doubt as to the applicability of S.4(1)(e), made its intention indubitably manifest by this express provision. It was, therefore, held that legal proceedings, which were institutied under the repealed Regulation, were not to be affected by the repeal and had, therefore, to be completed in accordance with the provisions of the repealed Regulation; and that it did not violate Right No.4. The punishment to be inflicted under the repealed law would not be affected by the repealing Act of 1963[1].

As to the second contention, that the petitioner should not be convicted under the invalid law, it was pointed out that by the abrogation of the Constitution of 1962, the Fundamental Rights set out in paras. 2, 4, 5, 6, 7, 8, 9, 13, 14, 15 and 17 of Chapter I of Part II of the Constitution have

1. Wali Mohd. v. Govt. of West Pakistan, PLD.,1970, Pesh.119, see also Sayeed Ahmad v. State, PLD.,1964, SC.266, Mohd.Bashir v. Prov.of West Pakistan, PLD., 1958, Lah.853, and Akhtar v. State, PLD., 1961, Lah.1049, distinguishable.

also been abrogated and the Provisional Constitution Order, 1969, has come into force, with the result that the High Courts have, under the new legal order, no authority to issue writs on the ground of violation of any of these Fundamental Rights. It is provided by Art.3(3) of the Provisional Constitution Order itself that all proceedings pending in any court, for the enforcement of these Rights, shall abate. A contention, therefore, that a law can still be declared void, if it is violative of basic human rights, and that the writs can still issue, is without any substance. It was, therefore, held that, on the plain reading of the aforesaid Art.3(3), the relief claimed on the ground that the petitioner's conviction and confirmation under the invalid law was violative of Right No.4 could not be granted now, when the petition had been abated by the aforesaid provisions[1].

In a case where the petitioner was convicted for not submitting the return of his election expenses and was sentenced to pay a fine of fifty rupees, under the President's Order No.IV of 1962, he was not disqualified, on account of this conviction, for contesting an election. Later on the Electoral College Act,1964, was enacted, S.53 where of disqualified the persons, convicted under the President's Order, for contesting an election to National or Provincial Assemblies. It was contended that the retrospective disqualification of the kind involved in the case was violative of Right No.4. The High Court, relying on its Division Bench decision[2], held that the disqualification of the aforesaid description amounted to 'punishment' within the meaning of Right No.4, in as much as, in relation to a pure election offence,

1. Wali Mohd. V. Govt.of West Pakistan, supra; for abrogation of F.Rs. and abatement of proceedings for their enforcement, see Chapter on'Martial Law'.
2. Jamalus Sattar v. Ch.Election Commr. PLD.,1964, Dac.788.

a greater penalty was inflicted retroactively than was prescribed at the time of the commission of the offence.[1]

There are cases from which it appears that the Pakistan bar has persistently tried to induce the Courts to read into Right No.4 a scope which is blatantly outside it. Hence in a case where certain ex-detenus, who were detained under the East Bengal Safety Act, 1951, were elected as member of the East Pakistan Bar Council, it was contended that their election was illegal, as they were disqualified for election to any elective body under S.5 of the Elective Bodies (Disqualification) Order, 1959, which came into force after the detenus were released. The Order was to remain in force for a short period and was to expire long before the election date. It was contended on behalf of the petitioner that the Disqualification Order was violative of Right No.4. It was pointed out that the disqualification Order did not attract the provisions of Right No.4, as it was to expire before the election; after that period the petitioners were no longer disqualified for contesting the election. Their election was however, held valid[2].

In one case where the Retired Judges (Legal Practice) Order, 1962, was repealed by S.4 of the Legal Practice (Disqualification) Ordinance, 1964, by which the retired judges of the Supreme Court were disqualified to practice before the Supreme Court and the retired judges of the High Court to practice before the High Court. The Retired Judges (Legal Practice) Order enabled these judges to practice before the respective Courts. Hence the Disqualifying Ordinance was challenged on the grounds that it operates against Right No.4. It was pointed out that it would be straining the language of Right No.4,beyond what is permissible to say that the Disqualifying Ordinance imposes retrospecti-

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1. Saheb Mia v. S.M.Mia,P.L.D.1966,Dac.439; see also John A.Cunning v.State,18th Law Ed.356,and Ben Jamnie Hawker v.People,42 Law Ed.100 2 and Hobbs v.Morey, (1904) K.B.74 and Pritchard v.Mayor,(1888)13 AC.241
2. Kamal Hussain v. Sirajul Islam, P.L.D.,1964 SC.42.

punishment on the retired judges[1]. It is submitted that the relevant Right is Right No.8, which guarantees freedom of trade, business or profession,

In another case, after the issue of a notification on the 26th February,1958, the provisions of the Essential Commodities Distribution Order, 1953, so far as the fixation of a maximum selling price of cigarettes was concerned, came to an end. The petitioner was convicted under the Order of 1953 after the Notification was issued. It was pointed out that the conviction was illegal and , that Right No.4 had nothing to do with the circumstances of the case. The conviction was bad on the general principle that he could not be convicted for an act which was no longer an offence punishable by law[2].

In case of continuing or recurring wrongs, the acts of a person, accused of such wrongs, prior to the enactment of the statute which makes them a continued offence, form the part of the same transaction. Thus a law which penalized the continued possession of the liquor, even though it was acquired prior to the coming into force of the law was held valid[3]. Penalties imposed on the continued performance of contract, which had initially been entered into prior to the enactment of the law prohibiting such contracts was held not to be violative of protection against ex post facto laws[4].

Alien Enemies:

Clause (3)(a) of Right No.2 lays down that protections afforded to the arrested person under clauses (1) and (2) of Right No.2, are not available to a person who, for the time being is an 'enemy alien'. This

1. Akhlaque Hussain, in the matter of PLD.,1965,Lah.147.
2. Shafique Ahmad v. State, PLD.,1959, Lah.420.
3. Samuels v. McCurdy, (1925),267,U.S.188.
4. Ghulam Mohd. v. Dy.Registrar, supra; see Water Peirce Oil Co. v. Texas, (1909), 212 U.S.86.

clause does not define 'enemy alien'. However, a definition of enemy is given in r.161 of the Defence of Pakistan Rules, 1965. Clause (b) of r.161 says that 'enemy' means 'any individual resident in the enemy territory.' But this definition of 'enemy' does mean that an 'alien enemy' has to be a national of a country at war with or engaged in military operations against Pakistan; it only says 'any individual resident in enemy territory.'

Whether Pakistan even today is actively at war with India, or whether India is engaged in military operations against Pakistan, does not seem sufficiently criterian to enable Courts to decide whether an individual, living in India, is an 'alien enemy'. So long as the emergency continues and the Defence of Pakistan Ordinance remains in force, an individual who is living in India, even a Pakistani National living in India, is likely to be defined as an 'alien enemy'. In a recent case, where a Pakistani, who had been staying in India on the authority of the passport granted to him by the Government of Pakistan, but had not renewed his passport since 1963. It was held that he was an 'alien enemy', in as much as he had been living in India without permission from the Government of Pakistan since 1963 and that an 'alien enemy' cannot invoke the jurisdiction of the High Court under Art.98 of the constitution of 1962[1]. An 'alien enemy',according to the Indian Supreme Court, means a foreigner whose country is at war with India. Where the detenus, alleged to be Pakistani agents, were arrested and detained in custody, without following the procedure laid down by clauses (1) and (2) of Art.22, it was held that it was a case of detention of alien enemies and did not call for compliance with clauses (1) and (2) of Art.22. This was a case of

1. Guru Das Shah v. Dy. Custodian, PLD.,1969, S.C.841.

deportation and Suba Rao J., dissenting from the majority observed:

> "Under this provision there is a constitutional injunction that a person arrested and detained in custody shall be produced before a magistrate within the prescribed time. It cannot be again said that arrest and detention in custody in contravention of this provision is illegal. Clause (3) of Article 22 specifies two exceptions to the said injunction. Admittedly the respondents did not fall under one or other of the two exceptions. The constitutional provision is couched in clear and unambiguous phraseology and it is not permissible to read into that provision exceptions other than those specially provided for. When a provision issues an injunction in clear words and provides for two specific exceptions it must be held that it prohibits any other exceptions... as the respondents were not produced before the nearest magistrate within twenty-four hours of their arrest, the arrest and detention was in contravention of Art.22(2) and was illegal." [1].

The Supreme Court of United States has always held that the procedure adopted for the deportation should be handled with due care and caution and must be 'established by due process of law' otherwise the deportation may result in loss of both life and liberty. In Bridges v. Nixon, it was observed that 'deportation is a penalty - at times a most serious one - cannot be doubted. Meticulous care must be exercised, lest the procedure by which he is deprived of the liberty should not meet the essential standards of fairness... Deportability must be established by due process of law'[2].

The aforesaid clause (3)(a) applies only to an enemy alien and only during the existence of a state of war between Pakistan and the foreign power; it cannot be applied to any foreigner whose country has ceased to be at war with Pakistan. Friendly aliens are immune from the application of this clause; they are entitled to the same protections against deprivation of

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1. State of U.P. v. Abdul Samad, AIR., 1962, SC.1506.
2. (1945) 326 U.S.135.

of personal liberty as a citizen of Pakistan.

The common law rule regarding enemy alien is the same. An enemy alien can be detained in custody without trial and has no right to the writ of habeas corpus. In R. v. Bottril, it was held that an enemy alien could lawfully be detained without trial by the Crown and, as such, the detenu was not entitled to habeas corpus[1].

But there is no such provision regarding enemy alien in the Constitution of the United States and the Legislatures can make laws in this respect. This question was considered at length in re Yamashito in which it was held that 'Congress, by sanctioning trials of enemy aliens by military commission for offences against the laws of war, has recognised the right of the accused to make a defence. It has not foreclosed their right to contend that the Constitution or laws of the United States withold authority to proceed with the trial. It has not withdrawn and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the Courts the duty and power to make such enquiry into the authority of the Commission as may be made by the habeas corpus'. It was further pointed out that 'the Fifth Amendment's guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy."[2]

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1. (1946) 2 All.E.R. 434.
2. (1945) 315 U.S.203.

CHAPTER 6

PROCEDURAL SAFEGUARDS.

Double Jeopardy

The Pakistan Constitution,[1] unlike the Indian [2] and the American Constitution, [3]does not provide protection against double jeopardy. However S.403 of the Code of Criminal Procedure provides the principle of autre fois Convict - formerly convicted - , and autre fois acquit - formerly acquitted; in effect the doctrine of double jeopardy. The principle of double jeopardy emerges from the ancient maxim "nemo debet bis vexari pro eadem causa"; that is, no person should be twice harassed for the same offence. It is laid down by the aforesaid S.403 (1) that a person, once convicted or acquitted by a Court of competent jurisdiction, cannot be tried again for the same offence on the same set of facts.

It is clear from the above provision that, in order to claim protection against double jeopardy, there must have been a conviction or acquittal, that it must be in relation to the same offence, being the subject matter of the first trial and based on the same set of facts; and finally that it must be by a Court of competent jurisdiction. In order to invoke the plea of double jeopardy, it was observed, that there must

1. See 1956 as well as 1962 Constitution of Pakistan.
2. See Art. 20 (3); but the Indian Constitution, however, uses the expression "convicted" and it is silent about previous acquittal.
3. See Fifth Amendment to the U.S. Constitution.

have been 'prosecution' and 'punishment', in respect of the same offence, before a Court of law or tribunal, competent to decide the matter in controversy judicially on evidence, given on oath, which it was authorised by law to administer; this does not constitute a tribunal which conducts a departmental or administrative enquiry[1]. Tribunals which are neither required to record the evidence of witnesses on oath nor bound by the provisions of the Code of Criminal Procedure, cannot be regarded as a 'judicial tribunals' in the context of double jeopardy[2]. Both previous and subsequent proceedings should be 'judicial proceedings', defined by S.4(1)(m), Criminal Procedure Code, as meaning, 'judicial proceedings in the course of which evidence is or may be legally taken on oath;' both the proceedings should be before a criminal court[3].

The question whether 'domestic tribunals' exercising 'quasi-judicial functions' are 'judicial tribunals' was comprehensively answered in Maclean v. Workers Union. It was observed that:

> "Speaking generally it is useful to bear in mind the very difference between the principles applicable to the Court of Justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by a judge according to the evidence legally adduced and has the right to be represented by a skilled legal advocate. All the procedure of a modern trial, including the examination and cross-examination of witnesses and summing up, it may be based on these two circumstances. A domestic tribunal is, in general, a tribunal composed of a layman. It has no power to administer on oath and a circumstance which is of great importance, no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence. It is indeed probably ignorant of them. It may act and some times act on mere hearsay and in many cases the members

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1. Maqbool Hussain v. State of Bombay, A.I.R.1953 SC.325.
2. Msoom Khan v. State, P.L.D.1969 S.C.M.R.208.
3. Ibid.

present or some of them are themselves both witnesses and Judges".[1]

The same principle has been applied to tribunals like the Sea Customs Authority and the tribunals holding departmental or administrative enquiries. The question whether, by reason of further proceedings taken by the Sea Customs Authority, the accused could be said to have been tried once again for the same offence, for which he has been prosecuted and convicted or acquitted by the criminal Court, has been answered in the negative.[2] It has been observed that the Sea Customs Authorities are not "judicial tribunals" and proceedings taken under the Sea Customs Act do not constitute a judgement or an order of a Court or judicial tribunal necessary to support a plea of double jeopardy.[3]

"Prosecution" was said in Thomas Das V. State of Punjab to mean a proceeding either by way of indictment or information in the Criminal Court in order to put an offender on trial. Proceedings under the Sea Customs Act,[4] for the confiscation of goods or infliction of penalty by the Sea Customs Authorities, do not amount to "judicial proceedings" nor can such an Authority be regarded as a "judicial tribunal" or "a Court of

1. (1929) 1 Ch. 602; see also Guy Wavering V.Charles,303 U.S. 391, and Compare Murphy V. United States, 272 U.S. 630
2. Maqbool Hussain V. State of Bom. Supra; Thomas Das V. St. of Punj. in fra; Masoom Khan V. State,Supra; State V. Ghulam Iafar PLD 1970 Pesh. 66; Leo Roy Frey V.Supdt.Dist. Jail, India (1958) S.C.R. 822 and Adam V. Collector of Karachi, P.L.D. 1969. S.C. 446.
3. ibid.
4. See S. 167, item (81) to its schedule, Sea Customs Act, 1878 as amended in Pakistan in 1957.

competent jurisdiction", so there arises no question of double punishment for the same offence, as envisaged by S. 403, Criminal Procedure Code, to bar the proceedings before the Sea Customs Authorities.[1]

It was also ruled that, since the proceedings of the Sea Customs Authorities and the Criminal prosecution of the same accused under the penal sections of the Act in a Court of Magistrate are not interdependent, both proceedings can proceed simultaneously.[2] The offences defined in S.167 of the Sea Customs Act, 1878, and the offences of conspiracy to commit such an offence under S.120-B of the Penal Code, are separate and distinct offences and do not constitute "the same offence" to support the plea of "double jeopardy".[3]

A tribunal which conducts a departmental or administrative enquiry is not a "judicial tribunal" and an enquiry conducted by such a tribunal will not bar the subsequent trial of an accused government servant for a Criminal offence; the principle of double jeopardy does not apply. The dismissal of a government servant by the Government on the ground of corruption will not protect him under S.403, Criminal Procedure Code, from subsequent trial and punishment under S.161 of the Penal Code.[4] Conversely on conviction of a government servant by a Criminal Court, the question of double jeopardy does not arise, if subsequently disciplinary proceedings against him are initiated for an object altogether different from dispensing criminal

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1. Adam V. Collector, Supra; Masoom Khan V. State, Supra, State V. Ghulam Jafar, Supra; Maqbool Hussaim V. State of Bom. Supra; Thomas Das V. State of Punjab. Supra.
2. Adam V. Collector, Supra; Masoom Khan V. State. Supra; State V. Ghulam Jafar, Supra.
3. Leo Roy Frey V. Supdt. Distt. Jail,(1958) India, S.C.R. 822.
4. Venkata Raman V. Union of India, A.I.R. 1954 S .C.375.

justice[1]; disciplinary proceedings are taken on the principle of the larger public interest, which has nothing to do with criminal prosecution[2]. The principle of autre fois acquit or autre fois convict does not apply to successive disciplinary proceedings; reversal of the report of the Enquiry Officer by the Appointing Authority and the holding of subsequent enquiry by the Appointing Authority after an accused government servant has been acquitted by an Enquiry Officer, is not prohibited by the principle of double jeopardy[3].

It is also well established that criminal investigations are not proceedings in the sense contemplated by the expression "criminal proceedings", so there is no legal limit to the number of investigations which can be held into a crime; when one investigation has been completed by the submission of a report under S. 173, Criminal Procedure Code, another may begin on further information received. The provisions of S. 403 (1) of the Code of Criminal Procedure cannot be invoked in respect of the number of such investigations.[4]

The expression "by a Court of competent jurisdiction" also involved in the case of a government servant who, on the sole gound of want of necessary sanction for his criminal prosecution from the appointing

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1. Shafqat Mahmood Lodhi V. Acctt. Gen. P.L.D. 1968 Lah.786; but a contrary view was taken in Dwarka Chand V. State of Raj; A.I.R. 1958 Raj.38, that the principle against double jeopardy is attracted to the number of departmental enquiries.
2. Province of E. Pak. V. Mohd. A. Miah. P.L.D. 1959 S.C. 276.
3. Shafqat Mahmood Lodhi V. Acctt.Gen. Supra; Azad J.&K.Govt.V. Mohd.Salim P.L.D.1957 Azad J.&K.33; cases of Rangachari A.I.R. 1937 P.C. 27 and Mohd. Hayat V. Province of W.Pak. P.L.D. 1964 Lah. 264, are, however, distinguishable; the principle of double jeopardy was not discussed by decisions in these cases.
4. See Dwakar V. Rama Murthi, 85 M.L.J. 127, and Mahinder V.Crown 33 P.L.R. 891, referred in Shafqat Mahmood Lodhi's case, Supra.

authority, as required by the Prevention of Corruption Act,1947, and other relevant statutes, was discharged or acquitted by a Criminal Court and the question arose whether his subsequent trial on the same charge, after the requisite sanction had been obtained, barred on the principle of double jeopardy. In Yusofalli Mulla Noorbhy V. King it was printed out that the whole basis of S.403 (1), Criminal Procedure Code, is that the first trial should have been before a Court, competent to hear and determine the case and to record a verdict of conviction or acquittal . It was, therefore, laid down that a Court cannot be said to be competent to hear and determine a case, the institution of which is prohibited in the absence of a proper sanction.[1] It has been further held that where an accused, a government servant, has been acquitted in the former trial on the sole ground of an invalid sanction[2] or want of sanction, the subsequent trial is not barred under S.403 (1), Criminal Procedure Code, as the previous trial has not been before a Court competent to proceed with the case.[3] It was clearly established by their Lordships of Privy Council that, if an order of acquittal were passed by a Court of competent jurisdiction, though wrongly, it would be binding and tantamount to a bar to a second trial on the same charge; but if the first trial were a nullity, having been held by a court not competent to hear and determine the case, it would not be binding; the State need not appeal against it; no question of a bar to the second

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1. P.L.D. 1949 P.C. 108.
2. State V. Mohd.Ziya Nayyar P.L.D. 1957 Lah. 477.
3. Ihsan Elahi V. Crown. P.L.D. 1951 Lah. 430 and Salahuddin V. Crown P.L.D. 1956. Lah. 87.

trial arose at all.[1] If a previous acquittal was not passed on the merits but on the sole ground of want of sanction, it did not fall within the purview of S. 403 (1) Criminal Procedure Code[2]. It was laid down by the Supreme Court in another case that a bar to the subsequent trial on the same charge, under S.403 (1), Criminal Procedure Code, applies only if the Court which held the first trial was a Court, not only qualified to try offences generally, but also competent to try the accused for the offence in the particular case.[3]

But the aforesaid rule will not apply in a case where the prosecution of the accused, a government servant, was kept pending for a long time, on account of want of the requisite sanction and, on the application of the accused under S.561 - A, Criminal Procedure Code, the High Court discharged the accused; subsequently, when the necessary sanction had been obtained, a fresh complaint on the same charge was made against the accused. It was held that, though it was true that, when the accused was discharged, he was not acquitted of the charge, the circumstances of the case showed that it was certainly not the intention of the High Court that fresh proceedings for the same offence should be instituted against the accused. To allow a fresh trial on the same charge would not only nullify the High Court's order quashing the proceedings, but

1. Yusofalli Mulla Noorbhoy V. King, Supra.
2. Abdul Jabbar Khan V. State, P.L.D. 1961 Dac.449; see also Hata V.Emper 30.C.L.J. 233; Hukum Singh V. Emperor, 30.C.L.J, 1149 and Ramanandan Lal V. Ali Hussain 26C.L.J; cited in Aboul Jabbar Khan's case, supra.
3. Mohd Afzal Khan V. State, P.L.D. 1962 S.C.397 at p. 407; see also Abdul Rashid V. Harish Chandra A.I.R. 1929 All.940; In re Muthu, A.I.R. 1937 Pesh.52; Emperor V. Ram Rakha, A.I.R. 1938 Lah.625; Emperor V. Ambaj A.I.R. 1928 Bom. 143; Mahendra N. Shah. V. Emperor A.I.R. 1934 Pat. 411; Farid Mohd. V. Emperor A.I.R. 1927 Sind 10; and Hari Jivan Shah V. Emperor, A.I.R. 1946 Bom. 492.

would constitute a glaring abuse of process of law[1]. Also where the Government had refused, in clear words, to sanction an appeal against the discharge of the accused, it wasobserved that the Government could not later be permitted to turn round and urge that their previous position was ill-advised. It was, therefore, held that fresh proceedings on the same charge, though armed with necessary sanction, was illegal as being barred under S.403(1) of the Code of Criminal Procedure[2]. An appeal against the order of the High Court was dismissed by the Federal Court[3]. But where the Government withheld the requisite sanction, requiring the matter to be further investigated by the Special Police, and the trial Court, implying wrongly that the Government did not want to accord the sanction, had acquitted the accused, it was held that the subsequent trial on the same charge, when the proper sanction was accorded, was not barred by S.403(1). It was, however, pointed out that this was not a case where the Government, having first decided not to accord the sanction, later changed its mind[4].

A different point was involved in Emperor v. Menrag Devidas where the police challenged the accused persons under S.291[5] of the Penal Code, when an order from the District Magistrate under S.144[6], Criminal Procedure Code, was in force. The case was withdrawn under the instructions

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1. State v. Qamar-uz-Zaman, P.L.D.1960,Lah.1199
2. Crown v. Sultan Mahmood, P.L.D.1953,Lah.271
3. Crown v. Sultan Mahmood, P.L.D.1955,FC.20.
4. State v. Mohd.Shafi,P.L.D.1964,Pesh.1
5. S.291 deals with continuance of nuisance by the accused after an injunction from a public servant having lawful authority to issue it, is in force.
6. S.144, Cr.P.C.gives power to the District Magistrate to issue order absolute at once in urgent cases of nuisance or apprehended danger.

of the D.M. after a number of adjournments. Then, armed with a fresh sanction from the D.M., a fresh complaint on the same set of facts, under ss.188[1] and 290[2] of the Penal Code was filed before another Magistrate. It was held that, as the previous withdrawl of case under S.494 (6)[3], Criminal Procedure Code, amounted to an acquittal of the charge by a "Court of competent jurisdiction", the acquittal operated as a bar to the subsequent trial on the same charge[4].

Where the evidence was not recorded as required by S.244[5], Criminal Procedure Code, before the acquittal of the accused under S.245 (1)[6], Criminal Procedure Code and later on a fresh challan was made on the same charge, it was held that the formal acquittal of the accused of the charge, without recording the evidence, did not amount to an acquittal by a "Court of competent jurisdiction, as envisaged by S.403 (1) of the Code of Criminal Procedure, to bar a subsequent trial on the same charge[7].

The acquittal of the accused under S. 247[8], Criminal Procedure Code, due to default of appearance of the complainant where the accused had appeared

1. S.188. P.P.C punishes disobedience to an order promulgated by a public servant, lawfully authorised to make that order.
2. S.290 P.P.C. lays down punishment for public nuisance not otherwise provided for in the Code.
3. S.494 deals with effect of withdrawl from prosecution by public prosecutor, of any person, of any one or more of the offences for which he is tried and states that upon such withdrawl, if it is made after a charge has been made, the accused shall be acquitted in respect of such offence or offences.
4. 23. C.L.J., cited in Abdul Jabbar Khan's case Supra.
5. S.244, Cr. P.C. requires that a Magistrate, in proceedings on non-admission of the accusation by the accused, should record the evidence adduced both in support of prosecution and accused's defence.
6. S.245 (1), Cr. P.C. empowers the Magistrate, after recording the aforesaid evidence, finds the accused not guilty, to record the order of acquittal.
7. Sardar V.Mohd Nqwaz, P.L.D. 1949 Lah. 537.
8. S.247 deals with non-appearance of complainant on the appointed day for the appearance of the accused on having been informed, and empowers him to acquit the accused if complainant does not appear.

and answered to the charge, would operate as a bar against the subsequent trial on the fresh complaint on the same charge[1]. But, in a summons case the trial cannot be said to have begun until the particulars of the charge are stated to the accused and are answered by him. In the instant case where there was nothing on the record to show that the accused was discharged after the trial was commenced on the first complaint, it was held that as there was no trial on merits in the previous proceedings, the subsequent trial on a fresh complaint, though on the same set of facts, was not barred under S.403(1) of the Code of Criminal Procedure[2].

But the cases of discharge are not covered by the principle of autre fois acquit laid down by S.403 of the Code of Criminal Procedure. The section itself excludes the cases of dismissal of a complaint, the stopping of proceedings under S.249[3], Criminal Procedure Code, the discharge of the accused or any entry made upon a charge under S.273[4], Criminal Procedure Code, by declaring that these are not cases of an acquittal to support the plea of double jeopardy[5]. But the Supreme Court of Pakistan pointed out that an order of discharge, which is passed on the merits, though it does not, in law, constitute a legal bar to a subsequent trial on the same charge, will usually

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1. Mohd Lalif v. Shah Nawaz,P.L.D.1961 Azad J. & K.24; and Raban Shah v. Mir Ramzan,P.L.D.1960 Azad J & K.29.
2. Abdullah v. Fazal Din,P.L.D.1960 Azad J.& K.24.
3. S.249 Cr.P.C.deals with the power of the Court to stop the proceedings in the case instituted otherwise than upon complaint, after having recorded the reasons, at any stage without pronouncing any judgement either of acquittal or conviction, and to thereupon release the accused.
4. S.273 Cr.P.C. lays down that, in trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the judge may make on the charge an entry to the effect.
5. See 'Explanation' to S.403, Cr.P.C.

have the same effect as an order of acquittal for the purpose of the application of S.403, Criminal Procedure Code. This was the case where the proceedings instituted on a complaint, had been revived, even though an order of discharge on the merits was in force and had not been set aside; it was, therefore, held that the order of discharge would operate as an order of acquittal to bar the subsequent proceedings on the same charge.[1] It seems hard to reconcile the principle laid down in this case with the provision of S. 403 of the Code of Criminal Procedure, which in express terms states that the discharge of an accused cannot be regarded as an acquittal to bar a subsequent trial on the same charge or to support a plea of autre fois acquit.[2] It cannot be a rule of law, as the Supreme Court of Pakistan has held that an order of discharge, if made on the merits, will operate as an acquittal to bar the subsequent trial; it may be under the circumstances of a particular case, that an order of discharge on the merits should be regarded as a bar to a subsequent trial on the same fact.

The principle of double jeopardy will certainly come into operation if the accused, on retrial, is tried once again for the offence for which he has previously been tried and acquitted by a Court of competent jurisdiction and that order is still in force. Some persons were tried for an offence punishable under S.302[3] read with S. 34[4] of the Penal Code and were acquitted of the said offence, except the petisioners, who were convicted of the offence.

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1. Abul Husain Sana V. Suwala Agrawala, per Kaikaus J.P.L.D. 1962 S.C. 242
2. See Raj Narayan V. Atmaram Govinda, A.I.R. 1954 All 319 ; In re: Wasudeo Narayan, A.I.R. 1950 Bom.10; and Inre: Dist. Magistrate, A.I.R. 1949 Mad. 76, see also Madad Ali V. State, infra and Sambasivan's case (1950) A.C.450
3. S.302, P.P.C. lays down punishment for Murder.
4. S.34 makes [illegible], when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons liable for that act in the same manner as if it were done by him, alone.

In appeal against their conviction under the aforesaid section, the convictions and sentences were, however, set aside and a retrial of the case was ordered. They were again convicted under S. 302 of the Penal Code. It was held, wrongly it is submitted, that the accused could not, on retrial, be convicted of an offence for which he had been formerly acquitted by a Court of competent jurisdiction and the order of acquittal was still in force as the state had not appealed against it.[1] In another case where, after the acquittal of the petitioner of a charge of misappropriation or abetment thereof under S.409/109[2] of the Penal Code, the petitioner again charged the accused with falsification of the accounts and putting his signature thereon under S.477-A of the Penal Code, and the accused was acquitted of the charge on the ground that he had signed the document, on which the prosecution relied, in good faith. Later on the accused was once again charged with the same offence and it was contented that the signatures were made with criminal intent, It was held that, as the facts alleged to have constituted the offence in the instant trial were the same as those which had formed the subject metter of the previous trial in which the accused was qcquitted, it would put the petitioner under double jeopardy, if the subsequent trial were allowed, so the proceedings were quashed.[3]

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1. Bahadur V. State P.L.D. 1961. Lah.923; See also Kisan Singh V. Emperor A.I.R. 1928 P.C. 254. Lala V. Emperor A.I.R. 1923 All. 941; Azam Ali V. Emperor A.I.R. 1929 All. 710; Indar Kumar Hath V. State, A.I.R. 1954 Cal.375; Nazimuddin v. Emperor A.I.R. 1940 Cal.163; and Mangi Jairam Bhate V. Emperor, A.I.R. 1929 Nag. 161.
2. S.409, P.P.C. deals with criminal breach of trust by public servant or banker or merchant or agent. S.109 lays down punishment of abetment if the act abetted is committed in consequence of the abetment and where no express provision is made by the code for the punishment of such abetment.
3. Abdul Majeed V. State P.L.D. 1963 Dac.661; see also Emperor V. Jhabar Mull I.L.R.49 Cal. Emperor V. Nand Kishore A.I.R. 1919 Pat.384, & Mahadeo Prasad V. Emperor A.I.R. 1937 All. 117.

When a person has been acquitted and a different charge is made in a subsequent trial, based on the same set of facts and supported by the same evidence as in the first trial, it will be clearly unjust and highly oppressive and amount to an abuse of the process of the Court, to permit his repeated trials on identical evidence in respect of the identical charges even though relating to different items.[1] Thus in case where the accused were acquitted on a charge under S.3 of the West Pakistan Suppression of Prostitution Ordinance, 1961, after the evidence of the prosecution and defence had been recorded but the accused, on a fresh complaint, was charged for the same offence under ss. 3,4 and 6[2] of the aforesaid Ordinance. It was held that the subsequent proceedings against the accused on the same set of facts for the same offence of which they had been acquitted, even under different sections of the aforesaid Ordinance, was against the principle of autre fois acquit.[3]

S.I. of the frontier Crimes Regulation requires that offences under S.11 of the Regulation should be referred to a Jirga during the pendency of the proceedings; the question arose whether the aforesaid reference under S.I. of the Regulation, after the accused had been discharged under S.209[4] of the Code of Criminal Procedure, by a Court of Competent Jurisdiction, would amount to double jeopardy. The Peshawar Division Bench of the Lahore High Court,

1. Mohd Ikram V. State, P.L.D. 1965 Lah.461; and Chaman Lal V. Emperor A.I.R. 1943 Lah. 304.
2. S.3 of the Ordinance of 1961 deals with punishing the offence of committing illegal sexual intercourses; S.4 makes illegal the living on the earning of the prostitution and punishes it; and S.6 lays down punishment for running a brothel house.
3. Ramzan Bibi V. Muzaffar Hussain, P.L.D. 1967 Lan. 186.
4. S.209, Cr. P.C. lays down condition in which an accused person can be discharged.

relying on the decision in Khanimullah V. Emperor[1] expressed the view that, as the discharged persons continued to be in jeopardy for two years[2] for the purposes of the fresh proceedings against him, even though the order of discharge had not been set aside[3], a fresh trial by a Jirja could validy be ordered within two years of the order of discharge[4]. On appeal a Full Bench differed from the aforesaid view and held that the case should have been referred to the Jirga during the pendency of the case, as required by S.1 of the Regulation; after discharge the case could not be said to be pending. It was concluded that as a fresh police report or complaint is required to start fresh proceedings against the discharged accused, the reference of the instant case to the Jirga could be made only when the proceedings had been recommenced on a fresh report or complaint. Then only could the reference be said to have been made during the pendency of the case; otherwise the reference to the Jirga by the commissioner on his own motion and without the initiation of fresh proceedings on such complaint or report, after the discharge of the accused, would amount to double Jeopardy.[5]

If a person is accused of more than one offences, one or more of which are mentioned in the First Schedule to the West Pakistan Criminal Law Amendment Act, 1963, and others are not so included, and the evidence is relevant partly or wholly to both categories, the question arises whether it is against the principle of double Jeopardy to allow the Commissioner to refer

1. A.I.R. 1947 Pesh. 19, See also Qasam V. Crown P.L.D. 1953 Pesh. 34.
2. See S. 437, Cr. P.C.
3. See Emperor V. Kiru, 11 I.C. 132; See also Abdul Ghani V. Rokhan Shah, A.I.R. 1942 Pesh. 24 and Allah Ditta V. Karam Bakhsh, A.I.R. 1937 Lah. 879.
4. Kasam Khan V. State, P.L.D. 1958 Pesh. 158.
5. Sher Wali V. State, P.L.D. 1961. Pesh 117, see also, Mohd. Afzal Khan V. State, P.L.D. 1959 Pesh. 133.

those offences which are included in the Schedule, to a Tribunal, leaving the otheres to be tried by a Criminal Court. Two of three Judges of the High Court were of the view that the Commissioner has no power to sub-divide the offences in the manner postulated and even if he were deemed to have such a power, it would be contrary to all known principles of justice to do so. The miniority view, however, was that there is no impediment imposed by law preventing the Commissioner from referring the question of guilt or innocence of the accused person to the Tribunal in relation to the some of the offences, as specified, in the Schedule, while leaving the others to be dealt with by ordinary Courts, even if the evidence in proof of the offences is relevant to both classes of offences. The Supreme Court observed that the proper reply which the Full Bench should have returned, should have been confined to answer the question referred; the writ petition did not raise the question of the power of the Commissioner to refer a Scheduled offence, while leaving the other allied offences to be dealt with by ordinary Courts; it sought to quash the whole order of reference, which mentioned a number of unscheduled offences. The proper course and that which as dictated by law was to find that the reference under S.363 of the Penal Code was in excess of the powers of the Commissioner and to that extent his order should be quashed. It was further pointed out that, both by reason of the exclusive nature of the Tribunal's jurisdiction and the facts, on which the Tribunal would be called upon to adjudicate were the basis of a charge of Kidnapping <u>simpliciter,</u> the requirement of the law should be that any further proceedings before the ordinary Court, which might be contemplated, whould wait upon the final

decision by the Tribunal under the aforesaid Act. In other words, after the withdrawl of charge under S.363 of the Penal Code from the jurisdiction of the Magistrate, further proceedings in respect of other offences, arising out of the same set of facts, should be stayed, until the decision in the case withdrawn and referred to the Tribunal was reported to the Magistrate, and the prosecuting agency had made known its intention with regard to the trial of such other offences. It would be at this stage that the plea of autre fois acquit or convict, as the case might be , would appropriately be raised for adjudication.[1]

The expression "offence" has been defined by the General Clauses Act as an "act or omission made punishable by law for the time being in force" For invoking the plea of double jeopardy, the cardinal principle is that, in the subsequent trial, not only the facts or evidence should be the same but also the judicial inferences from the facts. Cases may occur in which the same act may render the actor guilty of two or more distinct offences, for instance, theft[2] and robbery[3] or dacoity[4], or dacoity and riot[5], or kidnapping[6] and abduction[7]. Therefore, the essential requirement for attracting S.403, Criminal Procedure Code, is that the offences, in the previous and subsequent trials, should be indentical[8]. The protection against double jeopardy cannot be available where, there is difference in the basic elements which constitute

1. Commr. V. Khizar Hayat, P.L.D. 1966 Sc. 793.
2. See for "theft" S.378(2)
3. For "robbery" S.390 (3)
4. For "dacoity" S. 391(4)
5. For "riot" S.147 and 148
6. For "kidnapping" S.360; and
7. For"abduction" S. 362 of the penal Code of Pakistan.
8. State of Bom. V. Apte, A.I.R. 1961 S.C. 578.

the different offences arising out of the same set of facts.[1] Where the offences forming the basis for previous and subsequent trials or simulteneous two trials are distinct and different, the principle of double jeopardy cannot be invoked.[2]

In one case the petitioners had previously been acquitted on a charge of criminal breach of trust under S.403 of the Penal Code; later they were prosecuted under Martial Law Regulation (C.M.L.A.) No.16 read with Martial Law Order (M.L.A.S.) No.104, for the recovery of the Government dues outstanding, it was held that the subsequent trial was not for the same offence as the accused persons could be tried for any other offence for which a different charge from the one for which they might have been convicted, was made under S. 237 Criminal Procedure Code; the offence under the Martial Law Regulation was altogether different and hence the principle of autre fois acquit could not be invoked[3].

If subsections (1) and (2) of S.403, Criminal Procedure Code are read together, it seems that, if in the first trial an alternative charge under S.236, Criminal Procedure Code, is framed, or the accused is convicted of a different offence without such an alternative charge, under S.237 of the Code of Criminal Procedure, then the second trial for another offence on the same set of facts and identical evidence would be barred. It was pointed out in re: Tangvelu that an acquittal in respect of offences under S.477 - A[4]

1. Om Prakash V. St. of U.P. A.I.R. 1957 S.C. 458.
2. Mohd. Ikram V. State, P.L.D. 1965 Lan. 461; Motiur Rahman V. State, P.L.D. 1963 Dac. 595; Madad Ali V. State, P.L.D. 1865 Kar. 541; See also Sambasiwan V. Pub.Prosecutor (1950) A.C. 450 and Pritam Shigh V. St., P.L.D. 1957 S.C. (Ind) 1.
3. Ghulam Nabi V. State, P.L.D. 1966 Lah. 131.
4. S.477 - A of the Penal Code deals with falsification of accounts by a clerk, officer or servant with intent to defraud his employer or abets such falsification.

of the Penal Code, does not bar the prosecution of the accused under S.409[1] of the Penal Code. The fact that the evidence in the second trial was bound to be substantially the same as in the first trial was held to be not the material test. The material test is that laid down by S. 236 of the Code of Criminal Procedure, namely, whether the facts are of such a nature that it is doubtful which of the several offences, the facts, which are to be proved, would constitute. It is only in such circumstances that S.236 of the Criminal Procedure Code is attracted. And it goes without saying that S.237 cannot be attracted unless S.236 applies to the case.[2]

The Code of Criminal Procedure authorises prosecution for more than one offence at one trial. S.234 of the Code enables a Court to try a person for three offences of the same kind committed by him within a year. Two or more persons may be tried for three offences of the same kind committed by them jointly within a year under 239 (c). S.235 provides that, if one series of acts so connected together as to form the same transaction , more offences than one are committed by the same person, he may be charged with and tried at on trial for every such offence. S.222(2) enables person, charged with criminal misappropriation of criminal breach of trust, to be charged in respect of a total sum involved between specific dates, which shall be deemed to be a charge of one offence within the meaning of S. 234. Nowhere is it prescribed that separate charges, in respect of separate amounts misappropriated, shall not be made or that if the accused has misappropriated several sums

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1. S.409 of the Penal Code, provides punishment for criminal breach of trust by public servant, banker, merchant or agent.
2. A.I.R. 1956 Mad. 130.

within a year, they all must be added together and made into one gross sum and tried as one charge, Hence, where the accused in the former trial was not tried for a gross sum misappropriated within two dates but for misappropriation of specific sums of money recieved on one specific date, it was held that the subsequent trial for misappropriation of sums on other dates was not barred and that S.222(2) did not come into operation.[1]

Where the accused were formerly tried under S.189 of the Penal Code, for obstructing a public servant conducting a local auction and acquitted, but subsequently they were challaned for offences falling under SS.353/109/34 of the Penal Code, for assaulting a public servant in the execution of his duty, it was held that the second trial was barred under S.403, Criminal Procedure Code as S.235 (2) of the Code of Criminal Procedure applied. It was, however, pointed out that, in the first instance, when the knowledge of the alleged offences came to the notice of police authorities, they were at liberty to challan the accused at the first trial by the joinder of the offences, and that it is certainly not the intention of the Legislature to allow the prosecution of accused persons under one section of the Penal Code and, if the prosecution fails, to allow trial for another alleged offence on the same set of facts.[2]

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1. Kankayya V. Emperor, A.I.R. 1930 Mad.978
2. Mohd. Jan V. Crown, P.L.D. 1953 Bal. 14; Masir Ali V. Abdul Mami (1956) 8. D.L. R. 634; see also Malak Khan V. Emperor A.I.R. 1946. P.C. 16.

The petitioner was discharged of an offence under S.19-E[1] of the Arms act, 1878, but was convicted of murder under S.302 of the Penal Code. Later, after the discovery of a pistol in the accused's possession, he was again tried on the charge under the Arms Act. It was held that the subsequent trial was not barred under S.403 (1) Criminal Procedure Code. It was, however, pointed out that it is well established that a person discharged at previous trial cannot be said to be in double jeopardy of being convicted of the same offence for which he has been subsequently tried on the same evidence or on the discovery of new evidence.[2] Had the accused been acquitted of the charge under the Arms Act, his subsequent trial, even though on the discovery of the relevant evidence, would have been against the principle of double jeopardy.[3]

The appellants were placed on trial on a charge under S.302/109 of the Penal Code, for murder or ebetment of murder and acquitted. They, along with others, were thereafter tried on a charge under S. 148[4] of the Penal Code, for rioting; they were again acquitted but the other accused were convicted under S.147[5] of the Penal Code. The instant trial was the third, on a charge of being in possession of unlicenced fire arms under S.19-A of the Arms Act. To rebut the plea of double jeopardy, it was pointed out that subsection (2) of S.403 of the Code of Criminal Procedure provides that a person acquitted

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1. S-19-E punishes for carrying the fire arms with Criminal intentent
2. Madad Ali v. State, P.L.D. 1965 Kar. 541
3. Sambasivan V. Pub. Prosecutor, Supra; Pritam Singh V. State, P.L.D. 1957 S.C. India 1. See also Ataullah V. State, Supra.
4. S. 148 provides punishment for the accused persons guilty of rioting, being armed with a deadly weapon which is likely to cause death.
5. S. 147 lays down punishment for rioting; use of force or violence by unlawful assembly.

or convicted of an offence may be later on tried for any distinct offence for which a separate charge might have been made against them in the former trial under S. 235. It was further pointed out that, if the instant trial under the Arms Act were the subject matter of the charge under the provisions of S.236, Criminal Procedure Code, cumulatively or alternatively made in the first two trials, the instant trial of the appellant would be barred. If, however, the instant offence was a distinct one, which could have been joined under S.235 (1) along with the other charges in the previous two trials, in view of the fact that these offences were committed in the occurrence of the same transaction, the instant trial was not barred; in view of the circumstances the instant trial was held not to be barred under S.403.[1]

In one case the petitioners were charged with 24 distinct offences, arising out of the same act of misappropriation of money; the petitioners were convicted on only one charge but the other accused were acquitted. Later, proceedings were commenced against the petitioners on the remaining 23 charges. It was contended that the allegations in those twenty-three cases and the evidence to be adduced in their support were identical with those which formed the basis of the previous trial, offending against the principle of double jeopardy. It was ruled that the subsequent trial in respect of identical charges and on identical evidence was certainly barred against those who had been acquitted by the Court of competent jurisdiction in the previous trial. It was, however, pointed out that the same principle could not be applied to the accused, who had been convicted at the previous trial, for the reason that the punishment awarded at the previous trial had no relation

1. Motiur Rahuran V. State , P.L.D. 1963 Dac.595

to the offences which formed the basis of the subsequent trial. In the latter cases it was observed, the ends of justice requires that they should face the subsequent trials for the remaining offences. These were the cases in which distinct offences of misappropriation were committed on different dates of separate ascertained money.[1]

Continuing offences do not fall within the purview of S.403(1) of the Code of Criminal Procedure; the plea of double jeopardy cannot be invoked against a trial for a continuing offence. But it has been established that only those continuing offences can be excluded from the application of the aforesaid S.403(1) when their continuance is made punishable by the Statute. By "continuation of an offence" is meant that there should be repetition of the same offence by the commission of the same act. The Municipal Adminstration Ordinance, 1960 expressly provides that, if an offence under the Ordianance is continuing, the offender is liable to pay a fine of £1 for every day. The petitioner was convicted under cl.3 of the Second Schedule read with S.116 of the aforesaid Ordinance, for running a saw-mill without a licence and was ordered to dismantle the mill . After the conviction, the petitioner continued running the mill and consequently, he was again convicted and sentenced to pay a fine of Rs. 50 for every day on which he continued running the saw mill. It was held that, in the light of the provision for the punishment of the "continuing offence" under the aforesaid Ordinace, the petitioner's second conviction for the continuing offence, being the continuation of the same act, amounted to a fresh offence every day of its commission and was not barred by the provisions of S.403 (1) of the Code of

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1. Mohd. Ikram V, State, P.L.D. 1965 Lah. Supra; see also Inre: Osman Ali A.I.R. 1959, And. Pra. 520; Kankayya V. Emperor A.I.R.1930 Mad. 978.

Criminal Procedure.[1]

But where the petitioner was convicted under S.14 of the Foreigners Act 1946, for staying in Pakistan without having obtained the due permit under cl.7 of the Foreigners' Order, 1951, and subsequently he was again convicted for non-compliance of the aforesaid requirement of law on the ground that it amounted to a continuing offence . It was observed that, in order to consider the question of "continuing offence" in respect of the plea of double jeopardy, two questions are involved; (i) whether the person is being tried for the same offence for which he has been tried and convicted or acquitted before; and (ii) or alternatively, whether he is guilty of having committed a fresh offence daily. In the instant case, in order to answer these questions, the gist of the offence complained of has to be looked into. On the analysis of the said clause 7, it becomes patently clear that the clause does not require that the persons accused of non-compliance with the provisions of the said clause should be tried and convicted each day for a fresh offence so long as non-compliance continues. The failure to comply with the requirements of the said clause 7 is one act and it does not constitute a fresh breach of law every day; it is the same contravention of the law, which is being continued, not that a fresh contravention occurs daily. It was, therefore, the continuance of the "Same offence" and not "repetition" of the offence every day to constitute the "continuing offence"[2]. Hence, within the meaning of S.403(1), Criminal Procedure Code, nobody can be tried and convicted more than once in respect of the "same offence", unless the statute or the particular provision of the

1. Amanullah Molla V. Dacca Mplty., P.L.D. 1967 Dac.581 see also State V. Kunga Bihari, A.I.R. 1954 Pat. 371 F.B; and Emperor V.K.G.Ved, A.I.R. 1942 Bom.326.
2. For the explanation of the expression "continuing offence", see Emperor V. Chhota Lal Amarchand, A.I.R. 1937 Bom. 1.

relevant law clearly provides that if an act, so continued, would amount to a "fresh offence" committed daily, if continued from day to day. In the absence of any such provision in the aforesaid Act and Order, it was held that the second conviction of the petitioner was illegal, being in contravention of the provisions of the aforesaid S.403 (1).[1]

Retaining articles of stolen property is a continuing offence and if an accused is previously acquitted of an offence under S.411[2] of the Penal Code, for retaining stolen property, a subsequent prosecution under S.412[3] of the Penal Code in respect of the greater number of articles, discovered in accused's possession, is not barred under S.403(1), Criminal Procedure Code, though such articles might have been received at the same time.[4]

There is no conflict of authority on the point that an alternative punishment, provided by any valid statute, for an offence cannot be construed as creating double jeopardy[5], nor can S.403 (1) Criminal Procedure Code be invoked in a case where the law provides two punishments for the same offence, such as a sentence of rigorous punishment and fine provided for any single offence[6]. The plea of double jeopardy cannot be raised in cases of preventive

1. Amir Khan V. State, P.L.D. 1963 Dac.92; See also Griffiths V. Tezia Dosadh, I.L.R. 21 Cal. 262; Unwin V. Clarke,L.R; 1.Q.B.417 Cutler V.Turner,L.R.9.Q.B. 502 Ex Parte Baker, 26 L.J.M.C.155; and In re: S.V.Kishta Pillai, 8P.C.416;
2. S.411, provides punishment for dishonestly receiving stolen property. knowing or having reason to believe that same to be stolen property.
3. 412 lays down punishment for dishonetly receiving property stolen in the commission of dacoity, the possession whereof the accused knows or has reason to believe the same to be so, or dishonestly received it from a person whom he knows or has reason to believe to be belonging to a gang of dacoits
4. Ashutosh Todar V. State ,P.L.D.1963 Dac. 719; see also Yomappa Joteppa V. Emperor, 48 Cr. L.J.873, cited in the aforesaid case; However the cases of Hayat V. Emperor A.I.R. 1928 Lah.637; and Jalal V. Emperor A.I,R.1932 Lah.615 are distinguishable.
5. Loom Chand V.Official Liquidators l., M.L.J.514;see also Seervai op.cit.p.425
6. Ebraheem V. State of Bom. (1954) S.C.R.933

detention, because preventive detention is not a "prosecution" in the sense contemplated by S.403(1) of the Code of Criminal Procedure.[1]

Self-Incrimination

Differring from the American and the Indian Constitutions,[2] the Constitution of Pakistan has afforded no protection against self-incrimination. Nevertheless, the privilege, to the extent practicable today, has been incorporated in the Code of Criminal Procedure and the Evidence Act.[3]

The doctrine against self-incrimination emerged, in England, out of a feeling of revolt against the inquisitorial methods, of interrogating accused persons, adopted by the Court of Star Chamber in the exercise of its Criminal jurisdiction. The principle was firstly laid down in the case of Lilburn - which resulted in theabolition of the Court of Star chamber - that the accused should not be put on oath and that no evidence should be taken from him.[4] In course of time the doctrine attained the status of a privilege of the accused and was further extended to witnesses, who could not be compelled to give oral testimony or to produce documents, which could incriminate them. Though the Criminal Evidence Act, 1889, brought an amendment to the privilege to the extent that an accused person could be a competent witness on his own

1. P. Arumugham V. St. of Mad.; (1953) M.L.J.561; see seervai, 5p. cit p. 424 see also Prof. Alan Gledhill, India, p 198
2. See Art. 20(3) of the Indian Constitution; and IV and V Amendments to the American Constitution.
3. See S.342 of the Code of Criminal Procedure (India or Pakistan) and S.132 of the Indian (Pakistan) Evidence Act; see also ss.164 and 364, Criminal Procedure Code and ss24 - 26 of the Indian Evidence Act. N.B. These sections will be dealt with in the context of applicability of the privlege, infra.
4. 3 State Trials 1315.

behalf, if he so desired, but it did not affect the protection against the incriminating oral testimony or the production of documents.[1]

Before it was amended in England by the Statute, the doctrine was carried to America and was adopted as part of its common law.[2] It was incopporated in the V Amendment to the American Constitution, in its widest form, so as to include all aspects of self-incrimination, including compulsory oral testimony and production of documents. The doctrine was further extended to the protection against unreasonable search and seizures of documents; the evidence and documents thus obtained being held to be inadmissible in evidence.[3]

The Indian Constitution adopted the doctrine from the American Constitution; but, unlike the Vth Amendment to the American Constitutuion, Art. 20 (3) of the Indian Constitution does not provide protection against search and seizures. It was held in Sharma's case that the search and seizure do not violate the right guaranteed by Art. 19 (1) (f) of the Indian Constitution. It was further pointed out that search by itself does not affect any right of property, though the seizure does affect it; the affect of seizure, in the instant case, was temporary, and was a reasonable restriction on the exercise of the right to hold and deal with property[4].

Ever since the establishment of the protection against self-incrimination in England, its utility has been the subject of debate and the view has been expressed that the privilege has a tendency to defeat justice,

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1. See Phipson on Evidence, 9th ed. 215 and 274.
2. See Wigmore on Evidence, Vol.8 p.301-303; for history of the origin
3. See for development of "doctrine against self-incrimination", M.P.Sharama V. Satish chandra, (1954) S.C.R.1077, per Jngannadhadas J. See also Seervai, op. Cit pp. 428-429.
4. Supra.

in so far it closes one source of obtaining evidence. Wigmore points out that;

> "Indirectly and ultimately it works for good - for the good of innocent accused and of the community at large. But directly and concretely it works for ill - for the protection of guilty and the consequent derangement of civil order. There ought to be an end to judicial cant toward crime. We have already too much of what a wit has called "justice tempered with mercy". The privilege, therefore should be kept within the limits the strictest possible".[1]

It has been said that the privilege has become a shelter to ciminals that only the guilty claim the privilege or are protected by it. Hence Knox observes;

> "It is the experience of each one of us... If he can be content to maintain silence in the face of direct accusation, or of incriminating circumstances we immediately conclude that he cannot exculpate himself. In ninety-one cases out of a hundred, we know that such a conclusion is justified... The only answer that I can formulate is that law, in seeking to be property sensitive to the rights of a culprit, has developed a callousness for those of the public".[2]

Wigmore finally suggests that "Courts should unite to keep the privilege strictly within the limits directed by historic fact, cool reasoning,and sound policy"[3]

In modern times, with the development in the scientific detection of the crimes, the applicability of the doctrine, except against compulsory or forced oral testimony, cannot be extended to other aspects of self incrimination; such as physical examination, medical examination, or, blood or urine test, a examination of the specimen of the handwriting or finger or footprints; exhibition of the body or the taking of photograph, voice or face

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1. Wigmore, op.cit, pp 314-15; see also Sarkar, Law of Evidence, 11th ed.p 1192.
2. Knox, Self- incrimination, 74 U. Pa. L. Rev. 139, 148 (1924).
3. op.Cit. 319.

identification, examination for determination of insanity or psychological truth and deception test.[1] It has been eleborately observed by Williams that;

> "In the American legal writing, the concept of the privilege against self-incrimination has been applied to medical examinations of accused persons by police surgeons, the use of stomach-pumps and such like. In England we should not think of these problems as raising the issue of self-incrimination; they relate merely to the limits on the powers of the police in relation to the detained persons. Although there is little authority, it can be said with some confidence that the use of force against the body of a detained person for the purpose of obtaining evidence is an illegal battery. There is, however, a commonlaw power to search arrested persons (the police have not tried to assert that this extends to a search of the body, as distinct from a search of the clothes or exterior); and magistrates have statutory power to authorise the taking of finger prints"[2]

As regards applicability of the doctrine in modern times, there is conflict of opinion. One group holds that the protection underlying the doctrine includes a safeguard both against compulsory oral testimony and the forced production of documents exclusively, on the basis that historically the doctrine has been applied against these two forms of testimony.[3] Another expresses the view that, irrespective of the form of incriminating testimony, the test should be the active or passive participation of the accused in furnishing the testimony; for instance, he may be compelled to submit his body,

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1. See Wigmore, op. Cit; Mc Corwick, Evidence. (1954),Knox, Self Incrimmation op. cit; History of Criminal Law of England, by Stephens, Vol.1.p.442(1883) Inbau, Self Incrimination(1950); Model Code of Evidence,prepared by American Law Institute,1942,and Luther House, Criminal Procedure - Self Incrimination - Scientific Tests of Body Substance as Evidence, 44 Kentucky L.J.353,356 (1955-567 see also Self-Incrimination "published by Indian Law Instute (1963).
2. See Glanville L. Williams, The Privilege Against Self-Incrimination An International Symposium (England) 51 J. of Cr.Law pp. 165,169 (1960-61)
3. See Wigmore op. cit. p.375, Inbau, op. cit;Model Code of Evidence op.cit. p.201-5.

but cannot be forced actively to co-operate in the sense of rendering himself "to be a witness" or "to give evidence" against himself; he could be compelled to submit finger prints or an extract of blood, but he could not be required to aid in re-enacting the crime[1]. But according to the third view, any evidence secured by compulsion from the accused, whether by requiring to act or by his mere passive submission, is within the purview of the doctrine[2].

Professor Gledhill points out that the protection against self-incrimination envisages that no person accused of any offence shall be compelled "to be a witness" against himself. "To be witness" means "to furnish evidence", and includes the production of any evidentiary material under his control. The ban applies to any process to compel a person to produce such material, not only when he is on trial, but also when he is in a situation which, in the normal course of events, will result in his prosecution[3]. It has also been observed that it is only when a person is formally accused, or officially suspected of a crime that he may not be examined as a witness at all. In all other situations the witness must answer non-incriminating questions and must suffer the humiliation of claiming his privilege when the question is incriminating. Not much is left of his privacy then[4].

In India, it has been argued that, though the doctrine against self-incrimination should not be extended to cover aspects of self-incrimination other than the compulsory taking of oral or documentary evidence, within this

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1. See McCormick, op.cit.263
2. See Luther House,Criminal Procedure-self-Incrimination-Scientific Tests of Body Substance as Evidence, 44 Kentucky L.J. pp.355-358 (1955-56)
3. See Professor Alan Gledhil, Constitutional Protection of Life and Liberty, op.cit.p.135; see also M.P.Sharma v. Satishchandra,supra, atp.1088.
4. See McCormic, op.cit.p.288

limited area, it should be given full effect and not be drained of its content, as envisaged by Art. 20 (3) of the Indian Constitution, by any narrow interpretation or by countenancing evasion.[1] But an unrestricted application of the doctrine even within that limited area is impracticable in the context of the various provisions of the Code of Criminal Procedure and Indian Evidence Act, which allow the admission or confession of the accused to be admitted in evidence if it is recorded by a Magistrate, or if it is made before the Court conducting the trial;[2] s.342 of the Code of Criminal Procedure and s.132 of the Evidence Act authorise the Court to put questions to the accused, the answers to which may be incriminating.

Nevertheless, S.342, Criminal Procedure Code, provides that no oath shall be adminstered to the accused, and the proviso to S.132 of the Evidence Act lays down that no answer, which a witness is compelled to give, shall subject him to any arrest or prosecution, or to be proved against him in any criminal proceeding. S.24, Evidence Act, renders a "confession" made by an accused inadmissible in a criminal proceeding, if it appears to the Court to have been caused by any inducement, threat or promise. S.25, Evidence Act, makes a confession, made to a police officer, inadmissible in evidence against a person accused of any offence. S.26, Evidence Act, lays down that a confession, made by any person whilst he is in custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall not be proved as against such person. S.164 of the Code of Criminal Procedure confers a power

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1. See Jagannadhdas J's observation in Sharma's case, supra; see also Seervai, op. cit. p. 428.
2. See S.26, Evidence Act, and ss. 164 and 364 of the Code of Criminal Procedure.

on a Magistrate to record Statements or confessions made to him in the course of an investigation and requires that he should explain the person making it that he is not bound to make a confession and if he does so, it may be used as evidence against him, and that he should not record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make memorandum - as prescribed by the section itself. S.364 of the Code of Criminal Procedure lays down that a confession of statement, recorded by a Magistrate under S.164, Criminal Procedure Code, should be interpreted to the accused in a language which he understands, that he should be at liberty to explain or add to his answers and the record should be signed by the accused and the Magistrate or Judge or Court, and such Magistrate and Judge should certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the Statement made by the accused.

In view of these provisions in the Code of Criminal Procedure and Evidence Act, it is submitted that the protection against self-incrimination or against compulsory taking of evidence or production of material which may incriminate the accused has been sufficiently provided for and there is no need to incorporate a provision against self-incrimination in the Constitution. It seems likely that this consideration caused the framers of the Constitution of Pakistan to think unnecessary to repeat these provisions in the constitution.

Even if the protection is guaranteed by the Constitution, as in case of the Indian Constitution, the practical applicability of the doctrine is not, and cannot be, extended further than the limit put by various provisions of the

Code of the Criminal Procedure and Evidence Act, as discussed above and these provisions have not been invalidated so far in India. On the other hand there are other provisions, both under the Code of Criminal Procedure and Evidence Actm which make various forms of incriminating testimony admissible in evidence. Hence S.27 of the Evidence Act provides that, when any fact is deposed to as discovered in consequence of information received from a person, accused of any offence, in custody of a police officer, so much of such information, whether it amounts to confessionor not, as relates distinctly to the fact thereby discovered, may be proved. S.9 of the Evidence Act lays down that facts identifying relevant facts are admissible in evidence. S.73, Evidence Act enables the Court to take a specimen of handwriting, figures or signature of any person alleged to have been written by such person for the purpose of comparing the writing before the Court; this section applies also, with necessary modifications, if any, to finger - impressions or foot-prints. S. 165, Evidence Act, gives the Court power to put questions or order production of any document and the party has no right to object to such question or cross examination without leave of the Court; he can only refuse to answer such question or production of document under ss.121 to 131, Evidence Act, if it is asked or called for by the adverse party. S.51 of Code of Criminal Procedure empowers the police officer to whom a person, arrested by an officer or private person, is made over, to search such person and place in safe custody all articles, other than necessary wearing-apparel, found upon him. Ss.464 to 469 lay down the procedure incase of the accused being insane and authorise the court, if he appears to the Court to be of unsound mind, to determine first the fact of such unsoundness and incapacity by the report of a medical officer. Furthermore S.4 of the Identification of Prisoners Act,

1920, lays down that non-convicted person, if so required by a police officer, should allow his measurements, including foot-print impressions to be taken and S.5 of the Act empowers a Magistrate, First Class, to order a person, who has been arrested in connection with a criminal investigation or proceeding, to be measured or photographed.[1]

It has been submitted that the reasonable search and seizure do not violate the protection against Self incrimination.[2] The Indian Supreme Court also pointed out that there is no inconsistency between the provisions of S.132 of the Evidence Act and the protection against Self-incrimination laid down by Act.20(3) of the Indian Constitution.[3] As regards the provisions of S.27 of the Evidence Act, it was, however, pointed out that the evidence otherwise admissible under the aforesaid section is rendered in admissible, if obtained by compulsion.[4]

Until 1955, in India, in a Criminal trial, an accused person was not competent to testify, but at the conclusion of the prosecution case, he was examined, not inquisitorially, but solely for the purpose of enabling him to explain the facts against him. An Amendment of the Code of Criminal Procedure in 1955 has given him the option to give evidence. The Statute forbids any adverse inference, if he does not exercise his option, but no law can inhabit the human mind from drawing the inevitable conclusion about a man who could explain incriminating fact and does not. The Amendment is not, of course, in

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1. See also S.34 of the Prisoners Act 1894; see also for the general power of police to investigate into conguizable offence, ss.156&157 Cr.P.C.
2. See Sharma's Case Supra;
3. In Re Central Cal. Bank, A.I.R. 1957 Cal.520
4. Dnoom Singh's case, A.I.R. 1957 All. 197; see also Orissa V. Basanta Rag. A.I.R.1957 Orissa 33.

any way inconsistent with the right to protection against self-incrimination.[1]

The question of the inconsistency of S.73 of the Evidence Act with Art. 20(3) of the Indian Constitution was considered in State of Bombay V. Kathi Kalu Oghad and it was held that it is not inconsistent. In this case the question before the Supreme Court was, whether,(i) compulsory obtaining of handwriting from the accused by the police during the investigation; or(ii) giving of a direction by a Court to an accused person present in the Court to give his specimen handwriting and signature under S.73 of the evidence Act; or (iii) compulsory obtaining the impression of the palms and fingers of the accused by the investigating police officer in the presence of a magistrate, is violative of the provisions of Art.20(3), and it was held that it is not violative.[2]

Where a man was found in a State of intoxication, it was held that there had been no violation of Art.20(3) when the police caused him to be examined by a doctor, on which the charge of drunkenness was established; he had not bee compelled to give evidence against himself.[3] "To be a witness" may be equivalent to furnishing evidence in the sense of making oral or written Statements, but not in the larger sense of the expression, so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for the purpose of the identification.[4]

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1. See Prof Alan Gledhill, op. Cit. pp.137-138
2. A.I.R. 1961 S.C. 1808
3. In re Panali Gondam, A.I.R. 1957 Mad. 546.
4. State of Bombay V. Kathi Kalu Oghad, Supra.

In order to invoke protection against self-incrimination,two facts should be established; (1) that the person concerned is an accused of an offence; and (ii) that he is compelled "to be witness" against himself. If one of these facts and not the other is established, the requirement of the doctrine will not be fulfilled. Secondly there should be an element of compulsion in taking the incriminating testimony. If the taking of the testimony is allowed by various provisions of the Code of Criminal Procedure and the Evidence Act, in absence of any Constitutional guarantee, the protection against self-incrimination available in Pakistan must be found in the relevant provision of the Code of Criminal Procedure Code and the Evidence Act.

If the confessions recorded under S.164 of the Code of Criminal Procedure are found by the Court to be voluntary and true, they are admissible under s.24. of the Evidence Act.[1] But where the accused alleged that the confession was extorted from him by torture but no marks of torture were discovered on physical examination and no evidence was added to substantiate the allegation, the confession in the circumstance of the case, was held to be voluntary[2]. It was pointed out that, in cases of voluntary confession, the protection against self-incrimination cannot be invoked.[3] A confession, which failed to show in what words the accused made it, was held to be an extra-judicial confession and was not allowed to be used against the accused as it would incriminate against him.[4] A confession of the accused, made under s.164,

1. State V. Minhum, P.L.D.1964 S.C.813; see also Munir on the Law of Evidence, Vol.1.p.168; State V. Jatindra Kumar, P.L.D.1968 Dac.742; and Jan Mohd.V.state P.L.D.1966 Kar.365.
2. Qasim V. State P.L.D. 1967 Kar. 233.
3. State V. Minhum, Supra.
4. Iqbal Husain V. State. P.L.D. 1969 Lah. 217, see also Sukkio V. State P.L.D. 1967nKar. 800.

Criminal Procedure Code, when he was not under the influence of police, being lodged in the judicial lock-up, was held to be saved by the provisions of S.28 of the Evidence Act, which states that, if a confession, as is referred to in S.24 of theAct, is made after the impression caused by any such inducement, threat or promise, has, in the opinion of the Court, been fully removed, it is relevant in evidence.[1]

Though it is not against law to use a voluntary confession of the accused against him, where a boy of 18 years, charged with attempting to kill the Head of the State, was arrested and detained in Forts at two different places, it was held that the circumstances were such that, even in the absence of the physical pressure on him, he must have been under extreme mental pressure, which the police, far from alleviating, must have tried to aggravate the voluntary nature of the confession,under the circumstances, was held to be very doubtful; it was not allowed to be used against the accused.[2]

Where there was nothing on the record to show that the warning to be given to the accused, as contemplated by S.164 (3), Criminal Procedure Code, had been given to the accused, a confessional Statement was not allowed to be used against him, though the Magistrate recording the confession deposed at trial that such warning had been given.[3] The confessional statement of the accused under S.164 of the Code of Criminal Procedure should be read as a whole and should not be allowed to be taken into consideration in

1. Gulzar Khan V. State P.L.D.1963 Pesh. 178.
2. Mohd.Hussain Khan V. State, P.L.D. 1969 Pesh 347, see also Sawaran Singh Ratam Singh V. State of Punjab P.L.D. 1957 S.C.(Ind) 555; HQshim. V.State. P.L.D. 1960.Kar. 674; Haji Yar Mohd. V. Rahim P.L.D. 1960 Kar.769 Wazir V. State. P.L.D. 1960 Kar. 74; Mst. Akhtar Begum V. State. P.L.D.1960 Lah 797.
3. Ramzan V. State, P.L.D. 1966 Kar. 242.

piece meal in order to incriminate the accused[1]. The Court cannot rely on the portion of a confession implicating him in the commission of an offence and disregard another portion, simply because it would go against the prosecution story[2]. A confession made before a police officer and in the presence of Magistrate, was held not to be admissible under S.25 of the Evidence Act and S.27 of the Act cannot be attracted in such cases[3]. Where the Magistrate did not record all the questions put to the persons making statements and did not disclose that he was a Magistrate, and failed to inform them that if they made statements, they would be sent to judicial custody and not to police custody, it was held that the procedure was illegal. Confessional statements conflicting with ocular evidence held to have been made under coercion and oppression of the police; it was not admitted[4].

Though non-compliance with the provisions of Ss.164 and 364 of the Code of Criminal Procedure makes a confession extra-judicial and as such not admissible in evidence to be used against the accused[5], the confessions in the cases under the Prevention of Corruption Act, 1947[6], which does not require the formalities of S.164 of the Code of Criminal Procedure, are not regarded as

1. Mohd Amin v. State, P.L.D.1968 Quetta 29; see also State v. Minhum Supra.
2. Abul Subham v. State, A.I.R.1940 All.46; see also Balmukund v. Emperor, A.I.R.1931 All. 1.
3. Hakim Khan v. State, P.L.D.1961 Pesh.142.
4. State v. Madad Ali, P.L.D.1967 Kar.612.
5. Iqbal Husain v. State, Supra; Sukhio v. State, Supra; and Addl.A.G.W.P.V.A. Magid P.L.D. 1965 Quetta 20.
6. See Pakistan Special Police Establishment Ordinance and W.P. Anti Corruption Establishment Ordinance, 1961, which set up special force to deal with cases under Prevention of Corruption Act and lays down special procedure for prosecution of such cases which are immune from the formalities of Ss. 164 and 364, Criminal Procedure Code; see also s.23 of the Police Act,1861 read with s.5(1-A) and (2) of the Azad J & K.Prevention of Corruption Act, discussed in the case of Mohd.Afzal Khan v. Sarkar,P.L.D.1969 Azad J.& K.22.

being extra-judicial, despite non-compliance with the requirements of S.164, Criminal Procedure Code.[1]

It is well established that, if an important piece of evidence is not put to the accused under S.342, Criminal Procedure Code and he is not given an opportunity to explain any incriminating evidence, then it cannot be used against him.[2] Where the Magistrate, while examining the accused persons put one single question to all of them, it was held that S.342 contemplates individual statement by the accused persons and as such the recording of a joint statement made by the several accused persons was illegal.[3] Where the attention of the accused in examination was not drawn to incriminating circumstances, relied upon by the prosectution for conviction, it was held that omission was prejudicial to the accused and as such the trial was held to be vitiated.[4] As regards the question whether the plea of guilty or not guilty under S.255, Criminal Procedure Code, forms a part of examination of the accused, it was held that it can never be taken to be a part of the examination, nor can

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1. Mohd.Sarwar V.State P.L.D. 1969 S.C.278l Mohd Amin V. State P.L.D. 1968 Quet. 29;Sain V. Azad J & K. P.L.D. 1961 Azad J.& K.23. However Decision in Ghulam Abbas V. State, P.L.D. 1968 Lah. 101 was over ruled by the S.C.decision in the aforesaid case.
2. S.342 Cr. P.C. confers the power to examine the accused and lays down that for the purpose of enabling the accused to explain any evidence against, the Court may, at any stage of any enquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary and shall for this purpose question him... the answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him; the accused shall not render himself liable to punishment by refering to answer such questions or by giving false answers to them; but the Court may draw such inference from such refusal & answers.
3. Mohd Akbar Khan V.State,P.L.D.1967 Kar.186;Rahim Bukhs V.Crown P.L.D.1952 F.C. 1;Aminul Haque V.Crown P.L.D. 1952 F.C.63; Abdul Wahab V.Crown. P.L.D.1955 F.C. 88,Abdus Salam Molla V.Crown P.L.D. 1955 F.C.129; and Munawar Ahmad V.State P.L.D.1956 S.C.(Pak.) 300.
4. Abdullah V. State, P.L.D. 1967 Pesh. 62. See also Emperor V. Shicalomal A.I.R. 1937 Sind 304.

be a Statement under S.256, Criminal Procedure Code, in reply to the question as to which witness should be called for cross - examination by the accused, because this is a simple question of procedure and one that does not touch the circumstances appearing in evidence against the accused or the merits of the case against him. It was, therefore, pointed out that it would be erroneous to hold that a statement, made by the accused, in reply to the question put to him under ss255 and 256, can be considered to form a part of his examination, so as to require his signature in accordance with the provisions of S.364 (2), Criminal Procedure Code. It was, therefore, held that the accused by refusing to sign such statement committed no offence under S.180[2] of the Penal Code,[3] The Court can properly question the accused under the conditions mentioned in S.342 (1)[4]; hence protection against self-incrimination does not apply to a statement made by the accused before the Court.[5] Examination of the accused is an "integral part of the Scheme, under S.342, enabling the Court to discover the truth". Hence, where no examination of the accused was made by the Court, it was held to be improper compliance with S.342 and illegal.[6]

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1. Ashra fuddin Ahmed V. State R.L.D.1964 Dac.704.
2. S.180, P.P.C. provides punishment for any person who refuses to sign any statement made by him, when required by a public Servant legally competent to acquire it.
3. State V. Sardar Ahmad, P.L.D.1967 Kar. 75; see also Imperitix V.Sirsapa 4.I.L.R Bom.15.
4. Supra.
5. Agha Khan V. State P.L.D.1967 Lah. 348
6. A.M. Noor Mian V. Mokhlesur Rahman P.L.D. 1967 Dac. 503; see also Emperor V. Almuddin 52.L.L.R. supra Amritlal Hazra V. Emperor, 42, I.L.R.cal.957 and Bema Nath Mukherjee V. Emperor 50 I.L.R. Lah 5/8 Cal.

A Court has wide power under S.540 of the Code of Criminal Procedure to summon material witnesses or to examine persons present on summons but the very extent of these powers, imposes a reciprocal responsibility of the same magnitude to use these powers with care. It is only for the just decision of the case that the Court can have resort to S.540, Criminal Procedure Code for summoning Court witnesses. The Court cannot use these powers to advance the case of the prosecution, or that of the defence, and wherever such an order, is passed, putting one of the party in a position of advantage, Vis-a-Vis, the other, the High Court will be justified in interfering to correct the error[1].

In one case, on information given by the coaccused, currency notes worth Rs. 1,52,312 were discovered in the accused's bag by the police, who alleged they were the sale proceeds of smuggled gold, but there was no evidence to prove that the money was so obtained. The trial Magistrate, relying on the Statement of the co-accused, which he held to be admissible against the accused under s.27 of the Evidence Act, convicted him. It was held that the Statement of the co-accused, under the circumstances of the case, could not be used against the accused under the aforesaid S.27. It was pointed out the Statement of the Co-accused might have been correct and the notes, in fact, might have been the sale proceeds of smuggling gold, but there was not admissible evidence on the record to substantiate that fact.[2] Walizar V. State.[3] and Grown V. Saadullah[4] are distinguishable from the aforesaid mentioned case, in as much as, in these cases, the information given by the co-accused were used against

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1. Zafarul Huque V. State, P.L.D. 1968 Lah. 437; and Mohd. Ashraf V.Zafar Ahmad, P.L.D. 1967 Lah. 1045.
2. Mohd Akbar V. State, P.L.D. 1954 Lah. 627
3. P.L.D. 1960 Kar. 204.
4. P.L.D. 1953 Lah. 451; See also Abdus Samad V. State, P.L.D - 1964 S.C.167.

the accused persons under S.27 of the Evidence Act, because some facts relating to the offence were discovered on the information thus given, such as pointing out the accused by the co-accused.

Evidence as to the identity of the accused or stolen property by the owner of the property, in the Court, is admissible; an answer to the question, "who and what is this respondent" is not barred by S.9 of the Evidence Act.[1]

It is a well established principle of law, as enmuciated by S.105 of the Evidence Act, that the burden of proof to show that his case falls under exceptions or any special exception of self-defence, or under the proviso to the aforesaid section, lies on the accused, but he can be said to have discharged this onus by referring to circumstances in the evidence led by the prosecution from which a reasonable doubt is cast on the prosecution case.[2] Where the accused failed to establish circumstances enabling him to plead the protection of exceptions to criminal liability, but it appeared to the Court that there were such circumstances, it was held that the accused must be given the benefit of doubt, and that the onus was on the prosecution to prove that there were not such circumstances.[3] In another case it was held that the burden was on the prosecution to prove that a boy of 15 years committed the murder in self-defence while deseased tried to commit sodomy[4].

The Court has the right under S.73 of the Evidence Act to examine and compare the writing of the accused with the alleged writing, or signature or any

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1; State V. Ashfaq. A. Sheikh, P.L.D.1967 Lah. 1231.
2. State V. Farman Shah, P.L.D. 1967 Pesh. 229
3. Mahim Mandal V. State, P.L.D. 1964 Dac.480 see also Woolmington V.D.P.P. (1935) A.C. 462; Prabhoo V. Emperor A.I.R. 1941 All. 402; Safdar Ali V. Crown P.L.D. 1953 F.C.93 and Mohd Aslam V. Crown P.L.D. 1953 F.C.115.
4. Mohd. Idrees V.State, P.L.D. 1965 Lah. 553.

impression of foot-print or finger impression and it is not a violation of the protection against self-incrimination.[1] The Court has the right, not only to take and compare the signature or writing in the aforesaid manner, but also to arrive at a conclusion, after analysis and comparison, quite contrary to the opinion of the hand writing expert.[2]

The legal position which emerges from S.464 of the Code of Criminal Procedure, is that the Magistrate must have reason to believe that the accused person before him is of unsound mind and incapable of understanding the proceedings, and from S.465, is that "if it would appear to the Court" at the trial that the accused person suffers from unsoundness of mind and thus is incapable of making his defence. In either case the action is to follow the subjective reaction of a Magistrate or the Court to the situation that arises before him. If during the enquiry nothing comes to the notice of a Magistrate to induce a belief in him that an accused person is of unsound mind and consequently incapable of making his defence, there is nothing for him to do except to proceed with the trial in the normal manner. The words "appear to the Court" are used in S.465, while the words "has reason to believe" occur in S.464. But it is clear that in practical effect both the expressions mean almost the same thing. The phrase "to appear", it is submitted, is used, in the context of S.465, in its meaning nearest to the expressions "to be in one's opinion" as given in the Shorter Oxford Dictionary.[3] Hence enquiry is necessary only when the Magistrate under S.464 has "reason to believe" or under S.465 it "appears to the Court" that the accused is of unsound mind.

1; Ali Niwaz V. Mohd.YUSUF P.L.D.1963 S.C.51; Eskandar Ali V.Alhamra Begum, P.L.D.1969 DAC. 214 Majhavayya V. Achamma, P.L.D.1949 P.C.80.

2. Mohd.Umer V. State, P.L.D.1968 Kar. 875; Ali Niwaz V. Mohd.Yusuf, Supra, and Kassa bai V. Jethabhai Jiwan, A.I.R. 1928 P.C. 277.

3. See also Emperor V. Bahadur A.I.R.1928 Lah. 796 and Emperor V. Durga-Charan, A.I.R.1938 Cal.6.

In the instant case, the Magistrate, on the subsmission on behalf of the accused, that he had suffered from insanity since birth, refused to order an enquiry and proceeded with the trial. It was held that it is within the sole discretion of the Court to adjudicate upon the question of insanity. If the Magistrate or Court finds that insanity is feigned, it has simply to ignore it and proceed with the case.[1]

The words "shall in the first instance, try the fact of unsoundness and incapability" in S.464 and the word "appearing" in Cl.(2) of S.465 leave no manner of doubt that the question of unsoundness of mind and hence incapability of the accused of making, his defence shall be decided first and such trial shall be deemed to be part of the accused's trial before the Court. The onus of proof, in such a trial, that the accused is of sound mind is on the prosecution and therefore prosecution has to begin first, and after the prosecution closes its evidence, the accused is to be given a chance to prove that he is of an unsound mind and therefore incapable of making his defence. In the instant case the accused was not given an opportunity to prove his unsoundness of mind, which, in the Courts opinion, seriously and adversely affected the accused's interest. It was, therefore, held that the provisions of S.465 were not complied with and hence the trial was illegal.[2]

1; Ata Mohd.V. State. P.L.D.1960 Lah. 111.
2. Manga V. Sarkar, P.L.D. 1963 Azad J.& K. 88 and Abdur Rahman V. Sarkar, P.L.D. 1963 Azad J.& K. 41

CHAPTER 7.

PREVENTIVE DETENTION.

Constitutional Provision.

Sub clause (b) of clause (3) of Right No.2 provides another exception to the provisions laid down in clauses (1) and (2) of Right No.2 and states that the safeguards afforded by Right No.2 (1) and (2) are not applicable in the case of a person, who is arrested or detained under a law relating to preventive detention. The protections afforded to a person so detained are laid down in clauses (4) and (5) of Right No.2. Clause (4) states that no law providing for preventive detention shall authorise the detention of a person for a period exceeding three months, unless the appropriate Advisory Board has reported, before the expiry of the said period of three months, that there is, in its opinion, sufficient cause for such detention. Clause (5) lays down that the authority making the detention order shall, as soon as may be, communicate to the detenu the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the Order. The proviso to clause (5), however, entitles the detaining authority not to disclose facts which such authority considers it to be against the public interest to disclose.

But it must be noted that clauses (3) to (5),of Right No.2. do not themselves enunciate any law relating to preventive detention. It has been seen, clauses (4) and (5) simply provide safeguards for a person who has been

so detained. These clauses lay down the limitations on the law making power of the State, in as much as these constitutional guarantees cannot be violated by any legislation relating to preventive detention. The power to make laws relating to preventive detention is derived from Art.131 read with Third Schedule, paragraph (34) in case of Central legislation, and from Art.76 read with Third Schedule to the Constitution of 1962 - matters not covered by the aforesaid paragraph (34) - in respect of Provincial legislation[1]. The Central legislature is empowered by the aforesaid paragraph (34) to make laws relating to preventive detention for reasons connected with defence, external affairs, or the security of Pakistan; Provincial Legislatures cannot make laws for these purposes[2]. Laws relating to preventive detention should conform to the requirements of the aforesaid clauses (4) and (5) of Right No.2. However, if any statute fails to incorporate the provisions of these clauses but does not expressly or by necessary implication negative these provisions, the provisions can be read into such statute[3]. But a law which negatives these provisions expressly or by necessary implications, is void to the extent of the inconsistency[4].

Clauses (4) to (6) of Art.22 of the Indian Constitution correspond to clauses (4) and (5) of Right No.2 of Pakistan's Constitution 1962, with the exception that clause (7) of Art.22 of the Indian Constitution confers powers on the legislatures to exclude the right of reference to an advisory board and lays down that the validity of such laws cannot be challended in any

1. See also Constitution of 1956; Fifth Schedule, entry 18 of the Federal list and entry 5 of the Provincial list.
2. Rahmat Elahi v. Govt. of West Pakistan, PLD., 1965, Lah.112.
3. See Behram Khan v. State., PLD., 1957, Kar.709, Khair Mohd. v. Govt. of West Pakistan, PLD., 1956, Lah.668.
4. Ibid; Govt. of E.Pakistan v. Rowsham, PLD., 1966, SC.286; Rahmat Elahi v. Govt. of W.Pakistan, PLD., 1965, Lah.112; Farid Ahmad v. Govt. of West Pakistan, PLD., 1965, Lah.135 and Bazal Ahmad Ayyubi v. Prov. of West Pakistan, PLD., 1957, Lah.388.

Court; they are immune from judicial review[1]. But the Pakistan's Constitution does not confer such unfettered and unrestricted powers on the legislatures to make laws relating to preventive detention nor does it lay down any limitation on the power of Courts to rule on their validity; preventive detention laws, even if the Legislature manifests its intention in clear terms that such laws cannot be called in question in Court of law, are not immune from judicial review in Pakistan, Legislatures cannot, by subsequent amendment curtail the powers of judicial review afforded to the superior courts in Pakistan under Art.98 read with Art.2 of the Constitution of 1962[2].

The word 'preventive' in the expression 'preventive detention' is distinguishable from the word 'punitive'; it denotes a precautionary measure and does not amount to subjecting a man to punishment. By preventive detention a man is simply prevented from doing something which it is apprehended he is doing or is likely to do and which the law prohibits him to do. The acts which law prohibits him to do are acts which are prejudicial to the security of the State, the State's external relations, public safety or the maintenance of public order. 'Preventive detention' should be a war-time measure and it is argued that in time of peace preventive detention laws should be obliterated from the statute book. As Mahajan J., observed in Gopalan's case, preventive detention during peace is unknown to the democratic constitutions except the Indian[3]. The Pakistan Constitution has

1. Gopalan v. State of Madra, AIR.,1950, SC.27.
2. Begum A.K. Sorish Kashmiri v. Govt. of West Pakistan, Supra.
3. Supra.

also permitted preventive detention during peace. Kania C.J. said in the above case that neither the United States nor the Japanese Constitution provides for preventive detention in normal times, that is without a declaration of emergency, but in India, as in Pakistan, preventive detention in normal times has been recognised as a normal topic of legislation[1]. The history of preventive detention laws in their present form begins with the First World War, when the British Parliament was obliged to enact the Defence of Realm Act, 1914, for the effective prosecution of the War and to maintain internal and external security. Since then the accepted theory of the State involves a devaluation of the right to personal liberty; the right to personal liberty has been subjected to increasing interference by the State and the limitations on it, in the form of preventive detention, have been deemed to be necessary in the interest of the security of State, foreign relations, public safety and maintenance of the public order. The Defence of Pakistan Ordinance, 1965, and the Defence of Pakistan Rules made thereunder are framed on the lines of the Defence of India Act and the Defence of India Rules which were drafted on the pattern of the Emergency Powers (Defence) Act, 1939, and the Regulations made thereunder.

According to Mahajan J. there is no authoritative definition of the term 'Preventive detention'. The expression was first used by their Lordships in England to explain the meaning and nature of 'detention' under Reg.14(B) which was framed under the Defence of the Realm Consolidated Acts 1914. In

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1. Ibid.

Rex v. Haliday, Lord Atkinson pointed out that "'preventive justice', as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed or doing some act injurious to members of community, which he may do but has not yet done, is no new thing in the laws of England."[1] He further cited with approval the observations of May C.J. in R.V. Justices of Cork that -

> "Preventive justice consists in those persons whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen..."[2].

Lord Atkinson further observed that -

> "Where preventive justice is put in force, some suffering and inconvenience may be caused to the suspected person. This is inevitable. But the suffering under this statute indicates something much more important than his liberty or inconvenience, namely, for securing the public safety and the defence of realm... And preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do; it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof....."[3].

The decision of the House of Lords in Rex v. Haliday, for the first time, explained the nature of 'preventive detention' in its modern form. It was observed that 'The detention is not in the nature of punishment, but is a precautionary measure, taken for the purpose of preserving the public peace and order and the security of the State. The only essential preliminary to the exercise by the Minister of the powers contained in Section 4 is that he

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1. (1917) AC.260
2. (1882) 15 Cox C.C.78.
3. Rex v. Haliday, Supra.

should have formed opinions on the matters specifically mentioned in this section. The validity of such opinions cannot be questioned in any Court[1]. In R. v. Clarkson, it was observed that 'any preventive measures, even if they involve some restraint or hardship on individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State"[2].

'Preventive detention' can properly be contrasted to 'pumitive detention', one having reference to apprehension of wrong doing, and the other coming after the illegal act is actually committed. 'Preventive detention' is justified by a reasonable probability of the commission of a prejudicial act by the suspected person, whereas his conviction can only be justified by legal evidence. It is for the detaining authority to judge and to put its own interpretation on the suspected prejudicial acts of a suspected person. The two actions 'preventive' and 'punitive' are not mutually exclusive and resort can be had to either or both, depending the choice of the executive authority, with this limitation that the Courts will certainly interfere in aid of the accused person or detenu, if it is found that the action is taken to deprive him of his legal rights by committing him to trial under a punitive law while action was taken under preventive law, or when it appears to the Court that the Order was manifestly malicious and mala fide[3].

Art.98 of the Constitution of 1962, confers, in express terms, on the High Court vast power to probe into the power of an executive authority

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1. Ibid
2. (1961) 1 All. E.R. 557.
3. Mairaj Mohd. v. Govt. of West Pakistan, PLD.,1966, Kar.282.

howhighsoever. Even the highest executive authority's action, detaining a person under preventive detention law, is subject to judicial review under Art. 98[1]. Furthermore Art.2 is a safeguard and ensures the protection of personal liberty. It enjoins that it is an unalienable right of the citizen of Pakistan 'to be treated' in accordance with law 'and only in accordance with law' and that no person can be deprived of his life or liberty 'except in accordance with law.'[2]

Right No.2 (4) and (5) read with Art.98 and Art.2 confers tremendous powers on the Superior Courts to protect a citizen against arbitrary deprivation of his personal liberty under preventive detention laws, against both legislative as well as executive acts. This right of the High Courts cannot be curtailed or taken away by any legislative amendment; the amendment will be ineffective and the power of High Courts unfettered[3]. It is through the implication of Art.98 read with Art.2 that the superior Courts of Pakistan have protected, in a number of cases, the citizens of Pakistan against the arbitrary use of 'preventive detention' for political ends by the party in power[4].

The use of 'preventive detention' has been more extensive in India throughout the history of preventive detention laws. Though the superior Courts have always been alert to protect the citizens against improper exercise of 'preventive detention' by the executive, they cannot travel beyond the limitations imposed on their powers in respect of 'preventive detention' by the Constitution itself.[5] Since Gopalan's case[6] was decided, the Preventive

1. Govt. of W. Pakistan v. Begum A.A.K. Sorish Kashmiri, PLD.,1969, SC.14.
2. Govt. of W. Pakistan v. Begum A.A.K. S.Kashmiri, Supra, see also Abdul Baqi Baluch v. Govt. of W.Pakistan, PLD.,1968, SC.313.
3. Govt. of W. Pakistan v. Begum A.A.K.S. Kashmiri, Supra.
4. Abdul Baqi Baluch v. Govt. of West Pakistan, Supra.
5. Gopalan v. State of Madras,Supra.
6. Ibid.

Detention Act has been progressively amended in the interest of the detenu and the number of detenus has been considerably diminished; at the end of 1956, there were only 134 persons under preventive detention in the whole of India. Prof. Alan Gledhill comments on the statement with realistic approach and says -

> "It should, therefore, be possible to approach this subject with less emotion than it has aroused earlier,"

but Prof.Gledhill feels obliged to say that -

> "..in circumstances which have prevailed in India since independence, preventive detention is an essential instrument for ensuing peace and good government, and that it is irrelevant that lawyers dislike it, that democratic politicians denounce it; and that there is a convention in the United Kingdom that preventive detention laws should not be on the statute book in the time of peace."

He further says that -

> "The Indian Founding Fathers were aware of the existence of various preventive detention laws in India, and clauses (4) to (7) of Art.22 were intended not to restrict the general scope of those laws, but to ensure some protection against their abuse. In Gopalan's case it was obviously impossible successfully to impugn the statute as ullra vires the enacting legislature or as an unreasonable or inexpedient exercise of legislative powers and the main ground of attack was that it was repugnant to Art.21 because it deprived a person of his liberty otherwise than by 'procedure established by law.' This failed, as the Court declined to assign to this phrase anything other than its literal meaning and in doing so, it seems clear that it correctly interpreted the intentions of the Constituent Assembly, for the words 'procedure established by law' in the draft Constitution had been deliberately eliminated in favour of the phrase which the Supreme Court was called upon to interpret. S.3 of the Preventive Detention Act 1950 empowered the Central Government and the State Governments, if satisfied with respect to any person that, with a view to preventing him from acting in any manner prejudicial to the defence of India, the security of a State, the maintenance of public order or the maintenance of the essential supplies and services, it was necessary to do so, to make an order directing him to be detained. It was contended that the Court could go

> into the question whether the grounds on which the order was based were such as would justify a reasonable man in making the order of detention, reliance being placed on Lord Atkin's dissenting judgement in Liversidge's case, on the interpretation of similar language in Regulation 18B made under the Emergency Powers (Defence) Act,1939; he did not suggest that the Court should sit in appeal from the detaining authority, but he thought that the matter should be treated in the same way as the act of a police officer empowered to arrest a person reasonably suspected of committing an offence; the Court should be satisfied that the police officer had acted reasonably in the circumstances in which the arrest was made. It is of course immaterial that the Preventive Detention Act does not use the word 'reasonably' in conjunction with 'satisfied', for the assumption is that an official exercising the power given by the Statute will act reasonably. Some of Law Lords would have accepted Lord Atkin's views if they had been interpreting a permanent statute, but they did not regard them as representing what Parliament intended when enacting a war time emergency statute. Though the Supreme Court did not regard the Preventive Detention Act as a temporary piece of emergency legislation, like the Statute before the House of Lords in Liversidge's case, it disclaimed the power to enquire into the sufficiency of the materials on which the satisfaction of the detaining authority was based, but it would consider whether the grounds were relevant to the circumstances in which the Statute authorised detention, and the professed object of detention set out in the order; it would also consider whether the order was made for a purpose other than stated in the order...."[1]

The Detaining Authorities Satisfaction.

The Indian Supreme Court followed the majority view in Liversidge's Case[2] and upholding the dictum laid down in Gopalan's Case[3] that the Constitution has empowered Parliament to enact laws relating to preventive detention, which are immune from judicial review; if Parliament makes the detaining authority the judge of its own'satisfaction', the Courts have no power to adjudge the reasonableness of its 'satisfaction'; the 'satisfaction' is

1. Op.cit, pp.144-146.
2. (1942) AC.206; State of Bombay v. Atmaram, Supra; Shibban Lal's case, AIR. SC.179. /1954.
3. Supra.

subjective and the objectivity or the satisfaction of the grounds of detention is outside the scope of the enquiry by the Court[1]. Makherjea J., on the question whether the Court could rule on the validity of detention order, laid down three principles: first, the propriety of reasonableness of the satisfaction upon which an order of detention is based, cannot be questioned in a Court of Law; second, the Court is not competent to undertake an investigation into the sufficiency of the matters upon which the satisfaction is purported to be grounded; but third, the Court is competent to examine the grounds of detention to see if they are relevant to the object which the legislation has in view, namely the prevention of acts prejudicial to the defence of India or the Security of the State or the maintenance of law and order. In Makhan Singh v. State of Punjab it was held that the Court had no jurisdiction to interfere with the exercise of power to detain on the subjective satisfaction of the authority so empowered by the legislature[2]. In reviewing the orders of detention in Ram Manohan v. State of Bihar[3], Godavari v. State of Maharashtra[4], and Durgadas v. Union of India[5], under the Defence of India Rules, the Supreme Court of India held that, where an authority has power to pass an order, the Courtcannot enquire whether such grounds existed objectively.

In Pakistan, the Lahore and Karachi Benches of the High Court, relying on the majority view of the House of Lords in Liversidge's case[6] and the decision of the Judicial Committee of the Privy Council in Emperor v. Sibnath Banerji[7] held that the 'satisfaction' contemplated by r.32 of the Defence of

1. Shamsher Singh v. State of Pepsu, A.I.R.1954,SC.276;Dayanaud Modi v. State of Bihar, A.I.R.1951,Pat.47.
2. Shamsher Singh's Case; A.I.R.1954,SC.276.
3. A.I.R.1964, SC.381.
4. A.I.R.1966, SC.740.
5. A.I.R.1966, SC.1404.
6. A.I.R.1966, SC.1078.
7. Supra.

Pakistan Rules 1965 is subjective and it does not fall within the province of the Courts to probe into the 'satisfaction' or to analyse the substance and the quantum of evidence on which the satisfaction is based. Courts will interfere only where grounds alleged for detention are not relatable to the objects of detention and detention law, or where such detention is made mala fide by the detaining authority[1].

It was further pointed out that -

> "It is true that an executive authority cannot be permitted to exercise its authority except honestly and without malice and that it is duty of the Courts to see that the fraudulent exercise of such power or the colourable exercise of it to gain an ulterior object is not achieved; but the question as to mala fide exercise of power is one of fact in each case and the onus is on the detunu to show that the order of detention is in fact a fraudulent exercise of power vested in the Government and that he can sustain that burden only if he can successfully rebut the presumption of bona fides on part of the Government.."[2]

The meaning of the expression 'satisfied', as used by various preventive detention laws was considered in Abdul Ghafoor v. Crown. It was observed that -

> "Where, for the specified purposes, and official act is performed by a person, so authorised by law, in full and strict compliance with the conditions laid down in the law, and the record shows that he was 'satisfied', a presumption shall arise in favour of its legality and the onus should shift to the citizens to prove to the contrary. The expression 'satisfied' means 'satisfaction' of the officer concerned, as he alone is in possession or knowledge of the material to which others have no access. His 'satisfaction' means nothing more or less than his 'own satisfaction' and the Courts cannot hold an inquisition into its reasonableness

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1. Nasim Fatima v. Govt. of West Pakistan, P.L.D.1967, Lah.103; Mairaj Mohd v. Govt of West Pakistan, P.L.D.1966, Kar.282; see also Abdul Ghafoor v. Crown, P.L.D.1952, Lah.624.
2. Ibid; see also Abdul Ghafoor v. Crown P.L.D.1952. Lah.624; Lahore Electric Supply Co.Ltd., v. Province of Punjab, I.L.R.1943, Lah.617; Sec.of State for India v. Mask & Co., I.L.R.1940, Mad.599(PC); King v. Governor of Brixton, L.R.1916, 2 K.B.742(749); and Liversidge v. Anderson, 1941, All.E.R.338, Vol.III

> or otherwise but the 'satisfaction' must be real not sham; bona fide and not actuated by malice; fact and not a pretext and this can properly be determined from all the facts and circumstances of the case. Where the factum of 'satisfaction' is not established, it is not only the right but the duty of the Court to protect the citizen against the excesses of the executive and restore his liberty....."[1]

Similarly in The King v. Governor of Brixton Prison, Lord Reading observed -

> "If we are of a opinion that the powers were being misused, we should be able to deal with the matter. In other words, if it was clear that an action was done by the executive with the intention of abusing those powers, this Court would have jurisdiction to deal with the matter."[2]

The meaning of the word 'satisfied', as used in some of the Defence Regulations was discussed and considered in Liversidge v. Anderson and another; Viscount Maugham observed -

> "I can now deal much more shortly with the question whether an onus is thrown on the first respondent, the Secretary of State, who made the order for detention, to give evidence to show that he had reasonable cause to believe the appellant to be a person of hostile associations, and that by reason thereof, it was necessary to exercise control over him. The order on its face purports to be made under the regulation, and it states that the Secretary of State had reasonable cause to believe the facts in question. In my opinion, the well-known presumption omnia acta rite esse praesumuntar applies to this order, and accordingly, assuming the order to be proved or admitted, it must be taken prima facie - that is, until the contrary is proved - to have been properly made and it must be taken that the requisite as to the belief of the Secretary of State was complied with. It will be noted that on the view, I have expressed as to the construction of the regulation, it is the personal belief of the Secretary of State which is in question, and that if the appellant's contention on this point were correct, the same question may arise in the numerous cases where an executive order depends on the Secretary of State or some other public officer of

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1. Abdul Ghafoor v. Crown, Supra.

2. L.R.1916, 2 K.B. 742, 749.

> being 'satisfied' of some fact or circumstance. It has never, I think, been suggested in such cases that the Secretary of State or public officer must prove that he was so 'satisfied' when he made the order. Just as the fact that the act of the Secretary of State acting in a public office is prima facie evidence that he has been duly appointed to his office, so his compliance with provision of the statute or the order in council under which he purports to act must be presumed unless the contrary is proved."[1]

In the Lahore Electric Supply Company Limited, Lahore v. Province of Punjab it was laid down that -

> "the Court can interfere it it is satisfied that either the order under the Act is ultra vires or that the order was not made bona fide but for some collateral object. Sec.16 (Defence of India Act) in such a case, is not a bar to the Court dealing with the matter..."[2]

Where the adverb 'reasonably' qualifies the expression 'satisfied' no difficulty arises as to the interpretation of the expression, and it is interpreted that the 'satisfaction' of the detaining authority must be such that a rational human being would consider it 'reasonable' under the circumstance of the case.[3] But where the word 'reasonable' does not qualify the expression 'satisfied' and the contention was that the adverb may not be there but the intention of the Legislature was so, the Court rejected the contention and held that the Court could not read into the Statute the words which were not intended by the Legislature to be there and that the 'satisfaction' in S.3 of the West Punjab Public Safety Act,1948, cannot be construed as being qualified by the adverb 'reasonably'[4]. Reference was, however, made to

1. (1941) All. E.R.338, Vol.III.
2. IL.R.,1943,Lah.617; see also Sec.of State for India v. Mask & Co.,IL.R. 1940 Mad,559(P.C.)
3. Ghulam Jilani v. Govt. of West Pakistan, Supra.,see the different explanation of 'satisfaction' under. r.32 and r.204 of the Defence of Pakistan Rules, 1965 - The Defence of India Rules r.26 and r.129; see also Vimla bai Deshpande L.R.73,I.A.,144.; Shearer v. Shields (1914) AC.808.
4. Abdul Ghafoor v. Crown, P.L.D.,1952, Lah.624.

Prabhakar Keshor Tare v. Emperor[1] and Kamla Kant Azad v. Emperor[2] on behalf of the petitioner.

In the former case, the Nagpur High Court was interpreting the Defence of India Rule 26(f) and S.2 of the Defence of India Act. The words were identical, that the Provincial Government 'if it is satisfied... make an order.' The contention of the Crown, in that case was that this provision abrogated the remedy provided by S.491 of the Code of Criminal Procedure and that it was no longer open to the Courts to enquire into the detention so ordered. The learned judges did not accept this contention and it was held that 'the Courts have jurisdiction to see whether there has been fraud upon the Act or abuse upon the powers granted by the Legislature.' It was also held that this jurisdiction was not taken away by S.16 of the Defence of India Act, which stated that no order made under the Act could be called in question by any Court. This case has been supposed to be no authority for saying that the 'satisfaction' required is that of the Court and not of the authority empowered to act under the Rules[3].

In Kamla Kant Azad's case, the word 'satisfied' in r.26(1)(b) of the Defence of India Rules, was construed as meaning 'reasonably satisfied'. It was further observed:

> "..the powers of this Court are not the powers of the Court of Appeal. We do not know the material on which the orders were made. We cannot compel the Crown to disclose them and, therefore, we cannot pronounce on their validity or otherwise. But the power to order a detention of a man under r.26. Defence of India Rules, is not an arbitrary power. There are limitation on it and this Court may be and is bound to satisfy

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1. A.I.R. 1943, Nag.126.
2. A.I.R. 1944, Pat.354.
3. Prabhakar Keshav Tare, supra.

> itself that these limitations have not been exceeded. If the executive has gone beyond them and has used rule in a way not intended, the order is not bona fide order but a 'sham' order, and this Court may interfere."[1]

The distinction between r.129, Defence of Indian Rules, corresponding to r.204, Defence of Pakistan Rules, which states, '...if reasonably suspects," and the rule 26, D.I.R.corresponding to r.32 D.P.R. which uses the expression, '...the Government or... if satisfied' is indicated in the following cases. In Sibnath Benerji[2] and Vimlabai Deshpande [3] the Judicial Committee drew a sharp distinction between the powers under r.26 and r.129 of D.I.R. placing appreciable reliance on the difference of status between a high officer of the Provincial Government - under r.26 - and a police constable - under r.129 -. The argument is delineated with clarity in the following extract from the judgement in the Deshpande case -

> "On the first question it is important to notice the difference between r.26 and r.129. Under the former rule an order of detention can be made only by the Central Government or Provincial Government, though this power may be delegated under the Defence of India Act; and the Government may make an order of detention, if it is satisfied with respect to any particular person that, with a view to preventing him from indulging in the subversive activities as specified, it is necessary so to do. It is to be noticed that the Government must be satisfied; mere suspicion is not enough, but there is no qualifying adverb such as 'reasonably' or 'honestly' attached to the word 'satisfied'. On the other hand, under r.129, any police officer can arrest any person on mere suspicion, but the suspicion must be reasonable, the exact words being 'any person whom he reasonably suspects'"[4].

In Shearer v. Shields, the House of Lords had to construe a provision under the Glasgow Police Act, authorising constables to arrest, if they had reasonable grounds of suspicion and the House held that the burden rested on

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1. A.I.R.,1944,Pat.354 at p.367 per Shearer J.
2. L.R.72 IA.241.
3. L.R.73 IA.144.
4. Ibid.

the constable concerned to show that his suspicion was reasonable and his act, therefore, justified[1]. It can be noted that the same result follows under r.129, D.I.R.

In Liversidge v. Anderson the House of Lords was impressed by two facts; in the first place the authority empowered to detain under the Defence of Realm Act, 1914, was a high officer of the state, namely, the Home Secretary; and in the second place the obvious inconvenience and danger to the public interest, which might ensue, if the Home Secretarywas bound to disclose the confidential information on which he acted. It was, therefore, held that the Home Secretary was not bound to disclose the facts on which he had taken the action[2].

The view that the 'satisfaction' of the Government under r.26 of the D.I.R. was immune from judicial review, rested on the case of Sibnath Benerji[3], where the judicial Committee had found that the power given by r.26, D.I.R. to the Central Government to act in certain ways was derived from the first sub-section of S.2 of the Defence of India Act, which gave the general powers to the Central Government to make rules such as appeared to be necessary or expedient inter alia for the maintenance of public order. In Keshav Talpade, it was expressly held that this power as afforded by r.26 of the D.I.R. was not relatable to clause (x) of sub-section (2) of S.2 of the Defence of India Act, which gives power to apprehend and detain persons 'reasonably suspected of having acted or acting or being about to act' in certain pre-judicial ways. The Judicial Committee found that this judgement of the Federal Court of India, in which the vires of r.26 of the D.I.R. in relation to Cl.(x)

1. (1914) AC.808.
2. Supra.
3. Supra.

of S.2(2) of the D.I.A. had been construed, was wrongly decided[1].

The Lahore High Court, in Ghulam Jilami v. Govt.of West Pakistan[2], relying on the dictum laid down in Liversidge v. Anderson[3], held that the detaining authority was not bound to disclose the facts which led to its 'satisfaction' to take action under r.32 of the Defence of Pakistan Rules, 1965, and that the burden was on the detenu to prove that the order of detention was not bona fide; it was 'sham' and 'colourable.' The Supreme Court of Pakistan, overruling the decision of the High Court, for the first time, established that the detaining authority was bound to satisfy the Courts, to which the citizen is entitled to have resort, for the determination of the question, whether he had been treated in accordance with law, and whether the detaining authority had acted on reasonable grounds. It was, pointed out that it was too late ro reply, as the High Court had done, on the dictum in the English case of Liversidge v. Anderson for the purpose of investing a detaining authority with complete power to be judge of its own satisfaction, and that 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. It was further observed that r.32 of D.I.R. has been framed under the powers afforded by clause (x) of sub-section (2) of S.3 of the Defence of Pakistan Ordinance, which requires inter alia the existence of 'reasonable grounds' for depriving a citizen of his personal liberty. By reading clause (x), according to tenure of its language, and bearing in mind that it makes legal provision for restraint upon personal liberty, which is a fundamental right of citizens of Pakistan, the conclusion that appears

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1. (1943) F.C.R.49.
2. Supra.
3. Supra.

unavoidable is that to gain protection for any action under any rule made under the aforesaid Cl.(x), the existence of 'reasonable grounds' is essential; this should be proved before a Court of Law, and mere declaration of 'satisfaction' is not sufficient. If then r.32 owes its vires to clause (x) of S.3(2) of the aforesaid Ordinance, it must follow that, by use of the words 'reasonable grounds', cl.(x) has unmistakably imported into this rule, controlling the exercise of public power, the requirement that to gain protection of the rule for its action thereunder, the detaining authority should prove and satisfy the Court that the 'reasonable grounds' existed.[1]

It was, it seems, the type of Government in Pakistan that has made the Superior Courts conscious of the necessity to protect individuals against the arbitrary exercise of power by the executive, specially by the party in power. But at the same time, it is submitted, that they have been realistic in their approach to the problem. Long before Ghulam Jilani's case was decised, they always showed 'their determination to keep a proper balance between the needs of law and order on one hand, and the liberties of the individuals on the other.'[2]

In Ghulam Mohammad Loond Khwar v. State, where the detaining authority failed to produce, as required by the Court, the record of its 'satisfaction,' it was held that no order under S.3 of the N.W.F.P. Public Safety Act, 1948 could be passed, unless the Provincial Government - or, by delegation, the D.M. - was satisfied of its necessity, and that it is because of the 'subjective satisfaction' that the Courts are precluded from examining the adequacy of the

1. P.L.D. 1967, SC.373.
2. Annual Survey of Commonwealth Law, 1967, p.124.

material on which the 'satisfaction' is based. Where, as in the instant case, there is no record of 'satisfaction', the order is ab initio void[1].

In Hami duz Zafar v. D.M. Lahore, it was held that the grounds of detention should be reasonable in fact and that the 'subjective' satisfaction of the detaining authority is not enough; particulars justifying the 'satisfaction' should be put before the Court. It was, however, pointed out that S.12 of the Security of Pakistan Act, 1952 requires the existence of 'reasonable grounds,' before an order is passed. Reasonable ground means reasonable in fact. The wording of the aforesaid section shows that it is not merely the 'subjective satisfaction' of the detaining authority passing the order that would validate an order; the detaining authority has to prove that the grounds on which the action was taken were reasonable in fact[2].

In Abuzar v. Province of West Pakistan, where the Courts required the posters, allegedly containing material 'prejudicial to the public order,' to be put before the Court and it was found that the posters were nothing but a sort of election manifesto, it was held that not only the grounds but also the facts should be relatable to the purposes of preventive detention law under which the action is taken[3].

In Rafique Ahamad v. State, a very comprehensive observation was made on the interpretation of the expression, 'the Government, if it is satisfied.. necessary... to deprive any person of his liberty at any time,' in S.3 of the West Pakistan Public Safety Ordinance, 1960. It was pointed out that the judge of the necessity being the Government itself, and the right to be confiscated as

1. P.L.D.1957,Lah.497.
2. P.L.D.1960,Lah.952.
3. P.L.D.1960,Kar.260.

a result of that judgement being the most cherished possession of all free individuals - the right to personal liberty, the power is very wide indeed. The question arises whether the Legislature should be presumed to have given this power to the executive without any check, or at least without ensuring that it is not exercised without due care, caution and attention. The Court answered the question in the negative. It further pointed out that the expression 'the Government should be satisfied of the necessity' should be presumed to mean that the Legislature intended to impose limitations on the executive for the purpose of securing due care, caution and attention, before depriving a citizen of a free country of his personal freedom. Therefore, if there is any doubt about this requirement of being 'satisfied', whether of doubtful apprehension of the breech of public safety and public order, or of issuing of order without compliance with the procedure laid down in the statute, or of passing the order by unauthorised person, no such deprivation can be allowed under any circumstances whatsoever[1].

In Hussain Ali Chagla v. D.M.Lahore, the Lahore High Court went further. As to the privilege claimed by the Government under S.114 of the Evidence Act, 1872, that 'there is essential presumption in favour of the legality of two impugned orders being 'official acts' of the D.M.Lahore, in exercise of the power delegated to him by the Provincial Government', it was, h held that the presumption is optional and even its probative force depends upon the circumstances of each case[2]. The Court rejected the contention on behalf

/of the Government, which was based

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1. P.L.D.1963,Lah.337.
2. See Hari Kishandass v. Emperor, A.I.R.1944,Lah.33.

on the dictum laid down in Liversidge v. Anderson[1] that the decisive factor in the case was the factum of 'satisfaction' which had been amply proved by the sworn affidavits of the detaining authority, that it was itself satisfied of the necessity of the detention in the instant cases and that it was not open to the Court to substitute its own judgement for that of detaining authority, especially when the question in essence was the sufficiency or otherwise of the reasons leading to the 'satisfaction' of the detaining authority. Conceding the argument advanced by the counsel of petitioner that real question in the instant cases was not that of the sufficiency or otherwise of the reasons justifying detention orders but the question really was the factum of 'satisfaction,' which is the condition precedent for a valid exercise of power under r.32 of the D.P.R., the Court observed that there appeared to be a number of circumstances in the instant cases, which required that the record of 'satisfaction' should be put before the Court; the scrutiny by the Court showed that the 'satisfaction' of the detaining authority was fictitious, colourable and insufficient to maintain the validity of the impugned orders[2].

In Govt. of East Pakistan v. Rowshan, the Supreme Court of Pakistan[3] observed that it is to be noted that it is not sufficient that the Provincial Government should be 'satisfied' as to the necessity of the detention; it should be proved beyond reasonable doubt that there were sufficient facts which led to that 'satisfaction'. It was further pointed out that how much material is necessary for coming to such a conclusion is a question of fact, which depends upon the circumstances of each case, the determination whereof is a judicial or quasi-judicial function[4].

1. Supra.
2. P.L.D.1966,Lah.309.
3. Which must be regarded as a first step by the S.C.towards establishing the principle of objective satisfaction.
4. P.L.D.1966,S.C.286.

In India, emergency powers have remained in force since 1962 of which several commentators have been critical[1]. A number of judicial decisions bear witness to the fact[2] that a great deal of power can be exercised by the authorities' subjective satisfaction under the emergency rules but as far as possible the Courts have maintained their high traditions of scrutinizing carefully all legislation, superior or subordinate, to make sure that nothing has been done ultra vires[4]. It has been held that, even though the Proclamation of Emergency, made under Art.358 of the Constitution, suspended the normal methods of challenging the validity of an ordinance made under it, yet a citizen is not deprived of his right to move the Courts for write of habeas corpus on the ground that his detention has been ordered mala-fide[1]; and if

1. Chatterjea & Parmeswara Rao 'Inroads into Fundamental Rights in India', 1967, 29 Bull.Int.Comm.Jurists 24; V. Maya Krishnan 'Sixteen Years of Experience with Law of Preventive Detention in India - A retrospect', (1966), 2 Madras L.J.25 (though he believes the Courts have played a useful part in safeguarding so far as possible the personal liberty of individuals). Cf.S.R. Karemungikar, 'The Emergency Provisions and the Indian Federation' (1966) 2 Madra L.J.6 (defending staunchly the existence of emergency powers, and their exercise by the President as the Constitutional Head of State; see also Annual Survey of Commonwealth Law,1967.
2. See the preceeding pages; see also Ghasi Ram v. State,AIR.,1967,Raj.247; Rajnikant Keshaw Bhandari v. State,AIR.,1967,SC.243; see also Annual Survey of Commonwealth Law,1967, Supra.
3. Jagannath Misra v. State,AIR.,1966,SC.1140; Sadanandan v. State of Kerala, AIR.,1966,SC.1925; Karandikar v. State,AIR.,1967,Bom.11. (the Court should make sure that the detaining authority took the right things into account in being 'satisfied' of the need for order) Cf.Pio Fernandes v. Union of India,AIR.,1967,Cal.231, (Limiting the locus standi of a complainant); In State of Maharashtra v. Atma Ram,1966,SC,1786); See also Annual Survey of Commonwealth Law (1967) Supra.
4. Durgadas Shirali v. Union of India,AIR.,1966,SC.1078 (though on facts the petition failed) Arbind Prasad Sinha v. State of Bihar,AIR.,1966,Pat.391; See also Godawari S. Parulekar v. State of Maharashtra,AIR.,1966,SC.1404; and the State of Bihar v. Rambalak Singh,AIR.,1966,SC.1441,(habeas corpus cases); see also Annual Survey of Commonwealth Law,(1967) Supra.

the State cannot at least say on oath that it was not mala fide, he is entitled to be released[1].

In Sadanandan v. State of Kerala the Supreme Court reiterated its earlier view that as a detention order could be issued on the subjective satisfaction of the executive, it could not be judicially scrutinized nor could such an order be challenged on constitutional grounds. Subject to these limitations, however, the Court asserted that the detenu must be afforded the maximum protection provided by the statutory safeguards. A detention order will be set aside, if there is evidence to show that the detaining authority has not applied its mind to the problem or has acted mala fide, as in the instant case[2].

The procedural safeguards afforded to the detenu were considered by the Supreme Court in Lakhanpal v. Union of India, where the continuation of detention was in question. According to the Court, the continuation of the detention must be based on objective facts and circumstances and is, therefore, a quasi-judicial function. As such, it must comply with the rules of natural justice[3].

Ghulam Jilami's case is a judgement of great importance, in which the Supreme Court of Pakistan considered the question of the judicial review of detention and established the principle of 'objective satisfaction'. The detenus, who were leading politicians, were alleged to have fomented public agitation against the Tashkent Declaration and the existing regime. The Court - per

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1. Benoy Kumar Biswas v. State of Bengal, AIR., 1966, Cal. 509 (habeas Corpus granted)
2. AIR., 1966, SC. 1925; Cf. Jaichand Lal Sethia v. State of W. Bengal, AIR., 1967, SC. 483.
3. AIR., 1967, SC. 1507, See also Annual Survey of Commonwealth Law, (1967), supra.

Cornelius,C.J. - held that a mere declaration of the executive 'satisfaction' is not sufficient to justify detention. The existence of the 'reasonable grounds', though not expressly required by the Rule - r.32, Defence of Pakistan Rules, 1965 - is essential. It has been observed that 'There is no doubt that this is a bold and solitary decision and is in refreshing contrast to the opinion of the Indian Supreme Court that detention is a matter solely for the subjective satisfaction of the executive.'[1]

The Supreme Court came to the above conclusion on two grounds. The first was that since r.32 and r.204 of the Defence of Pakistan Rules - corresponding to r.26 and r.129 of the Defence of India Rules - had both been framed in exercise of the power granted by clause (x) of S.3(2) of the Defence of Pakistan Ordinance, 1965, they must both be subject to the condition that there must be 'reasonable grounds' for the detention of a person as required by the aforesaid clause(x). The second ground was that since Art.2 of the Constitution of Pakistan, 1962 requires every citizen to be treated strictly in accordance with law and Art.98 of the Consititution gives the power to the High Court to probe into the power of an executive authority howhighsoever, the principle laid down in Liversidge v. Anderson[2] and Vimlabai Deshpande[3] was like all other actions relatable to the power derived from the aforesaid clause (x) equally be susceptible of judicial review and the detaining authority had to show that there existed a state of mind, which had been induced by the existence of reasonable grounds, under which he could only say that he was

1. See Annual Survey of Commonwealth Law, (1967) at.p.58.
2. Supra.
3. Supra.

satisfied that the action was necessary in the circumstances of the case. The Court then proceeded to examine the evidence to satisfy itself as to whether 'justification' existed for the satisfaction expressed by the Deputy Commissioner in his order of detention.'

In further clarification of the scope of judicial review, it was pointed out:

> "Under a constitutional system which provides for judicial review of executive actions, it is, in my opinion, a fallacy to think that such a judicial review must be in the nature of appeal against the decision of the executive authority. It is not the purpose of the judicial authority reviewing executive actions to sit in appeal over the executive or to substitute the discretion of the Court for that of the administrative agency. What the Court is concerned with is to see that the executive or administrative authority had before it sufficient materials upon which a reasonable person could have come to the conclusion that the requirements of law were satisfied. It is not uncommon that even high executive authorities act upon the basis of the information supplied to them by their subordinates. In the circumstances it cannot be said that it would be unreasonable for the Court, in the proper exercise of its constitutional duty, to insist upon a disclosure of the materials upon which the authority had so acted, so that it should satisfy itself that the authority had not acted in an unlawful manner."

The view taken in case of Ghulam Jilani is not new or radical; indeed it seems that it was the conventional view generally accepted even in England until the House of Lords in the case of Liversidge v. Anderson[1] gave the doctrine of the 'subjective satisfaction' a new dimension under the circumstances of the case. As a matter of fact, the majority decision in the instant case followed the dissenting judgement of Lord Atkin in Liversidge's case and gave the principle of 'objective test' a new dimension. It is

1. Supra.

submitted that the majority judgement of the House of Lords in Liversidge's case was distinguishable from the principle laid down earlier by the House of Lords itself in Shearer v. Sheilds[1] and it had not been accepted in toto by the Privy Council in the case of Emperor v. Vimlabai Deshpande[2]. Its soundness has been doubted in a subsequent case in England itself, namely, Nakuda Ali v. F.M. De.S.Jayarandte[3].

The principle of 'objective satisfaction' was laid down as early as in 1950 by the Burmese Supreme Court in Tinsa Maw Naing v. Commissioner of Police[4]. Professor Alan Gledhill has realistically commented that this decision 'is, however, of outstanding importance.'[5] He further says that 'on the question whether a court can review a detention order on its merits,' the Indian Courts, during the British period, not without reluctance, followed the majority in Liversidge v. Anderson and disclaimed jurisdiction; the Pakistan Courts had done likewise. As the case mentioned was decided mainly on the Emergency character of the English legislation, a different view might have been, but was not taken in Gopalan's case. Nevertheless the Burmese Supreme Court, in effect, adopted the minority view in Liversidge's case[6].

Hamoodur Rahman J., as he then was, observed in Abdul Baqi Baluch v. Govt. of West Pakistan that the majority decision in Ghulan Jilani's case altered the law laid down in Liversidge's case, only to the extent that it is no longer sufficient for the executive authority merely to produce his order, saying that it is satisfied. It must also place before a Court material upon

1. Supra.
2. Supra.
3. (1951) A.C.66
4. B.L.R.(1950) SC.17.
5. 'The Burmese Constitution' p.9 (A reprint from the Indian Year Book of International Affairs,1953.)
6. Ibid.

which it so claims to have been satisfied, so that the Court can, in discharge of its duty under Art.98(2)(b)(i), be in turn satisfied that the detenu is not being held without lawful authority or in an unlawful manner. The wording of Cl.(b)(i) of Art.98(2) shows that not only the jurisdiction but also the manner of the exercise of that jurisdiction is subject to judicial review. If this funcion is to be discharged in a judicial manner, then it is necessary that the Court should have before it the material upon which the authorities have purported to act. If any such material is of a nature for which privilege can be claimed, then that too would be a matter for the Court to decide as to whether the document concerned is really so privileged. In exercising this power, however, the Court does not sit as an appellate authority. Nor does it substitute its own opinion for the opinion of the authority concerned. It was further pointed out that the detaining authority is expected to exercise the public power of apprehension and detention strictly in accordance with law, as enjoined by Art.2 of the Constitution of 1962 and not arbitrarily or perversely. Not only laws made by the Legislatures but also rules made under delegated legislative power and action taken under these laws should conform to the provision of the Constitution. The judicial power will be reduced to a nullity, if laws are so worded or interpreted that the executive authorities may make what statutory rules they please in the exercise of the power afforded to them and may use this freedom to make themselves the final judges of their own 'satisfaction' for imposing restraints on the enjoyment of fundamental rights of citizens, and Art.2 of the Constitution would be deprived of all its contents through this process and the Courts would cease to be guardians of the nation's liberties.[1] The ratio of Ghulam Jilani's case was reaffirmed in

1. P.L.D.1968,SC.313; See also Ghulam Jilani v. Govt. of West Pakistan, supra; see also Green v.Secretary of State,(1941) All.ER.388; Nakuda Ali's case supra; Faridson Ltd v.Govt. of Pakistan,P.L.D.1961,SC.537; Harward Law Review, Vol.56, p.808.

in Abdul Baqi Baluch[1].

By an ordinance - Defence of Pakistan Ordinance (Amendment) Ordinance 1968 - which was promulgated a few weeks before the judgement in Abdul Baqi Baluch and after the decision in Ghulam Jilani's case, the aforementioned clause (x) of S.3(2) of the Defence of Pakistan Ordinance, 1965, was amended so as to provide that the detaining authority need only be 'of the opinion' - rather than 'satisfied' - that detention is necessary; and 'for for the avoidance of doubt' it was declared, that 'the sufficiency of the grounds on which such opinion, as aforesaid, is based shall be determined by the authority forming such opinion,' the Court held that this amendment had no effect, and was not available to validate a detention order made in 1966, retrospectively - the validity of an order depended on the law at the time it was made. The Court did not find it necessary to express any opinion as to the prospective effect of the amendment, however[2].

The vires of the aforesaid amendment was considered in Govt. of West Pakistan v Begum A.A.K. Sorish Kashmiri. The question whether, according to the aforesaid amendment, the jurisdiction of the High Court to examine either the sufficiency or the reasonableness of the ground of detention had been taken away, was considered. The Court held that the amendment is ultra vires of the constitutional provision of Art.98(2)(b)(i) which cannot be amended by the Legislature in its legislative capacity[3]. The Court ignored the amendment and considered the validity of the detention order according to the unamended provision of the aforementioned clause (x). Relying on the ratio of Ghulam

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1. Ibid.
2. Abdul Baqi Baluch v. Govt. of West Pakistan, Supra.
3. Annual Survey of Commonwealth Law, 1968.

Jilani's case, reaffirmed in Abdul Baqi Baluch, it was held that the Court would satisfy itself that the 'satisfaction' of the detaining authority was based on 'reasonable grounds' and that the action taken was not merely a colourable exercise of power or a fraud upon the Statute, and that in Pakistan now, the onus is initially on the detaining authority to justify the dentention by establishing the legality of his action. A large number of decisions, mainly from India and Australia[1], were cited on behalf of the Government to show that, where the statute simply requires the authority to be 'satisfied' or to act 'if he has reason to believe,' then neither the sufficiency nor the reasonableness thereof can be examined by a Court in the exercise of its power of judicial review and it has to leave it to the "subjective satisfaction" of the authority so empowered. The observations of Professor C.K. Allen that 'where the word 'satisfied' simplicitor is used in a statute delegating powers to executive authorities, then the statute is almost 'judgeproof,' for the effect of these words would be virtually to exclude judicial review on the ground that ministerial action taken under their authority is purely administrative",[2] was not accepted. The Court, reproducing the reasoning afforded in Ghulam Jilani that both r.32 and r.204 of the D.P.R. are framed under cl(x) of S.3(2), of D.P.O., which required the existence of 'reasonable grounds' for action taken under either rule, rejected the contention and held that it has been well settled that, even if the expression 'satisfied' is not expressly qualified by the adverb 'reasonable' in r.32, it is so qualified, by necessary implication, by the expression 'reasonable grounds' in the aforesaid cl.(x) delegating powers to

1. Llyed v. Wallach (1915) 29 C.L.R.299; Adelaid Company v. Commonwealth, (1943) 67 C.L.R.116; Little v. Commonwealth (1947)75 C.L.R.94; Eliezer Zabrovsky v. General Officer Commanding (1947) A.C.246; Gopalan's case supra; N.B.Khare v. State of Delhi, A.I.R.1950, SC.211; and Virendra v. State of Punjab, A.I.R. 1957, SC.296.
2. 'Law and Orders' 2nd ed.p.291

frame the rules concerned[1]. On the examination of the material put before the Court, as required by it, it was found that there was only one speech on the 'record of satisfaction' alleged to be made by the detenu which the Government failed to show, on evidence, had caused or was sufficient to cause a breach of public order[2].

The Lahore High Court in a recent case, relying on the dictum laid down in Ghulam Jilani's[3] case as reaffirmed in Abdul Baqi Baluch[4] and Begum A.A. K. Sorish Kashmiri's[5] cases, observed that the 'satisfaction' of detaining authority, in Pakistan, is not immune from judicial review. The detaining authority has to prove beyond reasonable doubt that the material was reasonable enough to bring him to the 'satisfaction' that the detunu must be prevented from acting in the alleged prejudicial manner. It was further pointed out that it has been established by the aforementioned decisions of the Supreme Court that Art.98 of the Constitution 1962 casts a duty upon the High Courts to examine the 'reasonableness' of the 'satisfaction' of the detaining authority and that the matter no longer rests finally with the 'subjective satisfaction' of the detaining authority[6].

It is submitted that the doctrine of 'objective satisfaction, has been now well established in Pakistan and the Courts will not accept argument in favour of 'subjective satisfaction' whether a state of emergency exists or not.[7].

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1. P.L.D.1969,SC.14 per Hanoodar Rahmar J.
2. Ibid.
3. Supra.
4. Supra.
5. Supra.
6. Begum S.M.Hayal Khan v. Govt.of West Pakistan,P.L.D.1969,Lah,985.
7. See Govt. of West Pakistan v. Begum A.A.K.Sorish Kashmiri,Supra; see also Abdul Baqi Baluch and Ghulam Jilani's Cases, supra.

Successive Orders of Detention:

The questionsinvolved when considering successive orders of detention are (a) whether the subsequent order is a fresh order of detention; or (b) whether it is an order extending the previous period of detention. There is a material distinction between a fresh order of detention and an order extending the previous detention; a fresh order is not affected by the previous detention having been illegal, whereas an order of extension becomes illegal, if the detention which it extends was itself illegal[1]. When an order purports to be one of extension of detention, it cannot be regarded as an original order, unless there are circumstances which impel the Court to such a conclusion[2], whereas every fresh order becomes an original order of detention and as such unaffected by the illegality of the previous order.

In Masum v. State, where the first order of detention for three months was passed under S.3(1) of the N.W.F.P. Public Safety Act 1948, a second order was made under the same secion of the aforesaid Act, which extended the period of detention to six months, after the Act had been repealed and replaced by the West Pakistan Maintenance of Public Order Ordinance; consequently a third order, extending further the period of detention was made under S.3(1) and (3) of the Ordinance. It was held that the second order of detention was illegal, because it was passed under a statute which had been repealed at the time of making the order; the third order of detention which was merely an order of extension of an illegal order could not be treated as valid order of detention[3]. In Arab Mohd. H.Khan's case, Akram J., the Acting C.J., dissenting

1. Masum v. State, P.L.D.1961,Pesh.268.
2. Ibid.
3. Ibid. the principle was laid down in Arab Mohd. H.Kahn v. Crown,P.L.D.1954 FC.1.

from the majority, took a different view and observed -

> "No doubt the word 'extension' has been used rather loosely in several orders of detention, at times it has been used for specifying a particular period of detention and at times for specifying the lengthening of that period, but if, in the light of the circumstances known to the Government, an order of detention is made, the mere use of inappropriate language or the statement that it is an extention will not invalidate the order, if the order itself is a proper order, which carries out the purpose of the Statute. In doing substantial justice in the exercise of prerogative powers, mere technical errors or formal defects are hardly to be taken into consideration; one has to look to the substance of the thing and not to the form of it. I cannot say that in this case there has in fact been any injustice to the detenus, even if the word 'extension' is considered to be inapt with regard to some of the orders".

In view of the majority opinion, the detenu's petition was accepted and he was released[1].

In above case, where the first order of detention for six months was made under S.3 of the N.W.F.P.Public Safety Act on 8th June,1951 and the detenu was entitled to be released on December 8,1952, an order extending the period of detention was made on December,10 1952; it was held by the Federal Court of Pakistan that the detenu's detention on December 9,1952, not being under any order of detention,was illegal and therefore the order of December 10,1952, and a subsequent order of extention of May,16,1953, were also illegal as they were extending the period of illegal detention.[2]

In Basanta Chandra Chose v. Emperor,[3] Spens C.J., had held -

> "The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained on the date of the institution of the proceedings cannot be invoked in habeas corpus proceedings. If at any time before the

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1. Arab Mohd. Hashem Khan v. Crown,P.L.D.1954,FC.1. 2. ibid
2. A.I.R.1945, FC.18.

> Court directs the release of the detenu, a valid order directing his detention is produced, the Courtcannot direct his release merely on the ground that, at some prior stage, there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether, in face of the later valid order, the Court can direct the release of the petitioner."[1]

In re: Javantilal Nathu Bhai Parekh a full bench of the Bombay High Court observed that -

> "Where a person is arrested illegally and imprisoned, and when in imprisonment an order of detention under Bombay Public Safety measures Act, is served upon him and the detenu applies for a writ of habeas corpus, what the Court is concerned is not whether the arrest of the applicant is legal or illegal but whether his detention under the order passed is legal or illegal. The detention of which he complains by his application is the detention in the jail on the date when he made the application, and it is immaterial for the determination of the question as to whether his prior arrest and his prior detention were or were not legal. The question under the habeas corpus Act is as to whether the detention of which the detenu complains, that means the detention at the time he seeks to take out a writ of habeas corpus, is valid or not, which again resolves itself into the question whether at the moment there is for his detention a valid order in existence, and if there be such an order, then no writ of habeas corpus can be issued in his favour
>
> It is not as if, in this case, after an illegal order for detention was made, subsequently, because of powers conferred, an order was made continuing the original order for detention, which was in itself illegal. In such cases, where the subsequent order, even though made after the amendment conferring greater powers, continued the original order for detention which was bad, the subsequent order is also bad."[2]

It is submitted that views of the Indian Federal Court and the Bombay High Court are not different from the view taken in Arab Mohd. H.Khan's[3] case.

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1. A.I.R.1945, FC.18.
2. A.I.R.1949, Bom.319.
3. SUPRA.

In a recent case, during the course of hearing, an application was moved on behalf of the Governement urging that, as the detention order in question did not conform to the requirements of law, as declared by the Supreme Courtof Pakistan in Ghulam Jilani's [1] case, the detention order may be allowed to be withdrawn without prejudice to the Government's powers and jurisdiction to pass, if necessary, any fresh order in accordance with law; the order was allowed to be withdrawn and the immediate release of the detenu was directed, but as the detenu had just come out of the inner gate of the Central Prison, a police officer, specially deputed for the purpose, served a fresh order of detention, passed by the Governor of West Pakistan under r.32. Defence of Pakistan Rules, 1965, on him for a period of two months. The instant writ petition was made against the second order of detention. Upholding the second order of detention, the Court observed that there is nothing unconstitutional in passing successive orders of detention against a person on the same grounds, and that it is open to the authority making an order to revoke an order of detention found to be defective for any reason and substitute a fresh order against him. The Court further pointed out that in Basant Chandra's [2] case the Indian Federal Court laid down two propositions, namely, (a) that,where an earlier order of detention is found defective merely on formal grounds, there is nothing to preclude a proper order of detention being passed on the same grounds; and (b) that if at any time before the Court directs the release of detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention[3].

1. Supra.
2. Supra.
3. Begum Sardar Mohd.Hayat Khan v. Govt.of West Pakistan,P.L.D.1969,Lah.895.

S.3(7) of the Security of Pakistan Act, 1952, authorises a detaining authority to revoke its order at any time that he chooses, and provides that such a revocation shall not prevent the making of a fresh order to the same effect as the order revoked. In face of this provision it cannot be argued, merely on the ground that the previous order was revoked and a fresh order passed as in the instant case, that the subsequent order was mala fide. It may be due to negligence that the mandatory provisions of the Security Act were not complied with and, when the detaining authority came to know of the non-compliance, it realised that the further detention of the detenu was illegal and consequently revoked the previous order, but at the same time it felt that further detention of the detenue was necessary and so it passed a fresh order. In this view of the matter it cannot be said that the Court was wrong in holding that, under the circumstances of the case, the order was bona fide[1]. Whether there is a provision in a particular statute for the revocation of previous order and passing of subsequent order to the same effect or not is immaterial; a detaining authority can revoke its order of detention at any time and can pass a fresh one, if in its view further detention of the detenu is necessary, before a High Court is approached by writ of habeas corpus; even during the writ proceedings, the detaining authority can withdraw the detention order and later on can pass a fresh order to the same effect if it appears to it that there are some statutory or procedural defects in the previous order, sufficient to defeat the probative value of the order[2]. An order of detention can be passed against a person who is already in detention[3].

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1. Mohd.Ahmad v. Crown, P.L.D.1955,Sind.73.
2. Begum Sardar M. Hayat v. Govt.of West Pakistan,Supra.
3. Sibte Hasan v. Crown, P.L.D.1954, Lah.142.

Advisory Board:

Clause (4) of Right No.2 declares the detention of a person for a period exceeding three months illegal, unless the appropriate Advisory Board has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention. The explanation to the aforesaid Cl.(4) provides for the constitution of the 'approprate Advisory Board' and lays down qualifications for its members; that (i) in the case of a person detained under a Central law, the Board will consist of a Judge of the Supreme Court, who shall be nominated by the Chief Justice of that Court, and a senior officer in the service of Pakistan, who shall be nominated by the President; and (ii) in the case of a person detained under a Provincial Law, the Board will consist of a Judge of the High Court of the province concerned, who shall be nominated by the Chief Justice of that Court, and a senior officer in the Service of Pakistan, who shall be nominated by the Governor of the province concerned. The constitution does not prescribe a maximum period of detention. Once an Advisory Board recommends the detention of a person beyond the period of three months, there is no limitation on the length of period a detenu may be kept in preventive custody. However, there are some statutes, for instance the Security of Pakistan Act,1952, and the Preventive Detention Laws Amendment Act, 1962, which require that cases of detention for more than three months should be referred to an Advisory Board every six months and its opinion as to justification of further detention obtained, and that the decision of the Advisory Board should be communicated to the detenu.

In India, Parliament has been authorised to prescribe minimum periods

of detention and also classes of detenus who may be subjected to prolonged detention without recourse to an Advisory Board[1]. But under the Preventive Detention Law Amendment Act, 1952, in its present form, a detention order made by any authority other than the Government is only valid for twelve days and the case must be referred to the State Government forthwith. If the State confirms the order, it must be referred forthwich to the Union. The case must be referred to the Advisory Board within thirty days of the order. The Advisory Board has power to call for any information it wishes but the detunu has no right of audience. However, no person can be detained for more than twelve months[2]. Unlike the Pakistan Constitution, Art (22(4) of the Indian Constitution requires that a law of preventive detention for a period exceeding three months must provide for the establishment of an Advisory Board consisting of persons who were or had been, or are qualified to be Judges of a Hight Court and that the Board has to report before the expiration of a period of three months that, there is, in its opinion, sufficient cause for such detention. But the proviso to Art.22(4) further provided that, even if the Board are of the opinion that there is sufficient cause for such detention beyond the period of three months, such detention is not permitted beyond the maximum period, if any, prescribed by Parliament under Art.22(7)(b). However, Art.22(4)(a) 'is made inoperative by Art.22(4)(b) in respect of an Act for preventive detention passed by Parliament under Cls.(7)(a) and (7)(b)' of Art.22[3]. Art.22(7)(a) permits, in respect of an Act on preventive detention passed by Parliament, detention

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1. Constitution of India, Art.22(7)
2. See Prof.Alan Gledhill, India, p.202; see also H.M.Seervai, Constitutional Law of India, pp.447-448.
3. See Gopalan's case, supra at p.117, see also Seervai, H.M.op.cit.p.447.

beyond the period of three months without necessity of consulting an Advisory Board if the Act complies with the requirements of Art.22(7)(a). But Art.22(7)(b) does not make it obligatory on Parliament to prescribe a maximum period of detention. Art.22(7)(c) empowers Parliament to regulate the procedure to be followed by the Advisory Board in an inquiry under Art.22(4)(G). In Gopalan's case, Fazl Ali and Mahajan JJ.,dissented from the majority view taken by Kaniya C.J., Patanjali Shastri, Mukhergea and Das JJ.,according to which it was held that Parliament must prescribe either the circumstances under which or the class or classes of cases in which a person may be detained for a longer period than three months without reference to an Advisory Board[1].

Though there is no provision regarding the procedure of an Advisory Board and the detenu has no right of audience before the Board under the Pakistan Constitution, S.8 of the Security of Pakistan Act provides for the procedure of an Advisory Board.S.8(1) lays down that the Advisory Board shall, after considering the matter place before it and, if necessary, after calling for such further information from the Government or from any person concerned or affected, as it may deem necessary, submit its report to the Central Government,S.8(2) requires that the report of the Board shall specify in a separate part thereof the opinion of the Board as to whether or not there is sufficient cause for the passing of the order, and except for that part of the report in which such opinion of the Board is specified, the report shall be confidential. S.8(3) prohibits the deten's attendance in person or by legal representative before the Advisory Board; he cannot produce any witness before it. S.8(4) lays

1. Ibid.

down that, on receipt of the report of the Board, the Central Government shall consider the same and shall pass such order thereon as appears to it just and proper. But the proviso to S.8 makes it obligatory on the Central Government to review 'all such orders' every six months from the date of order, unless revoked earlier and to inform the detenu detained under S.3(1)(b) of the Act, of the result of such review.

The meaning of the expression 'such orders', occuring in the aforesaid proviso to S.8, was considered in Mohd.Sarwar v. Ch.Settlement Commr.[1] The point in question was whether the review contemplated by the proviso has to be made every six months from the date of original order made by the detaining authority or from the date of order passed by the Central Government after the report of the Advisory Board was obtained under the aforesaid S.8(4) of the Act. The majority followed the view taken by the Single Bench of the Lahore High Court in Sibte Hasan v. Crown[2] and held that six months should be construed as running from the date of the order passed by the Central Government after obtaining the report of the Advisory Board Lari J., dissenting from the majority, adopted, the reasoning of the Division Bench of the Sind High Court (Lari J. was one of Judes of the Division Bench) in Mirpaldas v. Crown[3] and observed that the six months should be counted from the date of the original order made by the detaining authority. The reasoning of the Single Bench was that 'the assumption, therefore, that the original order of detention'- under S.8(4) of the Security of Pakistan Act-'is to form the subject of a review every six months, is without substance.' The argument of Lari J., based on the view of the Division Bench,

1. P.L.D.1955 Sind.331
2. P.L.D.1954 Lah.142 (149)
3. P.L.D.1954 Sind 25.

was that the aforesaid provision should be read as a whole, with the preceeding clauses of S.8 and also with the preceeding sections of the Act, which deals with both the original and subsequent order, and that from such perusal both the interpretations, namely, six months from the date of oridinal order or six months from the date of the subsequent order passed by the Central Government are possible. But, it was pointed out, 'the Court should lean towards the interpretation which is favourable to the subject - to the detenu whose personal liberty is in danger - and which is in accordance with the object in view as the provision is in the nature of protection and Safeguard to the Detenu'. It was, therefore, observed that 'in view of the matter it is obligatory on the part of the Government to review orders of detention every six months from the date of the original order of detention[1]'. On the basis of the Court's policy of giving maximum protection to the detenu, the following observation was made in Mirpaldas's case:

> "It is a general rule which has been always acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular and that, if he fails to follow every step in the process with extreme regularity, the Court shall not allow the imprisonment to continue."[2]

The same consequences follow if a detention order is made under the Sind Control Order and Detention Act, 1952 as its provisions are similar to the Security of Pakistan Act. In this case the Provincial Government, instead of the Central Government was required to review the detention order every six months. Where, though the Central Government had reviewed the detention order, after having obtained the decision of the Advisory Board, as required by Priviso to

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1. Mohd. Sarwar V. Ch. Settle, Commr. supra.
2. Supra.

S.8 (4) of the Security of Pakistan Act, 1952, the result of such review was not communicated to the detenu, it was held that the failure of the Central Government to comply with Statutory obligation in respect of detention order, made the further detention illegal.[1] In another case where the detention order, as required by the Security of Pakistan Act, was not referred to the Advisory Board at all, the detention of the applicant was held to be illegal.[2]

However, the Preventive Detention Laws Amendment Act, 1962, deleted the provision for six monthly review by the Government under S.8 of the Security of Pakistan Act and laid down that no person should be detained under any preventive detention law for a period longer than two months without the authority of an advisory board - the qualification for membership of which was the same as that laid down by Right No 2 (4) of the Constitution, 1962 -; but this period of two months within which a detention order had to be referred to the advisory board, was to run after the expiration of the first fifteen days period provided for the communication of the grounds of detention. If the Board authorised the detention of a person for aperiod longer than two months, the Central Government could detain the person concerned for such period as it may think proper; even for an indefinite period.[3]

The West Pakistan Maintenance of Public Order Ordinance, 1960, made it illegal to detain a person for a period longer than two months without obtaining the opinion of an Advisory Board for such detention. A case was referred to the Advisory Board, before the expiration of the said period of two months and the

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1. Sirajuddin V. State P.L.D. 1957 Lah. 962.
2. Mohd. Ahmad V. Crown. P.L.D. 1955 Sind 72.
3. See Ss 3 (7-a) and 6-A (2) of the Preventive Detention Laws Amendment Act 1962.

Board reported that there was sufficient cause for detention beyond two months; the Provincial Government extended the initial period of detention to Six months. It was held that, as the Board recommended the detention beyond two months, but not beyond three months, the detention beyond three months was unconstitutional. It was, pointed out that, in such a case, the time factor could not be ignored. It was, however, contended that, by virtue of the provisions of Right No. 2 (4), an extention of an order of detention was not permissible, and that the period for which the Government considers it necessary to detain a person must be determined and specified before the case laid before an advisory board, so that his incarceration would not be continued for an indefinite period. The Court, rejecting the contention, observed that there are no words in Right No. 2 (4), which may be interpreted to mean that the period of detention once fixed by the Government cannot be extended thereafter, or that the order passed by the Government in the first instance must state the outside limit on the period of detention. The sine qua non for the attraction of Cl. (4) of Right No. 2 is, thus, detention for a period beyond three months and not the period set out in the initial order of detention. There may be circumstances which render it impossible for the detaining authority to fix in advance the period for which a person may be detained in preventive custody. For example if an enemy alien is taken into custody during a war, no one can predict when the war will end and till the event happens, it will be endangering the Security of Pakistan to release him from Custody.[1]

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1. Rahmat Elahi V. Govt of W.P.,Supra.

In a case where the Government had ordered the detention of the detenu "until further orders", it was observed by the Supreme Court that the expressions "the Government can continue the detention of a person for "such period as it thinks fit" - occuring in S.19 (d) of the East Pakistan Public Safety Ordinance, 1958, after the concurrence of the Advisory Board under S. 19 - A of the Ordinance - which corresponds to Right No. 2 (4) of the Constitution - does not contemplate any uncertain period; a certain and definite period must be mentioned. It was, therefore, held that the inpugned order suffered from uncertainty or indefiniteness of the period of detention and hence was illegal.[1]

S.3 of the West Pakistan Public Safety Act - as subsequently amended - did not provide for the reference of the detention order to the Advisory Board, as contemplated by Art. 7 (4) of the 1956 Constitution, under which the action was taken, but the provisions of Art.7 of the Constitution,1956 were strictly followed by the detaining authority, that is, the case was referred to the Advisory Board, despite the amendment introduced in the impugned Act in this respect by the West Pakistan Preventive Detention Laws Amendment Ordinance, 1956. It was held that neither the Statute nor the detention order suffered from any legal or constitutional defect on this score.[2]

The Supreme Court has held that the Pakistan Constitution, unlike the Indian Constitution, does not require the clause regarding the reference of the detention order to be inserted in every Statute. It simply puts a

1. Govt. of E.P.V. Rowshan, Supra.
2. A Aziz V.D.M. Lahore, P.L.D.1958 Lah.104.

limit on the exercise of the power of preventive detention for long periods; it lays down that under no law the detention of a person for a period longer than three months will be permitted without the concurrence of an appropriate Advisory Board for such detention. The constitution of the Advisory Board and the reference of the detention for a period longer than three months has been, no doubt made obligatory by the constitution if detention is ordered for more than three months,. It is however, not mandatory that the constitutional provisions should be repeated in a Statute authorising detention for more than three months.[1]

Where one of the members of the Advisory Board was the person who had recommended the detention order, it was held that the constitution of the Advisory Board was against the principle of natural justice that no one man can be a judge in his own cause and the reference of the case to such an Advisory Board was invalid and the detention was illegal[2].

It is not correct that a detenu is not entitled to pray for writ of habeas corpus before his case is referred to an advisory board, when the detention is to exceed three months. There are so many grounds, discussed in the following pages, on which a detenu can challenge the order of detention by writ petition and pray for habeas corpus immediately after his detention.[3]

Grounds of Preventive Detention

Clause (5) of Right No. 2, which corresponds to clause (5) of Art.22 of the Indian Constitution, requires that a detaining authority shall, as soon as may be, communicate, to the person detained, in pursuance of an order made

1. A Aziz V.W. Pak. P.L.D. 1958 SC. 499 see also Prof. Alan Gledhill, Pakistan. P.200
2. Rahmat Elahi V. Govt. of W.P., Supra.
3. Farid Ahmad V. Govt. of W.P., Supra.

under any law providing for preventive detention, the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order. The object of this clause is to enable the detenu to prepare his defence and apply for habeas corpus or bail, and to provide him with sufficient information as to why his personal liberty has been restrained.

This clause confers two distinct rights on a detenu, namely (i) the right to be informed of the grounds of detention; and (ii) the right to be enabled, at the earliest opportunity, to make a representation against the order. As far as clause (5) is concerned, the moment the grounds are communicated, the first requirement is complied with, but the second requirement is fulfilled only after the deteun has been supplied with such information as to enable him to make an effective representation. Therefore, if there is an infringement of either of these two conditions, in other words, if any of these requirements is not complied with the detenu has the right to approach the High Court for the writ of habeas corpus. The clause also envasiges a further condition that the grounds of detention should be furnished to the detenu,"as soon as may be" under the circumstances of the case which implies that the detenu should not only be enabled to make an effective and adequate representation but he should be afforded an opportunity to do so as soon as possible.

Detention without communication of grounds is void ab initio. Where the grounds, on which the impugned order was made, were not communicated to the detenu and it was contended that two previous similar orders in which grounds were mentioned, were not challenged by him, it was held that he could not be estopped from challenging the validity of the third order, which was violative

of the constitutional guarantee.[1]

It is a condition of lawful detention that the person arrested should know on what charge, suspicion or crime he has been arrested, so that he can be in a position to communicate information to his counsel for the purpose of making representation and arranging his defence. Hence, where even after streneous efforts were made by the petitioner to meet the detenus, the police officer did not disclose where the detenus were and what were the grounds of detention, it was held that their detention was illegal, as no proper remedy could be sought to secure their release.[2] S.8 of the security of Pakistan Act, 1952, required that the Central Government should review the order of detention every six months, after having referred the matter to the Advisory, Board, and that the decision of the Advisory Board should be communicated to the detenu every time. Where, though the Central Government had reviewed the order of detention, after having obtained the decision of the Advisory Board, but the result of such review was not communicated to the detenu, it was held that the failure of the Central Government to comply with Statutory obligation in respect of detention order, made further detention illegal.[3]

In one case the detenu was arrested and detained in custody for six days by a police officer for "prejudicial acts", under S.41 of the East Pakistan Public Safety Ordiance, 1958; this was, however, subject to the passing of a final detention order by the Provincial Government, under S.17 of the Ordinance, on the report of the detaining officer, which was required to be furnished within

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1. Abdus Salam v. A.M., P.L.D. 1969 Pesh. 167; see also Mirza Mahmood Beg. v. Commr. Multan, P.L.D. 1966 S.C. Zol; see also Prabhu v Emperor, A.I.R.1944 P.C.73.
2. Farooq Badar V. U.G. Police, P.L.D. 1969 Lah. 1020.
3. Sirajuddin V. State. P.L.D. 1957 Lah. 962.

thirty days of such arrest. No grounds of arrest and detention were communicated to the detenu by the police officer. On receipt of the aforesaid report by the arresting officer, the final detention order, furnishing the grounds of detention, was passed by the Provincial Government, under S.17 of the Ordiance within six days of the arrest. It was held by the majority that the first arrest and detention of the detenu by the police officer under S.41 of the Ordianance, which does not relate to preventive detention, without compliance with the constitutional requirement, which require communication of grounds of arrest and detention, was void ab initio and consequently the second order of detention, made by the Provincial Government under S.17 of the Ordinance, in furtherance of the first illegal order, was also unlawful. Cornelius, C.J., dissenting from the majority view, however, observed that Ss.41 and 17 of the aforesaid Ordinance are reproductions of rr.129 and 26 of the Defence of India Rules, that S.41 is interrelated with S.17 of the Ordinance in the same sense as r.129 is with r.26 of the Defence of India Rules; and that S.41 of the Ordinance relates to such detention as may be described as " preliminary precautionary preventive detention", with a view to making of enquiries as to whether the"final order" of detention to prevent the doing of "prejudicial Acts" should be made under S.17 of the Ordinance. Therefore, in his view, the arrest and detention of the detenu under S.41 of the Ordinance was not subject to the constitutional requirement of communication of grounds or report to the nearest Magistrate within twenty-four hours of arrest.[1] The interpretation of r.129 of the defence of India Rules was afforded by the Full

1. Govt. of East Pak. V. Rowshan P.L.D. 1966 S.C.286.

Bench of Lahore High Court In re Subrammniyam in the following words;

> " The rule (i.e.r.129) to my mind, was provided to enable police officers or other officers of the Government to detain dangerous men immediately and to hold them in detention until the Provincial Government or the Central Government issued order of detention under r.26 of the Defence of India Rules".[1]

But the majority opinion was that S.41 relates to preventive detention and as such a person cannot be detained in the custody by the police officer under S.41 without communication of grounds to the detenu.[2]

The grounds on which the preventive detention order is said to be based, should actually exist and should be suceptible of rational proof. If the alleged grounds do not exist at all,[3] or one or more of them are not of rationally operative value, then the order of detention cannot be upheld by the Courts; it must be declared to be illegal.[4]

The grounds communicated to the delenu should not be too vague to enable him to make an earliest representation against the detention. "Vagueness" is the anti-thesis of definiteness that is to say, if the grounds are not definite, they are said to be vague.[5] According to the Supreme Court of India, "vagueness" is a relative term, whose meaning must vary with the facts and circumstances of each case; what may be said to be vague in one case may not be so in another. Hence it could not be asserted, as a general rule, that a ground was necessarily vague, if the only answer of the detenu could be to deny it; if the Statement of facts was capable of being clearly understood and was

1. A.I.R. 1943 Lah. 329, per Harries C.J.
2. Govt. of East Pak. V. Rowshan, Supra.
3. Dayanand Modi V. State of Bihar, A.I.R.1951 Pat. 47.
4. Abdul Qayyum V. Povt. of East Pak. P.L.D.1967 Dac.268; and Hasan Navaz V. Crwon. P.L.D.1953 Sind.37.
5. Sibte Hasan V. The Crown P.L.D.1954 Lah. 142.

sufficiently definite to enable the detenu to make his representation, it could not be said to be vague.[1] Lahore High Court observed, that, what information should be communicated to the detenu in order to enable him to make an adequate representation depends upon the circumstances of each case. The test is, however whether the grounds communicated convey sufficient information to enable the detenu to make an effective representation. Where the information left the petitioner in no doubt as to what the accusation against him was, it was held to be enough for making the representation against the detention order.[2] On the contrary, if the statement of the grounds was so indefinite and insufficient as to make it difficult for the detenu to make an effective representation, it would be declared to be vague.[3] The detaining authority should make its meaning clear beyond doubt, without leaving the person detained to his own resources to interpret; otherwise such grounds would be regarded as vague.[4]

The grounds should not be couched in such general terms, giving no particulars as to what crime or "prejudicial act" has been exactly committed by the detenu. Where the detention order stated that " the Government was satisfied that the applicant was believed to be notorious thief", it was held that the aforesaid information was of a general nature; it certainly communicated nothing about the matter from which the authority's order sprang.[5] In another case, where the grounds were that the applicant worked for and was trained by the Communist Party, that he was engaged in directing the activities of the

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1. Naresh Chandra V. State of Bengal A.I.R.1959 S.C.1335.
2. Sibte Hasan V. Crown Supra.
3. Ramkrishan V. State of Delhi A.I.R.1953 S.C.138
4. Ibid.
5. Sardaru V. Crown P.L.D.1953 Sind. 4.

Communist Party, under different assumed names and remained underground to escape notice and that his activities were prejudicial to the security of Pakistan, it was held that these grounds did not disclose what particular activities of the applicant endangered the security of Pakistan and, as such, the grounds were indefinite and vague.[1] Also where the grounds communicated to the detenu were that he was "an ace criminal, most desperate bad character and excise criminal of great notoriety and that his activities were prejudicial to the maintenance of public order", it was held that the grounds were wholly general and did not provide sufficient information, on the basis of which an effective representation could be made by the detenu and therefore the detention order was illegal.[2] The grounds that the petitioner had been fomenting agrarian trouble between landlords and tenants, and inciting tenants in a manner likely to endanger peace and tranquillity of the area, could not be said to have been stated in such detail as to enable the detenu to make an effective representation; the grounds were vague and detention on their basis was illegal.[3] The test can, however, be said to be that the detenu should have particulars "as full and adequate as the circumstances permit", so as to enable him to make an effective representation.[4]

The "prejudicial acts" as defined by S.17 of the East Pakistan Public Safety Ordinance, 1958, include a variety of activities and unless he is informed as to which of the prejudicial activities the detenu was involved in, it could not be said that there was sufficient compliance with the provision

1. Hasan Nasir V. Crown P.L.D.1953 Sind 37.
2. Mahd. Ahmad V. Crown. P.L.D.1955 Sind. 73.
3. Ghulam Mohd.Khan V. State P.L.D.1957 Lah. 497
4. State of Bombay V. Atma Ram. A.I.R.1951 S.C.158; and Ram Krishana V.State of Delhi A.I.R.1953 S.C.318.

of Right No. 2 (5) of the Constitution. In one case, the nature of the prejudicial activities, in which the detenu was alleged to be involved, was not particularised nor were the alleged illegal activities or the objectives of the alleged secret association, with which he was said to have associated himself, specified. It was not also specified what sort of alleged propaganda was being carried on by the detenu, by quoting the offending passage or giving their gist or substance. It was therefore, held that the grounds were vague.[1] In Mahbub Anam V. Government of East Pak., the facts of which were similar to those in the aforesaid case, it was observed that it is not possible to lay down any hard and fast rule as to what grounds should be contained in the order so that the detenu may be able to make a representation. But it can certainly be said that, in a particular case, if the groundsof detention are found to be too vague and indefinite to enable the detenu to make an effective representation, the detenu would be entitled to be released.[2]

If the information conveyed by the grounds is sufficient to enable a detenuto make an effective and adequate representation, the grounds cannot be said to be vague and indefinite. Where the grounds were that the detenu, "is member of a gang of decoits and an association of dangerous criminals", it was held that as it was clearly stated, by disclosing the connection of the detenu with the notorious gangs of dacoits and dangerous criminals, and that the activities of the detenu were such as to be prejudicial to the public safety and the maintenance of public order, it could not be said that the information communicated to the detenu was not sufficient or the grounds were vague.[3]

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1. Govt. of East Pak.V. Rowshan P.L.D.1966 S.C. 286.
2. P.L.D.1959 Dac. 774.
3. Muzaffar V. Crown, P.L.D.1950 Sind. 115.

In one order of detention it was disclosed that the Government was satisfied that the detenu was acting in a manner prejudicial to the security of Pakistan, as he was engaged in conspiring with other communist leaders and planning to overthrow the Government established by law; it was held that, in view of the grounds communicated to detenu, which were based on solid particular facts, it could not be said that the grounds were vague and indefinite.[1] Where it was stated that the central Government was satisfied that, with a view to preventing the detenu from acting in a manner prejudicial to the public safety and maintenance of public order, it was necessary to detain him, it was held that, on the principle of omnia praesumuntur rite esse acta and various decision of the Privy Council and the Federal Courts and numerous decisions of the High Courts, it had to be presumed that the grounds were sufficient, that the Government believed that the detenu had been engaged or was about to be engaged in activities which were prejudicial to the public safety and maintenance of public order and that it had become necessary, especially on account of his previous record and his present activities, to arrest and detain him, with a view to preventing him from engaging himself in those activities. It is to be noted that these activities were not disclosed in the grounds communicated to the detenu but were proved by the evidence produced by the Government.[2] In Fazle Karim V. Government of East Pakistan where the facts were more or less similar to the aforesaid case, it was held that as the grounds supplied to the detenu were sufficient to enable him to make a representation, the

1. Sardaru V. Crown. P.L.D. 1953 Sind 4.
2. Inayatullah Mashriqi V. Crown P.L.D.1952 Lah. 331

could not be open to any objection.[1] In a case where it was stated that the detenu had been receiving substantial amounts of money from the diplomatic mission of a country unfriendly to Pakistan, for organising objectionable and subversive activities in furtherence of that country's designs to disrupt the unity of the people of Pakistan and to cause serious cleavage between various sects of Muslins in Pakistan, it was held that the grounds were sufficient to make effective representation possible.[2]

The grounds should not be couched in such a general way as to appear to be a mere reproduction of the objects of the statute authorising detention. Where the grounds were that the two detenus were acting in a manner prejudicial to national security, public safety or the Defence of Pakistan, the maintenance of public order, Pakistan's relations with any other power, maintenance of essential supplies and services or the efficient prosecution of war", it was held that these grounds were simply a reproduction of the words of r 32(1) of the Defence of Pakistan Rules, 1965, and, as such, the detention orders on the face of it, verged on absurdity, as there was no indication, in the two detention orders and the afidavits filed in support thereof, as to how and in what manner the detenus were engaged in the activities alleged to be prejudicial.[3] In another case where it was stated that the Government was satisfied that, with a view to preventing him from acting in a manner prejudicial to the public safety, maintenance of public order and maintenance of peaceful conditions in the District" it was necessary to detain him, it was held that the grounds were

1. (1956) P.D.L.R. 700.
2. Moina. Khatoon V. Govt. of Pakistan P.L.D. 1957 Kar. 530
3. Husain Ali Chagla V.L.M. Lahore. P.L.D.1966 Lah. 309.

just the reproduction of the provisions of r.32 of the Defence of Pakistan Rules and that, in as much as no particular activity of the detenu amounting to breach of public safety or public order, or destruction of security of Pakistan was specified, the order was illegal.[1]

The grounds of detention should conform to the purposes envisaged by the statute authorising detention; in other words, they should be relevant to the provisions of such statute. The grounds should be such as a rational human being would consider connected in some manner with the objects, which the statute sought to achieve.[2] The Court should examine the grounds of detention, in order to ascertain whether they were relevant to the objects which the legislation had in view.[3] If a reason is given for the detention of a person, which is not within the scope and ambit of the Act conferring the power upon the Government to detain, then the whole order is vitiated.[4] The grounds supplied to the detenu must be connected with the order of detention under the particular statute. If it is found that they are not so connected, it cannot be said that the requirements of Art. 22(1) and (5) of the Indian Constitution - Right No. 2(1) and (5) of the Constitution of Pakistan, 1962 - have been complied with. Failure to establish a rational connection between them and the order of detention would render it invalid.[5]

In a case where the grounds were that the detenus party - Jamat-e-Islami - was attempting to create disaffection among the Armed Forces, by

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1. Begum Sardar M. Hayat Khan V. Govt. Of Pak. P.L.D.1969 Lah. 985.
2. State of Bombay V. Atma Ram. Supra.
3. Shamsher Singh V. State of Pepsu, A.I.R. 1954 S.C.276.
4. In re Rajdhar Kalu Patil, A.I.R. 1948 Bom. 334.
5. Har Dirath Singh V. The Crown, A.I.R.1950 (East) Punj. 222.

means of objectionable speeches by its leaders and that the detenu, in his monthly periodical, had published a vicious and unwarranted attack on Iran and its royal family, with the objects of undermining friendly relations between Pakistan and Iran, it was held that the grounds fell outside the purview of S.3 of the W.P. Maintenance of Public Order Ordinance, 1960, under which the order was passed and, as such, the detention order was illegal,. It was pointed out that, with respect to matters relating to "preventive detention for reasons connected with defence or external affairs of Pakistan", the Central Legislature had exclusive power to make laws.[1] A Provincial Statute, like that under which action was taken, cannot and does not have these matters as its objects. The objects of S.3 of the W.P. Maintenance of Public Order Ordinance,1960, are acts or activities which are "prejudicial" to the "public safety and maintenance of public order." The activities of the detenu mentioned in the grounds were prejudicial to the defence and external affairs of Pakistan, which cannot be said to be within the fourview of S.3 of the aforesaid Ordinance.[2]

In another case, where the petitioner was detained on the ground that he had made speeches in which he criticized the President, after citing certain instances of "his Hands being strengthened " and exhorted people by saying " we wish those hands should be broken" and also criticized the police force for indulging in tyranny, it was held that the grounds which were communicated to the detenu were beyond the purview of S.3 (1) of the W.P. Maintenance of Public Order Ordinance, 1960, as those speeched did not amount to incitement to create hatred and contempt for the Government established by law or to commit

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1. See Third Schedule to the Constitution of Pakistan, 1962.
2. Rahmat Elahi V. Gowt. of W.P. P.L.D. 1965 Lah. 112.

" prejudicial acts" as contemplated by the Statute. According to S.3 (1) of the W.P. Maintenance of Public Order Ordinance, 1960, the acts which would justify the detention are the acts which are "prejudicial to the public safety and maintenance of public order". Hence any activity which threatens the public safety and the maintenance of public order, attracts the operation of S.3(1) of the aforesaid Ordinance. On the examination of the speeches made by the petitioner, the Court came to the conclusion that there was no direct or casual connection between them and the maintenance of public order, neither had such speeches of the petitioner created a breach of public order in the past nor was there any threat to the maintenance of public order in future. It was further observed that, in order to get at the intention of the speaker, the central theme of the speeches, their objects and circumstances in which they were made, should be considered. As, in the present case, the petitioner was making speeches in connection with an election compaign and was anxious to win the electorate to his side, by criticizing the policies of those who were in power, he simply wished to introduce the mainfesto of the Opposition in his propaganda campaign. Such political activities should not be interfered with, unless they transgress the limits imposed by the various laws, purporting to establish the security of the State and the maintenance of law and order, as every citizen of Pakistan has the right to freedom of speech subject to reasonable restrictions under the Constitution. The test laid down for adjudging whether a particular speech was likely to incite the commission of "prejudicial acts", as contemplated by various laws, however, is that they should be proved to be likely to create a clear and present danger of a serious substantive evil.[1]

1. Farid Ahmad V. Govt. of W.Pak. P.L.D.1965 Lah. see also, Arthur Terminiello V. City of Chicago, 337 U.S.1; American Communication V.Douds, 340 U.S.260; Dirk De Jonge V. State of Orgegon, 229 U.S.353,356.

Nearly the same observation was made by the Supreme Court of Pakistan, In Province of East Pakistan V. Tofazzal Husain; the court said that, to determine whether a particular speech was itself an incitement to hatred and contempt for the Government established by law and whether the publication of that speech constituted a "prejudicial report" in the sense that it had the effect of inciting the commission of a "prejudicial acts", as contemplated by S.7 of the East Pakistan Public Safety Ordinance, it is important to consider the whole speech, to determine its scope, and to analyse the directions into which it was designed to guide the minds and actions of the audience. The law would, however, not begin to apply, unless the words used were in themselves of a character that would bring about, in the minds of the audience, a strong revulsion of feeling against the established Government, so that a state of active contempt for it would be created. As the Government failed to show that the speeches in question were calculated to produce any such effect, it must be declared that the grounds were irrelevant to the objects of the Statute.[1] If the grounds furnished to the detenu were the printing and distribution of posters, allegedly containing material "prejudicial to the public order" but on the examination of the Court, the contents of the posters were found to be a sort of Election Manifestos on behalf of the combined Opposition Parties against a candidate of the Ruling Party and not such as to be likely to incite the general public to commit acts of violence or cause a breach of law and order, the detention order would be void. It was held that the grounds were not relatable to the purposes of preventive detention under S.3 of the West

1. P.L.D.1965 S.C.520.

Pakistan Maintenance of Public Order Ordinance, 1960.[1]

The membership of a particular party cannot be a valid ground for detention, in as much as it cannot be said to be relevant to the purposes of any preventive detention law. Where the grounds simply stated that the detenu was associated with and was a member of the Communist Party of Pakistan but they did not disclose any particular activity on the party of the detenu nor did they reveal any particular objective or activity of the Communist Party it was held that the grounds were irrelevant to the objects of S.3 (1) (b) of the Security of Pakistan Act, 1952. It was, however, observed that a member of the Communist Party may be presumed to have a certain ideology, but merely holding certain views cannot possibly affect the security of Pakistan. It is well established that the Court can examine the grounds, to see if they are relevant to the object, which the legislation has in view and for which detention has been ordered, the safety of the State in particular, because satisfaction in this connection must be grounded on material, which is of rational operative value.[2]

The question whether membership of a particular party can be a relevant ground for the detention of a person has been considered in various Indian cases. In Nek Muhammad V. Province of Bihar, the question was whether membership of the R.S.S. or the Muslim League National Guard could be a relevant ground for detention. The high court observed that, in the absence of any indication of the nature of the activities and particulars thereof, the grounds that the detenu belonged to a particular party and participated in its

1. Abuzar V. Province of West Pakistan P.L.D.1960 Kar.260.
2. Hasan Nasir V. Crown P.L.D. 1953 Sind 37; see also Rahmat Elahi V. Govt. of West Pak P.L.D.1965 Lah 112.

activites, must be held to be no grounds at all under S.4 of the impugned Act[1] which is equivalent to S.6 of the Security of Pakistan Act, 1952 - . In R.L. Reddy V. Provincial Government the question before the court was whether membership of the Communist Party of India, which had not been declared unlawful, without anything else, could prima facie attract the provisions of the Act under which the detention order was made. The reply was returned in the negative and it was held that mere membership of the Communist Party, apart from any specific "prejudicial activity", could not prima facie attract the provisions of the Act and the detention would be illegal.[2] In Har Tirath Singh V. The Crown, the grounds, interalia, stated that the detenue had communist views. It was held that merely holding certain views or being a member of a particular party could not be a relevant ground for detention under the impugned statute, unless it was shown that the activities of the detenu fell under the purview of the Statute.[3]

The grounds should conform to the objects of the particular section of the statute under which the order is passed. If an order is made under a particular section and the grounds actually correspond to the purposes of another section, the grounds cannot be said to be relevant. Where an order of detention was passed by the Provincial Government under S.41 of East Pakistan Public Safety Ordinance, 1958, and it was found that the grounds were not relatable or relevant to the objects of S.41 but related to the purposes laid down by S.17 of the aforesaid Ordinance, it was held that it was not a proper

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1. A.I.R.1949 Pat. 1
2. A.I.R. 1949 Nag. 146; see also Kalamoni Mohanty V. State A.I.R.1951 Orissa 20
3. A.I.R. 1950 (East) Punj. 222; see also In re Rajdhar Kalu Patil A.I.R.1948 Bom 334.

order,as envisaged by S.41; it should have been made under S.17 of the Ordinance[1].

All the grounds should be relatable to the purposes of the Statute under which the order of detention is made; if one of the grounds supplied to the detenu falls outside the purview of the objects contemplated by the Statute, then the order must in its entirety, be declared illegal. Where one of the three grounds was that the detenu threatened the Head Master of a particular school for removing the manuscripts and objectionable posters, from the school premises, it was held that, as the foresaid ground, which in itself could not be a valid ground for detention, could not be dissociated and isolated from the other two grounds, in as much as there was nexus linking all three grounds, namely, the presidential election, and as that ground did not conform to the objects of S.17 of the East Pakistan Public Safety Ordinance,1958, under which the order was made, the defeat of that ground would render the detention order illegal in toto. It was further observed that the vision presented by the grounds was inconsistent with the objects of the Ordinance as the activities mentioned therein, for the most part were of a criminal nature and were much too limited to be likely to create public disorder[2]. Similary in Mahboob Anan v. Government of East Pakistan it was observed that, when a detaining authority gives general grounds for detaining a man, and out of these grounds, one or more, but not all, grounds are beyond the scope and ambit of the Statute authorising detention, the detention will be illegal, /unless such ground or grounds are of an

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1. Mukhtear Ali v. Province of East Pakistan,P.L.D.1965,Dac.277.
2. Abdul Qayyum v. Govt. of East Pakistan, P.L.D.1967, Dac.268.

insignificant and unessential nature[1]. Where the grounds, inter alia, were that the detenu and the member of his family had been smuggling articles into Pakistan from outside and had been flooding the local market with such articles, which had been banned by the Government, and, as such, their activities were prejudicial to the maintenance of essential supplies to the community, it was held that their detention was illegal, in as much as detention for their smuggling activities was not contemplated by the concerned statute, the Sind Maintenance of Public Safety Act, 1948. It was, however, observed that 'smuggling" includes both smuggling out and smuggling in and in so far as they were smuggling in, their activities could not be said to be, in any way, 'prejudicial to the maintenance of essential supplies in Pakistan, as contemplated by the Act, on the contrary it increased, though illegally, the supply of articles in Pakistan. Their activities might be anti-social or anti-national or whatever one chose to call it, but they certainly did not come within the purview of law, as envisaged by S.3 of the aforesaid Act[2].

The words 'reasonably suspects' in S.41 of the East Pakistan Public Safety Ordinance, 1958,r.204 of the Defence of Pakistan Rules,1965 and r.129 of the Defence of India Rules, which authorise a police officer, not less in rank than an inspector, to arrest a person whom he 'reasonably suspects" of

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1. P.L.D.1959 Dac.774; See also Keshav Talpade v. Emperor,A.I.R.1943,F.C.1; Rajdhar v. Patil,A.I.R.,1948,Bom.334; Fayaz Ali v. D.M.Kanpur,A.I.R.1949, All.158; M.R.S.Mani v. S.M.Mathural,A.I.R.1950,Mad.162; Harinath Singh v. Crown,A.I.R.1950.Punj.222; Sibban Lal v. State of U.P.,A.I.R.154 SC.179; See also Dwar Kadas Bhatia v. State of J.& K.A.I.R.1957,SC 164; and Mohammad Ali v. Crown,P.L.D.1950 FC.1
2. Abdullah v. Crown P.L.D.1955 sind 384; see also Misrilal and others, A.I.R.1951, Pat.134.

having done, or of doing, or being about to do acts prejudicial to the maintenance of public safety, do not mean that there must be grounds, beyond doubt, for such apprehension. Whether the suspicion of the police officer was reasonable is a justifiable question. The arresting officer, therefore, had to prove that he entertained the suspicion against the detenu on reasonable grounds.

The words "other particulars" in the expression "the communication to the detenu of the grounds on which the order is made as well as other particulars," in S.4 of the Sind Maintenance of Public Safety Act, 1952, signifies, it was observed, that particulars of the grounds of detention should be communicated to the detenu. It was further observed that, in enjoining the communication of particulars to the detenu, the legislature has sought to ensure that the right and opportunity of the detenu to make representation against the detention order is a substantial and real one, and that it is not impaired and rendered ineffectual by the generality of the terms in which the communication is couched. The term "particulars" connotes facts on which the grounds are based.[1] The facts which are necessary to make theeffective representation possible and which it is not against the public interest to disclose, should be stated, because all facts except those, which are against public interest,should be disclosed.[2]

The meaning of the word "grounds" was considered by the Allahbad High Court. It was observed that "grounds" do not merely mean the conclusions or abstract reasons for the action taken. Besides the conclusions arrived at,

1. Govt of East Pak. V. Rowshan Supra.
2. Sardaru V. Crown Supra; Mohd. Anwar V. Govt of West Pak. Supra.

they comprehend the basis and reasons for those conclusions and so include the facts on which those conclusions or reasons are based.[1] A similar view was taken by the Calcutta High Court.[2] The above observations find support from two decisions of the Supreme Court of India. It was observed that a detenu should have particulars "as full and adequate as the circumstances permit", so as to enable him to make an effective representation against the order of detention.[3] The Sind High Court observed that the word "ground" has as one of its meaning" a premise, reason or collection of data, upon which anything is made to rely for cogency or validity, as facts are the grounds of scientific theory or belief.[4] The detaining authority, while furnishing grounds for detention, is required to state the facts, on account of which he is satisfied that the detention is necessary in the interest of the security of the State, or the maintenance of public order, or any matter connected with the objects of detention law. The only privilege a detaining authority can claim against disclosure of facts, is on grounds of public interest. If no facts at all leading to the detention of a person are mentioned in the grounds which are furnished to him, then obviously the intention underlying the enactment of Art.22 of the Constitution of India - Right No.2 of the Constitution of Pakistan - will be frustrated.[5]

The detenu has a right to ask for "additional grounds", if he thinks that the grounds furnished to him, are insufficient to enable him to make an effective representation. The detaining authority can also furnish

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1. Inder Prakash V. Emperor, A.I.R. 1949 All. 41,
2. Safatullah Khan V. Chief Secretary, A.I.R.1951 Cal.194.
3. State of Bom. V. Atma Ram, Supra; and Ram Krishna V. State of Delhi A.I.R. 1953 Sc.318
4. Mohd. Ahmad V. Crown. P.L.D.1955 Sind. 73.
5. In re Pandurang Kashinath More A.I.R.1951 Bom. 30.

"supplementary grounds", if it is found that the grounds formerly communicated to the detenu, will not be adequate and sufficient to enable him to make the representation. Furnishing "supplementary grounds" does not mean that the detaining authority can derive new conclusions from the earlier facts, because it is incumbent on the detaining authority to furnish all the necessary information or relevant grounds to the detenu in the first instance which led to its satisfaction, subject to the reservation of such facts whose disclosure is against public interest. The expression "supplementary grounds" connotes that there should not be new conclusions from facts but "additional facts" in support of old conclusions, which were not available or were not given in the first instance,. It will be against the spirit of Art. 22 of the Indian Constitution - Right No. 2 of the Constitution of Pakistan - if new conclusions from facts are allowed to be added to justify the detention at a later stage.[1] Where the detenu was previously detained by the order of a District Magistrate but the period of detention was extended by the order of State Government, it was held that he was entitled to claim that fresh grounds of detention should be furnished to him.[2]

The detenu should be enabled not only to make an effective representation but he should have the earliest opportunity to make the representation. It is required by the Constitution that grounds of detention should be furnished to the detenu "as soon as may be". The expression " as soon as may be" must be considered with reference to the circumstances of a particular case. The question whether the grounds had been furnished to the detenu "as soon as may be" is question of fact, which depends upon the

1. State of Bombay V. Atma Ram. Supra.
2. Fazal Ahmad Gha zi V. State P.L.D. 1957 Kar. 191.
see also Murat Patwa V. Crown A.I.R.1948 Pat. 135.

particular circumstances of each case. It was observed that the expression connotes that the detaining authority should, as early as possible, enable the detenu, by furnishing the grounds of detention, to make an early representation to the authority concerned. Where the question before the Court was whether the delay of two months in communicating the grounds of detention, was such as to lead to an inference that it was in keeping with the spirit of words "as soon as may be" as provided by S.3 (5-A) (i) of the Baluchistan Public Safety Regulation, 1947 or clauses (1) and (5) of Art.7 of the Constitution of Pakistan, 1956, it was observed that it was difficult to read the words "as soon as may be" to mean an indefinite period; as contended on behalf of the Government; the delay was held violative of spirit of the Constitution.[1]

Where the grounds of detention were not communicated, until the notice by the Court was served on the respondent, after the detenu had approached the Court for habeas corpus, it was held that the delay contravened the Constitutional as well as the Statutory provisions, which require that the grounds of detention should be communicated to the detenu "as soon as may be".[2]

The grounds of detention should be communicated to the detenu normally within twenty-four hours. The words "as soon as may be" have nearly the same meaning in cl.(5) as in cl. (1) of Art. 7 of the Constitution of 1956. The grounds on which the detaining authority makes the order of detention should be known to it on the day when the order is made and should be served on the detenu, along with the detention order, unless some extra - ordinary circumstances render it impossible. Where the grounds were communicated

1. Ghulamullah Khan. V.D.M. P.L.D.1967 Pesh. 195.
2. Ibid

sixteen days after the detention, without any reasonable excuse, it was held that the order of detention was illegal.[1] The case is, however, distinguishable from the decision of the Indian Supreme Court in Tarapada De V. State of West Bengal, in which a delay of sixteen days was held not to be violative of the constitutional requirement,"under the circumstances of the case". The delay in that case resulted from the fact that the Provincial Government had to deal with a large number of detention cases, a hundred or more, in one day.[2] But the delay in the aforesaid case resulted from an ordinary negligence on the part of detaining authority. It was, therefore, held that it could not be allowed to evade a constitutional guarantee.[3] The Security of Pakistan Act, 1952, requires that the grounds for a fresh order of detention should be communicated to the detenu within fifteen days of receipt of the decision of the Advisory Board, by the detaining authority. Where the communication was not made within fifteen days, it was held that the fresh order of detention was illegal. It was, however, observed that to know the grounds of detention on the day of detention, or within twenty-four hours; or, as required by the aforesaid Act, within fifteen days of the detention, is the right of the detenu. It is the protection guaranteed to the detenu against the restraint on his personal liberty. A contravention of such constitutional requirement for the protection of personal liberty, is a denial of one of a few and extremely valuable rights of the detenu.[4] The time taken in furnishing the grounds for detention must be a reasonable time, reasonable in the circumstances of each case. It is impossible to lay down a definite and unchallengeable yardstick, by which the

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1. Muzaffaruddin V. Crown P.L.D.1950 Kar. 68
2. A.I.R.1951 S.C.174
3. Muzaffarnddin V. Crown Supra.
4. Abdul Samad V. State P.L.D.1963 Kar.853.

court must judge as to whether the time taken in a particular case was reasonable or not.[1] The words "as soon as may be" must be interpreted as meaning "with reasonable promptitude in the circumstances of the case;[2] or "as soon as is reasonable" in the circumstances of each case.[3]

Non-Disclosure of Facts in the Public Interest

The proviso to cl.(5) of Right No. 2. empowers the authority making the order of preventive detention to refuse to disclose facts which such authority considers it to be against public interest to disclose. This seems hard to reconcile with the rule that a full disclosure of the grounds for detention is imperative.[4] However the distinction between the terms "grounds" and"facts" renders the proposition less difficult,. It was pointed out that "grounds" are the conclusions drawn from the detenu's activities and intentions, as ascertain from the information to the detaining authority, whereas "facts" are particulars in the information supporting the grounds; all the grounds must be disclosed but facts the disclosure of which the detaining authority considers to be against public interest, may be withheld by it.[5] In another case it was observed that "grounds" are the conclusions and "facts" are the evidence on which the conclusions are based.[6]

All grounds should be communicated to the detenu but it is not required by law that "all the material facts in possession of Government should

1. In re Pandurang Kashinath More A.I.R.1951 Bom.30.
2. In re Maganlal A.I.R.1951 Bom. 33.
3. State of Bombay V. Atma Ram. Supra.
4. See Cl.(5) of Right No.2. Constitution of Pak; 1962.
5. Bombay V. Atma Ram, A.I.R.1951 S.C.157.
6. Safatullah Khan V. Ch. Sec. A.I.R.1951 Cal.194 see also Fazle Karim V.Govt of E.Pak (1956) D.L.R. 700; and Govt of E.P.V.Rawshan,Supra.

be embodied in the grounds to be served"[1]; not all facts, but only those whose disclosure are against the public interest may be withheld.[2]

To justify refusal to disclose the evidence or facts in its possession, a detaining authority has to claim an absolute privilege against its production under the aforesaid proviso to Right No 2 (5). As regards the privilege so claimed, two questions are involved; firstly, whether the evidence, in respect of which privilege is claimed, is one relating to the affairs of the State; and secondly, whether the disclosure would be against the public interest. The question whether evidence withheld is concerned with "affairs of the State" is a matter for the Court to rule on, though there is always presumption under S.114 of the Evidence Act, in favour of the legality of the order passed by the detaining authority being regulary informed in exercise of the power delegated to him by the Central or Provincial Government; however, this presumption is optional and even its probative force depends upon the circumstances of each case.[3]

The test was laid down in L.C.Duncan V.Cammel[4] Laid & Co. As regards the privileged thus claimed, it was pointed out that,

> "The principle to be applied in every case is that the document otherwise relevant and liable to production must not be produced if the public interest requires that it should be withheld. This test maybe found satisfactory either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which on the ground of the public interst, must as a class be withheld from production".[4]

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1. ibid, Fazle Karim's Case Supra.
2. Govt of E.P.V. Rowshan, Supra.
3. Hussain Ali Chagla V.D.M. Supra.
4. (1942) A.C.624.

While it is entirely for the authority to claim privilege and the Court is bound to allow that claim, it does not follow from this that the Court is not entitled, according to the circumstances of each particular case, to draw an inference adverse to the party claiming privilege[1]. If the authority fails to produce evidence in, his possession, adverse inference can be drawn[2].

It was held by the Indian Supreme Court that the discretion to withhold the evidence is with the authority[3]. It can only be challenged on grounds of mala fides.

The Federal Court of Pakistan pointed out that the presumption, under the aforesaid S.114, applies to all cases and cases of preventive detention cannot be excluded from the operation of the presumption. It is, of course, open to the detenu to point to any material on the record to show that, even if the presumption has to be made, it has been sufficiently rebutted. If he can point to any suspicious circumstances, it would be open to Court in a particular case to hold that the presumption should not be made and the Crown should be called upon to prove that the officer ordering detention had sufficient reasons to pass the order[4].

It was observed in Governor-General-in-Council V. Pir Mohd. Khuda Baksh that the Court can hold an enquiry into the validity of the objection that the document does not relate to the affairs of the State. It is, nevertheless, true that, once the Court comes to the conclusion that the document

1. Mohan Singh V. Emperor, A.I.R.1940 Lah. 217,
2. Azad J.&K.V.Omar Shad P.L.D.1964 Azad J.& K.1.
3. Sharma Rao Vishnu Parulker V.D.M. Thana (1956) S.C.R.644.
4. Mohd. Hayat V. Crown. P.L.D.1951 F.C.15.

relates to the affairs of the State, the decision of the authority to give or withhold permission to its production must be accepted as final.[1]

It is imperative that the authority claiming privilege, in respect of any document or evidence, should have gone through it and satisfied himself as to the contents of such document; otherwise it cannot be said that he has applied his mind to each part of the document. Thus, in a case where privilege was claimed by the Additional Chief Secretary, Government of West Pakistan with regard to entire office file and it was evident that only a few documents out of the file were put before him, and on them only he had formed the opinion that it was a fit case in which the detention order ought to be passed against the detenu, it was observed that "it is to be deplored that, without knowing the contents of remaining documents on the file and without even applying his mind to them , the Additional Chief Secretary should have ventured to claim privilege in respect of the whole file. In order to claim privilege the authority should have gone through the whole file pertaining to the matter. It is not proper for him to consider the particular documents put before him and claim privilege for the whole record or file ". The privilege was, therefore, not allowed.[2]

Until Ghulam Jilani's[3] case was decided, Pakistan Courts, like Indian Courts, following the English tradition,leaned in favour of the presumption of validity of the privilege claimed by the detaining authority against the

1. A.I.R.1950 Punj. 228. see also Robinson V. South Australia,A.I.R.1931 A.C.254 and Crown V. Abdul Ghani, P.L.D.1955 Lah.39.
2. Begum Sardar S.M.Hayat V. Govt. of W.P.,P.L.D.1969 Lah.985 see also Chandra Dhar Tewari V. Dy.Commr. Luck Now, A.I.R.1939 oudh 65.
3. Supra.

disclosure of certain facts or evidence in the public interest. The ruling of the High Court in Ghulam Ali V. Abdul Aziz[1] and Nasim Fatina V. Government of W.Pak,[2] which was based on English Judgements[3] that, if an objection is taken in the proper form, by a detaining authority under the proviso to clause (5) of Right No.2 against the production of evidence on the ground that it relates to affairs of the State, it is conslusive, and the onus lies on the detenu to rebut it; then the Court is left with no say in the matter. This was reversed by the Supreme Court of Pakistan in Ghulam Jilani's case; the plea of privilege taken by the West Pakistan Government was disallowed. It was pointed out that the Central Government's instructions to the authority reviewing cases of detention under r.32 of the Defence of Pakistan Rules, 1965, against which the privilege was claimed, had already been shown to detenus and exhibited in the case before the High Court; it could not constitute "affairs of the State"; on the contrary as a result of these circumstances, the instructions had become an "affair of Justice," and as such the privilege was disallowed.

The question was thoroughly considered and answered in Abdul Baqi Baluch's case, in which the privilege was claimed against the disclosure of certain facts, by the West Pakistan Government. It was observed that, by the decision in Ghulam Jilam's case, it has been established, that the detaining authority must place before a Court the material upon which it so claims to have been satisfied, so that the Court can, in the discharge of its duty under Art. 98 (2) (b) (i), be in turn satisfied that the detenu is not being held without

1. P.L.D.1962 Lah. 765.
2. Supra.
3. See Duncan V. Cammell, Supra.

lawful authority or in an unlawful manner, and the wording of clause (b) (i) of Art.98 (2) shows that, not only the jurisdiction but also the manner of the exercise of that jurisdiction is subject to judicial review; if this function is to be discharged in a judicial manner, then it is necessary that the Court should have before it the materials upon which authority might have purported to act. If any such material is of a nature that privilege can be claimed, then it would be for the Court to decide whether the evidence concerned is really so privileged. The privilege, therefore, was disallowed. On the examination of the evidence concerned by the Supreme Court, the onus being on the detaining authority to prove that it was so privileged, it was found that it was not so privileged as it did not relate to "affairs of State".[1]

Depending upon the circumstances of each case, the Court can under S.114 (e) of the Evidence Act, make a presumption as to the validity of the privilege claimed by the detaining authority under proviso to Cl.(5) of R.No2, from the terms of the order itself when the order, on the face of it, is regular and unobjectionable in any way. In this connection it was observed in Emperor V. Sibnath Banerji, that:

> "It is quite different thing to question the accuracy of recital contained in a duly authenticated order, particularly where the recital purports to state as a fact the carrying out of a condition necessary to the valid making of that order. In the normal course the existence of such a recital in a duly autheticated order, will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a different burden on the detenu to produce admissible evidence sufficient to establish even in a prima facie case that the recital is not accurate."[2]

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1. Abdul Baqi Baluch V. Govt. of W.P. Supra.
2. A.I.R.1943 F.C.75 . . . see also Mohd Hayat V. Crown P.L.D. 1951 F.C.15; Sharma Rao Vishnu V.D.M. Thana Supra.

The Supreme Court of Pakistan, in support of its arguments in Ghulam Jilam's[1] case, reproduced the following remarks from the judgement of the Privy Council in Vimlabai Deshpande's case[2];

> "In their Lordships' opinion, therefore, the High Court was right in holding that the burden lay on the police officer to satisfy the court that his suspicions were reasonable and it is plain that on the evidence he had not discharged that burden".

and commenting on this the Supreme Court has observed that the Judicial Committee felt no hesitation in holding that there was an onus on the police officer to satisfy the Court that he had reasonable grounds for his suspicion. But from these observations of the Supreme Court it cannot be inferred that the view of the law in Sibnath Banerji's[3] case in respect of the aforesaid privilege has been overruled.

The court may not allow the privlege claimed by the detaining authority and enquire into the document or evidence concerned, only when the mala fides of the detaining authority has been pleaded by the detenu and supported by evidence. As to the scope of enquiry, it was observed in Abdul Baqi Baluch's case that it is not to be turned into a roving enquiry, permitting the detenu to hunt for some ground to support his case of Mala fides nor should an enquiry be launched merely on the basis of vague and indefinite allegations. Mala fides must be pleaded with particularity and once one kind of mala fides is alleged, the detenu should not be allowed to adduce proof of any other kind of mala fides.[4]

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1. Supra.
2. A.I.R.1946 P.C.12.
3. Supra.
4. Supra.

It was pointed by the Supreme Court in Govt. of W. Pak. V.Begum A.A.K.S.Kashmiri that it must be remembered that initially the onus is on the detaining authority to justify the detention by establishing the legality of his action,[1] for under principles of English Law, which have been adopted in the legal system of Pakistan, also, the presumption is that every imprisonment without trial and conviction is prima facie unlawful,[2] and it is only then that onus shifts on the detenu to show mala fides. Again having regard to the fact that, in such cases, materials upon which the relief is based, will be mainly in the special knowledge of the detaining authority and not to the detenu; S.106 of the Evidence Act itself would require the detaining authority to discharge this burden. The contention that the detaining authority may avoid doing so by claiming privilege under proviso to cl.(5) of R.No.2 - S.123 of the Evidence Act -, omits to take into account that even where such a claim is preferred, S.162 of the Evidence Act gives the Court abundant power to inspect the document or the evidence in order to determine the validity of the claim of privilege. The privilege is indeed a narrow one, as pointed out by Lord Blanesburgh in the case of Henry Green Robinson V. State of South Australia[3] and it is lawful for the Court to inspect the document or evidence for the purpose of deciding that the privilege is not being claimed inadvisedlyor lightly or as a matter of routine.[4]

It is submitted that, according to the doctrine of "objective satisfaction" the inititial onus lies on the detaining authority to show that he was in fact

1. Ghulam Jilam's case supra.
2. See Liversidge V. Anderson, Supra, Per Lord Atkin.
3. A.I.R.1931 P.C.254.
4. Supra.

satisfied about the necessity of the detention of the detenu before the order was passed; it indeed is a condition precedent before the detaining authority can claim privilege under proviso to cl.(5) of R.No.2. But depending on the circumstances of the particular case, the presumption will have to be in favour of the validity of the privilege claimed by the detaining authority, and the onus will be shifted on the detenu to show mala fides on evidence, if duly authenticated and a regular order of detention is produced.[1]

1. Begum S.S.M. Hayat V. Govt of W.P. Supra.

CHAPTER 8.

FREEDOM OF MOVEMENT AND PERSONAL LIBERTY:

Right No.5 of the 1962 Constitution - Art 11 of the 1956 Constitution - guarantees to every citizen of Pakistan, subject to the reasonable restrictions imposed by law in the public interest, the right to move freely throughout Pakistan and to reside and settle in any part thereof. The purpose behind this safeguard is to remove territorial barriers within the country. It is designed to be a check against provincialism, regional discrimination and all parochial considerations. To a citizen of Pakistan the whole of his country, the East and West, is his cherished home, freely and equally, accessible to him[1]. Like Art. 19 (1)(d) and (e) of the Indian Constitution right No.5 emphasizes that the whole of Pakistan is one unit, so far as the citizens of Pakistan are concerned, they can freely move from and settle in any palce in an part of Pakistan. The right can be restricted only in accordance with a law which imposes reasonable restrictions in the public interest; it makes available to the citizens of Pakistan the right to be treated in accordance with law, guaranteed by Art. 2 of the 1962 Constitution. The right affords protection against unreasonable restriction on the freedom of movement and residence and protection against unreasonable internment, externment or banishment.

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1. See Abul Ala Maudoodi v. State Bank of Pakistan, P.L.D.1969, Lah.908.

The right, though it affords protection against unreasonable curtailment or infringement of the liberty of movement of a citizen of Pakistan, does not contemplate the protection against deprivation of personal liberty guaranteed to every person, whether a citizen of Pakistan or alien under right No.1. Professor Gledhill has, therefore, observed that the right is independent of and in addition to the right to personal liberty; it is a protection against parochialism and provincialism[1]. It does not also include the freedom of universal locomotion.

Mohd. Akram J. in Abul Ala Maudoodi v. State Bank of Pakistan[2], wrongly it is submitted, observed that freedom of locomotion is part of the personal liberty of the people; Fundamental Right No. 5 affords protection to freedom of movement, but Right No.1 is more extensive in application to all persons and is in the nature of a safeguard for the personal liberty, jus personarum in the people. In Pakistan, the personal liberty of a person is guaranteed to him under Right No.1 and, as a necessary corollary following from it, he also enjoys the undeniable right, vested in him, to go abroad for travel and to return to his country, subject, of course, to reasonable restrictions imposed by law. For coming to the conclusion he relied on the decision in Kent v. Dulles[3], in which it was held that the right to travel aboud is a part of the 'liberty', of which a citizen cannot be deprived without the 'due process of law', in accordance with the Vth Amendment. A citizen's right of exit can be regulated only pursuant to the law...'

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1. See Prof. A. Gledhill, India, p.189; see also Gopalan v. State of Mad. Supra.
2. Supra.
3. Supra.

Similarly in Asserwathan v. Permanent Secretary[1], the Supreme Court of Ceylon held that there should be no unreasonable restrictions placed on a person's freedom of movement and clearance to go abroad. He further relied on the judgement in Satwant Singh Sawhney v. A.P.O.New Delhi[2]. In this case, Subbaroa, C.J. expressing the majority view, held that a person in India enjoys the fundamental right to travel abroad. In this connection the Court observed that "the want of a passport prevented a person from leaving India, and the Government, by withholding such passport, deprived him of his right to travel abroad. This right was one which every person in India, whether a citizen or not, enjoyed. No person should be deprived of this right to travel, except according to the procedure established by law. There existed no law made by the State regulating or depriving persons of the right to travel, the petitioner should not be deprived of his right to go abroad. It is submitted that the majority view expressed by the Indian Supreme Court is not tenable.

It seems that Mohd. Akram J. when citing the aforesaid authorities, failed to take the notice of the minority judgement in Satwant Singh Sawhney's case delivered by Hitayatullah J., as he then was, which appears to be comprehensive and correct. He observed that a person is ordinarily entitled to a passport unless, for reasons which can be established to the satisfaction of the Court, the passport can be validly refused to him. Since an aggrieved party can always ask for mandamns, if he is treated unfairly, it is not

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1. Reported on p.319, Journal of International Commission of Jurists, Vol.No.2, Winter,1965 part.
2. A.I.R. 1967,SC.1836; see also International Commission of Jurists, Vol. VIII, December 1967, Part,No.2.

permissible by straining the Constitution, to create an absolute and fundamental right to a passport, where none exists in the Constitution. There is no doubt a fundamental right to equality in the matter of granting a passport - subject to reasonable classification - but there is no fundamental right to travel abroad or to the grant of a passport. A passport is a political document. The enactment of a law relating to passports will not make things better. Even if such a law were to be made, the position would hardly change, because the discretion would have to be allowed to the issueing authority to decide upon the worth of an applicant. Where the passport authority is proved to be wrong, a mandamous will always set right the matter."[1]

It is further submitted that the minority view of Hitayatullah, J., is supported by the majority decision of the Indian Supreme Court in an earlier case, Kharak Singh v. State of U.P.[2]; whereas the majority view expressed by Subbarao, C.J., has advanced the minority judgement in Kharak Singh's case. The above view of Hitayatullah J., also finds support in the Madras High Court's decision in V.C. Row v. State of Madras[3] in which it was observed that the issue of a passport is the part of functioning of the Department of Foreign Affairs, not open to judicial review by Courts. It was further pointed out that 'a passport is a document enabling a citizen of a country to enter another country.

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1. Ibid, per Hitayatullah J.
2. A.I.R. 163, SC. 1295.
3. A.I.R. 1954 Mad. 240.

Nor is it a document under which a citizen of a country is permitted to leave the country. By its terms it requires in the name of Sovereign, all those whom it may concern, to allow the bearer to pass freely, without let or hindrance and to afford him every assistance and protection, of which he may stand in need. In granting a passport the Government does not purport to exercise any power at all, but, by reason of its status as a sovereign State, it purports to request another Foreign State to give certain facilities to one of its citizens. Such rights are recognised in a Sovereign State under all established rules of International law, and, therefore, the exercise of those rights cannot be impugned on the ground that a power, not found in the Constitution, has been exercised by the executive. No person has a legal right to obtain a passport to any particular country."[1]

The view expressed by Mohd.Gul J., differing from the opinion of Mohd.Akram J., in Abul Ala Maudoodi v. State Bank of Pakistan,[2] appears to be correct, and is in line with the observation of Hitayatullah J., in the aforesaid case. He pointed out that Right No.5, which guarantees the freedom of movement, cannot be regarded as forming part of the general right to personal liberty guaranteed under Right No.1. He further observed that Right No.1 comes under the caption 'security of person', which stands in sharp contrast to the caption of Right No.5, which guarantees 'freedom of movement'. The word 'security' in the caption is plainly used in the sense of protection, so as to guarantee freedom from physical restraint. The word 'deprived' in the operative part of the provision, which qualifies both 'life' and 'liberty' is equally

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1. See also Manzoor Khan v. Govt.of Pakistan,P.L.D.1966,Pesh.29, and Abdul Ala Mandoodi v. State Bank of Pakistan, supra.
2. Supra.

significant. Acoording to Blackstone's Commentaries 'deprivation' means total loss and, therefore, has not the same meaning as a restriction on free movement. What is sought to be protected by Right No.1 is loss of life and personal liberty, that is to say, freedom from physical restraint of the person and from incarceration as distinguished from restriction or partial control of the right to move freely. It is true that 'liberty' is a very comprehensive term and in its widest sense, as held in Kent v. Dulles, might include 'freedom of locomotion' in any part of the world. But 'liberty' in Right No.1 cannot be defined independently of 'life'. We have to interpret the word with reference to the context in which it is found - according to the rules of the interpretation of Statutes. If the word 'liberty' in Right No.1 is understood to comprehend, freedom of 'universal locomotion' in any part of the world, Right No.5, which guarantees freedom of movement to every citizen throughout Pakistan, would be a redundancy. In effect it would be a repetition of what has already been ordained in Right No.1, which is available to every person, citizen and alien alike. No such anomaly would arise if the word 'liberty' is understood in the sense of 'personal liberty' of the individual, that is to say, freedom from restraint or incarceration. This would be in accord with the principle of interpretation that a statute must be read as a whole, with a view to determining the intention of each part, and the conctruction must be uniform and harmonious[1].

But this does not mean that a citizen of Pakistan has no right at all to leave his country. He can leave Pakistan, subject to any reasonable law, such as one providing for the grant of a passport or for foreign exchange,

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1. Adbul Ala Maudoodi v. State Bank of Pakistan, Supra; per Mohd.Gul,J.

regulating his exit from Pakistan to travel abroad and re-enter Pakistan. A person, who has a valid passport and the requisite permission with regard to foreign exchange from the State Bank of Pakistan, can leave Pakistan to travel abroad.

In the instant case, the petitioner had a valid passport and also a return ticket from an organisation is Saudi Arabia, but the requisite grant of foreign exchange was refused by the State Bank of Pakistan. The only allegation against the petitioner was that, on secret information received, the Government had reason to believe that the petitioner, if allowed to go abroad, was likely to receive funds and import the same into Pakistan, without allowing the funds to be dealt with under the Foreign Exchange Regulation Act, 1947. At best, according to the allegations, there had been some preparation but no direct movement or overt act or attempt on the part of the petitioner to evade the aforesaid Act. He did not appear to have committed any actionable wrong. The Act, as it stands, does not take cognizance of the mere apprehension or even the belief in the mind of the authority that the petitioner is likely to commit an evasion of the Act, if allowed to go abroad[1]. Therefore, it was pointed out that the petitioner could not be held guilty of any evasion, cognizable under S.8.(1) read with S.23 or any other provision of the Act.

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1. See Ss 1 to 27 of the Foreign Exchange Act, 1947, as well as S.19 of the Sea Customs Act which has been adopted in S.23 of the former Act. Under S.8(1), no person, shall except with the permission of the State Bank, bring or send into Pakistan, any gold or silver or any currency notes or Bank notes, whether Pakistani or Foreign. S.23 lays down the Penal provisions and says that whosoever contravenes....the Act, shall be liable to be tried by a Tribunal... and shall be punishable with imprisonment or fine or both. Under these provisions the respondents were empowered to act in anticipation and to refuse to issue the permission to go abroad on the ground that he was likely to commit an evasion of the Act in the foreign country.

He was allowed to go abroad. As to the contention that due to the Proclamation of Emergency by the President in 1965, Right No. 5 stood suspended, the writ jurisdiction of the High Court could not be invoked to enforce the right; it was observed that no doubt Right No.5 remained suspended but not Right No. 1 which was available to the petitioner. It was, therefore, held that writ of habeas corpus would issue to enforce Right No 1 under At.98 to protect the right to move freely.[1] It is submitted that this is straining Right No. 1 to protect the freedom of movement guaranteed under Right No 5, in the sense discussed above. It seems that the period of emergency had become unnecessarily long and the High Courts remained unable to protect the people against the violation of those basic fundamental rights, which remained suspended, though conditions had long been normal. Hence, without ruling on the invalidity of the continuance of the State of emergency, the Courts went out of their way to prevent the violation of those rights. The proper attitude would have been to hold that, as the petitioner had not been treated in accordance with law, as envisaged by Art. 2, he had been illegally prevented from going abroad, and mandamous would have been issued to grant him suffieient foreign exchange.

Personal liberty, guaranteed by Right No 1 and protected by Right No. 2, is distinguishable from the freedom of movement guaranteed by Right No 5; these two freedoms are entirely different concepts. Both punitive and preventive detentions are thus outside the purview of Right No 5.[2] But externment banishment and restriction to a particular area, which do not come within the scope of preventive detention, are within the purview of the right guaranteed by Right No. 5.

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1. Abul Ala Maudoodi V. State Bank of Pak. Supra.
2. N.B. Khare V. State of Delhi, A.I.R. 1950 S.C.211.

It has been pointed out that, as not all cases of detention fall within the purview of the clauses (1) and (2) or (3) to (5) of Art.7 of the 1956 Constitution - Right No. 2 of 1962 Constitution - unreasonable restrictions on the freedom of movement or externment or restriction to a particular area would be protected by Art. 11 of the 1956 Constitution - Right No. 5 of the 1962 Constitution.[1] The order of restriction within a particular area under S.5 of the Prinjab Public Safety Act, 1949[2], or under S.6 of the Prinjab Control of Goondas Act, 1951,[3] falls more appropriately within the purview of Ar.11 than within the scope of preventive detention dealt with in Art. 7 of the 1956 Constitution. The restriction put on the freedom of movement under these sections are no doubt akin to those falling within the scope of preventive detention, but they do not certainly come within the purview of preventive detention; Art.11 would apply and not Art. 7 of the 1956 Constitution[4].

As to the question whether a person, deprived of his right of free movement or freedom of residence, can be regarded as being "detained", Wharton's Law Lexican[5] affords an answer in the affirmative. It was held in Mohd.Aslam V. Crown,[6] Mohd. Umar V. Crown[7] and Ghulam Haider Shah V. Sarkar,[8] that restriction to a particular area does not result in "detention" of the externee; the meaning of "detention" was laid down to mean "locked up". But the Lahore High

1. Jumma Khan V.Pak. P.L.D. 1957 Kar.339;
2. Rao Mahroz Akhtar V. D.M. Dera Ghazi, P.L.D. 1957 Lah. 676.
3. Bazal Ahmad Ayyubi's case, Supra.
4. Jumma Khan's case, Supra; Rao Mahroz Akhtar's case Supra; Bazal Ahmad Ayyubi's case Supra;Abdul Quddus V. Ch. Commr. Kar, P.L.D.1956 Kar.533; Lina Ahmad v D.M.,P.L.D. 1958 Kar. 92; see also N. B. Khare V. St. of Delhi, A.I.R. 1950 S.C.211; Gurn Bachan Singh V. St. of Bomby, A.I.R.1952 S.C.211, Gopalan V. St. of Madras, Supra;Ganga Ram V. Fim Ram Charan, A.I.R. 1952 S.C.9; Jesingh Bhai V. Emp. A.I.R.1950 Bom.363(F.B.); Ismail V.St.of Orissa, A.I.R. 1951 Orissa 86; Ibrahim Vazir V.St.of Bom. A.I.R.1954 S.C.229.
5. 14th ed. 1938 as reproduced in Chitaley's Cr.P.C., Vol III, 4th ed. p.2750
6. P.L.D. 1954 Lah. 720
7. P.L.D. 1955 Lah; 180.
8. P.L.D. 1959 Azad J & K. 15.

Court, in Mohd. Anwar V. Govt. of W.P, overruling the principle laid down in the aforesaid cases, held that restriction to a particular area amounts to "detention"; illegal externment or restriction to a specified area was held to be"unlawful detention".[1] In coming to this conclusion, the High Court relied on an earlier decision in Rao Mahroz Aktar's[2] case. In that case the Division Bench of the Lahore High Court pointed out that the judgement given by the single judge in Mohd. Umar's[3] case did not lay down the law correctly. It was further pointed out that the decisions in Mohd. Aslam's[4] case and Mohd Umar's[5] case were made at a time when the Constitution of Pakistan, which for the first time guaranteed the fundamental rights, had not come into force.[6] It is submitted that the Lahore High Court was wrong in holding that an illegal externment or restriction to a particular area amounted to unlawful "detention". The proper attitude should have been that illegal restriction to a particular area, as laid down by the earlier decisions, cannot be held to mean unlawful "detention" so as to invoke the provisions of Right No. 2 ,but it does certainly mean "wrongful deprivation of freedom of movement" as guaranteed by Right No.5 of the 1962 Constitution; Habeas Corpus could have still issued to protect the wrongful deprivation of the freedom of movement. It is further submitted that this was the view which had been expressed by the Lahore High Court's Division Bench in Rao Mahroz Akhar's case

The question arises whether, in a case of preventive detention, the Right of freedom of movement and residence guaranteed by Right No. 5 is

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1. P.L.D. 1963 Lah. 109.
2. Supra.
3. Supra
4. Supra
5. Supra.
6. Mohd Anwar V. Govt of W.P. Supra;

involved. It was answered negatively in Province of E.Pakistan v. Roshan[1]. But if a law does not exclusively or expressly provide for preventive detention and permits ad interim custody of a person for two months, which may or may not be followed by a preventive detention order, it places a curb on the liberty of the citizen to move about freely, as it does not guarantee the production of citizen before a Magistrate within twenty-four hours or the communication to him of the grounds of detention. It was, therefore, observed that, in this sense, the E.P.Public Safety Ordinance,1950, and the order made thereunder contravened Right No.5[2].

As the W.P.Control of Goondas Ordinance, 1959, permits the imposition of restrictions on the movement of a citizen who has been declared a goonda and further authorises the restriction of his residence within a specified area, it was pointed out that an element of preventive detention is there, but it does not amount to preventive detention[3]; Right No.5 would apply. It is submitted that this is the proper view which should have been adopted by the Lahore High Court in Mohd.Anwar's[4] case; the Supreme Court has laid down the law correctly.

Right No.5 is not an absolute right; 'reasonable restrictions' can be imposed in the public interest on the freedom of movement of citizens by a relevant law. The expression 'reasonable restrictions' is also used to qualify the provisions of the Constitution regarding freedom of assembly, association and speech[5]. It has been pointed out that a 'reasonable restriction' is one imposed with due regard to the public requirement, which it is

1. Supra; see also Gopalan v. State of Madras, Supra.
2. Govt. of E.Pakistan v. Rowshan, Supra.
3. Ghulam Ali Shah v. State, P.L.D.1970,SC.253.
4. Supra.
5. See Professor A. Gledhill, Pakistan, p.203.

designed to meet; anything which is arbitrary or excessive will be outside the bounds of reason in the relevant regard. But in considering the disadvantage imposed upon the subject, in relation to the advantages which the public derives, it is necessary that the Court should have a clear appreciation of the public need, which is to be met. Where the statute prescribes a restraint upon an individual, the Court should consider whether it is a reasonable restriction, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest[1].

Professor Gledhill suggests that the matter has to be examined from the standpoint of a reasonable man, considering whether the cure is worse than the disease[2]. S.A.Rahman J. observes that it should be considered from the view point of the nature of the right affected and the character of the restrictions in question; the mischief sought to be suppressed and the circumstances in which the restrictions are intended to be imposed would be the determining factor[3]. According to Hamoodur Rhahman J., as he then was, if the circumstances do not demand such action or the action is disproportionate to the mischief to be prevented and can be exercised without any check, then the restriction will be entirely unreasonable[4].

Professor Gledhill points out that laws empowering the making of restrictions on movement come within the purview of Right No.5, not the rights

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1. East and West Steamship Co's case, P.L.D.1958,SC.41
2. Op.cit p.203.
3. Abul Ala Maudoodi v. Govt.of W.Pakistan, P.L.D.1964,SC.673
4. Ibid.

relating to arrest and detention discussed above and their reasonableness must be determined on a consideration of their procedural as well as their substantive provisions[1]. As Sec.5 of the Punjab Public Safety Act,1949 which empowers the authority to intern a citizen of Pakistan, fails to provide for communication of the grounds to the internee, so as to afford him an opportunity to make a representation against the order, it was declared to be unreasonable and inconsistent with Art.11 of the 1956 Constitution. It was observed that, in assessing the reasonableness of the provisions of a statute, placing restrictions on the free movement of a citizen, the substantive as well as the procedural part of the law must be brought under scrutiny. Not only the nature and the extent of the restrictions in question, but also the procedure by which the final result is achieved must be reasonable[2].

Professor Gledhill has further observed that the laws usually impeached as repugnant to the right of free movement enable public authorities to restrict reputed criminals or political agitators to particular places or forbid them to enter particular areas or to banish them[3]. The Karachi (Control of Disorderly Persons) Act, 1952, in so far as it authorises the authorities to make an order requiring a dangerously disorderly person to report periodically at a police station, was held not to be repugnant to Art.11 of the 1956 Constitution, but to the extent that it empowers the authorities to banish him for an indefinite period it was declared to be so repugnant[4].

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1. Professor A.Gledhill, Pakistan,p.203.
2. Rao Mohroz Akhtar v. D.M.Dera Ghazi Kh.Supra
3. Professor A. Gledhill,op.cit.p.203
4. Laiq Ahmad v. D.M.Kar, P.L.D. 1958,Kar.92.

In so far as the Security of Pakistan Act, 1952, omits to provide for communication of grounds to the externee, so as to afford him an opportunity of making representation against the order, it was held that the Act imposes unreasonable restrictions on the freedom of movement and residence; to this extent it is inconsistent with Art.11 of the 1956 Constitution[1].

S.152 of the Punjab Municipal Act does not exclusively prohibit prostitution but simple gives a power to forbid it in any specified area of the town, in recognition of its injurious effect on morals, as certain locality may be particularly susceptible to injury. This is not an unreasonable restriction. A resolution of the Municipal committee, requiring prostitutes to move to another locality, was held not to infringe the right of free movement and residence, in as much as the purpose behind the resolution was to confine prostitution to one out-of-the-way locality. Had the resolution been intended to turn prostitutes out of one locality after another, without providing for reasonable steps to be taken in respect of their livelihood, it would have been unreasonable and repugnant to Art.11[2].

S.14(2) of the Punjab Control of Goondas Act,1951, empowers the Tribunal to direct that a person, who is declared a dangerously goonda, shall be restricted to any area specified in the order; there is no limit in the Act on the extent of the area within which such person can be confined, nor is there any limitation on the period of restriction; it puts unreasonable restrictions on the freedom of movement and residence. It was pointed out that the objection cannot be sustained in so far as there are rules for regulating the cases of restriction to a particular area, framed by the Provincial

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1. Abdul Qudros Bihari v. Ch.Commr.Kar; P.L.D.1956,Kar.(NP)533.
2. Mehtab Jan V. D.M. P.L.D.,1958, Lah.928

Government in exercise of powers given by S.16 of the Restriction of Habitual Offenders (Punjab) Act, 1918, which has been adopted by S.17 of the Punjab Control of Goondas Act, 1951. These rules are guiding principlies for the exercise of the discretion vested in the relevant authority making Order of restriction to a particular area[1]. In the light of these rules such persons cannot be turned out of the district within which he normally resides; a villager can only be restricted to the area of the village where he resides or to contiguous villages in which he owns or occupies any immovable property or practices any trade or calling; a resident of a town may be retricted to the area of the town. In special circumstances, the Court or the Tribunal may fix a larger area, but, in any case, the restriction cannot amount to externment from the whole district in which the person normally resides. In the circumstances it cannot be said that the contemplated resistrictions are unreasonable. It was, therefore, held that the aforesaid S.14(2) is not repugnant to Art.11 of the 1956 Constitution[2].

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1. Rule 2 or rules framed under S.16 of the Restriction of Habitual Offenders (Punjab) Act,1918, expressly declared that area to which person may be restricted shall ordinarily be, if a person resides in the village, the area of that village.. and if he resides in town, the area of that town. It is only in the case of persons twice convicted and who are not owners of land or occupancy tenants that the area of restriction may be settlement established under S.16 of the Criminal Tribes Act,1911. Even then the authority concerned must obtain the concurrence of the Dy.Commr. for Criminal Tribes before passing such an order.
   Under S.27 of the Punjab Control of Goondas Act, 1951 further machinery is provided for bringing under scrutiny the cases of individuals against whom orders have been passed under the Act from time to time, and they may even be released from any bond for good behaviour or from an order of prohibition or detention if it is found that the person concerned has reformed his ways. Even his name may be removed on that ground, from the list of goondas or dangerous goonds, as the case may be. The position is therefore not that an order of confinement, within an area is left entirely on the sweet will of the Tribunal.
2. Bazal Ahmad Ayubi's Case, Supra.

It has been pointed out by the Supreme Court that the various provisions of the W.P.Control of Goondas Ordinance, 1959, in 'pith and substance' are intended to control the activities of disorderly persons within the district and thereby to prevent anti-social activities, which are calculated to cause a breach of peace or disturbance of public tranquillity, public safety and social security. The subject matter of the Ordinance may be said to be relatable to the maintenance of 'public order'. The movement, residence or activities of a person declared a goonda must, therefore, be restricted to certain areas in the district[1].

Rule 51 of the Chittagong Hill Tracts Regulations, empowers the Dy.Commissioner, if he is satisfied that the presence in the district of a person who is not a native of the district, is or may be injurious to the peace and good administration of the district, he can order him to leave the district, or, if he is outside the district, forbid him to enter it. There is no provision for giving the aggrieved party any opportunity to show cause why should he not be ordered to leave the district, nor is there any provision for such person to be represented before the Dy.Commissioner, so that he can challenge the information on which the order has been passed. It was held that such unlimited power with such far reaching consequences and without check or remedy of a judicial character being provided to enable the aggrieved party to obtain redress, cannot be said to be reasonable; the rule is repugnant to Right No.5 of the 1962 Constitution guaranteeing freedom of movement and residence[2].

Rule 32(1)(c) of the Defence of Pakistan Rules,1965, is in two parts;

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1. Ghulam Ali v. State. P.L.D.1970,SC.253.
2. Mustafa Ansari v. Dy.Commr.P.L.D.1966,Dac.576.

the first part authorises the officer concerned to direct a person not to enter or remain in the area specified in the order, and the second part begins with the word 'except' and says that conditions and restrictions may be imposed requiring that the 'person may be permitted to stay in the area subject to the observance of such conditions as are specified in the order' by the authority making it. In the instant case, where the petitioner was ordered not to enter or reside within ten miles of Indo-Pak, border of Lahore District, it was contended that the conditions and restrictions imposed on the freedom of movement and residence of the petitioner were repugnant to Right No.5. In the alternative it was argued that the Dy.Commissioner could not make a direct order of externment, without the occurrence of a breach of such conditions, a condition precednet to themaking of the final order. It was pointed out that the purpose of the aforesaid rule was clear from insertion of the word 'except' before the latter part of the clause. The authority could impose conditions before making the final order of externment but it was not obligatory; it was not a condition precedent to the final order of externment. It was, however, held that the conditions and restrictions impossible under the rule are not unreasonable in so far as they are to be imposed in the interest of the State. It was observed that the liberty of an individual cannot be allowed to override the existence of the State itself, for if the latter loses its sovereignity, the citizen, whose liberty is sought to be protected, would not only lose such liberty but would be subjected to other consequences which follow enslavement by a foreign power[1].

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1. Mohd.Akbar v. Dy.Commr.Lah.P.L.D.1968 Lah. 327

Professor Gledhill[1], while discussing the right to freedom of movement and residence in the Indian Constitution, observes that the expression 'in the interest of general public' is synonymous with 'in the public interest'. He further points out that the expression contemplates laws intended to prevent the spread of infectious decease by prohibiting sick persons using public transport[2] or forbidding entry opon defence works[3] and laws empowering officials to expel potential trouble makers from a local area.

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1. Professor A. Gledhill, India, p.189.
2. See S.117 of the Railways Act,1923.
3. See S.3 of the Official Secrets Act,1923.
4. See Prof.A.Gledhill, India,p.189; see also Thatlinkarantavila v. Island Inspector Officer,A.I.R.1957,Mad.433.

CHAPTER 9.

HABEAS CORPUS.

Nature and Scope:

Habeas corpus is a Latin term. It means 'you may have the body'. Several forms of habeas corpus were known to common law; they are the writs of habeas corpus ad subjiciendum, habeas corpus ad testificandum, habeas corpus ad testifiendum, habeas corpus ad prosequendum, habeas corpus ad deliberandum, ad habeas corpus ad faciendum et recipiendum commonly known as habeas corpus cum causa. Their general object was to secure the production of an individual before a court or Judge for various purposes as their names indicate. All save the first two are in practice obsolte[1].

Out of these writs, the writ which has most frequently been used for securing the liberty of a subject by affording him an effective means of immediate release from unjustifiable detention, whether in prison or in private custody[2], is the writ of habeas corpus ad subjiciendum. It has been used 'for protecting the liberty of a subject by examining into the legality of commitments for criminal or supposed criminal matters, or any other forcible detention including imprisonments, and also for admitting to bail a person legally committed.'[3] It is 'directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of its caption and detention, ad faciendum subjiciendum et recipiendum, to do, submit to and to receive whatever the Judge of the Court awarding such writ

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1. Halsbury's Laws of England, 3rdEd.Vol.II,p.24.
2. R. v. Earls of Ferres (1758) 1.Burr,631
3. Short and Mellor's, Crown Office Practice,(2nded.)p.318)

shall consider on that behalf.'[1] As liberation from illegal detention is the prominent function of the writ, habeas corpus ad subjiciendum has in practice appropriated the name 'habeas corpus' to itself so that if the term habeas corpus is used simpliciter, it is this writ which is signified[2].

Habeas corpus is the prerogative writ by which the Queenhas the right to inquire into the causes for which any of her subjects are denied of their liberty. It is an extraordinary remedy, which is issued upon cause shown, in cases where the ordinary legal remedies are inapplicable or inadequate[3]. It is also a writ of right[4], and is granted ex debito justitiae[5]. Though it is a writ of right, it is not a writ of course, and therefore may be refused where there is an alternative remedy available by which the legality of the detention can be questioned[6]. Both at common law and by statute[7], the writ of habeas corpus is granted only upon reasonable ground for its issue being shown[8]. If there is no legal justification for detention the party is ordered to be released. Release on habeas corpus is however not an acquittal, nor may the writ be used as a means of appeal[9]. When the order of committal by a Magistrate is questioned before the Court on an application for habeas corpus, the Court cannot re-hear the case; all it can do is to enquire whether the Magistrate had reasonable grounds for exercising his discretion as he did or whether he

1. Blackstone's Comm. Book,p.131
2. Markose,Judicial Control of Administrative Actions in India, p.131.
3. R.V.Cowle(1759) 2 Burr,834 at P.855 per Lord Mansfield: see also Crawley's case (1818) 2 Swan,1,at p.48 per Lord Eldon,L.C.
4. R v. Heath (1744) 18 St.Tr.19 per Marley C.J.
5. Cowle's and Crowley's cases supra.
6. R v. Commanding Officer.. Expate Ferguson (1917)1 K.B.176 at p.179; see also Ex parte Corke (1954)-2 All.E.R.440.
7. Habeas corpus Act 1679,31 Car.2C.2.
8. Halsbury Laws of England,op.cit.p.26.
9. Ex parte Corke supra; R.V.Commanding Officer..Ex parte Eliot (1949) All. E.R. at p.379 per Lord Goddard C.J.; see also Halsbury's Laws of England op.cit.p.26.

had jurisdiction to do so[1].

Habeas corpus is a remedial measure and cannot be used for punitive purposes. If a person in custody or under detention has been released before the petition for habeas corpus is filed, the writ becomes infractuous, it cannot be granted[2]. The primary purpose of the writ is to enquire into the legality of the detention[3]. The question is whether the cause given for detention is justifiable in law, if it is proved to be unjustifiable the applicant for the writ is entitled to be realised instantly. But it does not follow from this that he is immune from civil or criminal proceedings which may properly be brought against him by the person who has detained him or by another. Equally it does not follow that the gaoler is automatically guilty of any civil or criminal of malicious prosecution in separate proceedings. All that the habeas corpus enables him to do is to recover his liberty[4].

Where an individual is detained under process for supposed criminal causes, the jurisdiction of the Court and the regularity of the commitment may be inquired into. Where the restraint is imposed on civil grounds, under claim of authority, the legal validity of the claim may be investigated and determined, and where as frequently occurs in the case of infants, conflicting claims for custody of the same my be inquired into, which is generally done on the return

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1. Schtraks v. Govt. of Israel (1962) 3 W.L.R.1013; see also Heuston,R.F.V., Essays in Constitutional Law, 2nd Ed.pp.108-109.
2. Basant Chandra v. Emperor Supra; Arab Mohd.Hashin Khan v. Crown,P.L.D.1954. F.C.1; Begum S.M.Hayat Khan&s case, supra.
3. Sampath v. Govindammal, I.L.R.(1952) Mad.468.
4. Heuston, op.cit.pp.108-109.

of the writ of habeas corpus and custody awarded to the right person. In other words where personal liberty of an individual is wrongly interfered with by another, the release of the former from the illegal detention, may be effected by habeas corpus. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification is the basis of jurisdiction in habeas corpus cases.[1]

Historical Evolution:

In England habeas corpus is of common law origin though its effectiveness has been enhanced by statutes[2]. The right to habeas corpus exists at common law independently of any statute; the right has been confirmed and regulated by the statutes[3]. At common law the jurisdiction to award the writ was exercised by the Courts of Queen's Bench, Chancery and Common Pleas, and, in a case of privilege, by the Court of Exchequer[4]. This jurisdiction is now vested in the High Court of Justice, and is exercised by the Queen's Bench Division and the Judges of the High Court of Justice. The jurisdiction of the old Courts of common law is now, under the Supreme Court of Judicature[5].

The writ of habeas corpus is said to be the unique contribution of British Jurisprudence[6] and the most celebrated writ in English law[7]. The writ in England is closely related to the constitutional struggles of the English

1. See Barnardo v. Ford, Gossege's case (1892),A.C.236.H.L.at p.339, per Lord Herschell; see also Halsbury's Laws of England, op.cit.p.24-25.
2. Habeas corpus acts of 1640; 1679; 1816; and 1862.
3. Ex parte Besset (1844) 6Q.B.481.
4. Back.Abr. ,Habeas corpus (B),1;2 Co.1st.55; 3 Bl.Com.129; see also Halsbury's Laws,op.cit.p.27.
5. Consolidation Act of,1925 (15 and 16 Geo.5C.26)SS.14 and 18; and Administration of Justice Act,1928,(18 and 19 Geo.5.C.26)S.6; See also Halsbury's Laws of England,op.cit.p.28.
6. See Prof.Freund,Administrative Powers over Person and Property,(1926) at p.232; see Lord Denning, Freedom under the Law (1950) at. p.9.
7. 3 B.L.Com.Ch.VIII,p.129.

people[1]. It has been observed by Lord Wright that the basis for the Statutory writ of habeas corpus is found in Magna Carta; the right to freedom from unlawful detention, which the writ was said secure, is guaranteed by the words of Magna Carta[2].

But Darnell's[3] case, in which it was held that if a man were committed by the command of the King, he could not be delivered by habeas corpus, proved the inefficacy of the mere constitutional guarantee afforded by Magna Carta, in the absence of an efficacious statutory measure to enforce the guarantee. It resulted in the passing of the Petition of Rights of 1628 by Parliament. But still the enforcement of the right to personal liberty was not secured, as, under exectuve pressure, the effect of habeas corpus could easily be mullified. Consequently the statute, entitled 'an Act for the regulation of the Privy Council, and for taking away the Court commonly called the Star Chamber,' was passed in 1640[4]. The statute recites the provisions of Magna Carta and the statutes of the reign of Edward III, relating to the liberty of the subject. The statute, which is still in force - subject to the partial repeal contained in the Statute Law Revision Act, 1948[5], was intended further to secure the liberty of the subject by regulating the issue of the writ in the particular cases of infringement of the right to personal liberty at the hands of the King or of the Privy Council, and was necessitated by the cases of arbitrary imprisonment[6], which were prevalent at the time of the Statute. It entitled the aggrie-

1. Ibid, p.133
2. Green v.Secretary of State,(1942) H.C.254 at p.301.
3. (1627) 3 St.Tr.1.
4. 16 Car.1,C.10.
5. 11 and 12 Geo.6C.62.
6. See Darnell's case.

ved person to the immediate issue of a writ of habeas corpus, upon demand or motion made in open Court. It also requires the person to whom the writ is directed, at the return to the writ, to produce in open Court the body of the person, so committed or restrained, and to certify the true cause of his detention or imprisonment; within three days after such return, the Court must proceed to examine and determine whether the cause of such confinement appearing upon the return is just and legal or not, and must deliver, bail or remand the prisoner accordingly[1].

Holdsworth[2] regards the right to the statutory writ as simply a result of the Act of 1679.[3] Before the Act of 1679, there was no authority for saything that, if a writ was refused, or if on the return the prisoner was remanded, an application could be made to another Court. It is no real exception that by the Act of 1640, which abolished the Star Chamber, the Judges of the King's Bench or Common Pleas were enabled to grant the writ where there had been imprisonment by the Star Chamber or similar Courts. Before the Act of 1679, the King's Bench or a Judge thereof, in vacation was the only Court from which the writ issued. Although Coke says that 'it ought to issue out of the Court of King's Bench in term time and out of the Chancery in term or vaction, it was not till 1679 that the Chancellor could issue the writ; there is no trace of writ ever having been granted by the Exchequer[4].

Jenke's[5] case is commonly supposed to be the cause for enactment of

1. Lord Halsbury, op.cit,28(2).
2. See History of English Law.
3. See Lord Goddard;"A note on habeas corpus," 65 L.Q.R.30.
4. Ibid.
5. Cited by Taswell-Langmead in Constitutional History,(11th Ed. pp.33-34).

the habeas corpus Act, 1679. But Hallam[1] considers this common belief to be erroneous[2]. According to him the arbitrary proceedings of Lord Claredon led to the passing of the Act. Jenke's case, where the Lord Chancellor refused to issue habeas corpus, during the vacation showed that habeas corpus was still not an efficacious remedy. Many other vexations shifts were practised; the gaoler used to delay the return by waiting for the second and third writ, known as alias and pluris, detunus were shifted from one prison to another in order to evade the writ or its issue was refused during the vacation[3].

The Act of 1679 was passed 'for the better securing the liberty of the subject'. It was designed to overcome the aforesaid difficulties in the enforcement of the writ. It was primarilly applicable in criminal cases; all other cases of unjust imprisonment were left to habeas corpus at common law. It was required by the Act that the writ of habeas corpus should immediately be issued without any delay and obeyed without wating for alias or pluries; the writ was made readily accessible during the vacation; penalties were prescribed for causing delay or disobeying the writ; the issue and grant of the writ was regulated and the procedure upon its return laid down. Any person committed or detained in vacation for any crime, except for felony or treason, plainly expressed in the warrant of commitment, was entitled to apply to the Lord Chancellor, or any Judge of the High Court of Justice, for habeas corpus. The Act of 1679 also did not satisfactorily cover all the cases of wrongful detention otherwise than on a criminal charge, as, for instance, the illegal detention of

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1. See Constitutional History, Vol.II. Ch.I. p.11. (8th Ed.)
2. See Lord Goddard op.cit.
3. See 3 BL. Com. p.135

children by persons not legally entitled to their custody; wrongful restraint of lunatics and custody of illegal confinement of one person by another did not come within its scope.

The Habeas Corpus Act,1816 was enacted to remove the defects discussed above. It applies to all cases of wrongful detention or imprisonment, whether civil or criminal, except the cases of persons imprisoned for debt or by process of civil courts; the cases of persons imprisoned by the decision of a Court on a Criminal charge or detained during the trial on a supposed criminal charge, were not covered by it, except that the prisoner could be released on bail in the last case.

It will be remembered that, before the Act of 1816, a Court had no power to inquire into the facts; they could only see whether on the face of the commitment, the detention was lawful. The truth as to why the prisoner was committed could only be inquired into by means of an action for false return[1]. It was not until early in the 19th century that the practice of moving for rule nisi was started. Previously the writ had always been granted ex parte, and the grant of writ decided nothing except that there was a case calling for an answer by the gaoler[2].

The Act of 1816 was not applicable to the King's domain; it was only enforceable in England. After the Act of 1816, habeas corpus continued its progress in setting subjects, wrongfully detained or imprisoned, at liberty except for occasional extradition cases until the First World War.[3]

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1. See Wilmot C.J's opinion delivered in the House of Lords on the second reading of the Habeas Corpus Bill of 1758, which never became law; Wilmot's opinion, p.108 see also Goddard,op.cit.
2. See Goddard op.cit.p.34.
3. See Stephen, History of Criminal Law in England(1883)Vol.2,pp.65-74; see for the Law on Extradition, Clarke, 4th Ed.

The Habeas Corpus Act,1862, was passed in consequence of the decision in Ex parte Anderson that habeas corpus could issue in Canada. It provides "no writ of habeas corpus shall issue out of England into any colony or foreign dominion of the Crown where H.M. has a lawfully established Court having authority to grant and issue the said writ."

Formerly, before the Act of 1816, the writ of habeas corpus lay to any part of the dominion of the Crown[1], including Ireland, Berwick-upon-Tweed, The Isle of Man, the Channel Islands, and the colonies; the writ may still issue from the English Courts to the Isle of Man, that Island not being a foreign dominion of the Crown within the meaning of the Act of 1862[2].

The writ will not issue in respect of persons detained in foreign territory, not forming part of H.M's.Dominion, though H.M. may have certain jurisdiction there, derived from treaties and from the Foreign Jurisdiction Act, 1890[3] and 1913[4].

The writ of habeas corpus cannot be issued against a person who is abroad, it being issuable only for immediate service on a person, who is within the jurisdiction of English Courts at the date of issue[5]; or against a person who is on board a public vessel of war of a foreign State, though in British waters[6]; or in respect of an alien detained in England, in a foreign embassy or legation of the Country to which he belongs[7].

1. See 2 Roll.Abr.69; Brown's case (1619),Cro.Jac.543; and R.v.Pell and Offly (1674) 3 Keb.279; see also Halsbury's Law of England,op.cit.p.30.
2. See re Brown;(1864),33 L.J.Q.B.193; see also Halsbury op.cit.p.30.
3. 53 & 54 Vict.C.37; See also Ex parte Sekgome (1910) 2K.B.576 C.A.; and re Ring Yi-Ching (1939),56 T.L.R.3.
4. 3 & 4 Geo.5C.16.
5. R.v.Pinckney (1904)2K.B.84,C.A;see also Brown's case supra; R.v.Cowle (1759) 2 Burr.834 at 856.
6. See Oppenheim's International Law; 8th ed.p.851.
7. Re Sun Yat (1896), cited in Short & Mellor's Crown Office Practice,2nd Ed. p.318; See also Halsbury Laws of England op.cit.p.31.

Suspension of habeas corpus:

The operation of the Habeas Corpus Act, 1679, has at various periods been temporarily suspended by the legislature on the ground of urgent political necessity[1]. In the reign of George III, the Habeas Corpus Suspending Act, 1793, was passed and continued for seven years by annual re-enactments. This led to the passing of the Indemnity Act, 1801, by Parliament. The uncertain legal position, which resulted from the enactment of the Indemnity Act, to remove the effects of Habeas Corpus Suspension Act,1793, persuaded the executive in Britain during the First World War, to avoid it by acquiring direct powers to detain any person in custody in the interest of the defence of the Realm, without bail or trial, under the specific legislative sanction, notwithstanding any law to the contrary. The Defence of Realm Act, 1914-1915, empowered the Executive to make Regulations by Order in Council for securing the public safety or the defence of the Realm. This kind of preventive detention gave the Executive immunity from any action for false imprisonment and trespass and precluded release of the detenu on a writ of habeas corpus[2]. Lord Shaw, in his dissenting opinion in King v. Haliday[3], refused to infer, from the mere delegation of power to make regulations for public safety and defence, the authority to detain individuals without accusation or trial, since Parliament had not expressly said that such powers to detain arbitrarily had been conferred on the Executive. During Second World War, Parliament, in order to avoid such

1. See Halsbury's Laws of England, op.cit.p.29.
2. See Markose op.cit.p.123-124.
3. (1917) A.C.260

criticism, gave the Executive powers in express words; The Emergency Powers (Defence) Act,1939, authorised the making of regulations by Order in Council to detain individuals without trial in the interest of the public safety and defence. The powers of detention without trial granted to the Executive by the Emergency Powers Act,1939, is sometimes alleged to be equivalent to 'suspending the Habeas Corpus Acts.' But it is submitted that Habeas Corpus Acts were not touched by the Act of 1939; it was fully open to any person detained under the Act to question the legality of the detention. All that had been done was that, by the Emergency Powers Act,1939, and the Regulations made thereunder, the area of lawful detention had been greatly widened. But if the application for the writ was successful and it had been shown that the cause of detention was illegal, the writ would be enforced against the Executive so far as the Court could do so[1]. Previously the writ had been issued to free slaves[2], to question the imprisonment of persons by the order of the House of Commons[3], to challenge extradition proceedings[4], and to release a young lady who had been convicted by the Vice Chancellor of Cambridge University to a local prison known as the Spinning House, for 'walking in the street with a member of the University[5].'

Even detention orders under the Emergency Powers Act and Regulations of 1939 were challenged. Liversidge v. Anderson[6] and Green v. Home Secretary[7]

1. See Wolfe Tone's case (1798) 27 St.Tr.614; see also Heuston op.cit.p.109.
2. See Somerset's case,(1772) 20 St.Tr.1.
3. See the case of Sheriff of Middlesex (1840) 11 A.& E.273.
4. See Denko v. Home Secretary (1959) A.C.654.
5. Ex parte Daisy Hopkins (1891) 61L.J.Q.B.240; see also Henston, op.cit.109.
6. (1942) A.C.206.
7. (1942) A.C. 284.

were the most important cases in which detention under the Secretary of the State orders was contested in the Courts. The dissenting opinion of Lord Atkin in the Liversidge's case was so cogant that it has been followed by the Courts of various countries[1]. Lord Atkin expressed the view that preventive detention during peace time should stand the test of 'objective satisfaction.' In one case the applicant detained under the Regulation 18-B of 1939, secured his release by means of habeas corpus proceedings, but he was immediately re-arrested under a valid order of detention[2].

In order to give protection to detenus under the Regulations of 1939, Advisory Committees were set up and the detenus were given facilities to make their objections to the detention orders before such committees. They were also afforded the right to legal advice, The Home Secretary was obliged to report to Parliament monthly the number of persons detained and also the number of cases in which he refused to follow the recommendations of the Adisory Committees[3].

India:

In India the writ of Habeas corpus is of statutory origin and was first conferred on the Supreme Court of Calcutta in 1774. The writ was therefore imported into India subject to the common and statute law, that governed the issue of habeas corpus in England[4]. But the jurisdiction on the Courts in India, in the earlier period was not as extensive as in England[5].

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1. In Burma and Pakistan; see the topic in the preceeding Chapter;'Objective satisfaction.'
2. Ex parte Budd (1942) 2 K.B.14.
3. Markose, op.cit.124.
4. Markose,op.cit. 114.
5. See Leach C.J's. remarks in Grindra Nath v. Birendra Nath Paul I.L.R. (1927)Cal. 727.

The Supreme Court of Calcutta was established by the Regulating Act of 1773[1]. Clause 4 of the Charter of 1774 gave to the Judges of theSupreme Court power to issue the writ of habeas corpus. In 1798 Recorders Courts were established at Madras and Bombay, with power to issue the prerogative writs[2]. But an Act of 1861[3] abolished these Courts and authorised the Crown to establish by Letters Patent, High Courts at Calcutta, Bombay and Madras, which were called Presidency High Courts. Under S.9 of the Act, the High Courts thus to be established were to have 'all jurisdiction and every power and authority whatsoever in any manner vested in any of Courts in the same Presidency abolished under the Act, at the time of their abolition.' But by the same section the jurisdiction of the High Courts to be established was made expressly 'subject and without prejudice to the legislative powers... of the Governor-General of India in Council.' Clause 44 of the Letters Patent Act of 1865, specifically stated that the legislative power of the Governor-General in Council included the power to alter the jurisdiction of the High Courts. However, the opinion was expressed by the Judges that the common law writ of habeas corpus could be issued outside the original jurisdiction of the earlier Supreme Courts, and that the power was inherited by the High Courts[4].

Soon after this opinion was expressed, the Criminal Procedure Code of 1872[5] was enacted. Though, in the case of detention of European British subjects,

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1. SS.13-22
2. Cls.11 and 47 of the Letter Patent Act,1798.
3. See 24 and 25 Vict.C.104.
4. In re Ameer Khan,(1870) 6 Bengal L.R.392; for an instance of writ being issued in Bombay see Reg. v. Soulter, 8 Bom.H.C.R.Crown Cases 13.
5. Act X of 1872.

S.81 of theCode conferred the right to issue orders in the nature of habeas corpus, both within and outside the original jurisdiction of the Presidency High Courts, in the case of British European subjects, the power of High Court and its Judges to issue the writ of habeas corpus beyond the Presidency towns in the case of Indian subjects, was taken away by S.82. It is to be noted here that there was no provision for habeas corpus in the Code of Cr.P.of 1861. In 1875, another Cr.P.C. was passed[1], S.148 whereof gave the Presidency High Courts the power to issue direction in the nature of habeas corpus on certain conditions but it took away the jurisdiction of the High Courts to issue the common law writ of habeas corpus for any of the purposes mentioned in the section. The section also excluded five laws[2] from its application; detention under these laws could not be reviewed by the High Courts[3].

Though S.491 of the Code of Criminal Procedure,1882, conferred powers on the Presidency High Courts to issue, directions in the nature of habeas corpus, they were substantially the same as those provided by S.148 of the Code of 1875, with the difference that the powers were to be exercised within the limits of their ordinary original civil jurisdiction and not their original criminal jurisdiction. By the Criminal Procedure Code of 1898, the Code of Criminal Procedure of 1882 was repealed but S.491 was reproduced in the former Code. Though S.491 of the Cr.P.Code was amended by the Repealing and Amending Act of 1914, the prohibition against the issue of the common law writ of habeas corpus still continued and even the three Presidency High Courts did not have

1. Act X of 1875
2. Infra.
3. See Markose, op.cit.p.129.

the power to issue habeas corpus regarding an Indian, who was outside the jurisdiction of the Presidency Towns[1]. In 1922 the Madras High Court, in a Full Bench decision[2], held that the common law writ of habeas corpus was issuable by the Madras High Court within its appellate jurisdiction. This view was held to be erroneous by the Privy Council in 1939 in Mathen v. D.M. Trivandarum[3].

An amendment in S.491 Cr.P.C.in 1923[4] settled the matter finally, by S.3 of the Amending Act, habeas corpus was made available to almost everyone in India. The power to issue orders in the nature of habeas corpus was conferred on all the High Courts[5]. Whereas previously an order under S.491 Cr.P.C.1898 could be made only with regard to the persons residing within the ordinary civil jurisdiction of the three Presidency High Courts, the Amending Act of 1923 gave jurisdiction of all the High Courts to pass orders with regard to persons in places within the limits of their criminal appellate jurisdiction. The marginal note of the amended S.491 Cr.P.C. is to the effect that the High Courts could issue directions in the nature of habeas corpus[6]. The Amending Act of 1923 brought the S.491 Cr.P.C. to its present form. The position continued like this till the Partition of the British India and emergence of India and Pakistan.

In the period 1774-1780, the struggle between the Supreme Court at Calcutta and the Supreme Council for India resulted in the complete withdrawal

1. See in re the Justices of the S.C.of Bom.12 EP.22.
2. In re Govindan Nair, (1922) 45 Mad.922 F.B.
3. A.I.R.1939,P.C.213; see also Markrose op.cit.130.
4. Cr.P.C.(Amendment) Act (XII of) 1923.
5. See Haridas Awadi v. King/Emp.I,L.R.1948, Nag.953,957,960 per Sen J.
6. Subclause (b) of Cl.(1) of 491 Cr.P.C.lays down, the Principle of English law that habeas corpus be issued against all cases of illegal detention whether by a public authority of private person; see Mohd.Amwar v. Govt. of West Pakistan, Supra.

of the jurisdiction of the Supreme Court to interfere with the orders of the Governore-General-in-Council, affected native subjects, made in exercise of powers conferred on the Executive by the Revenue Laws. Many people had been detained by the East India Company's Administration, who were liberated by the Supreme Court on habeas corpus. Later, though habeas corpus was made available to people within the jurisdiction of the Presidency Towns; there were five laws, enumerated in the proviso to S.148 of the Cr.P.C. of 1875, detention under which could not be challenged in the Presidency High Courts. This proviso was continued in S.491 of the Cr.P.Codes of 1882 and 1898 and was retained even after the amendment of S.491 in 1923. Special statutes[1] were enacted periodically to exclude in effect the remedy of habeas corpus for the purpose of curbing occasional political upheavals. These statutes either expressly or by necessary implication suspended the remedy of habeas corpus[2].

During the First World War the Executive of India obtained very vast powers under the Defence of India Act,1915, and there was a complete ouster of the jurisdiction of the High Courts for all practical purposes in the cases of preventive detention. During the Second World War, the Defence of India Act, 1939, was enacted; under S.2 the Central Government was authorised to make such rules as appeared it to be necessary or expedient for securing the defence of the British India, the efficient prosecution of war or the maintenance of public order and public safety. R.26 of the Defence of India Rules, made under the aforesaid Act, empowered the Central or Provincial Government, if it was satisfied with respect to any individual that he was acting or about to act in

1. The Rowlatt Act (XI of)1919; The Bengal Cr.Law (Amendment) Act,1925; and the Sholapur Martial Law Ordinance (IV of)1930 and VIII of 1932.
2. See Pratul Mitra v. Commandant High Detention Camp,16 Cal.197; see also Markose op.cit.pp.136-137.

a manner prejudicial to the aforementioned purposes, to pass an order directing that he be detained. Under r.129 of the D.I.R. 1939, any police officer empowered by the Central or Provincial Government could arrest any person whom he reasonably suspected of having acted or of acting or being about to act in a manner prejudicial to the maintenance of public order or public safety[1].

After the partition of India and the emergence of India and Pakistan in 1947, the political situation became very tense, due to communal riots and communist activities. When, therefore, the Defence of India Act,1939, and the Defence of India Rules had expired, the Provincial and Central legislations of India and Pakistan had to enact special statutes[2], to provide for preventive detention in the interest of the public order and public safety. These statutes were drafted on the lines of the Emergency Powers (Defence) Act, 1939, and the Regulations made thereunder, and the Defence of India Act, 1939, and the Rules framed thereunder.

Habeas corpus in Pakistan:

Soon after independence, the Indian Constitution was framed in 1950. Art.226 of the Indian Constitution empowers the High Courts to issue writs including habeas corpus within their territorial jurisdiction and Art. 32 confers powers on the Supreme Court to grant the writs to enforce throughout India and fundamental rights, including the right to personal liberty. Arts.21 and 226 provide remedies for the deprivation of personal liberty by the executive; the person arbitrarily and illegally detained or imprisoned is

1. See Markose op.cit.p.137
2. See for India; C.P. & Berar Pub.Safety Act(XXXVIII of)1947;Bom.Pub.Security Measures Act,1944 and 1947 (Act VI of 1947); Mad.Maintenance of Pub.Order Act (I of)1947; U.P.Maintenance of Pub.Ord.Act.(IV of 1947) M.B.Maintenance of Pub.Ord.Act.1949; Bihar Maintenance of Pub.Ord.Act,1947; Orissa Maint.

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entitled to the writ of habeas corpus which is available against any kind of detention not authorised by law.

In Pakistan the issue of the writ was governed by S.491, Cr.P.C. till 1953, when S.223-A was inserted in the Government of India Act,1935, which act continued to be Constitution of Pakistan till 1956. S.223-A gave the High Courts powers to issue writs including habeas corpus. This situation continued till 1956, when the first Constitution of Pakistan was framed. Art.170 of the 1956 Constitution conferred on the High Courts powers to issue habeas corpus and other writs. By Art.22 of the 1956 Constitution the right to move the Supreme Court for the enforcement of fundamental rights was guaranteed; the Supreme Court was empowered to issue writs including habeas corpus for this purpose. Art.170 conferred on the High Courts power to issue writs, not only to enforce the fundamental rights but also 'for any other purpose'. However, there was a difference between the jurisdiction of the Supreme Court and the High Courts, whereas the right to invoke the Supreme Court's jurisdiction for the enforcement of fundamental right was itself a fundamental right, the right to apply to the High Court for the issue of habeas corpus or any other writ, for 'any other purpose' was not. The High Courts had a discretion to grant or refuse the writ, unless it was made to protect a fundamental right[1]. The High Courts jurisdiction was governed by the corpus juris which had accumulated in England,

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of Pub.Ord.Act,1948; and in Pakistan: W.Punjab Public Safety Act (IIof)1947, (XVIII of)1949, Baluchistan Public Safety Regulation (Iof)1947; (Iof)1949; N.W.F.P.Public Safety Act (Iof) 1949; Sind Maintenance of Pub.Safety Act (XVof)1948; East Bengal Pub.Safety Act (XII) of 1948,(Iof) 1950; Security of Pakistan Act.1952.

1. See Sheo Shanker v. State of M.P, A.I.R.1951,Nag.58; Himmat Lal v. St.of M.P. A.I.R.1954 SC.403: State of Bom. v. United Motors, A.I.R.1953 SC.252.

India and Pakistan[1].

The Constitution of 1956 was abrogated on 7th Oct.1958 when the whole of Pakistan was placed under Martial Law. But even during the Martial Law period, the power of the superior Courts to issue writs continued, because a provision for the issue of writs including habeas corpus was made in the Laws (Continuance in Force) Order,1958. Then in 1962, a new constitution was promulgated.Art.98 of the 1962 Constitution conferred on the High Courts very wide powers for the issue of writs. Under this Constitution, the jurisdiction formerly exercised by the Supreme Court for enforcing the fundamental rights was transferred to the High Courts. The High Courts' power to issue orders or directions, except where fundamental rights are involved, is discretionary and the Supreme Courtcan interfere only by granting leave to appeal from the judgement of a High Court. Art.98 is unique in the sense that it gives powers to the High Courts to issue prerogative writs, without menticning their technical names, but the limits within which this jurisdiction is to be exercised are in some respects narrower and in others wider than before[3]. Art.98(2)(b)(i) confers on the High Courts power to set at liberty persons detained in 'unlawful custody' or 'in an unlawful manner.' It is noticeable that, while with regard to other orders mentioned in Art.98, a High Court can grant relief only at the instance of a person aggrieved, there is no such restriction with regard to the person who can move the Court when the matter brought before

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1.See Munir J.,Constitution of Pakistan, p.327.
2.Mehboob Ali Malik v. Prov. of West Pakistan,P.L.D.1963 Lah.575; see also Prof.Gledhill, Pakistan, p.180; see also Mimir J.,op.cit.p.327.

the Court relates to setting a person at liberty[1]. The jurisdiction of a High Court to issue habeas corpus or any other writ can be invoked when there is no other adequate remedy provided by law[2].

Art.98(2)(b)(i) the 1962 Constitution lays down that a High Court may, on the application of a person,not necessarily an aggrieved party, if there is no other adequate remedy, direct a person in custody in the Province to be brought before the High Court, so that it may 'satisfy' itself that the person is not being held in the custody"without lawful authority"'or'"in an unlawful manner". The provision is similar to S.491 of Cr.P.C.1898[3], but, being a Constitutional guarantee, it is of higher authority[4] and is not subject to the restriction imposed by subsection (3) of S.491 Cr.P.C. with regard to certain laws, mentioned above, which were put outside the scope of High Courts' jurisdiction under S.491 Cr.P.C. Furthermore Art.98(2)(b)(i) requires a High Court to be 'satisfied' of the legality of the detention, whereas S.491 states that a High Court may direct that a person under detention he set at liberty whenever it thinks"it fit;" Art.98(2)(b)(i) does not say, as S.491 Cr. P.C.does, that it may order him to be set at liberty, but setting the person detained at liberty is a necessary corollary to the expression that a 'High Court' should 'satisfy' itself that the person is not held in custody 'without lawful authority' or 'in an unlawful manner'. It can,therefore,be said that Art.98(2)(b)(i) confers on High Courts jurisdiction which corresponds broadly to that possessed by the Courts in England to issue the prerogative writ of

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1. Mohd. Anwar v. Govt. of West Pakistan, supra.
2. See Art.98 of the 1962 Const.,see also Prof.Alan Gledhill,Pakistan,p.180 and Munir J.,op.cit.p.327.
3. As amended by Amending Act of 1923.
4. See Mohd.Ali v. Mohd. Bashir, P.L.D.1963 Lah.230

habeas corpus ad subjiciendeum to safeguard the liberty of the subjects[1].

There are periods when the issue of habeas corpus has been suspended in Pakistand. The Constitution of Pakistan was abrogated by the Proclamation of Martial Law Order, 1958, issued by the President;Martial Law was declared throughout the country; M.L.Orders and Regulations were passed; and special Courts were established to try the offences in contravention of these Orders and Regulations as well as offences under the Ordinary Law. Though the existing jurisdiction of the Courts was maintained by the L.C.F.O., 1958[2] - a new legal order or an interim constitutional document - but the order was silent about the fundamental rights. In State v. Dosso it was pointed out by the Supreme Court that even the jurisdiction of High Courts and the Supreme Court would be determined according to the new legal order; the fundamental rights which were abrogated along with the Constitution of 1956, could no longer be enforced by the Courts; and the Supeior Courts, deriving their jurisdiction under the new legal order, could only be moved for a writ when a right preserved by the L.C.F.O.,1958, was infringed[3].

Though Martial Law was brought to an end by the promulgation of the 1962 Constitution, the fundamental rights were not incorporated in the Constitution; they were included in the Constitution by the Constitution (First Amendment) Act of 1963. But 31[4] Orders and Regulations of the Martial Law period were preserved and protected against avoidance for repugnancy to the fundamental rights, if challenged in the Courts.

On September 6, 1965, on account of war with India, a Proclamation of Emergency was issued by the President under Art.30 of the Constitution of

1. See Mimir J. op.cit.p.328
2. See Art.2(4), L.C.F.O.,1958
3. P.L.D.1958,S.C.533; See also Prov.of East Pakistan v. M.Mehdi Ali Khan,P.L.D., 1959,SC.387, and Mian Iftekharuddin v. Mohd.Sarfraz, P.L.D.1961,SC.585.
4. See the 'Fourth Schedule' annexed to the Constitution of 1962.

1962. On the same day an order under cl.(10) of Art.30, suspending the right to move a High Court for enforcement of certain fundamental rights; the proceedings pending in the Courts for the enforcement of fundamental rights were also suspended. Right No.1, which protects life and liberty was not touched but Right No.2 which lays down the safeguards against arrest and detention was, along with other Rights, suspended, but, if a person could not be protected against arrest and detention, his personal liberty could no longer exist. On the lines of D.I.A. and D.I.R.,1939, the Defence of Pakistan Ordinance, 1965, and the Defence of Pakistan Rules, 1965, were framed; r.32 and r.204 of the D.P.R. correspond respectively to r.26 and r.129 of the D.I.R.,1939.

Art.2 of the Constitution of 1962 lays down that no person shall be deprived of his life, liberty or property 'except in accordance with law'; the Indian Constitution says, '...except' "the procedure established by law." The Supreme Court of Pakistan in Ghulam Jilani's case, where the detenus were detained under r.32 of the D.P.R.,1965, and when the Emergency Proclamation,1965, had not yet been revoked, held that, in view of the provisions of Art.98(2)(b)(i) of the 1962 Constitution, which requires the High Court to be 'satisfied' as to the legality of detention, as well as the provision of Art.2, which requires that no person should be deprived of his life or liberty 'except in accordance with law,' the High Court is enjoined to protect the person against arbitrary deprivation of personal liberty; the 'satisfaction' of the Court, that is the 'objective satisfaction,' as to the legality of detention, is required; this can only be obtained by scrutinizing the facts which led the detaining authority to detain a person; and the 'subjective satisfaction' of the detaining authority can no longer be regarded as final under Art.98(2)(b)(i) read with Art.2 of the 1962 Constitution, whether in time of emergency or peace time.[1]

1. Supra; the principle thus laid down by the SC.has been followed in A.Baqi Baluch case supra, Begum A.K.S.Kashmire's case supra and other cases discussed in the preceding chapter.

As Righ No.1, as discussed above, was not abrogated, Courts have sometimes gone out of their way to issue the writ of habeas corpus to protect a right which does not come within the purview of Right No.1, by straining Art.2 probably in consideration of the unnecessarily long prolongation of the state of Emergency, which made it impossible for the High Courts to protect the people against the arbitrary deprivation of their rights; mandamous could have been issued under the circumstances[1].

The state of Emergency continued until the Constitution of 1962 was abrogated and Martial Law was once again imposed throughout Pakistan on 25th March,1969. M.L.Regulations and Orders were promulgated; special Military Courts were established and the Courts' jurisdiction, inter alia, to call in question any M.L.Regulation or Order, or any finding, judgement or order of Military Courts was ousted by the M.L.Proclamation of 1969. In the Proclamation of 1969, there is a significant difference from the Proclamation of 1958, in that the jurisdiction of the superior Courts to issue writs against any of M.L.Authorities has been expressly and completely taken away.

A few days later, the Provisional Constitution Order,1969, was promulgated. The crucial difference between the Provisional Constitution Order 1969 and the L.C.F.O.,1958, is that whereas the L.C.F.O.,1958, was silent about the fundamental rights, though the Provisional Constitution Order,1969, has abrogated and annulled the fundamental rights, enumerated in paragraphs 2, 4, 5, 6, 7, 8, 9, 13, 14 and 15 of Chapter 1 of Part II of the 1962 Constitution, which includes the safeguards against arrest and detention[2]; the other rights remain in force. For the purpose of this study, the most remarkable effect of the

1. See Abul Ala Maudoodi v. State Bank,Supra; discussed in the preceeding Chapter.
2. Paragraph 2 - Right No.2 - deals with safeguards against 'arrest and detention.'

Provisional Constitution Order,1969, is that it deprives a person preventively detained of the right of recourse to an Advisory Board, as laid down by Right No.2(4), if it is proposed to detain him for more than three months. The Provisional Constitution Order gives arbitrary powers to the M.L.Authorities to deprive a person of his liberty, in as much as the power of the judicial review of the actions of the M.L. Authorities as well as the jurisdiction of the superior Courts to enforce the specified Rights, has been expressly annulled. It is, therefore, submitted that, though the Right No.1 which guarantees the right to life and liberty, and Art.2 which requires that no person can be deprived of life and liberty 'except in accordance with law,' have not been abrogated, habeas corpus cannot issue to protect the people against wrongful or arbitrary deprivation of personal liberty by the M.L.Authorities.

In a recent case, the Lahore High Court held that the M.L.Authorities could not make any law repugnant to the Provisional Constitution Order; in accordance with the provision of Art.2 of the 1962 Constitution, no public authority could take any action infringing the rights of the people, in exercise of the power conferred on it by any statute made in contravention of the Provisional Constitution Order, without lawful justification; and the action of any authority, including the C.M.L.A. could not be immune from being struck down by the Courts of Pakistan under Art.98 read with Art.2 of the 1962 Constitution[1]. It is submitted that the President/C.M.L.A. has unchallengeable legislative power and the Lahore High Court was wrong in holding that the M.L. Authorities could not make any law repugnant to the Provisional Constitution Order, or that action of M.L.Authorities under the repugnant law could not be immune from judicial review.

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1. Mir Hassan v. State, P.L.D., 1969, Lah.786.

Soon after this decision, presumably on the same day, the jurisdiction of Courts (Removal of Doubts) Order,1969 was promulgated to remove the doubts as to whether the Courts still have jurisdiction to challenge the actions taken by M.L.Authorities or to issue writs to enforce the specified Fundamental Rights. The Order lays down that no Court, including the Supreme Court and High Courts, shall have jurisdiction to receive any application, petition or any other representation against the decision of the Military Courts or the Orders passed by the M.L.Authorities. The matter has thus been finally settled.

Arts.98(2)(b)(i) and 2 of the 1962 Constitution:

Art.98(2)(b)(ii) of the 1962 Constitution is radically different from Art.170 of the 1956 Constitution, which was equivalent to Art.226 of the Indian Constitution. Under Art.98(2)(b)(i), unlike Art.170 of 1956 Constitution or Art.226 of the Indian Constitution, a duty is cast upon a High Court to be 'satisfied' that a person is not being held in the custody 'without lawful authority' or 'in an unlawful manner.' The real significance of these expressions has been shown in the case of Baqi Baluch[1]. It has been pointed out that the expressions 'without lawful authority' and 'in an unlawful manner' occuring in Art.98(2)(b)(i) are not tautologous. A definite meaning has, therefore, to be given to each of them. The Constitution, it appears, casts a heavy r responsibility upon the Court to satisfy itself with regard to both these two matters. It is agreed that in 'without lawful authority' will be comprised all questions of vires of the Statute itself,and of the person or persons purporting to act under the statute, that is, there must be a competant law authorising the detention and the officer issuing such an order must have been

1. Supra.

lawfully vested with the power. But the expression 'in an unlawful manner' covers all matters within the scope of judicial review, apart from the question of vires.

The words 'in an unlawful manner' have been used deliberately to give meaning and content to the solemn declaration under Art.2 of the 1962 Constitution that it is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining how and in what circumstances a detention would be 'in an unlawful manner.' one must first see whether the action is in accordance with law; if not, it is action in an unlawful manner,'Law' is here not confined to statute law alone but is used in its generic sense as connoting everything that is regarded as law in Pakistan, including even judicial principles laid down from time to time by the superior Courts. It means 'according to the accepted forms of legal process' and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested, that in this sense it is as comprehensive as the American 'due process' clause in a new garb. It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not an action in accordance with law. Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner[1].

It would seem, therefore, that by these words,'without unlawful authority' or 'in an unlawful manner', so far the deprivation of the liberty of a citizen is concerned, the Constitution makers intended that this most cherished

1. See Govt. of W.Pakistan v. Begum A.K.Sorigh Kashmiri, Supra.

right should not be taken away in an arbitrary manner and hence, by sub-clause(b) of clause(2)of Art.98, they advisedly left it to the High Courts to review the actions of the detaining authority, untrammelled by the formalities or technicalities of either S.491 of the Cr.P.C. or the old prerogative writ of habeas corpus, not only with regard to the vires of the law or the officer concerned, but also to satisfy themselves that the decision is not in any manner contrary to law. The scope of enquiry is, therefore, not in any way fettered by the procedure of a writ of habeas corpus or rules laid down under the various Habeas Corpus Acts. The Court must nevertheless, in deciding this question, necessarily have regard to the language of the Statute under which the power is exercised, the purpose for which the detention is sought to be made and the circumstances in which it came to be ordered. The content of the power vested by the Constitution in the High Courts under Art.98(2)(b)(i) cannot be limited or taken away by sub-constitutional legislation, that is, the enactments made by legislatures in their legislative capacity[1].

The question, however, that remains to be considered is whether the reasonableness of the action taken by the detaining authority can be examined by the High Court, when the statute itself does not require the authority to act upon reasonable grounds, but leaves him to act upon his own 'subjective satisfaction.' It has been pointed out in Abdul Baqi Baluch[2], following the principle of 'objective satisfaction' laid down in Ghulam Jilani's[3] case, that, in view of the provision of Art.98(2)(b)(i), the degree of reasonabless of the authority's satisfaction should be established by High Courts only[4].

Since the issue before the Court is one of 'lawful authority' the

1. Govt.of W.Pakistan v. Begum A,K.S.Kahmiri, supra.
2. Supra.
3. Supra.
4. Govt.of W.Pakistan v. Begum A,K.S.Kashmiri, supra.

High Court's jurisdiction in cases under the special Acts or statutes will be invoked to enquire into whether the document authorising detention is on the face of it valid; whether the authority acting under the special statute was a competant authority constituted in accordance with the statute; whether the authority acted within the limits and under the conditions prescribed by the statute; and whether the contravention of the right to personal liberty was 'in accordance with law.' It is a general rule that any detention will be illegal unless it can be shown to be in accordance with law[1].

The writ under Art.98(2)(b)(i) or habeas corpus under S.491,Cr.P.C. will not issue, if there is any other adequate remedy provided by law to give relief to the aggrieved party; habeas corpus can issue only when there is no adequate and proper remedy provided by the ordinary law. The alternative remedy, however, should be specific, adequate, prompt and efficacious[2]. Ferris[3] observes that '...ordinarily, habeas corpus will not lie where there is another adequate remedy, by appeal, writ of error, maudamus, motion or otherwise.' He further observes:

> "But where constitutional rights cannot be otherwise adequately preserved, as where there was no other speedy and efficacious remedy open to petitioner in the usual and orderly course of criminal procedure, and there could be no inquiry whether the charge constituted an offence against the statute until the meeting of a grand jury, and no relief from imprisonment, meantime except the writ of habeas corpus, or by furnishing bail, circumstances are presented which call for summary inquiry and habeas corpus is proper."

But the existence of an alternative remedy is not per se a bar to the issue of an order under Art.98 of the 1962 Constitution. If a remedy is available, but it is not adequate, it will not be a bar to invoking the

1. Begum S.M.Hayat Khan v. Govt.of W.Pakistan, Supra.
2. Mohd. Baqui v. Supdt.Cent.Prison, P.L.D.1957, Lah.694; see also Pasmore v. Oswaldwistle Urban District Council,(1898) A.C.387 (H.L); see also Hamesh Gul's case,P.L.D.1955,Pesh.1.
3. See 'Law of Extraordinary Legal Remedies,(1926th Ed.)p.34.

jurisdiction of the High Court under Art.98[1]. The question whether or not a particular remedy is an adequate remedy, will always depend on the facts of each case. In Mehbooh Ali Malik v. Province of W.Pakistan[2], the scope and extent of Art.98 with specific reference to the 'other adequate remedy' has been explained. It was pointed out that the adequacy of an alternative remedy is to be judged in relation to the requisite relief. If the relief available through the alternative remedy, in its nature or extent, is not what is necessary to give the requisite relief, the alternative remedy is not 'other adequate remedy' within the meaning of Art.98. If the relief available through the alternative remedy, in its nature and context, is what is necessary to give the requisite relief, the 'adequacy' of the alternative remedy must further be judged, with reference to a comparison of the speed, expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Art.98. The steps to determine whether a suitor has an alternative adequate remedy were also laid down; those are '(a) formulate the grievance in the given case, as a generalised category; (b) formulate the relief that is necessary to redress that category of grievance; (c) see if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent; (d) if such a remedy is prescribed, the law contemplates that resort must be had to that remedy; (e) if it appears that the machinery established for the purposes of that remedy is not functioning properly, the correct step to take will be a step that is calculated to ensure, so far as lies in the power of the Court, that that machinery begins to function as it should. It would not be correct to take over the function of that machinery. If the function of another organ is taken

1. See Prof. A.Gledhill op.cit.p.180; See also Mehboob Ali Malik's case,infra.
2. P.L.D.1963 Lah.575.

over, that other organ will atrophy, and the organ that takes over, will break down under the strain; (f) if there is no other remedy that can redress that category of grievance in that way and to the required extent, or if there is such a remedy but conditions attached to it which for a particular category of cases, would neutralise or defeat it so as to deprive it of its substance, the Court should give the requisite relief under Art.98, and (g) if there is such other remedy but there is something so special in the circumstances of a given case that the other remedy, while generally adequate to the relief required for that category of grievance, is not adequate to the relief that is essential in the very special category to which that case belongs, the Courts should give the required relief under Art.98.'

The decision given by the Full Bench in Mehboob Aki Makik's case and the basis laid down for determining whether the alternative remedy is or is not adequate, has to be followed whenever a question comes up before the Courts. As to the question whether an alternative remedy by way of an appeal under S.18 of the W.Pakistan Criminal Law (Amendment) Act, 1963, can operate as a bar to entertaining a petition under Art.98 of the Constitution, it has been held that if the remedy provided by the appeal was not an adequate remedy, the aggrieved party could invoke the jurisdiction under Art.98, without resorting to the remedy of the appeal[1]. In cases of excess of jurisdiction, the litigant could directly apply to the High Court for the issue of the writ under Art.98 without exhausting the other remedy of appeal[2]; the writ of habeas corpus will issue[3].

1. Fazal Din v. Commr. P.L.D.1968,Pesh,1968.
2. Ali Abbas v. Visham Singh, P.L.D.1967,SC.294.
3. Abdus Sabur v. D.M.P.L.D.1969 Pesh.

Pendency of an appeal will not stand in the way of the aggrieved party seeking relief under Art.98, where there are allegations of mala fides, excess of jurisdiction or failure to observe the rule of natural justice; the establishment of any of the aforesaid allegations corrodes the very foundation of the jurisdiction of the Court making the impugned order[1], and habeas corpus will issue[2].

An accused person may be discharged by a writ of habeas corpus if it is established that his conviction was by a Court without jurisdiction, even though an eappeal had been taken against his conviction and dismissed, as there will be no other remedy available to him to question the validity of his conviction which was illegal. In going into the validity of the conviction, the High Court will not function as a Court of appeal on facts[3].

Under the Constitution of 1962, the existence of another adequate remedy is a constitutional bar. It is well settled that, when an adequate alternative remedy is available to the petitioner, he is required to pursue that remedy first and not to invoke the special jurisdiction of the High Court to issue write of habeas corpus under Art.98(2)(b)(i). The Court will refuse to grant habeas corpus where there exists an alternative remedy, which is equally efficient, efficacious and adequate[4]. In all the cases decided before 1963, prior to the enforcement of the 1962 Constitution, the High Courts ordinarily did not issue writs, if there wasanother adequate remedy available to the

1. Mohd.Amir Khan v. Controller,P.L.D.1961,SC.119; Murrey Brewery Co.Ltd., v. Pakistan,P.L.D.1970 Lah.821; Mohd.Swaleh v. M/s Kaud United Fodder,P.L.D.1964, SC.97; M/s Farid Sons Ltd.,v.Govt.of Pakistan,1961,SC.537; East and West Steam ship Co's. case supra; R.Wandsworth ex parte read,1942, All.E.R.1
2. A Sabur v. A.M. Supra.
3. Muslem uddin Sikdar v. Ch.Sec.Govt.of E.Pakistan,P.L.D.1957,Dac.101; see also In re: Authors; 22Q.B.345; in re Baker: in re Bailey, E & B.607; 2H and N.219.
4. Sardar Khan v. D.M.,P.L.D.1970, Pesh. 1.

petitioner. The decisions prior to Constitution of 1962, cannot be pressed into service in interpreting Art.98, because the Courts then adopted the principle of adequate remedy as a rule of policy, prudence and discretion, rather than a rule of law. Under Art.98 of the 1962 Constitution, the jurisdiction of the High Courts cannot be invoked, if there exists another adequate remedy; the 'adequate remedy' clause is incorporated in Art.98 itself[1].

Aggrieved Party:

The person who applies for the writ of habeas corpus, unlike the other writs, and the person who is detained need not be same, under Art.98(2)(b)(i). An exception is made to the general rule that a petitioner must urge his own grievance, because a persom may be incarcerated in circumstances making it impossible for him to communicate with the Court or his legal adviser[2]. In England, a person illegally detained or imprisoned, is, bothat common law and by statute, entitled to apply for a writ of habeas corpus, but it is not essential that the application should proceed directly from him; any person is entitled to apply for and obtain the writ for the purpose of liberating another from illegal detention[3]. But a mere stranger or volunteer, however, who has no authority to appear on behalf of a prisoner or right to represent him, will not be allowed to apply for habeas corpus[4].

1. Fazal Din v. Commr. Supra.
2. See Prof. Gledhill, Pak. p.182.
3. R. v. Clarke (1758) 1 Burr.606; and Gregory's case (1766) 4 Burr.1991.
4. Ibid; see also Halsburys Laws of England, op.cit.p.37.; Munir J. op.cit., p.377; See also Ashley v. White, 14 St.Tr.695; In re Agrarellis (1883) 24 Ch.D.317, and Shivram v. Commr. of Police 50 Bom.LR.210; In re Rajendra, 50 Bom.LR.183.

A question before the Supreme Court in an application for ceriorari (and not for habeas corpus)was whether the petition filed by the son of a convict was maintainable; could he not be regarded as an 'aggrieved party' in the sense contemplated by Art.98? It was peinted out that his father being incarcerated, the son was naturally afflicted by the tragedy; he had an inherent legal right and interest to avert it, so he must be an aggrieved party. A writ of certiorari, under the circumstances of the case, to quash the proceedings, which were without jurisdiction, could be treated as one for a writ of habeas corpus for the release of the convict, whose illegal confinement and detention could be challenged by any person under Art.98(2)(b)(i).[1]

An application, under Art.98(2)(b)(i), challenging detention should normally be made by a relation sufficiently close to him or by a friend, who can satisfy the Court that there is no one else among the relations of the detenu to challenge the detention order. Such friend should be very close to the detenu and know all the facts and circumstances of the case, so as to be able to help the Court in coming to a correct decision on facts alleged or contraverted. Where the person, pretending to be friend of the detenu, failed to establish friendship with the detenu to the satisfaction of the Court and other facts showed that his connection with the detenu was doubtful and there were near relations of the detenu capable of challenging the detention order, the petition for habeas corpus was rejected[2]. But a petition from a friend of the detenu for his release from illegal detention was accepted where there was no relation of the detenu to challenge the detention and the petitioner was an intimate friend, knowing the alleged and controverted facts of the case[3].

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1. Prov. of E.Pakistan v. Hirajal Agrawal, P.L.D.,1970,SC.399.
2. Azizul Haque v. Prov. of E.Pakistan, P.L.D.,1968,Dac.728.
3. Mazhar Hussain v. Prov. of E.Pakistan, P.L.D.,1970,SC.397

Though a petition for habeas corpus may be filed by a person other than a detenu such person should, in fact, be seeking a remedy for the detenue and be closely related to the detenu so as to disclose the facts of the case[1].

Where a writ petition, aimed at securing the release of some foreigners, who were detained as illegal immigrants for deportation to their own country, was not made by the relation of the detenue or friends, but by the secretary of a semi political body who displayed ignorance of the fact relating to the detention, it was contended that such a petition was an abuse of law. The High Court, while recognising the general soundness of the submission, was not inclined to dismiss the petition on this ground, as the objection to the party was raised at almost the conclusion of the arguments. It was, however, remarked that it was difficult to see why the detenus, who were absolute strangers in Pakistan,presumably without any personal friends and relations, should be deprived of the chance of coming to the Court for the writ of habeas corpus. The petition was dismissed on another point; it had become infractuous, on account of the deportation of the detenus to their country. It is submitted that, under the circumstances of the case, the detenus should not be deprived of the right to be represented, even by a third person[2].

The question who may apply and in what manner, is one to be regulated by the High Court by Rules to be framed under Art.101, but it seems that, until such rules are framed, any one may apply, even a stranger, though the relief being discretionary, the Court may decline to make the order asked for, where the applicant has no interest whatsoever in the matter. In the case of a minor,

1. Fazal Din. v. Commir.Peshawar, Supra.
2. Jumna Khan v. Govt. of Pakistan, P.L.D.,1957 Kar.939

however, the application should be by a person who is entitled to the custody of the minor and, in the absence of such a person, by a person interested in the welfare of the minor[1] and the rule is the same in case of a lunatic[2].

Successive Applications for Habeas Corpus:

In England until recently, the applicant had a right to apply successively to every Court competent to issue the writ and to every Judge of such Court[3]; each Judge having separate jurisdiction to issue the writ, as many applications on the same ground as the number of Judges might be made[4], and each Court and Judge was bound to determine such application upon its merits, unfettered by the decision of any other Court or Judge of co-ordinate jurisdiction, even though grounds were exactly the same. By the Appellate Jurisdiction Act, 1960, the position has been changed. S.14(2) of the Appellate Jurisdiction Act, 1960, lays down that, when an application for habeas corpus has been made in a civil or criminal matter, no such application shall be made on the same grounds in respect of the same person to any Court or Judge, unless fresh evidence is produced in support of the application.

Under Art.226 of the Indian Constitution, the jurisdiction to issue the writ is conferred on the High Courts as such and not upon any Judge or Judges of the High Court. When a Division Bench has rejected an application for habeas corpus, it is not open to the applicant to approach the Full Bench or any other judge or judges of the High Court for a similar purpose. To make a second application on the same ground would be to apply for a review by the High Court of its decision. No Court has an inherent power to review and there is no power

1. Raj Bahadur v. Legal remembrance (1953) 47 CWN.507,(504).
2. Ex parte Child (1854) 15 CB.238; see also Mumir J. op.cit.377.
3. See Goddard op.cit; and Heuston, Habeas Corpus Procedure,66 LQ.79.
4. Ibid., see also Halsbury's Laws of England, op.cit. A.I.R. 1951,Bom.25(27)

conferred on the High Court to review its decisions in the matter falling under Art.226. The decision of the High Court is, therefore, final qua the High Courts, notwithstanding that the protection of Fundamental Rights guaranteed to the citizen is involved . Under Art.32 the Supreme Court of India has concurrent jurisdiction to issue writs for the enforcement of Fundamental Rights, But an applicant whose application has been rejected by the High Court cannot move the Supreme Court for the writ of habeas corpus on the same ground directly; he can approach to the Supreme Court only after obtaining leave from the High Court to appeal, as the rule of res judicate will apply to such case[2]. It has been pointed out by the Indian Supreme Court that the rule of res judicate is not merely a technical rule but is based on public policy; it can be invoked against a petition under Art.32 of the Constitution. It was further observed that 'it is in the interest of the public at large that a finalty should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata, they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petition filed under Art. 32.'[3] Successive applications for habeas corpus on the same ground cannot be made to the Supreme Court of Burma'[4].

In England no appeal lies against a decision of the Court granting a writ of habeas corpus because the grant or refusal of a prerogative writ is not technically a judgement[5]. It was laid down in Cox v. Hakes that a prisoner

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2. Daryao v. St. of U.P.,A.I.R.1961,SC.1457.
3. Ibid.
4. (1949) Bur. LR.(SC) 157 (159)
5. Goddard, op.cit.

discharged under the writ is free once and for all; error never lay in respect of habeas corpus proceedings[1]. Commenting on this Lord Goddard says that:

> "It is true, but the tenor of Lord Halsbury's speech and that of Lord Bramwell may well lead to the belief that this was because of law's anxiety to protect the liberty of subject and so it was intolerant of anything in the nature of an appeal."

He further observes that..

> "...it was quite another and highly technical lesson that prevented any sort of Appeal."

Appeal against the grant of writ was refused by the House of Lords in Secretary of State v. O'Brien[2], on the principle laid down in Cox v. Hakes. The decision of the House of Lords in Ex parte Armaud[3] puts the question whether an appeal against the grant of habeas corpus lies or not beyond controversy, as indeed did the earlier cases cited above.[4]

Under the Constitution of Pakistan 1962, the earlier jurisdiction of the Supreme Court to issue writs concurrently under Art.22 of the 1956 constitution has come to an end; the Supreme Court of Pakistan cannot issue the writs directly, even if the Fundamental Rights are involved. Only the High Courts are empowered under Art.98 of the Constitution of 1962 to issue the writs initially and the appeal from the decision of the High Court lies to the Supreme Court only on the leave to appeal is granted; if the leave is not granted, the aggrieved party cannot move the Supreme Court. Under Art.98 the power to issue habeas corpus or any other writ, is the power of the High Court as such and not of individual Judges, and once it has disposed of a

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1. 15 App.Cas.506.
2. (1923) A.C.603.
3. (1943) A.C.147.
4. See Goddard op.cit.

petition one way or the other, the High Court is functus officio and the only remedy available to the aggrieved party is a petition for leave to appeal under Art.58(3)[1].

A subsequent application on the discovery of new facts which, although they existed at the timeof previous application, were not known to the applicant at that time, can be made to the same High Court. But grounds which were available to the applicant at the time of a prior application for habeas corpus but not incorporated in that application, cannot be raised by means of a second application; the application will be dismissed.

In the absence of a rule framed by the High Court as to who may apply, which is necessary to avoid repeated applications, the Court always finds itself in an embarrassing position where a petition by a stranger has been dismissed and is followed by one by the detenue himself or someone interested in him, who is more conversant with the facts[2].

But there is no bar to making a subsequent application on the rejection of the first, on new grounds or facts or the production of new evidence, which was not known to the petitioner at the time of the institution of the prior application. Where the sentence imposed on the petitioner exceeded what the petitioner should have served after the remission ordered by the Provincial Government under S.401 of the Cr. P.C. but there were technical difficulties with regard to the proof of remission orders, the petitioner was

1. See Kishori v. The Crown, I.L.R. (1945) 26 Lah.573; Mirza Mohd.Yaqub v. The Chief Settlement Commr. Lah.,P.L.D.1965,SC.254.
2. See Munir J. op.cit. p.379.

allowed to withdraw the petition with permission to file it again after proof had been obtained. It was pointed out that, if the detention of the convict was illegal at the time when the petition was filed, in view of the aforesaid facts, it was a continuing wrong; there should be no bar to the making of a fresh petition under S.491, Cr.P.C. read with Art.98(2)(b)(i), for habeas corpus to set right that wrong.[1]

The right to the custody of a minor is, in any event, in the nature of a continuing right, as for each day the minor is kept out of the custody of person lawfully entitled thereto, successive petitions can be made to obtain the custody of the child[2].

Nature of Habeas Corpus Proceedings:

Prior to the Independence, High Courts in the Indo-Pak sub-continent could issue the writ of habeas corpus only under S.491 Cr.P.C. and when they issued such a writ, it was the view of High Courts that they did so in the exercise of their appellate criminal jurisdiction. The position has, however, now considerably changed. In India due to the incorporation of Art.226 in the Constitution, and in Pakistan on account of insertion of S.223-A in the Govt. of India Act, 1935, it certainly could not, by any stretch of imagination, be said to act as a criminal Court or a civil Court. At the most it could be said that it exercised an extraordinary jurisdiction to grant speedy justice to helpless persons kept in captivity[3]. The position was the same under Art.170 of the 1956 Constitution and has continued in the Constitution of 1962; by Art.98

1. Mazhar Hussain v. Prov. of E.Pakistan, supra.
2. Khizar Hayat Khan v. Zainab Begum, P.L.D.1967,SC.402.
3. Hamesh Gul v. Crown, P.L.D. 1955,Pesh.1.

(2)(b)(i) the right to personal liberty has been vindicated, so far as the writ of habeas corpus is concerned, by providing an easy and effective means of immediate release from an illegal and unjustifiable confinement, whether in a civil or criminal proceedings, by a private person or person in authority.

The right of a person to a petition of habeas corpus is a constitutional remedy for all matters of illegal confinement, guaranteed under Art.98(2)(b)(ii) of the 1962 Constitution. There being no limitation placed on the exercise of power by the High Court under Art.98(2)(b)(i), it is untrammelled and unfettered by limitations put on it by an ordinary legislation; the legislation restricting the jurisdiction of the High Court under Art.98 will be ignored, and the power, conferred on the High Court to set the person, illegally confined or detained, at liberty, will be given effect to[1]. The content of the power vested by the Constitution under Art.98 cannot be limited or taken away by an enactment made by the legislature in its legislative capacity[2]; the bar put on the powers of the High Court under Art.98(2)(b)(i) by the Defence of Pakistan (Amendment) Ordinance,1968, that a valid order of detention under the Defence of Pakistan Ordinance,1965, or Rules made thereunder could not be called in question by the High Court was held to be invalid; the order of detention made under r.32 of Defence of Pakistan Rules was scrutinized and the detune was set at liberty on an application for habeas corpus[3].

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1. Farid Ahmad v. Govt. of W.Pakistan; P.L.D.1965 Lah.135.
2. Govt. of W. Pakistan v. Begum A.K.S. Kashmiri, supra.
3. Ibid.

S.23 of the W.P. Maintenance of Public Order Ordinance, 1960, completely bars the jurisdiction of the Courts to call in question the matter, if the detention order is made under the Ordinance. Explaining the vast and unfetted powers given to the High Court under Art.98 (2) (b) (1), it was pointed out that the bar does not operate in view of these vast powers.[1] The limiting provisions of S.16(1) of the Defence of Pakistan Ordinance, 1965, which completely bars the High Court's jurisdiction to hear the petition under Art.98 (2)(b)(i), cannot in any manner be construed to exclude or curtail the writ jurisdiction of the High Court. It was pointed out that the High Court would not be subject to such limitation but would step in to grant redress, if any order, purporting to be made under the Ordinance or Rules made thereunder, transgresses any provision of the Constitution or is otherwise mala fide[2].

S.60 of the F.C.R. expressly excludes the jurisdiction of the Courts by providing that no decision given, sentence passed or order made by the authorities authorised under the F.C.R. could be called in question or set aside by any civil or criminal court. It was pointed out that if the order by any authority is proved to be mala fide or ultra vires the powers conferred on such authority, the order in the nature of habeas corpus under S.491, notwithstanding the limiting provision of S.60 of the F.C.R., would lie.[3] Under S.6 of the Pakistan (Recovery of Abducted Persons) Ordinance, 1949, the matters referred to and decided by the Tribunal constituted under the Ordinance, were to be final, subject to the revision or review by the Central Government. It was held

1. Mohd Anwar V. Govt. of W.P. Supra.
2. Hussain Ali Chagla V. D.M, Supra.
3. Sammundar V. Crown, P.L.D. 1954 F.C. 228, see also Hamesh Gul V. Crown, Supra.

that the section does not bar the jurisdiction of the High Court for all purposes. If the detention of the abducted person is the result of mala fides of the Tribunal's decision, the detention will be illegal and it does not by stretch of imagination mean that, in the absence of any other adequate remedy, the jurisdiction of the High Court to issue habeas corpus to set the person at liberty illegally detained, is ousted by the aforesaid section of the Ordinance.[1]

There are certain specified Tribal areas in relation to which, notwithstanding any provision of the Constitution of 1962, neither the Supreme Court nor a High Court can, unless the Central Legislature by law provides otherwise, exercise any jurisdiction under the Constitution. It is obvious that the High Court can not exercise their power under Art. 98 to issue writ to any aggrieved party from such areas.[2]

Writ jurisdiction has not so far been conferred on the Azad Kashmir High Court. While it is for the Government to decide whether the time is or is not opportune for the conferment of such powers, citizens should have speedy and summary remedy available for what they may consider as arbitrary curtailment of their fundamental rights, which are inherent in every free society, by executive action. It was, therefore, pointed out that within the four corners of law, S.491 of Cr.P.C., read with Art.98 (2) (b) (i) ought to receive a liberal interpretation. Where, therefore, the liberty of petitioner was infringed by executive action, it was held that the writ of habeas corpus would run into

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1. Sakhi Daler Khan V.Supdt, P.L.D.1957 Lah. 813.
2. See Art. 223 (5) Constitution of 1962.

the territory of Azad Kashmir to protect the people against the arbitrary deprivation of their personal liberty.[1]

Illegal detention

It is well settled that any detention will be illegal unless it is shown that it was made "in accordance with law".[2] In each case of arrest, if the Court comes to the conclusion that the Constitutional safeguards provided by Right No. 2,[3] or the statutory requirements of the law,[4] have been contravened, it will issue the writ of habeas corpus. The proof that action has lawfully been taken against the aggrieved person is a complete answer to a petition for habeas corpus.[5] Where for the specific purposes laid down by the law,[6] the official act is performed by a person so authorised,[7] in full and strict compliance with the conditions prescribed by the law,[8] and the record of the case shows that there was no mala fides on the part of detaining authority,[9] the writ would be refused.

As a general rule the writ of habeas corpus will be granted if the accused is illegally detained in custody without being produced before the Magistrate within twenty-four hours of the arrest;[10] where he has been detained

1. See Walayat Jan V. State, Supra.
2. Sakhi Daler V. Supdt. Supra;and Abul Ala Maudoodi V.State Bank,Supra.
3. Aboul Baqi Baluch's case supra;and Hussain Chagla's case,supra;and Rafique Ahmad's case,supra;
4. Mohd. Anwar V.Govt of W.P., supra;and Khair Mohd V.Govt of W.P.supra; Sira Juddin V.State, Supra.
5. Farooq Badar's case supra; but the writ was granted as the Court failed to give such proof.
6. Muzaffar Mahmood V.Crown,supra.
7. Jumma Khan V.Pak.P.L.D.1957 Kar.939.Crown V. Mohd. Afzal.ifra P.L.D.1956 F.C.1
8. Inayatullah Kh.Mashriqi V.Crown P.L.D.1952 Lah.331
9. Ibid.
10. Abdus Salm V. A.M. supra; and Aishya Begram V.Crown P.L.D.1955 Sind,375.

in the C.I.D.[1] or C.I.A. office[2] instead of the "police-station" or "judicial lock-up";[3] or where there is nothing on the record to show what crime had been committed by the accused or no reasons for the detention have been communicated the prisoner or detenu.[4] Where an illegal order of remand to "public custody" namely the "police-station" or the "judicial lock-up was made without any justification or reasonable ground;[5] where the Magistrate making the remand order did not disclose that he was a Magistrate;[6] where the reasons for the remand order were not stated in writing;[7] where the prisoner was not produced before the Magistrate making the remand order,[8] where the Magistrate did not allow the accused to arrange for counsel to appear and represent him,[9] where the remand order was inviolation of the law under which the accused was being tried,[10] where the accused was remanded to the C.I.A. or C.I.D. office instead of "public custody",[11] where the remand was ordered by a Magistrate while he was walking in the street,[12] where the Dy. Commissioner had not been "satisfied" as to the validity of making the remand order, as required by S.6 of the F.C.R. before he referred the case to the Jirgha;[13] or where the authority making the remand order

1. Aiysha Begum's case,supra.
2. State V.Mohd. Yusuf P.L.D.1965,Lah.324
3. ibid
4. Ghulam Ullah Khan V.D.M. Supra; Mahmooda Begum's V. Commr.P.L.D.1966.S.C.701. Aishya Begum's case supra and state v. Mohd Yasaf, supra.
5. Farooq Badar's case, supra;
6. Jahangiri Lal V. Emp. Supra.
7. Khairati Ram's case, supra.
8. Crown V. Shera Supra;
9. Farooq Badar's case supra.
10. Nazir Ahmad V. State, supra.
11. State v Mohd Yusuz, supra; and Aishya Begum's case, supra.
12. Edward V.Ferris, supra;
13. Hamesh Gul V. Crown; Supra.

was not a 'Magistrate[1], the aggrieved person were held to be entitled to habeas corpus.

When the right of the accused to be defended by the counsel of his choice has been contravened[2], the detenu was not allowed to be defended by the counsel[3], when if the aggrieved person and his counsel were excluded from the court[4] and the proceedings were held in their absence, habeas corpus was granted.

In England the detenu may be set at liberty by a writ of habeas corpus, if it is established that his conviction was without jurisdiction, even though an appeal has been filed against his conviction and dismissed[5]. The law is the same in India and Pakistan. The condition precedent to making of an order of reference to a Jirga under the F.C.R. is that these should be a prima facie case against the accused. Where there was no prima facie case against the accused, his detention in the prison during the trial by the Jirga, was held illegal, habeas corpus was granted[6]. Habeas corpus was also issued, where a case against the accused was pending before a magistrate for enquiry, but was transferred to the Tribunal for trial under the W.P. Criminal Law (Amendment) Act, 1963 but there was no evidence against the accused and the transfer was held to be without jurisdiction[7]. Where the authority empowered to try a case was the Political Agent, but the accused was convicted by the Additional Political Agent[8] and where the authority to detain was vested in the

1. Khair Mohd's case,supra,; but Dy.Commr.under F.C.R.is a Magistrate; he makes a remand order, see state v. Dosso, P.L.D.1958 SC.5 p.3.
2. Khair Mohd's case, supra; and Liaq Ahmad's case,supra.
3. Muslemuddin Sikdar V.Ch.Sec.P.L.D.1957 Dac.101; Warryam v. State 1958 Lah.151 and Bazal Ahmad Aynbi's case, Supra.
4. Bazal Ahmad Ayynbi's case.
5. In re: Bailey,(1864) 3 E.B.607; in re: Barker,2 H.N.219; In re:Authors (1889) 22 Q.B.345; in re. Coiler; 16 Q.Digest 254,257 and King Governor of Lawes Prison, Ex parte Doyle (1917) 2 K.B.254.
6. S.N.Haji Mohd.Khan v. Addl.Commr.P.L.D.1964 Lah.401; and Sher Mohd v. Sibghatullah P.L.D.1967 Pesh.167.
7. Mehar Jang v. Commir.P.L.D.1969 Pesh.111.
8. Bahadur Zaman v Crown, P.L.D.1957, Pesh,41.

D.M. but the order of detention was made by the A.D.M.[1], habeas corpus was issued. The authority to order three years R.I. for failure to furnish security to keep the peace under S.123(3) of the Code of Criminal Procedure vested by reference to the F.C.R., in the Commissioner; where the order of imprisonment was made by the Dy. Commissioner, it was held to be without jurisdiction and the petitioner was set at liberty[2].

Even if the matter has been properly referred to a Jirga under S.11 of the F.C.R., to rule on the guilt or innocence of the accused, Art.98(2)(b)(i) of the 1962 Constitution confers power on the High Court to interfere, if the Statutory requirements of the F.C.R. that there should be a prima facie case against the accused[3], Dy.Commissioner should be satisfied before he makes the reference to a Jirga[4], and no reference can be made to a Jirga if a complaint has been dismissed under S.203 of the Cr.P.C. unless further enquiry has been ordered for a revival of a case on a fresh application[5], have been contravened; the detention of the accused under such circumstances, violating the mandatory requirements, will be without jurisdiction and the detenu will be set at liberty.

Where the petitioners were arrested and convicted for possessing the foodstuff's in excess of the permitted amount, the proof whereof was not given by the authority, as required by the E.P.Food Control of Movements and

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1. Mohd.Ali v. Pakistan,P.L.D.1961.Kar.88.
2. Ajab Khan v. State,P.L.D.1963 Pesh,224.
3. Mohd.Aslam v. State,P.L.D.1963 S.C.373.
4. Ali Mohd. v. Commr.P.L.D.1964 Quetta 1; Mohd.Aslam v. State,P.L.D.1963SC. 373 and S.N.Haji Mohd.Khan v. Addl.Commr.P.L.D.1964 Lah.401. The decision in Samundar v. Crown,P.L.D.1954 FC.228,was dissented from as the powers under Art.98(2)(b)(i) were held to be wider than that enjoyed by the High Court under S,491,Cr.P.C.; which was applicable when that case was decided.
5. State v. Nawab Gul,P.L.D.1963 SC.270.

Distribution) Ordinance,1956, it was held that the conviction was illegal; the convict was released[1]. Habeas corpus was also granted when a detenu was placed in the jail under a 'warrant of commitment' issued by the Central Government for 'reasons connected with the maintenance of public order,' it was held that the warrant was invalid as the 'warrant of commitment' for the aforesaid purposes could, under the Bengal State, Prisoners Regulation,1818,only be issued by the Provincial Government; the detention was held to be illegal, and the detenu was set at liberty[2].

The rules of natural justice apply to all tribunals, quasi-judicial or administrative, who are called upon to pass orders depriving a person of his liberty, they must keep an open mind, that is a mind which is not so biased as to be prompted by any personal motive to pass an order of imprisonment. They should act on the maxim that, not only should justice be done, but it should be manifestly seen to be done. Thus where it was proved that the authority making the order of detention was biased[3], where the prosecuting authority and the judge were one and the same person[4], where one of the members of an Advisory Board was the person who passed the detention order[5] and where opportunity to be heard was not given before action was taken[6], the petitioners were released by writ of habeas corpus.

(ii) Preventive Detention:

Even in the cases of preventive detention, habeas corpus will issue, if it is established that the order of detention was sham, colourful or

1. Muslemuddin Sikdar's case supra.
2. Mohd.Anwar Bepari v. Crown, P.L.D.1955 Lah.585.
3. Sher Mohd.Khan's case supra.
4. Mohd.Mohsin Siddiqui v. Govt.of W.Pakistan,supra.
5. Rahmat Elahi v. Govt.of West Pakistan,supra.
6. Liaq Ahmad's case; supra Bazal Ahmad Ayyubi's case supra; Mustafa Ansari's case supra; Tofazzal Hussain's case supra.

malafide[1]. Before the decision in Ghulam Jilani's case, which laid down the principle that 'objective satisfaction', the 'subjective satisfaction' of the detaining authority was regarded as final; production of a valid detention order, made under the relevant preventive detention law, was accepted as a complete answer to a petition for habeas corpus[2]. But since, Ghulam Jilani's case was decided, the principle of 'objective satisfaction' in the case of preventive detention, has been established in Pakistan[3]. It was held in that case that, on a petition for habeas corpus, the Court must, in exercising its powers under Art.98(2)(b)(ii) of the 1962 Constitution, be satisfied that the detenu is not being held without lawful authority or in an unlawful manner. The ipse dixit of the detaining authority is not enough. The material on which it claims to be satisfied must be proved. If the detaining authority fails to satisfy the Court on facts that there existed justification for the detention of the petitioner, the writ of habeas corpus will issue[4].

Where a person, who has been detained under a preventive detention law, applies for a writ of habeas corpus, what the Court is concerned is not whether the arrest of the petitioner was legal or illegal but whether his detention under the order passed is legal or illegal at the time he makes application.

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1. Ghulam Mohd. Loondkhwar's case, supra, Hamiduzhafar's case supra; Abuzar's case supra; Refique Ahmad's case, supra; Hussain Ali Chagla's case supra; Govt. of E.Pakistan v. Rowshan, supra; Jagannath Misra v. State, A.I.R.1966 SC.1140; Sadanandon v. State of Kerala, A.I.R.1966 SC.125 and Kurandikar v. State Cal.A.I.R.1967 Bom.11; Pio Fernandes v. Union A.I.R.1967 Cal.231; State of M.S.V.Almarane, A.I.R.1966, SC.1786.
2. See Inayatullah Mashrique's case, supra; and Nasim Fatima's case supra.
3. Ghulam Jilam's case, supra. Abdul Baqi Balach's case supra; Govt. of W. Pakistan v. Begum A.K.S.Kashimri's case, supra; and Begum S.M.Hayat Khan v. Govt. of W.Pakistan, supra and Mohd Aslam v. Govt. of W.Pakistan, P.L.D. 1968, Lah.667.
4. Ibid.

The detention which he complains by the petition, is the detention in the jail on the date when he makes application, and it is immaterial for the determination of the question as to whether his prior arrest and detention were or were not legal. The question in the habeas corpus proceedings is whether the detention of which the detenue complains, that is, the detention at the time when he seeks a writ of habeas corpus, is valid or not. The question is whether at the moment there is for his detention a valid order in existence; if there is such an order no writ of habeas corpus can be issued[1]. It follows from this that successive orders, correcting defects in previous order of detention can be made and what is required is that the petitioner must be detained under a valid order of detention at the time of instituting the writ proceedings. But where a subsequent order merely extends a previous order of detention, which itself was illegal[2], it cannot be regarded as valid order of detention, and habeas corpus will be granted[3]. Repeated orders of detention without given the detenu an opportunity to desist from his activities may, in certain cases, be regarded as vindictive, dishonest or punitive and not preventive and where such a view can fairly be taken, the High Court will hold the order invalid and set the detenu at liberty[4]. But renewal of an order of detention from time to time is justified, if the Government is satisfied and honestly forms the opinion that the detenu, if released, would engage in the same activities. Such successive orders of detention were held valid and a writ under Art.98(2)(1) was refused[5].

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1. Basant Chandra Ghose's case,supra; in re Jayarartilal N.Parek supra. and Begum S.M.Hayat Khan's case, supra.
2. Mohd.Aslam v. Govt.W.P. supra.
3. Mohd.Masum v. State supra; Arab Mohd.Khan's case, supra; Begum S.M.Hayat Khan, supra.
4. Inayatullaly Kh.Mashriqi v. Crown P.L.D.1952,Lah.331.
5. Mirzachughtai v. Govt.of W.P,P.L.D.1968,infra; see also Inayalullah Khan Mashriqu's case supra.

In preventive detention cases, the writ under Art.98(2)(b)(i) or under S.491 Cr.P.C. has issued where the grounds of detention were not communicated to the detenu[1], where the grounds did not exist at all[2], where the grounds were vague as to render the detenu unable to make the representation[3], where the grounds were so general as to be a mere reproduction of the purposes enumerated in the preventive detention law[4], where the grounds were not relevant to the purposes of the statute[5], and where on of the grounds was illegal or outside the scope of the preventive detention law[6]. Speeches not calculated to disturb public order[7] and membership of a political party, unaccompanied by the commission of subversive activities by the detenu[8], cannot be grounds for the detention of any person, and if anybody is detained on these grounds, he will be released on the writ of habeas corpus. But if the grounds are sufficiently clear and relevant to the purposes of the preventive detention law, the writ of habeas corpus will not be granted[9]. Delay which cannot stand the test of 'as soon as may be' in the communication of the grounds will entitle the detenu

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1. Ghulamullah Khan's case supra; Farooq Badar's case,supra; Sirajuddin's case, supra; and Govt.of E.P. v. Rowshan supra.
2. Abdul Qayyum's case supra; Hasan Nasir's case supra; Sibte Hasan's case supra
3. Hasan Nasir's case,supra; Sardaru v. Crown P.L.D.1953,sind; Ghulam Mohd.Khan Loond Khwar's case supra.
4. Hasan Ali Chagla's case, supra; and Begum S.MHayat Khan's case,supra;
5. Farid Ahmad Khan's case supra; Rahmat Elahi's case,supra,Mukhtear Ali's case supra; Abdullah v. Crown P.L.D.1950,Kar.68.
6. Mahboob Anam's case, Supra
7. Farid Ahmad Khan's case, supra; Prov.of E.P.V. Tofazzal Hussain,supra; Abuxar v. Prov.of W.Pakistan.
8. Hasan Nasir's case supra; Ralmat Elahi's case, supra; Farid Ahmad's case supra.
9. Muzaffaruddin v. Crown,P.L.D.1950,Sind.115; Inayatullah Khan's case supra. and Moina Khatoon v. Govt. of Pak.P.L.D.1957,Kar.530.

to habeas corpus.[1] Habeas corpus will also be granted in cases of detention under an invalid law.[2]

In cases of preventive detention for a period exceeding three months, if the constitutional requirements, that the matter should be referred to the Advisory Board constituted under Right No.2 (4), and that the Advisory Board should report before the expiration of three months about the validity of the continuation of the detention, are contravened, habeas corpus will be issued.[3] Habeas corpus will also be granted where the decision of the Advisory Board is not communicated to the detenu;[4] or where the Advisory Board is not properly constituted.[5] A detenu is entitled to the writ of habeas corpus even before his case has been referred to the Advisory Board; a detenu can challenge the order of detention by the writ petition for habeas corpus immediately after his detention.[6]

Freedom of Movement:

Writ of habeas corpus is also available to a person aggrieved by wrongful deprivation of his right to move freely in Pakistan. A writ or direction in the nature of habeas corpus was issued in a case where the movements of a person were restricted to a specified area, thereby depriving him of the

1. Fazal Ahmad Ghazi's case, supra;Ghulamullah Khan's case,supra;but writ was refused where the delay was justifiable under the circumstances of the case; see Muzaffaruddin's case supra.
2. See Behram Khan v State, P.L.D. 1957 Kar.409,but habeas corpus will not be granted where the statute does not contravene any of the safeguards provided by the constitution,ibid;
3. Mohd Sarwar's case supra;Sibte Hassan's case,supra;and Mirpaldas' case supra;
4. Sirajuddin's case,supra;Mohd Ahmad's case supra.
5. Rahmat Elahi's case,supra.
6. Farid Ahmad's case,supra; Farooq Badar's case supra.

liberty of free movement.[1] Where an order of externment is not relatable to the object of the Statute authorising externment[2], where the authority passing the externment order was not satisfied as to the reasonableness of the exterment[3], where the grounds of the externment order were not communicated to the externee[4], and where an order under S.108-A of the Cr. P.C. was passed without following the mandatory procedure laid down in ss.112,113,114, 117 and 118 of the Cr.P.C.[5], and where the externee was directed to remove himself from the district in which he resided, in violation of the Statute authorising externment[6], habeas corpus was granted.

Wrongful refusal to bail

The remedy at common law for the improper refusal of bail was the writ of habeas corpus.[7] An exception to the authority of the Courts to admit to bail is where the commitment is for contempt or execution[8], for the adjudication that an act is contempt or breach of privilege amounts to conviction, and the commitment in consequence is execution.[9] When a court decides to make a complaint to a magistrate of an offence committed in relation to a proceeding before it under S.476 of the Code of Criminal Procedure, it may order the accused to appear before

1. Rao Mahroz Akhtar's case,supra;Mohd Anwar's case,supra;Hari Khemu Gawali's case supra;N.B. Khare v state,supra; Guru Bachan Singh's case supra;Ranji Luxman v. State,supra; Jesinghbhai v.Emperor,supra;and Bazal Ahmad Ayyubi's case supra.
2. Mohd.Anwar's case supra.
3. Abid Ali Mirza v.Govt.of W.P.,P.L.D.1967 Kar.408.
4. Hakim Ali V.A.M.,P.L.D.1965 Lah.418
5. Walayat Jan v.State,P.L.D.1970 Azad J.andK.27.
6. Hakim Ali's case supra,see also Ghulan Mohd.V.state,P.L.D.1969 Lah.767,and Ghulam Ali v.State,P.L.D.1970 S.C.253.
7. 4,Co. Inst.70
8. 4,Bl.Com.296.
9. See Brass Crosby's case (1771), 3 Wils. 188 at p.199, per De Grey,C.J.see also R.v. Beardmore (1754) 2 Burr.792;see Halsbury's Laws of England op.Cit p.33.

the magistrate only when it has recorded its findings and decided to make a complaint. Before passing a final order that a complaint should be made, the court has no power to confine or put on bail. Therefore, where a Court, before finally deciding to make a complaint under S.476, Cr.P.C., ordered the accused to be detained in the judicial lock-up, the proper application would be for habeas corpus and not for bail, because the court has no power at this stage to grant bail.[1]

Where the accused was brought before the city Magistrate for the verification of the sureties to be furnished for his release on bail, the accused was asked to appear next day with sureties for an enhanced amount. Meanwhile he was ordered to be detained under ss.13 and 14 of the W.P.Control of Goondas Ordinance, 1959, by the D.M. In a writ petition for habeas corpus it was held that his detention in the jail was without any lawful authority, in so far as he had been deprived of his right to be released on bail; he should be released on furnishing the proper amount of security. It was emphasized that the Magistrates and Tribunals should not demand an excessive amount of security and that the amount should be fixed with proper regard to the financial Status of the person concerned.[2] The principles for the guidance of the Magistrates and Tribunals fixing the amount of security or number of sureties, were enumerated in Mohd.Sarwar.v State.[3]

Extradition

Under Art.2 of the Constitution of 1962, an inalienable right to the enjoyment of the protection of law and to be treated in accordance with law

1. Brahma Nand V.S.D.Sabha A.I.R.1944 Lah.328.
2. Abdus Sabur V.D.M. P.L.D. 1969 Pesh.167
3. P.L.D. 1965 Pesh.14.

has been guaranteed to two categories of persons; firstly to every citizen of Pakistan, and secondly to every other person who is for the time being in Pakistan. The second category includes a foreigner, who has been committed by a Magistrate on the warrant of a foreign Government for extradition in respect of an offence committed abroad[1], and such foreigner is entitled to invoke the jurisdiction of the High Court in challenging the validity of an extradition order and praying for habeas corpus.[2]

Even in the report of the Asia Regions Conference, Kyote, held on 25th and 26th of September,1967, the right and responsibility of the judiciary of the country from which extradition is sought to enquire into the question of the claims has been acknowledged[3]. Also, in the Extraditions Acts themselves, there are references to petitions of habeas corpus and the right of a person sought to be extradited to file such a petition has been clearly admitted. Hence the high court has beyond doubt, jurisdiction to entertain a petition for habeas corpus, even after the extradition orders have been made against the petitioner and he has been put in charge of the embassy of the country seeking extradition[4]

An accused, not a British subject, but a native of Jind State, had committed an offence within the cognizance of British Indian Courts and was arrested in Jind State by the British Indian Police. Before he was tried by a court in British India, he as extradited and handed over to the British Indian authorities nearest to the border of Jind State. It was held by their Lordships of the Privy Council that the detention of the accused in British India was not illegal, as he was properly extradited and handed over to the proper authorities ,-

1. See S.3 of the Indian Extradition Act (XV of 1903 as adopted in Pakistan.
2. Joseph Gonzale De Garcia Balseras v. State, P.L.D. 1969 Lah.129; see also Sandal v. D.M. Dehradun A.I.R. 1934 All.148, A.W. Goulter v.Emperor A.I.R. 1935 Sind 244
3. See Halsbury's Laws of England,3rd ed.vol.16,paras 1190 to 1192
4. Joseph Gonzalo De Garcia Balseras v. State, supra.

so the writ was not granted.[1] In another case the petitioner who had previously been arrested, was released on bail by the District Magistrate, but later was ordered to appear in the Court of the Assistant Commissioner, as it was intended to hand him over to the Karachi Police for the extradition proceedings, on a simple message from the Karachi Police. It was held that the handing over of the petitioner to the Karachi Police, on a mere message and without any proceedings was preposterous and illegal; the D.M. was directed not to hand over the petitioner to the Karachi Police.[2]

In England, no one may be surrendered for extradition in respect of an offence of a political character.[3] When a Magistrate commits a person for extradition, his decision that the offence charged is not of a political c character, may be reviewed by the High Court on an application for a writ of habeas corpus.[4] A person may be released Brom custody by a writ of habeas corpus if he has been committed for extradition where the offence is not extraditable; where it is political offence, or is not covered by Extradition Treaty,[5] but if there is evidence that the offence alleged to have been committed is extraditable, no writ can be granted on the ground that the extradition is being asked for to take action against him for political activites.[6]

But the Indian Extradition Act, 1903, adapted in Pakistan, lays down that, if the Central Government[7] is of opinion that the crime, of which any fugitive criminal of a foreign state is accused or alleged to have been convicted is of a political character,it may, if it thinks fit, refuse to issue an order

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1. Rahim v. Emperor, A.I.R.1944 P.C. 73.
2. Mohd Boata v. Sarker,P.L.D. 1959 Azad J & K 72.
3. See S.3(1) Extradition Act 1870 (33 & 34 vict.C.25)
4. Re Castioni (1891) 1.Q.B.149; Re Kolczynski (1955) 1 All.E.R.31, Halsbury's Laws,opcit p.33.
5. In re Wilson (1891) 1 Q.B.D.42:
6. Adibandhu v. Emp.,A.I.R.1946 Pat.146; Munir J.opcit.p.381
7. Words "for any Local Govt", were omitted by A.O. 1937.

to any Magistrate who would have jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.[1] In India or Pakistan, it is clear that the final authority to rule on whether a crime, of which a fugitive criminal of a foreign state is charged, is of political character lies with the Central Government; Courts are debarred from deciding the said question.

In India, with respect to British Statutes relating to extradition, which were applicable to India before the commencement of the Constitution 1950, the Law Commission of India has made the following observation.

> "We have got a law of our own on the subject - the Indian Extradition Act,1903, This lays down the procedure to be followed in India after a valid requisition for extradition is received from a Foreign State. The right of a Foreign Government to make such requisition, however, rests on treaty between the two countries concerned."
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> "Now, so far as the right of England or any British possession to demand extradition from India is concerned, the law is provided by the English Statutes[2]...and the Indian Extradition Act proceeds on the assumption that these Statutes apply to India. The Statutes,however, apply to "British possessions". In State of Madras v. V.G.Menon[3], the Supreme English Statutes were,therefore, no longer applicable to India after it had become republic".
>
> "Observations were made by the Supreme Court as to the need of making fresh treaties with the Republic of India and need for fresh legislation in this respect. Government should take early steps in the matter of fresh legislation, in view of those observations of the Supreme Court"[4].

In Pakistan, as far as extradition matters are concerned, Indian Extradition Act, 1903, is applicable and no observations of the effect, as made by the Indian Law Commission and the Indian Supreme Court, has been made by the Pakistan's Courts.

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1. See S.5 of the Indian Extradition Act,1903.
2. Extradition Act, 1870 & 1873.
3. A.I.R. 1954 S.C. 517
4. Fifth Report, dated 11th May 1957.

Custody of Infants

In England, a parent, guardian or other person who is legally entitled to the custody of a child can regain that custody when wrongfully deprived of it, by means of the writ of habeas corpus. The unlawful detention of a child from the person who is legally entitled to its custody is, for the purpose of issue of the writ, is regarded an equivalent to unlawful imprisonment or detention of the child.[1] It is therefore, necessary to allege in applying for the writ of habeas corpus that any restraint or force is being used towards the infant by the person in whose custody and control it is for the time being.[2] It is submitted, law is same in India and Pakistan.

The question of the consent of the children does not - arise in a case of habeas corpus for the restoration of custody of children who are minors.[3] Where, in a petition for habeas corpus by the divorced wife, it was contended on behalf of the father that the children were not being detained against their will, the contention was rejected and it was held that the question of the consent of the minor children did not arise at all, and that the detention of the children against the wishes of their lawful guardian, the mother, amounted to unlawful detention as contemplated by S.491, or P.C.; Habeas corpus was granted.[4]

The writ of habeas corpus is resorted to not only to obtain the custody of the children wrongfully detained but also to determine the rights of the

1. R.V.Clarke (1875) 7 E & B. 186 (193) per Lord Cambell C.J.
2. See Ex parte M'Clellan (1831) 1.Dowl.81; see also Halsbury Laws op.ci.p.34.
3. 14 yrs. in a case of a boy and 16 yrs in case of a girl.
4. Safia Bibi v. Ghulam Hussain Shah, Maqsood Begum v.Mohd.Aslam Khan,P.L.D. Azad J.&.K. 13.

parties to their custody.[1] If by an erroneous view of the law or an erroneous assumption of the facts, the jurisdiction to rule on the conflicting rights of the parties to the custody of the children is assumed or denied by the Court to which the application for the custody of the children is made by the person fully entitled for such custody, remedy by writ of habeas corpus will be available.[2]

When the parent has voluntarily parted with the custody of the child by entrusting it to another person, a writ of habeas corpus will be issued at the instance of the parent, even though the person whom the child was entrusted alleges that he does not know where the child is, for the parent is entitled to acquire a return to be made to the writ, so that the facts may be fully investigated.[3]

The availability of another remedy at law, such as the remedy under the Guardians and Wards Act, for obtaining custody of a minor child is not a ground for refusing an application for habeas corpus by the parent or guardian of the minor who is entitled to have his or her custody, where the minor is being illegally detained by another person.[4]

The true principles deducible from the authorities, by which the Court should be guided in an application for habeas corpus for the restoration of the child by the real guardian are that the Court must judge upon the circumstances of each particular case and that the welfare of the infant, irrespective of its age, is the main factor to be regarded.[5]

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1. Khizar Hayat Khan v. Zainab Begum, P.L.D.1967 S.C.402.
2. See Burnardo v.Ford, Supra; see also Lord Halsbury, Op.Cit p. 34.
3. Subbaswami Govindan v. Kamakshi Ammal, A.I.R.1929 Mad.834 [illegible]
4. Khizar Hayat Khan v.Zianab Begun, Supra.
5. Mrs. Annie Besant v.G.Narayamiah.A.I.R.1914, P.C.41(42); see also Loyors v. Blenkin (1S2) Jac.Rep.245.

The fact that the father had married a second wife is not a sufficient ground for holding that he was unfit to be the guardian of his children. There is no doubt that the welfare of the girls was the primary consideration, which would influence the Court ultimately; at the same time, it ought not to be forgotten that the Legislature advisedly draws a distriction between the legal rights of husband and parents on the one side and those of the other near relations on the other side. In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship; the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations.[1]

In England, as among the Hundus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot, therefore, during his lifetime, substitute another person to be a guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the crown over infants, to create associations or give rise to expectations on the part of the infants, which it would be undersirable in their interests to

1. Audiappa Pillai v. Nallendran Pillai A.I.R.1916 Mad.605 (D.B.)

disturb or disappoint, such Court will interfere to prevent its revocation.[1]

The custody of a minor may even be handed over to a Court of Wards if it is legally entitled to superintendence over the minors and if it is to the benefit of the minors.[2] Where a person has been appointed as guardian of a minor by a Court, an application for habeas corpus for recovery of custody from him cannot be made, because his custody cannot be said to be improper or illegal. Habeas corpus cannot be resorted to for the purpose of nullifying the order of the Court in such a case.[3]

The Court has jurisdiction to make an order relating to the custody of an infant even when the infant is outside the jurisdiction, though it would be very unusual to do so and in many cases most undersirable to do so.[4] When the infants were residing in England, the Court in India had no Jurisdiction over them.[5] Where the infants were in England and an Indian Court granted a mandatory injunction against the defendant, directing him to give possession of the infants so that they could be brought to India and handed over to their father, it was held by the Priory Council that such an order ought not to have been made. Considering the age of the children an attempted compliance with the order would, if the infants had refused to return to India, have been contrary to law of England and would have at once exposed the defendants to proceedings in England on a writ of habeas courpus. No Court ought to make an order which might lead to such consequence.[6]

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1. Mrs. Annie Beasant v.G. Narayiah, A.I.R.1914 P.C.41 (44)
2. Dy. Commissioner, Gond v. M.L. Shikoh, A.I.R. 1934 Oudh 392 (395)
3. King. v. Greenhill. (1936) 4 Ad. & El. 624 Disting; see A.I.R.1931 Mad.773 (775)
4. R.V. Sadback Justices,Ex Parte Smith (1950) 2 All, E.R.781-783)
5. Harris v Harris, (1949) 2 All E.R.318 (322)
6. Mrs. Annie Beasant v. G. Narayaniah, A.I.R.1914 P.C.41 (44)

Husband and wife

In England, a husband may obtain the custody of his wife by a writ of habeas corpus, if she is detained by third person against her will[1], but not where she is living voluntarily and without any restraint.[2] A wife may also ask to be released from the custody of her husband who wishes to exercise his conjugal rights by force or confinement.[3]

But in Pakistan, a Muslin husband has a right to the custody of his wife and whether she is living with third person according to her will or not, is immaterial; the husband is entitled to obtain her custody[4], in both the cases, by a writ of habeas corpus. The cases of Christian or other minority community wives are, however, governed by the same law as in England. According to Muslim Personal law, which is applicable to Muslims in cases of marriage, divorce, and other cases falling under Muslim personal law, a wife has no right to exercise her free will to live with any person other than her husband, so far as she is married to the husband. If she wants to live with or marry a third person she will have to get first her marriage dissolved by the Family Court.[5] Nor can a wife ask by a petition for habeas corpus to be released from the custody of her husband in cases of illegal or improper detention by the husband except in some extra ordinary circumstances, when she is fearing death or other serious consequences, she can, no doubt, apply for the writ of habeas corpus.[6]

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1. Re Cockrane, (1948) Dowl.630.
2. Place v. Searle (1932) 2 K.B.497.
3. R.V. Jackson (1891) 1 Q.B.671; see also Munr. J.op.cit.p.381
4. Mushtaque Ahmad v. Mohd.Amin, P.L.D.1962 Kar.442.
5. See Family Laws Ordinance, 1962.
6. State v. Ashfaque Ahmad Sheikh, P.L.D.1967 Lah.1231.

It has been observed by the Lahore High Court that a Muslim husband's custody of his wife is not normally illegal or improper detention, but it might become so in the circumstances of the case, so a heavy duty is cast on the Court, in cases where a Muslim husband is described as illegally or improperly detaining his wife, to come to a definite conclusion that the husband is actually detaining his wife illegally or improperly, before the Court can pass an order setting the wife at liberty. The discretionary relief which the High Court is supposed to provide under S.491, Cr.P.C., is not meant for promoting the cause of vice.[1] A wife had started cohabiting with her husband's brother and was the mother of a young son; she had not broken the marriage tie with her husband; she could not produce a Nikah-Nama (marriage certificate) in proof of marriage with her husband's brother; it was contended that she did not want to live with her husband, but that she wished to live with her husband's brother. The Court, on a petition for habeas corpus, ordered that she should return to her husband. It was pointed out that in an application for habeas corpus under S.491,Cr.P.C., by the Muslim husband for the restoration of his wife, the Court, when exercising its discretinary power, must be satisfied of the "illegality of the detention"; in the instant case the wife could not legally live with her husband's brother.[2]

Insane Persons

In England, the writ of habeas corpus is generally granted in the cases of persons alleged to have been detained on the ground of insanity. The writ may issue at the instance of any person who is wrongfully kept in confinement under the pretence of insanity or unsoundness of mind to the person having the custody of the person alleged to be of unsound mind to produce him in Court, so that

1. ibid
2. ibid.

the legality of detention may be inquired into.[1] It is essential in such a case that there should be an affidavit by the person alleged to be of unsound mind, or that there should be clear evidence that he is prevented from making an affidavit.[2]

In India and Pakistan, the Indian Lunacy Act of 1912, is in force. Under the Lunacy Act, a lunatic can be detained in an asylum, on a reception order made to the officer in charge of the asylum under ss.7,10,14, 15 or 17 of the Act. If subsequently, on an application from the relative - in case of a husband, from the wife, and in case of a wife, from the husband, in other cases from nearest relations - or the Advocate General, an inquisition order is made by the District Court,[3] and, in inquisition, if it is found that the concerned person is not of unsound mind or not incapable of managing himself or his affairs, the person in charge of the asylum shall forthwith, on the production of a certified copy of such finding, discharge the alleged lunatic from the asylum.

However, an application for the writ of habeas corpus under S.491,Cr. P.C., lies to the High Court to challenge the finding of the inquisition Court, amd if the High Court is satisfied that the Court was wrong in rejecting the inquisition application, habeas corpus will issue to release the alleged lunatic from the asylum.[4]

What has to be found under the Lunacy Act is that the alleged person is of unsound mind and that the unsoundness of mind is such as to make him

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1. R.v.Purlington(1761) 2 Burr 1115; Re Shuttleworth(1846) 9 Q.B.651; R.v Pinder Re Greenword(1855) 24 L.J.Q.B.148;R.v. Wright (1731) 2 Stra.915.
2. Ex parte Child (1854),15 C.B.238 Re:Carter(1893) 95 L.T.J.37; see also Halsbury's Laws,op.cit p.
3. See chap.IV or V of the Indian Lunancy Act,1912.
4. See chap V of the Indian Lunancy Act, 1912.

incapable of managing his affairs. A person who is incapable ofmanaging his affairs is not necessarily of unsound mind and a person of unsound mind may not be incapable of managing his affairs. The Court must hold that both the unsoundness of mind and incapability to manage his affairs are present and that the latter is due to the former[1].

When Habeas Corpus is refused:

In England and India, no writ of habeas corpus will normally lie in regard to a person who is undergoing imprisonment under sentence of a Court in a Criminal trial on the ground of erroneousness of the conviction[2]. A writ of habeas corpus is not granted to persons convicted or in execution under legal process including execution of a legal sentence after conviction on indictment in the usual course. It is refused where the effect of it would be to review the judgement of one of the inferior courts which might have been reviewed on a writ of error, or where it would falsify the record of a court which shows jurisdiction on the fact of it[3].

The law is same in Pakistan. Detention in execution of a sentence, or indictment on a Criminal charge would be a sufficient answer to an application for habeas corpus[4]. Detention of an abducted woman for restoration to her kins-folk[5], or detention during the trial by the Council of Elders under the orders of Dy.Commissioner made under the F.C.R.[6], is not illegal; it cannot be challenged by a petition for habeas

1. Mahipati v. Mt.Changuna,A.I.R.1934,Nag.27.
2. Janardhan Reddy v. State of Hyd.A.I.R.1951,SC.217; see also Reg. v.Murphy (1869)2 P.C.235; Newton in Re (1885) C.J.C.P.148; Rex C. Suddies (1801) East,306.
3. In re Bonamally Gupta,A.I.R.1917 Cal.149,see also Reg v. Murphy Supra; Reg v. Suddis, Supra.
4. Mohd.Akram v. State,P.L.D.1963 SC.373
5. Jumma Khan v. Pak.supra.
6. Khair Mohd. v. Govt.of W.Pakistan,P.L.D.1956,Lah.668.

corpus; the writ will not be granted. Where a person is ordered by a Magistrate to be detained in prison pending the orders of the Session Judge under s.123[1], Cr.P.C.[2], where an order of imprisonment is passed on failure to furnish security for good behaviour which is a 'sentence' within the meaning of S.397[3] of P.C.[4] or where the petitioner has been ordered to undergo a term of 8 years R.I. by the Dy.Commissioner on failure to furnish the required security to be of good behaviour under S.40 of the F.C.R.[5], the High Court has no jurisdiction to entertain the petition for habeas corpus; the petition will fail.

In England the writ of habeas corpus is not granted to question the decision of an inferior Court on a matter within its jurisdiction[6]. In India and Pakistan, with regard to applications under S.491,Cr.P.C., review of decisions on such applications is barred under S.369 of the Code. There is no provisions either in Cr.P.C. or any other law, for the time being in force, which enables the Court to rehear an application for a writ of habeas corpus, which has been disposed of on merits by the Court, after examing the matter placed before it, even though the party or counsel was not present at the time the petition was heard. An application for a writ of habeas corpus is of a criminal nature and no review is allowed in such matters[7].

Martial Law:

In English law, a writ of habeas corpus does not lie in the cases of persons who have been convicted by a duly constituted tribunal. On this principle, the writ will not be granted to persons undergoing a sentence of

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1. S.123,Cr.P.C,provides for imprisonment on default of security
2. Emperor v. Tula Khan, 30 I.L.R.p (sec) 334.
3. S.397 lays down the sentence on an offender already sentenced for another offence
4. Ajab Khan v. State, P.L.D.1963 Pesh.224.
5. Mohd.Akram v. State, Supra.
6. R.V. Commanding Officer, ex Parte Ferguson (1917) I.K.B.176.
7. Godawari v. State of Bombay, A.I.R.1953, S.C.52(53)

imprisonment after conviction by a duly constituted court-martial, the proceedings of which have been in due course confirmed by a competent authority[1].

In England, martial law is considered to be a part of the law relating to the maintenance of public order. Under English law, it is the duty not merely of the army but of every citizen to assist in maintaining the public peace, and failure of authorities to put down and of the citizens to assist the authorities in putting down, breaches of public peace is an indictable offence. Disturbances of the public peace by a stray, assault or affray raises no question of constitutional law, but important constitutional questions arise in connection with a riot. The occurrence of a riot imposes onerous duties on all within the vicinity and particularly on magistrates and sheriffs[3]. In suppressing a riot the magistrate may require the assistance of the military[4].

These principles have been recognised in India and Pakistan[5]. S.42 Cr.P.C., obliges every person to assist a magistrate or a police officer who reasonably demands his aid in the prevention or suspension of a breach of the peace and s.187 of the Penal Code, makes the failure to render such aid an offence, S.127 Cr.P.C. authorises any magistrate or officer in charge of the

1. A.W.Meads v. Imperator, A.I.R.1946 Lah.112(113); see also R. v. Lewes Prison Governor - Ex parte Doyle (1917) 2 K.B.254 (269)
2. Dicey op.cit.p.288
3. Ibid, p.289; citing R v. Pinney (1832) 5 car & p.254.
4. Keir and Lawson, p.404.
5. See Seervai op.cit.p.752.

State police to command an unlawful assembly, likely to cause disturbance of public peace to disperse. Under S.128, Cr.P.C. the magistrate is empowered to call upon any male person, not a member of the armed forces, to assist him in dispersing it. S.129 authorises the magistrate, if the assembly has not by other means dispersed, and it is necessary for the public security to disperse it, to get it dispersed by military force. Under S.130, an officer commanding troops is bound to obey the requisition from the magistrate to disperse such assembly with the aid of military forces under his command. Under S.131, in the absence of a magistrate, any commissioned officer of the army can disperse it with the help of military force under his command and arrest and confine the persons forming part of it. S.132, Cr.P.C. affords protection to the acts done under ss.127 to 131 and lays down that no prosecution against any person for any act purporting to be done in good faith under ss.127 to 131 shall be instituted in any Criminal Court, except with sanction of the "Local Government".[1]

Art.33 of the Indian Constitution provides that not withstanding anything contained in Arts 12 to 32, relating to fundamental rights, Parliament may by law restrict or abrogate fundamental rights in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, so as to ensure proper discharge of their duties and maintenance of discipline among them. Art. 34 enables Parliament, (i) to indemnify any person in the service of the Union or of a State or any other person in respect of acts done by him in connection with the maintenance or restoration of order

1. words in inverted commas were substituted for the words "Governor General in Council" by s.2 and Sch. 1 of the Devolution Act.1920 (XXXVLLL of 1920)

in any area within India where martial law was in force, and (ii) to validate any sentence, punishment forfeiture, or any other act done under martial law, By this provision any Act of Indemnity, following the termination of martial law, cannot be declared void under Art. 13 of the Indian Constitution as violative of fundamental rights, Art. 35 (a) (i) excludes States' legislatures and entitles Parliament only to make laws with respect to any matters under Arts.33 and 34. Art 35 (b) protects from challenge on the ground of violation of fundamental rights, any law in force immediately before the commencement of the Constitution with respect to any of matters referred to in Arts.33 and 34.[1]

Art. 6 (3) (i) of the Pakistan Constitution,1962, is analogous to Art.33 of the Indian Constitution, but unlike Art. 35 (a) (i) of the Indian Constitution, there is no provision in the Pakistan Constitution as to whether the Central or Provincial legislatures have power to make laws with respect to matters under Art. 6 (3) (i). Art 6.(3) (ii) of the Pakistan Constitution excludes thirty-one Regulations and orders of the Martial Law period which were in force immediately before the comming into force of the Constitution of 1962, from the application of fundamental rights. It is provided by Art. 6 (3) (iii) that no law, either made in exercise of power under Art.6 (3) (i) or preserved under Art.6 (3) (ii) can be declared void on the ground of repugnancy with fundamental rights. Art.223A.[2] of the Pakistan Constitution 1962, corresponds to Art.34 of the Indian Constitution and lays down that nothing in the Constitution shall prevent the Central Legislature from making any law

1. See Seervai op. Cit, p.751.
2. Art.196 of the Constitution of 1956.

indemnifying any person in the service of the Central or 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 where martial law was in force, or validating any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

In an emergency where there is an insurrection, rebellion or condition of war and the situation is such that it cannot be controlled merely by calling in the aid of military and the citizen body[1], the civil authorities can hand over the control of the area to the military authorities; martial law is imposed, "supplementing the ordinary law as may be necessary, but no more than is necessary"[2], for the restoration of order. The military officer may issue such orders, and enforce them in such a manner as may be necessary for restoration of order. The military officer has the power to try an offender and punish him under martial law, but he should not exercise this power beyond what is necessary to achieve the said purpose or when it is not possible to keep an accused person in arrest until he can be handed over for trial by the ordinary courts. If he has to try an offender, though this should only be necessary in very exceptional circumstances, the trial should follow the forms of military law; and a record must be kept of every trial so held, and every punishment inflicted under martial law. Any punishment so inflicted must not be excessive[3].

The conditions which justify the imposition of martial law are,(i) a state of war or armed rebellion or insurrection must exist and not merely a

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1. as laid down by ss.127 to 131, Cr. P.C. discussed above.
2. See Departmental Instruction to Military Authorities,Government of India, 1942; see also Joseph Minattur, Martial Law and Pakistan,- Law Review, Monthly Journal of Law Society,Vol.1 No.4, School of Oriental & African Studies
3. Mohd.Umar Khan,v. Crown, P.L.R.1953 Lah. 528.

state of riot which could be put down with the aid of military and other citizens; (ii) the military or the citizen can refuse or impose conditions on such aid; (iii) the necessity must be proved, not merely of recourse to the military, but also of the imposibility of functioning the ordinary civil laws and the necessity of their abolitionfor the time being, and the courts have power to go into the question whether such necessity existed; and (iv) it is only when the existence of war, whether against foreigners or rebels, and necessity, are established, that the jurisdiction of the court ceases.[1]

The powers exercised by the military commonly but incorrectly known as " martial law", infact, are no law at all and would be, if the fact of necessity for a war is not established, illegal and therefore need Acts of Indemnity, if they are not to be questioned.[2]

It is in the sense discussed above that martial law is understood in England. As Pakistan was created by the division of British India into two dominicus, it inherited, along with India, the laws in force at the time of partition. Martial law was part of the existing laws thus inherited. Martial law under the common law rule was administered in 1942 in Sind which later became a province of Pakistan. To the Government of Pakistan this was the latest instance of martial law administration with which they were closely familiar.[3]

Martial law has been imposed in Pakistan three times, in 1953,1958 and 1969 of which the martial Law of 1953 was of the kind known to common law. Martial law was proclaimed in Lahore on March 6, 1953 when other sects of

1. Chappana v. Emperor, A.I.R. 1931 Bom. 57, per Beaumont, C.J.
2. ibid
3. See Joseph Minattur. op. cit. ppll-12.

Muslims resorted to direct action against Ahmadiyas, a Muslim sect following the teaching of Mirza Ghulam Ahmad. In a matter of six hours, order was restored by the Military forces. The military commander constituted himself the Chief Martial Law Administrator and conferred on himself authority to issue martial law regulations and orders and to appoint military courts for trial and punishment of persons contravening such regulations and orders. Ordinary Criminal courts were permitted to exercise jurisdiction in respect of offences other than those created by the martial law regulations or orders, or connected with the disturbances. On May 9, 1953, the Governor General, acting under S.42 of the Govt. of India Act 1935 promulgated the Martial Law (Indemuity) Ordinance, 1953,[1] indeminfying servants of the Crown and other persons in respects of the acts done by them in good faith, under martial law and validating sentences passed by military courts,[2] and leaving the matter of determination of the martial law period with the Federal Government. The Martial Law period was defined by s.2 of the Indeminty Act, 1953, as the period beginning on March 6, 1953 and ending on May 15, 1953.

In Mohammad Umar Khan v. Crown, re Maulana Abdus Sattar Khan Niazi,[3] where an application for relief in the nature of habeas corpus, alleging that the detenu was being illegally detained in the prison in Lahore and praying that he be set at liberty, was made, the reply to the writ was that the detenu was undergoing a life sentence, validly passed by the Military Court, for the breach of Martial Law Regulation, 1953, which had been validated by the Martial Law

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1. No. 11 of 1953
2. See Joseph Minattur op cit pp.16-17
3. P.L.D.1953 Lah. 528.

(Indeminity) Ordinance, 1953.[1]

The other objections which were raised in the petition are worth considering. It was further alleged that the imposition of Martial Law, 1953 and the constitution of Special Military Court which sentenced the detenu were illegal, that the Court did not act in a judicial capacity, and, in the procedure adopted by it, it did not conform to the Ordinary forms of criminal trials, that the necessity for Martial Law, if it ever existed, had ceased on 23rd March 1953 and thereafter the continuance of the Martial Law regime and the functioning of the Special Military Courts were illegal, and that the Indemnity Ordinance, 1953, in as much as it gave to the Central Government the power to determine the martial law period and purported to validate sentences, which were essentially in the nature of advice tendered by the Special Military Courts to the Martial Law Administrator, was ultra vires.

The essential question in the instant case was whether the M.L. Indemnity Ordinance, 1953, which not only validated the acts done or order made in good faith, during the martial law period, for the purpose of maintaining or restoring order but also kept alive, after the martial law period, all unexpired sentences of confinement passed by a Court of Martial Law Authority in a judicial capacity.[2] The questinn, therefore, was whether this confirmatory povision conflicted with the principle that when martial law is withdrawn and civil power fully restored, all orders passed by the military must expire on such withdrawl.

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1. Ordinance 11 of 1953.
2. See ss. 6 and 7 of the M.L. (Indemnity) Ordinance, 1953.

It can be noted here that, in England, no such confirmatory provision appears to have been passed since the time of Edward III, though there have been more than a dozen "indemnity bills" in the history of that country. In Ireland and other colonies also there have been several such bills without any confimatory provision. In fact, in Anglo- Saxon law, the setting of the military tribunals to exercise what, in substance, are judicial powers, is not recognized at all. This is the pure effect of the House of Lords' decision in Clifford V.O'Sullivan[1] and the Privy Council's decision in Tilonko's[2] case, where the true distinction between the "Courts" and "Courts Martial" has been brought out. The decision of the United States' Supreme Court in Mayor v. Peabody[3] lays down very much the same principle.

In recent times, however, there have been several instances of such confirmatory legislation. Thus in Tilonko's case an indemnity Act giving effect to the sentence' imposed by a military tribunal in Natal was recognized by the Privy Council to be valid. In the Cape of Good Hope, the sentences were revised by a commission and confirmed by S.5 (1) of Act IV of 1902. In the Union of South Africa, such legislation was first passed in 1914 and repeated in 1915 and 1922. In the Indo-Pak subcontinent besides the Ordinance in question, there are three previous instances of such legislation, namely, the Punjab Disturbances Act[4], the 1919, Sholapur Disturbances Ordinance, 1930[5], and the Sind Disturbances Ordinance, 1942.[6] The validity of such legislation was taken for granted by the Bombay High Court in Emperor v. Chanappa Shantirappa[7]; the Court relied on the principle

1. (1921) 2 A.C.570
2. Tilonko V. Att. Gen. of Natal (1907) A.C.93.
3. 212 U.S.78
4. Act XX VII of 1919
5. Ordinance IV of 1930
6. Ordinance XVIII of 1942
7. I.L.R.55 Bom. 263.

laid down in Tilonko's case and Phillip v. Eyre[1]. The validity of the impugned confirmatory provision, in the light of aforesaid decision, was upheld by the Lahore High Court.[2]

As regards the contention that M.L. (Indeminty) Ordinance, 1953 amounted to delegated legislation, it was pointed out that the Ordinance was an enactment of the Federal Legislature in so far as it was promulgated by the Governor General in the exercise of power conferred on him under S.42 of the Government of India Act, 1935; no exception could be taken to the Indemnity Ordinance on the ground that it amounted to delegated legislation. It was, however, observed that if the legislature defines the principle and policy of an enactment and subject to well defined restrictions and limitations, delegates to a named authority the power to carry out the object of that enactment, including the power to make rules for that purpose, the legislation does not amount to delegated legislation and is perfectly constitutional.

It was further contended that, if the legislature had merely appointed the officer Commanding the Tenth division as the Chief Martial Administrator todo whatever he liked in the Martial Law area; it would have amounted to delegated legislation and, therefore, the law giving such unfettered powers to him would have been ultra vires, and since what, if enacted by the legislature, would have been ultra vires, the acts done in exercise of an unlimited authority must remain invalid and could not be validated by retrospective legislation. The Crown's reply to this contention, which the Court approved, was that the precise question to be determined was not whether, if the legislation had been in the form

1. Supra.
2. Mohd. Umar's case, supra.

suggested, it would have been ultra vires, but whether the validating legislation actually amounted to delegated legislation; the two questions not being identical. It was, therefore pointed out that the point sought to be made was that when the legislature passed the Indemnity Ordinance it must have known in what manner and on what principles the martial law adminstration had to be carried on and that the validating legislation must have been passed keeping in view the manner and the principle of such adminstration. The legislature, the argument proceeded, must, therefore, be presumed, to have approved the various regulation and orders by which courts were appointed, their powers and procedure defined, and the law to be adminstered by them duly notified. If the legislature had passed an Act recognizing or defining the principle on which martial law was in fact administered no objection to it could have been taken on the ground that it did not contain the principle or policy of the legislation and that it delegated uncontrolled and unfettered ligislative functions to the Officer Commanding. What had been done could originally have been permitted to be done, and no objection to such expost facto legislation could be taken on the ground of retroactivity. It was, therefore, held that no exception could be taken to the Indemnity Ordinance that it amounted to delegated legislation.

As to the contention that the necessity of Martial Law, if it ever existed, ceased on 25rd March 1953, after the declaration made by the C.M.L.A. to the effect that "the first phase of Martial Law" to restore peace and order, "having been achieved, the second phase of reconstruction has been begun" any action on the part of military since 23rd March 1953, was clearly beyond the scope of their legitimate function and hence illegal, it was held that the

contention must fail on the ground that when the C.M.L.A. expressed the aforesaid words, he did not mean there was "no possibility of the recrudescence and disorder" after 23rd March. It was pointed out that the terminus a quo of the Martial Law period had been defined by the Statute itself and the mere fact that the expiration of that period was left to be determined by the Central Government and was not determined by the Legislature itself, neither amounted to delegated legislation, nor to suspension of the Constitution.[1]

A petition, for special leave to appeal from the judgement of the Lahore High Court, was filed in the Federal Court of Pakistan.[2] There were three main questions before the Federal Court to be considered,(ii) whether, after 23rd March 1953, the Major-General Mohd. Azam Khan had made a declaration to the effect that "the first phase of restoring peace and order having been achieved, the second phase of reconstruction has begun", any action on the part of the military since 23rd March 1953, was beyond the scope of their legitimate function and contrary to the principles of constitutional law; consequently whether the sentence of death passed against the petitioner on May 7, 1953 and commuted on May 14, 1953, was unlawful and of no legal effect; (ii) whether the Martial Law (Indemnity) Act, 1953,[3] which superseded the Martial Law (Indemnity) Ordinance, 1953, was ultra vires of the Federal Legislature, as in fact it amounted to delegated legislation of its own powers to the military personnel by giving them a free-hand in the civil adminstration while the martial law remained in force; and (iii) whether S.6 of the Martial Law (Indemnity) Act,

1. Mohd. Umar Khan v. Crown, supra.
2. Abdus Sattar Khan Niazi v. Crown, P.L.D.1954 F.C. 187
3. Act XXXII of 1953.

1953, validated all sentences passed during the Martial Law period by a Court or other authority constituted or appointed under martial law and whether the words acting in a judicial capacity", implied the application of a judicial procedure as usually followed in the courts of justice; as, contrary to it, some of the defence witnesses, who were absent, had not been re-summoned by the Court Martial for their re-examination.

As to the first question it was pointed that it was not for the military authorities, but for the Executive Goverment to determine when it could take back the work of administration with safety and without risk, since it was the Executive Government which called the military to its aid. Further, under S.2 of the Indemnity Act, " Martial Law period" was defined as the period "beginning on the sixth day of March 1953, and ending on the 15th day of May 1953" which obviously covered both the dates, when the death sentence was passed and when the commutation was ordered.

The answer to the second question was that the Federal Legislature was the legislative body possessing sovereign powers and no question, therefore, of ultra vires with regard to its legislative enactment could arise. Akram, J. further quoted S.6 (2) of the Independence Act, 1947 which lays down that;

> "No law and no provision of any law made by the legislatures of either of the new Dominion shall be void or in operative on the ground that it is repugnant to law of England, or to the provisions of this or any existing or future Act of Parliament of the U.K., or any order, rule or regulation made under any such act and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order rule or regulation in so far as it is part of the Law of the Dominion".

and observed that the powers which the Federal Legislature then exercised were as large and ample as those of the British Parliament itself. The Martial Law (Indemnity) Act, 1953 was an Act of the Federal Legislature and no question

therefore of a delegation of powers to anyone arose at all.

Cornelius J., though maintaining that the contravention of the constitutional provision in relation to the administration of the Martial Law area during the material period was brought directly before the Federal Legislature, when it was asked to enact the Martial Law (Indemnity) Act,1953, and it was open to the Legislature, in dealing with the Bill, to take such action as it thought fit in relation to the executive authorities which were responsible, held that such actions need not have involved any act of legislation, and consequently no question of abdication of legislative functions was involved in that aspect of matter. But he did not agree with the view expressed by Akram J. According to him the powers of Federal Legislature were derived from, and were circumscribed by the express provisions of the Government of India Act, 1935, and the powers of the Federal Legislature, as distinguished from Legislature of the Dominion, were, in the existing circumstances, not as wide as those passed by British Parliament. It is submitted that the latter view is correct.

As regards the third question, Akram J. observed that the expression 'acting in a judicial capacity' in S.6 of the Indemnity Act,1953, only emphasized that the duty of the adjudication must be distinguished from administration and meeting the requirements of military exegencies. The word 'capacity' was not without significance; 'one may be vested with various capacities for exercising various kinds of functions; 'judicial capacity' described only the character in which the work was to be performed. In any event the calling or not calling of witnesses by the Court Martialor or other authority constituted under Martial law was no ground for an order of release under S.491 Cr.P.C. It must be borne in mind, the 'Martial Laws', which in a strict legal sense are no laws at all,

are merely exceptional methods adopted by the military for preserving Order and safeguarding the interests and integrity of the State during the war and insurrection[1].

But Corneliu J. expressed the view that the words 'acting in a judicial capacity' are not merely words of indication but, are intended to be, and are in fact, words of limitation.' So much appeared to him to follow from giving to each word in the phrase, its full and plain grammatical meaning, but he based his conclusion also upon the consideration that, when the Federal Legislature was considering the question of the extent to which the act performed by the self-appointed authorities during the extra-constitutional regime presented by the Martial law period could be maintained in their effect, it might well have considered that the saving should be confined to those particular acts, purporting to be acts performed in the administration of justice, which were in fact performed in compliance with the minimum requirements of the consideration of justice. It is submitted that the former view is correct. Cornelius J. failed to take into consideration the sole purpose behind the indemnity legislation; had the authorities, exercising power under martial law, been required to comply with the minimum requirements of the administration of justice, there would not have been any necessity, after Martial Law was over, for the statute indemnifying the acts done by such authorities in good faith, when martial law was in force. The petition was, however, dismissed.

The Martial law, imposed in Pakistan in 1958 and 1969[2], is not martial law, in the strict legal sense or in the sense in which it is under-

1. A.Sattar Khan Niyazi's case P.L.D.1951/FC.73 p.106.
2. The Proclamation of Martial Law,1958, The Laws Continuance in Force Order, 1958, the M.L.Proclamation of 1969 and Provisional Constitution Order, 1969 have been duscused in the preceeding chapter.

stood in common law. These events were, as held by the Supreme Court of Pakistan, victorious revolutions or successful coup d'etat[1]. It was observed that, after a change of the character which has taken place in Pakistan, the national legal order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution - Laws Continuance in Force Order, 1958.

In 1958, the Constitution of Pakistan was abrogated by the M.L. Proclamation 1958, as well as by Art. IV of the L.C.F.O.,1958, but by Art.II of the L.C.F.O. it was provided that 'Pakistan shall be governed as nearly as may be in accordance with the late Constitution.'

In State v. Dosso, which was a Constitutional Criminal Appeal No.1 of 1957, and preferred by the State against the decision of the Division Bench of Lahore, allowing a petition for habeas corpus, on the ground that the conviction of the petitioners under the F.C.R. was without valid legal sanction, having been obtained by a proceeding under S.11 and other relevant provisions of the F.C.R., which were repugnant to Art.5 of the 1956 Constitution, guaranteeing equality before law, and consequently void under Art. 4 of that Constitution.

The Supreme Court held that along with the abrogation of the Constitution, the fundamental rights were also abrogated and unless, as provided by Art.4 of the L.C.F.O., the President expressly enacted the provisions relating to fundamental rights, they were not a part of the law of the land and no writs could be issued on this basis. As regards pending applications for writs or writs already issued but which were either sub judice before the Supreme Court

1. State v. Dosso; supra.

or required enforcement, the relevant provision, clause (7) of Art. 2 of the L.C.F.O. was applied, according to which not only the application for the writ would abate but also the proceedings which required the enforcement of the writ. The abatement was, therefore, held to govern all those writs which were the subject matter of appeal before the Supreme Court either on certificate or by special leave. The position in regard to future applications for writs, was, therefore, held to be that they would lie only on the ground of anyone or more of the laws mentioned in Art.4 of the L.C.F.O. or on contravention of any other right preserved by the Laws Continuance in Force Order,1958. The appeal before the Supreme Court and the enforcement of the writ of habeas corpus granted by the High Court were declared to have been abated.

It is submitted that two crucial questions, which would have been important for the purpose of the study of this chapter, were not discussed by the Supreme Court at all. These questions were (i) whether the Jailor of Machh Jail was acting in compliance with a valid warrnat in detaining the petitioners who belonged to Loralai,[a] 'Special Area' excluded from the jurisdiction of the High Court, as well as of the Supreme Court by Art.178 of the Constitution of 1956; and (ii) whether in absence of the jurisdiction in respect of the things done within the 'Special Areas' in which Loralai, is included, the High Court acted properly in declaring that the conviction by the Dy. Commissioner of Loralai was an 'illegal order'.

According to clause (4) of Art.2 of L.C.F.O.,1950, 'The Supreme Court and the High Courts were to have power to issue the writs of habeas corpus, mandamous, prohibition, quo warranto and certiorari, but clause (5) of Art.2, L.C.F.O. ,saysthat no writ shall be issued against the Chief Martial Law

Administrator or Dy. C.M.L.A. or any person exercising powers or jurisdiction under the authority of the either, and clause (7) lays down that no writ or order for a writ issued or made after the Proclamation of 1958, shall have effect, unless it is provided by the L.C.F.O., and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith.

In view of these provisions, the High Courts and the Supreme Court, by the passage of time, issued the writs where any provision of law preserved the by/L.C.F.O.,1958, or of any Martial Law Regulation or Order was contravened or where an Order made by any Martial Law Authority was void or illegal, being repugnant to Martial Law Regulations or Orders. The position of fundamental rights and the jurisdiction of the Supreme Court and the High Courts during the Martial Law periods, 1958-1962 and 1969 will be discussed later.

For the purpose of this chapter it is submitted that the writ of habeas corpus was not granted by the Lahore High Court in Manzoor Elahi v. State[1] where the Court held that sentence passed by the Special Military Court was on proper legal sanction; it was in accordance withthe valid Order promulgated by M.L.Authority competent to make it; no writ against such an order could issue. It was pointed out that the facts, which could have presented a good defence in his case or mitigated his offence, should have been brought to the notice of the Summary Military Court by the petitioner; whatever might be the position under the ordinary law, those facts could not give jurisdiction to the High Court to issue a writ of habeas corpus with regard to the order passed by the Summary Military Court under a valid Order of

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1. P.L.D.1959,Lah.243.

Martial Law Authority.

But in Mohd. Ayyub Khoro v. Pakistan[1] where the petitioner, who was arrested by the police on a charge under the Hoarding and Blackmarket Ordinance 1956, was after the investigation and on a complaint by the Government put up for trial before a Special Judge for offences under the aforesaid Ordinance of 1956 as well as under M.L.Reg.No.26 read with M.L.Reg.No.5 and on being convicted only under the Regulations, the charge under the Ordinance of 1956 having been separated, was sentenced to five years R.I. and a fine of Rs.1,50,000, in default of the payment of which he was ordered to suffer another three years R.I. M.A.Khoro presented an omnibus application to the High Court which purported to be a petition for appeal, a petition for revision and a petition for habeas corpus and certiorari. On objection being taken to the jurisdiction of the High Court to interfere with the matter, the Court dismissed the petition holding that its jurisdiction to interfere with the proceedings of the Special Judge which were subject to the incident of confirmation under the M.L.(Zonal) Order No.10 was barred. The Supreme Court, however, gave special leave to appeal from the judgement of the High Court because the case raised some questions of fundamental importance for consideration and decision. At the outset objection was taken to the jurisdiction of the Supreme Court to interfere with the proceedings, which, after the judgement of the High Court, had been confirmed by the Dy. M.L.Administrator. The objection was taken on the basis of M.L. (C.M.L.A)Order No.10 issued by the C.M.L.A. on 18th October of 1958, which provided that proceedings of the cases tried under the M.L. Regulations or Orders by the criminal courts, after confirmation by the Martial

1. P.L.D.1960,SC.237.

Law Administrators would be forwarded to the Judge Advocate-General Rawalpindi, for final review. The Supreme Court, dismissing the objection, held that the jurisdiction of the Supreme Court and of the High Courts is barred, in this respect, only in the cases where decisions made by the criminal courts under the Martial Law Regulations and Orders are valid and legal, then only the confirmation of such sentences will oust the jurisdiction of the superior Courts, but where the decisions made or sentences passed by the criminal courts are prima facia illegal, the confirmation will not be valid and consequently the superior Courts will have to protect the aggrieved party against the wrong sentences or wrongful deprivation of their liberty.

It was observed that, in the instant case, in fairness to the Dy. M.L.Administrator and M.L.Administrator, because it appeared that the sentence had been confirmed by him as well, that from the manner in which the judgement was written by the Special Judge, it was impossible for the confirming authority to appreciate the legal and factual aspect of the case or to separate the alleged Martial Law offences from the alleged pre-Martial Law blackmarket deal for which the appellant was admittedly not tried. The Court which tried the Martial Law offence was not set up by the Administrator; nor was the case sent to the Court by the Administrator himself. The jurisdictional aspect of the criminal Courts, especially where the intricate question of law arises, was a matter with which he was not supposed to be conversant. Therefore, when he confirmed the sentences he could not have been conscious of the position that what he was confirming was something that did not exist in law or that he was purporting to validate what could not be validated. On the merits, apart from the Statement of the pardoned accomplice there was no other evidence of any act

or omission by the appellant subsequent to the promulgation of Regulation No.26; there was not a single statement which could amount to independent corroboration; and in the absence of such corroboration the prosecution took a grave risk in separating the charge under the Hoarding and Blackmarket Ordinance, 1956 from that under M.L.Reg.No.26. An Officer of the Special Judge's experience could not be unaware that law required corroboration of an accomplice by 'independent evidence', and that 'an accomplice's own statements or confession of a co-accused is not corroboration by'independent evidence'.' There was, however, not one word in the judgement on this vital point for the consideration of the confirming authority. The appeals were, therefore, accepted and the convictions and the sentence of the appellant were quashed.

Parliamentary Privilege:

In England a member of Parliament committed by the Parliament for breach of its privilege cannot obtain his release during the seesion by means of habeas corpus[1]. Where a person, who is not a member, is committed by the House of Commons[2] or by the House of Lords[3], for breach of privilege, the Court will not review the committal or grant a discharge on habeas corpus. When it is clear that the committal was for contempt of either House of Parliament, it was held that the Court had no power to investigate the alleged contempt. Even if where the writ was granted to bring the detenus before the Court, the Court refused to inquire into the merits of the committal by the House of Commons; the warrant of arrest was not bad for omitting to state the grounds on which

1. Earl of Shaftsbury's case (1677) 1, Mod.Rep.144.
2. Hobhouse case (1920) 3 B.& Ald.420.
3. R,v. Flower(1799) 8 Term. Rep.314.

the party had been adjudged guilty of contempt[1]. A person committed for contempt by order of either House of Parliament may be discharged on habeas corpus after a dissolution or prorogation of Parliament.[2]

In India the controversy and difference of opinion as to whether the Parliamentary privilege under Art.194 of the Indian Constitution can override the provisions regarding Fundamental Rights, laid down in Part III, and the writ jurisdiction of the High Courts under Art.226 and of the Supreme Court under Art.32 of the Constitution, arose in the case of Keshav Singh, President's Reference No.1 of 1964[3]. The facts of the case were that the petitioner was sentenced to seven days imprisonment by the Legislative Assembly of the State of U.P., for contempt. On an application for habeas corpus under S.491,Cr.P.C., the petitioner was released on bail by the Allabad High Court pending a hearing on the legality of the action of the Assembly. In consequence of action by the Speaker against the Judges, the President referred the matter to the Supreme Court.

In the opinion of the majority, though the British House of Commons had privilege to commit for contempt, under the Indian Constitution, this privilege of the legislatures is subject to review by the Courts; the Supreme Court and the High Courts under Art.32, and Art.226, respectively, could examine the unspeaking warrant issued by the House for the contempt to ascertain whether a contempt had in fact taken place, and that the privilege of the legislatures under Art.194(3) is subject to fundamental rights. The minority view

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1. See Sheriff of Middlesex case (1840) 11 Ad.& EL.273; see also Burdett v. Abbot-(1811) 14 East.1, on appeal (1817) 5 Dow.165 H.L.
2. Speeter's case (1654) Sty.415; see also Earl of Shaftsbury's case,Supra; and Sheriff of Middlesex case,supra.
3. A.I.R. 1965,SC.745.

was that, on the basis of the authorities on the Constitutional Law, it could be said that the right of the House of Commons was a recognised privilege, and that in thelight of the decision of the Supreme Court in M.S.M.Sharma v. Sri Kishna Sinha[1] in which it was held that the privilege of prohibiting the publication of its proceedings did belong to the House of Commons in which sense the Bihar Assembly also possessed the same privilege, it could be pointed out that such privilege is not subject to fundamental rights of a citizen. He further held that to allow Art.32 and 226 to prevail over the privileges of the legislatures under Art.194(3) was not to harmonize two independent provisions of the Constitution, but to destroy one of them. It is submitted that the minority opinion has expressed the correct view of law; it is the view on which two independent provisions of the Constitution could be reconciled. Fundamental Rights are no doubt subject to other provisions of the Constitution.[2]

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1. A.I.R.1954,SC.636.
2. President's Reference No.1 of 1964, Supra, see also Seeval, op.cit. p.583-587.

CHAPTER 10

MARTIAL LAW.

Nature and Scope:

It is difficult to define 'martial law' because of the 'haze of uncertainty which envelops it.'[1] In constitutional jurisprudence, martial law is ued at least in four senses . In the first sense, it is the law relating to discipline in the armed forces of the State, which is administered by tribunals, called 'Courts Martial'. These Courts are constituted for the purpose of regulating the government of the armed forces and their jurisdiction only exceptionally extends to civilians. In Pakistan or India, martial law in this sense means the law administered by the Courts Martial, constituted under the Army Act, the Naval Discipline Act and the Air Force Act.

In the second sense the word 'martial law' means 'military government' in occupied territory' and is used to describe the powers of a military commander in times of war in enemy territory. It means the law by which the commander of a conquering army administers the territory, which he has conquered In this sense martial law is recognised by Public International Law as a part of the jus belli.

In the third sense, in which it is a part of the English Constitutional Law, 'martial law' means the rights and obligations of the military under the common and statute law of the country to repel force by force, while assisting the civil authorities to suppress insurrections, rebellion or other disorders in the land. In American Constitutional Law, 'martial law' in this

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1. C. Fairman, The Law of Martial Rule, p.19.

sense is part of the police power of the State and means the law applicable when the military arm does not supersede the civil authority but is merely called upon to aid such authority in the execution of its civil functions. This form of martial law is well recognised by the law of England and there are several ancient statutes, which make it incumbant not only on civilians but also Crown servants, including the army, to assist civil authorities in suppressing disorders in the land[1].

Cases illustrative of this form of law are Rex v. Kenneth[2] and Rex v. Pinney[3], but its best exposition is to be found in Lord Tindal, C.J's charge to the Bristol Grand Jury, on the Special Commission, on the 2nd January,1832[4]. He said:-

> "It has been well said, that the use of the law consists first, in preserving men's persons from death and violence - next, in securing to them the free enjoyment of their property; and although every single act of violence and each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuous meetings of the people in a more special and particular manner produce this effect, not only removing all security, both from the persons and property of men, but for the time putting down the law itself, and daring to usurp its place. The law of England hath, accordingly in proportion to the danger which it attaches to riotous and disorderly meetings of the people, made ample provision for preventing such offences, and for the prompt and effectual suppression of them whenever they arise; and I think it may not be unsuitable to the present occasion if I proceed to call your attention, with some degree of detail, to the various provisions of the law for carrying that purpose into effect. In the first place, by the common law, every private persom may lawfully endeavour, of his own authority, and without any warrant or sanction of the Magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up, from joining the rest; and not only has he the authority, but it is his bounden duty as a good subject of

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1. See Umar Khan v. Crown, Supra at p.534.
2. 5 Car. &P.282.
3. 5 Car.& P. 254.
4. (1832) 172, E.R.966.

the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil doers to keep the peace. Such was the opinion of all the Judges of England in the time of Queen Elizabeth, in a case called the Case of Arms[1], although the Judges add, 'that it would be more discreat for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this.' It would undoubtedly be more advisable so to do; for the presence and authority of the Magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events, the assistance given by men who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed than any efforts, however, well-intended, of separated and dis-united individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. And whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe, that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate,rather than upon his own authority, before recourse is had to arms, or to operate in a still stronger degree with a military force. But, where the danger is pressing and immediate: where a felony has actually been committed, or cannot otherwise be prevented; and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities; the military subjects of the King, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent.....

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1. Popham's rep. 121.

It has been observed in Mohd Umar Khan v. Crown -

> "Martial law means the suppression of ordinary law in any part of the country by military authority, whose sole duty is to restore such condition of things as will enable the civil authority to resume charge. In order to attain that object, the military officer may issue such orders, and enforce them in such manner as may be necessary for that purpose only. His authority is, for the time being, supreme, but in practice the amount of his interference with the civil administration and the ordinary courts is measured by military necessity. He should not interfere beyond what is necessary for the restoration of order, and should, whenever possible, act in consultation with the local civil authorities. Offenders should be handed over to the ordinary courts for trial whenever this is possible; but persons charged with offences which are not offences against the civil law cannot be so handed over. The military officer has power to try an offender and punish him under Martial Law, but he should not exercise this power except where it is necessary for him to do so for the purpose of restoring order or when it is not possible to keep an accused person in arrest until he can be handed over for trial by the ordinary courts. Such occasion may arise if communications are interrupted during a considerable period, but even then the military officer can generally arrange for the attendance of a civil magistrate to whom prisoners can be handed over for trial, and this should be done when possible. If the military officer has to try an offender, though this should only be necessary in very exceptional circumstances, the trial should follow the forms of the powers exercised by the military commonly but incorrectly known as 'martial law' in fact are no law at all and would be, if the fact of necessity for a war is not established, illegal and therefore need Acts of Indemnity, if they are not to be questioned."[1]

It will be seen that the justification of this form of martial law, if it can be so called, is the common law of England and several English statutes, which create rights in and impose obligations on citizens and servants of the Crown when suppressing riots or rebellions. In Pakistan and

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1. Supra.

India, rights and duties of citizens and the servants of the State, including the military, can only be gathered from the provisions in the Penal Code, the Cr.P.C., and the Polic Act, which have been discussed in the preceeding chapter.

On comparing the provisions of the Pakistan or Indian law with those of English Law, it will be apparent that the rights and duties of citizens, including public servants and the military, are substantialy identical in both systems. It is, however, a misuse of the term to describe these rights and duties as martial law; they are no more than a part of the civil law of the land.

If riot, rebellion or insurrection overcome the ordinary guardians of law and order, and assume such proportions that the civil authorities become powerless to deal with them, theState will naturally turn to its armed forces for assistance. If the military take over in any such contingency and the General commanding the army completely ousts or subordinates the civil authorities in the area, the law applicable by him during such a period is 'martial law' in sensu strictiore. During such period, all constitutional guarantees are suspended and the officer in chief command of the forces operating in the troubled area acquires for the time being supreme legislative, judicial and executive authority. In other words he himself fixes the limits and definition of his own authority. He makes his own law, sets up his own Courts, and no civil authority, when he is in command, may call in question what he does. In this sense, therefore, 'martial law' is not law at all, but the will of the officer commanding the army. A commander, who steps in to quell a rebellion, inaugurates a reign of lawlessness and a civil authority,

legislative or the executive, which hands over the civil populace of a locality to the military, places the life, liberty and property of the people in the hands of the General who commands the army in such a period[1]. This was the position in Pakistan in 1953, when martial law was imposed in Lahore[2].

Just as the transition from civil tumult into rebellion or from rebellion into war is easy and imperceptible, so the common law right to use force against force can be extended to justify the use of necessary force, where riots have assumed the form of armed rebellion or insurrection has become war. There is authority for this proposition in the Privy Council's decision in Tilonko v. A.G.of Natal[3], which was followed by the House of Lords in Clifford v. O'Sullivan[4] and in the Queen's Bench case Phillip v. Eyre[5].

On such occasions, the civil courts may still function, though a delicate position may develop here, while the courts are functioning, the military seeks to oust their jurisdiction by setting up parallel tribunals and claiming paramountcy for them. The situation that actually arose in Wolfe Tone's[6] case is illustrative of such conflict; the Court issued an Order in the nature of habeas corpus to produce the body of the detenu who was shortly going to be hanged and the Commander refused to obey the writ. Where

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1. See Mohd.Umar Khan v. Crown, Supra at p.538.
2. This has been discussed at length in the previous Chapter.
3. (1907) A.C.93.
4. (1921) 2 A.C.580.
5. (1870) 6 Q.B.1.
6. (1799) St.Tr.759

any such conflict between the civil and the martial law authority arises, the antagonism becomes so irreconcilable that in the conflict one or the other must give way; the civil Courts claiming that they have jurisdiction to judge whether war exists to oust their jurisdiction and the military commander asserting that there is war and that his will is supreme. The Privy Council were considering such a position when their Lordships observed in Marais v. G.O.C. Lines of Communications[1] that when war prevails, the ordinary courts have no jurisdiction over the action of the military but it is for the civil courts to decide whether a state of war exists or not.

Most constitutional writers affirm that, where the civil power is deposed, suspended or paralysed by domestic disturbances, the military are entitled to step in to fill up the void, but these writers are equally clear in their opinion that, while so acting, the legality or excusability of any action taken by the military will be judged by 'necessity' and that judgement on the necessity can be passed by the Civil Courts ex post facto. Thus martial law is the law of military necessity. The moment that necessity come to an end, there is no justification to continue martial law further. After martial law ceases, the ordinary courts are open to any person aggrieved by an act not justified by the circumstances then existing and the necessities of the case[2].

Martial law, in this sense, is not statutory in character; it is the 'public law of necessity;' necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree to which it may be employed[3]. Nothing short of necessity can justify a recourse to martial law;

1. (1902) A.C.109.
2. See Tilonkov's case, supra.
3. F.B. Werner, A Practical manual of Martial Law, p.16.

such a necessity may exist before the blow actually falls. All that can be said with certainty is that there must be reasonable and probable cause for believing in the imminency of a peril that suspends the ordinary rules[1]. Even a proclamation of martial law is not necessary, if the exigencies of the situation compel its initiation[2]. Commenting on it, General Anthony writes that the lawful existence of a state of martial law is a matter of fact; not a matter of proclamation; the validity of any act done in the name of martial law rests not upon the presence or absence of a proclamation but the existence of a military necessity justifies the act in question[3].

As martial law is said not to be law, it is obvious that, when the military step in and take charge of civil administration in the disturbed area, setting up their own courts, any action by them, unless justified by civil law, would render them liable to be sued or prosecuted for all encroachments on the rights of person and property unless, by subsequent legislation, their acts are condoned or indemnified. Now because the professed justification for the military to step in is the disturbance of public tranquility and the object is to restore civil authority to its normal condition, the scope of the activities of a military commander only extends to taking such actions as is necessary for the restoration of law and order, and all acts that fall within the scope of that activity will certainly be validated for the martial law period by an indemnity bill.

The characteristics of martial law, in this sense are:

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1. J.I.C. Hare, American Constitutional Law, Vol.II,p.965.
2. Zimmermann v. Walker, 319 U.S.744(1943).
3. Anthony, Hawaii under Army Rule p.64 (California) 1955.

(i) proclamation by the Crown of martial law is not necessary; the military can take over when, by war, insurrection, rebellion or tumult, civil authority is disposed, suspended or paralysed;

(ii) all acts done by the military which are justified by the civil law or dictated by necessity and done in good faith will be protected, even if there be no bill of indemnity;

(iii) though preventive action while the martial law is in force will be valid, punitive action will generally be invalid;

(iv) martial law will cease ipso facto with the cessation of the necessity for it;

(vi) sentences of imprisonment by military courts will expire with the expiry of martial law[1], but the tendency in recent years has been to pass an Act of Indemnity with a provision by which the unexpired sentences of martial law are confirmed and continued; this has been discussed in the preceeding chapter.

Martial Law and State of Siege:

Martial law as it is known in the common law countries, is an emergency device designed for use in crises of invasion or rebellion, whereas the 'state of siege', in the civil law countries of continental Europe and Latin America, is the counter part of martial law. The state of siege and martial law are two edges of the same sword[2], and in practice there is a large degree of similarity between them. The same circumstances give rise to both, the same procedure is followed and the same purpose is sought to be served. An invasion or insurrection may give rise to both martial law and state of siege; suspension of civil rights, establishment of military courts for trial of civilians, and the substitution of the military arm for the regular

1. See Mohd. Umar Khan v. Crown, supra, pp.539-554.
2. C.L. Rossiter, Constitutional Dictatorship (1948) p,140.

police generally characterise the procedure in both. The object in view in both is the restoration of public order and normal government. In spite of these similarities, 'martial law' and 'state of seige' arise from two different legal systems, and from different political and military histories[1].

What is remarkable about the stage of siege is its stamp of legality and its thorough regulation by statutes[2]. As the state of siege is statutory in character, and the statutes dealing with the same subject matter in different countries may vary in their contents, the connotation of the term, if one looks at details, may vary from one state to another; though there appears to be general agreement about the meaning of the term. In the Dominican Republic a state of siege may be declared in case of a breach of public peace, while in Argentina, domestic disturbance or foreign attack endangering the the observance of the Constitution and the authorities created by it is a necessary prelude to such declaration[3]. The general observations in this chapter are based on the institution as it obtains in France.

Another important characteristic of the state of siege is that Parliament is assumed to be in decisive, positive control of the state of siege. While it is the responsibility of the Cabinet and the army to see to the successful termination of the state of siege, it has to be borne in mind that they act by the grace of Parliament alone[4]. It has been aptly said,

1. Ibid. p.139
2. See J. Minattur: op.cit.p.18-19
3. Minattur, op.cit.p.19.
4. Ibid.

"The right to suspend the rule of the laws can belong to no one but the power which makes them."[1]

When a state of siege is in force in France, the jurisdiction of civil courts is transferred to the military courts, which must, in exercising it, follow the civil law and not issue hasty, ill-considered judgements. Procedure may be simplified, duration of trials shortened, and technical and dilatory pleas summarily brushed aside, but 'the essentials, even of procedure, may not be dispensed with, and the guarantees of civil liberty, so far as they affect trials for ordinary offences, normally punishable under the Penal Code, remain in force.'[2]

A further point of interest is that the judicial function in all routine matters is generally assigned to the ordinary Courts, which act on behalf of the military authorities during a state of siege. The military authorities may occasionally intervene and take cognizance of the cases themselves if they find it necessary to do so. This is not done except under pressure of actual necessity created by the situation. The military authorities, under the provisions of the Code of Military Justice, do take cognizance of offences like treason, espionage, sabotage, and other offences that interfere with the armed forces or the war effort. The trial of persons accused of such offences is seldom left to the civil authorities[3].

As, in a state of siege, military tribunals are substituted for civil courts and exercise jurisdiction over the entire population, both soldiers and civilians, it can be assumed that 'during this suspension of ordinary law, any man whatso-

1. Frank Chaveau in the Chamber of Deputies on Feb.6th,1878, quoted in Rossiter, op.cit.p.84.
2. M.Radin,'Martial Law and the State of Siege,' 30 (1941-42)California Law Review, p.634-636.
3. J. Minattur, op.cit.p.22.

ever is liable to arrest, imprisonment or execution at the will of the military tribunal consisting of a few officers who are excited by the passions natural to civil way."[1] But 'the state of siege is not a condition in which the law is temporarily abrogated, and the arbitrary fiat of a commander takes place. It is emphatically a legal institution, expressly authorised by the Constitution and the various bills of rights that succeeded each other in France, and organised under their authority by a specific statute."[2]

In spite of all the arrangements in respect of organisation and procedure, which emphasize the character of the state of siege as a constitutional and legal institution, the opportunities of abuse of power are great and military officials, given to common human frailities, may yield to temptation. If and when they do, there is very little scope for redress for the victim. By instituting civil or criminal proceedings against those guilty of abuse of power, some redress may be obtained, but the chances are slim, as it is often difficult to distinguish between the personal and the official responsibility of a public officer; the responsibility of redress from the civil courts or the administrative courts, though not non-existent, may appear to recede to the background in the circumstances envisaged in the stage of siege, because a declaration of a state of siege is regarded as an acte de gouvernement[3].

Though 'martial law is regulated by no known or established system of Code of Laws, as it is over and above all of them,"[4] according to judicial decisions in common law countries, however, those who yield this extra ordinary

1. A.V. Dicey, The Law of the Constitution (8th ed.1915) p.288.
2. M.Radin. op.cit.p.637.
3. See E.Laferriere, Traitede la Jurisdiction - Administrative,(2nd Ed.Paris, 1896) Vol.II.p.36. Henry Berthelemy disagrees with this view in his Traite Elementaire de Driot Administratif)(9th Ed.Paris,1920)p.443; see also Pelletier c.de Ladmirault,Sirey (1874)-2.28.
4. In re Egan, 8 Fed.Case.No.4303

authority under martial law should be able to prove to the Courts, when normalcy has returned , that the particular measures adopted by them were warranted by the exegencies of the situation, for they may be proceeded against both civilly and criminally."[1] In this respect also martial law differs from the state of siege. In a state of siege, the courts do not offer substantial redress to the individuals injured by the authorities during the material period, but the legislature maintains a continual check upon the arbitrary exercise of power by officials. Under martial law, it may be said that the courts act only at the termination of the emergency, but the fact that they do act at some future time is the main, though not very effective, deterrent to wanton acts on the part of the officials. Even in this difference, there is an element of similarity, for in both systems, the checks are not as effective in practice as they appear to be in theory. Further, though the declaration and administration of martial law ordinarily remains an act of the executive exercisable in its discretion, there is only one occasion when the legislature may exercise ex post facto control over the executive acts of officials engaged in the administration of martial law, and this is when an indemnity bill is brought before it by the government. But this control, again, appears to be quite illusory. While the unpleasant prospect of a trial for mis-application of power may tend to inhibit wantonness, the hope of indemnity legislation may encourage military authorities in their reckless activities. For it is the invariable practice of Parliament to pass an act of indemnity, giving statutory sanction to the measures adopted by the authorities and sentences passed by the courts martial or special tribunals instituted by them during the period of emergency. An act of indemnity is

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1. See for instance, Wright v. Fitzgerald (1799) 27 St.Tr.759.

usually passed after a regime of martial law; its significance rests in that it maintains parliamentary control over the executive in the exercise of emergency powers. It is usual to frame the indemnity provisions in such a manner as to give statutory sanction only to those acts done in good faith by the authorities, thus precluding immunity from judicial scrutiny of wanton exercise of authority. But the standard of a good faith is a very classic one, with the result that the authorities often find themselves protected from interference from the courts[1].

Under martial law as well as in the state of siege, special tribunals are ordinarily instituted. The difference between the two in this respect is that, while in the state of siege there is statutory authority for the maintenance of such tribunals, under martial law the proceedings of these tribunals 'derive their sole 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'[2]. In France the declaration of a state of siege is regulated by law and subject to known limitations, whereas in the Commonwealth countries as well in the United States of America, there is no law on the subject; in Anglo-Saxon countries, the law governing the exercise of martial law rule is largely customary and judge made[3].

Martial Law in Pakistan in 1958 and 1969:

'Martial Law' must be dinstinguished from 'military law' which is the law governing those in the armed services, and from 'military government', which

1. See J. Minattur, op.cit.p.27.
2. See Rex v. Allen (1921) 2 Irish Rep.241
3. C.Fairman , Martial Rule and the Suppression of Insurrection', 23 Illion.L.R. 766 at 776; see also J. Minattur, op.cit.p.27.

is rule by an army of occupation in conquered territories, and from situations in which military forces are called upon to assist the civil authorities in maintaining public order without the existence of martial law. Where the military forces are called upon only to assist, the civil courts continue to function, and members of the civilian population may be punished only for violations of the civil law, not for violations of military orders other than those in implementation of civil law[1]. Military law is the law applied to the armed forces in peace as well as in war. It is generally codified and found in such laws as the Army, Naval and Air Force Acts; it is administered for the most part by courts martial, which theoretically have no jurisdiction to enforce martial law. 'Military Government' is a descriptive term which applies to any form of government by an army with or without the aid of civil authorities[2]. While martial law theoretically exists for the purpose of restoring civil government as soon as possible, military government offers no such apology for its existence and is a relatively permanent order. As mentioned above, the best example of the latter is seen in the government of a conquered territory[3].

The distinction between the 'military government' and 'martial law' is best drawn by Magoon[4]. He says -

> "A military Government takes the place of a suspended or destroyed sovereignty, while martial law, or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with the existing conditions in a locality which remains subject to the sovereignty. The occasion of military Government is the expulsion of the

1. Gayer,J.K.'Martial Law,''Encyclopaedia Britannica,'(1967Ed.)Vol.14,p.977.
2. T.Arnold, 'Martial Law','Encyclopaedia of the Social Science'Vol.10.p.163.
3. E.S.Corwin, The President, Practice & Powers,(3rd ed.1948)p.450; see also Minattur op.cit.p.14.
4. See his reports on the Law of Civil Government in Territories Subject to Military Occupation; cited in Mohd.Umar Khan v. Crown, supra, at p.534.

> sovereignty theretofore existing, which is usually accomplished by a successful military invasion. The occasion of martial rule is simply public exigency which may rise in time of war or peace. A military government since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions."

The ' martial law', imposed in Pakistan from October 7,1958 to June 1962 and from March 25, 1969 onwards, in Hawaii from December 1941 to October, 1944 and in some African countries[1], falls under the fourth category of martial law; during these martial law periods in Pakistan the Constitution was abrogated and a new legal order was set up. It is not martial law at all in the strict legal sense; it is more akin to the military government, discussed above, in that it suspended or destroyed the government existing at that time, not in a conquered territory but in the home country. It has been observed by the Supreme Court of Pakistan that this form of martial law can be regarded as a victorious revolution or successful coup d'etat, which is an internationally recognised legal mode of changing the government or the Constitution. Where a revolution is successful, it satisfies the test of efficacy and becomes a basic law-creating fact. After a change of that character has taken place, the national legal order must for its validity depend upon the new law-creating organ, as the existing constitution has been abrogated by the revolutionary government; even the Courts lose their existing jurisdiction, and can function only to the extent and in the manner determined by the newConstitution. 'If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the

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1. Infra, see the following pages.

revolutionary government and the new Constitution are, according to International Law, the legitimate government and the valid Constitution of the State.'[1]

It is submitted that this form of martial law comes midway between the martial law, known in Commonwealth countries and the law administered by the military government in occupied territory. Prof.de Smith cites two types of situations found in the recent constitutional cases in Commonwealth countries; the first type is exemplified by the situation in Pakistan, in 1953 and Cyprus, the second by the situation in Pakistan in 1958, in Uganda and Rhodesia, and says that these cases fall in the first of the two categories but involve some consideration of the second category also[2].

It is apparent, from the declaration made by General Mohd.Ayub Khan, as Chief Administrator of Martial Law on 17th October,1958, that, though martial law purported to be imposed out of necessity, it was not to end with the mere assertion of the extinction of that necessity. He said -

> "Let me assure everyone that, whereas Martial Law will not be retained a minute longer than is necessary, it will not be lifted a minute earlier than the purpose, for which it has been imposed, has been fulfilled. That purpose is the clearance of the political, social, economic and administrative mess that has been created in the past.[3]"

As the President on 30th October, 1958, he said -

> "We want martial law cover for the reforms we want to introduce, such as settlement of the refugees.. and land reforms. For the bulk of a population it is a good thing, but is bound to hurt some."[4]

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1. State v. Dosso, supra, per Mimur C.J. at p.539 'B and C'.
2. See 'Constitutional Lawyers in Revolutionary Situations' in Western Ontario Law Review , vol.7,1968, p.93. . . . . He points out that incomplete reports of the judgements delivered by the members of the Appellate Division of the High Court on Jan,29,1968, indicate that judicial opinion in Rhodesia is shifting towards an acknowledgement that the second class of situation has arisen.
3. The 'Asian Recorder', November,15-21,1958,p.2349.
4. See 'Dawn' Karachi, October,31,1958.

The jurisdiction of martial law was said to be the then prevailing situation; the legislative machinery had become defunct, civil administration had become corrupt to the core and law and order had broken down. The purpose of the martial law in the words of the President was 'to prepare the country suitable for the representative form of government to come in and flourish.'[1]

It is from this point of State necessity that the legality of Martial law, or the new legal order, as observed by the Supreme Court of Pakistan, is to be judged. Lord Camden, C.J., in Entic v. Carrington pointed out -

> "..with respect to the argument of State necessity... the common law does not understand that kind of reasoning... If the master himself has no power to declare when the law ought to be violated for reasons of State, I am sure, we his judges have no prerogative."[2]

It is said that the Judges in Pakistan should not have gone so far as to validate the abrogation of the Constitution by the President. But the situation raises three questions, (i) what alternatives were open to them? 'ii) what ought they to say or do? and (iii) what respectable legal argument could be advanced to justify the validity of the conduct which appeared manifestly wrong? Professor de Smith says that the answer to these questions are fundamentally political judgements dressed in legalistic garb, but he suggests, these questions should not be pressed too far. He further comments that, on the whole, the Judges trained in the British common law tradition hanker after that 'strict and complete legalism,' which Sir Owen Dixon commended as the only sure guide to the determination of political disputes set in a legal context; and, in so far

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1. Address by General Mohd.Ayub Khan to Karachi Bar Association, on Jan.15,1959 quoted by M.Ahmed in 'Government and Politics in Pakiston, p.209.
2. 19 St.Tr.1030 at p.1073; see also Keir and Lawson, cases in Constitutional Law, 5th Ed. 1967,p.312; see also Prof.de Smith, op.cit.p.93.

as the narrowly positivist approach can provide a satisfactory answer to the problem, it will be eagerly pursued. Constitutional crises, which involve the very foundation of the legal order, where the old regime is replaced by a new regime as a whole, and not merely one aspect of it, should be answered in a legalistic way. Where the legitimacy of the regime itself or of the measures taken by the regime, which it considers vital to its survival, are in issue, the pressure upon the judges to decide in a particular way, or not to decide in another way, may be irresistable, even if they wish to resist them. He further says that, if the politically 'right' answer can be delivered by pressing in an appropriate sequence the buttons which Judges are in habit of pressing, when deciding a case of constitutional importance, so much the better and if it cannot be delivered by this means, buttons hitherto mysteriously screened from view may be discoverable and a suitable answer can then be flourished amidst asseverations that the legitimacy of the political order has been demonstrated by reference to pre-existing criteria. The end result is that ostensibly unlawful action is shown to be lawful. He finally concludes that, if on the other hand, forensic and judicial ingenuity cannot conceal the obvious, it has to be acknowledged that a breach of legal continuity has taken place, so that the legitimacy of the political order cannot be ascribed to anything in the pre-existing constitution; a different approach may be followed. Out comes Hans Kelsen's "General Theory of Law and State" and it is found that a successful revolution begets its own legality.

But he disapproves of Hans Kelsen's "Pure Theory of Law," which, according to him, has always commanded a certain grudging respect among common law jurists, by saying that 'Lon Fuller has dismissed it as' 'an empty wheelbarrow'

and Harold Laski as 'an exercise in logic and not in life.'
Never to the best of his knowledge, has Kelsen been cited in an English Court, and 'he is disregarded in our books on constitutional law.'[1] Sethna[2] points out, 'Kelsen's jurisprudence is too abstract to be appreciated and is divorced from social order. It is not of much utility."

Kelsen's estimate of the successful coup d'etat or victorious revolution' may be correct in International Law,in relation to the recognition of the changed government by the nations of the world. As said by Mumir,C.J.,in Dosso's[3] case , citing Kelsen, a foreign country cannot go into the questions who brought about the revolution and by what means was it achieved. The successful coup d'etat or victorious revolution, irrespective of whether it has been brought about by unconstitutional action of the Head of the State, as in Pakistan, may be regarded as having instituted a legitimate government by other nations for the purpose of International Law. But it cannot be justified under the constitutional law which is part of the Municipal law; International Law cannot be applied by Municipal Courts if it is repugnant to the Municipal Law . If an aggrieved citizen challenges the validity of a new regime, alleging it to have been established by unconstitional means, in the superior Courts of his country, it is difficult to see how Kelsen's theory of 'Law and State', can be invoked to justify the unconstitutional action of the Head of the State.

Professor de Smith further, discussing the present situation in the new Commonwealth, remarks that this is an era of constitutional breakdowns. When

1. See Prof.de Smith op.cit.p.96. It can be noted here that this was the situation before the Supreme Court of Pakistan, that Mumir,C.J.relying on Hans Kelson's theory of successful coup d'etat approved the abrogation of the Constitution by the President as well as the legality of the new regime and legal order.
2. Sethna,M.J., Jurisprudence, p.22.
3. Supra.

the Constitution ceases to function normally, when it becomes unworkable, when it is partly or wholly superseded or suspended or a government is overturned in a manner not authorised by the Constitution itself, the constitutional lawyer finds himself transported into an entirely new dimension. Ostensibly unconstitutional action has been taken by persons, who are wielding effective political power and have not the slightest intention of relinquising it[1].

This was the situation which the Judges of the Supreme Court of Pakistan were facing in Dosso's case, when the unconstitutional action was taken; the Constitution had been abrogated by the President who was exercising effective power. The Judges had no other alternative but to validate the unconstitutional action of the President by applying, it is submitted wrongly, Kelsen's theory, and to approve the validity of the new regime and the new legal order. Had they decided the case in an other way, they would have been ousted and the new Judges, most probably military officers, selected by the President himself, would have validated the abrogation of the Constitution, as well as the new legal order. Moreover, it is submitted, the situation in the country was deteriorating day by day and there was such a high degree of lawlessness that the martial law regime was welcomed by the masses of Pakistan. The realisation of the situation by the Judges is manifested by the frank remarks of Munir C.J. himself on the validation of the unconstitutional act of the Governor-General, in dissolving the Constituent assembly in 1954 which was a main issue in Tamizuddum Khan's case, discussed in the preceeding chapter; where no question of abrogation of the Constitution was involved and the question was not as serious as it was in 1958. He said -

1. Prof. de Smith, op.cit. p.96.

> "The mental anguish caused to the Judges by these cases... was beyond description... no judiciary elsewhere in the world had to pass through what may be described as judicial torture."

If the Court had found against the Governor-General, he was -

> "..quite sure that there would have been chaos in the country"

and a revolutionary situation would have been precipitated. In any case, who could say that -

> "...the coercive power of the State was with the Court and not with the Governor-General? At moments like this public law is not to be found in the books, it lies elsewhere, viz, in the events that have happened."[1]

Commenting on these remarks, Prof.de Smith says that it was very important for the Court, in Tamizuddun Khan's[2] case not to come to a conclusion adverse to the Governor-General on the main issues. Fortunately, it was possible for the Court to come to a favourable conclusion by using rules of public law found in books. Nor did the Court have to justify its decision by treating the Governor-General as a successful revolutionary; instead it was able to discern legal continuity by invoking the doctrine of necessity to abridge the gap between the law and the facts of political life. In 1958, as has been seen, this option was not available and the Court was faced with a revolution claiming the accolade of legitimacy[3]. It is submitted that this is the correct view.

Kelsen was invoked by the High Court of Uganda in 1966[4]. In 1966, the Prime Minister, Dr. Obote, removed the President, suspended the Constitution

1. 5 Pakistan Bar Journal,16-18.(1960) quoted by Prof.de Smith,op.cit.p.97.
2. Supra.
3. See Prof.de Smith, op.cit.p.97.
4. Uganda v. Prison Commr., ex parte Matovu (1966) E.A.514.

and procured the adoption, by a procedure not sanctioned by the legitimate Constitution, of a new Constitution, under which he became President. The Court held that his coup d'etat had been successful and efficacious, in as much as the will of the Government was being generally obeyed, and accepted the legality of the new regime and the new Constitution of Dr.Obote; the petition for a writ of habeas corpus was dismissed by applying more citations from Kelsen[1].

It is submitted that the situation was not very different from that in Pakistan. The unconstitutional action was taken by the man who was wielding effective power and there was no alternative course open to the Judges than to validate the action of the Prime Minister and accept the new regime and the new Constitution by straining Kelsen's theory. It has been said that the Judges should have resigned, as the Chief Justice of the Federation of Rhodesia and Nyasaland did in 1960[2]. But, it is submitted, their resignation would not have prevented the acceptance of the new regime and the new Constitution by other Judges.

Frank, commenting on the unconstitutional action and the authentication of the revolution or new regime by the Judges, says that -

> "...it is interesting to note that perpetrators of illegal action have, in each case, made strenuous efforts to be readmitted to the mainstream of constitutional respectability by moving efficaciously to re-establish a rule of law, in terms scarcely less, and sometimes more traditional than the fundamental that the revolution overthrew. To debate whether a revolution is constitutional is pointless sophistry, and only a political not a legal answer can be given to the more sensible question, whether the revolution must necessarily number amongst its casualties the normative concept of rule of law. To some extent, the answer will depend on the quality of the system which the revolution

1. See Prof.de Smith, op.cit.p.103.
2. Ibid.

> overthrew, on the dispatch with which the rule of law is restored by the revolutionaries and how frequently the society indulges in revolution."[1]

It is submitted that this is a realistic analysis, which gives a comprehensive answer to the political question sought to be answered in a legal way by the constitutional lawyers. Whether the recognition of the revolution brought about by the unconstitutional action of the President was legal, when there was no provision in the Constitution of 1956 for its abrogation by the President, when the Constitution itself was susceptible of such amendment or reformation[2] as the President intended to bring about to maintain the ruleof law in the country and especially when the conditions represented as justifying the proclamation of martial law, did not, as previously indicated, justify its promulgation, no other answer is possible. It can, however, he said that, in so far as recognition of the revolution is concerned, there was no alternative open to the Supreme Court of Pakistan than to validate it. As to the question of overthrowing the existing system, it is arguable that, as it was not functioning in a way calculated to maintain the rule of law in the country, there was justification for its overthrow.

It is worth discussing at length the circumstances alleged to have lead to the promulgation of martial law in 1958 and the abrogation of the 1956 Constitution. The legislative machinery had become impotent, the civil administration had become corrupt and law and order had broken down. The Constitution Commission, set up by the President Ayub Khan in February, 1960 was

1. Frank, Comparative Constitutional Process; Cases and Materials.
2. See Cornelius, J.'s observation in State v. Dosso supra.

the first step taken by him to restore constitutional government in the country; the former Chief Justice of Pakistan was appointed as its Chairman. The terms of reference of the Commission, inter alia, were to 'examine the progressive failure of parliamentary Government in Pakistan, leading to the abrogation of the Constitution of 1956 and to determine the causes and nature of failure; to consider how best the said or like causes may be identified and their recurrence prevented.' The Commission came to the conclusion that the Parliamentary form of Government had failed in Pakistan and they suggested the following causes of its failure,

> "(i) lack of proper elections and efects in the late constitution;
>
> (ii) undue interference by the Head of the State with the Ministers and political parties, and by the Central Government with the functioning of the government of the provinces;
>
> (iii) lack of leadership resulting in lack of well organised and disciplined parties, the general lack of character in the politicians and their undue interference in the administration."[1]

According to the Commission, it was the last mentioned group of facts which were the main causes of the alleged failure of parliamentary democracy in Pakistan. But it was strongly contended by the politicians that, as parliamentary democracy had not been given a fair trial in Pakistan, the question of failure did not arise. The Commission seems to have been convinced that, even if a general election had been held, the right type of leader would not have been elected, so the failure to hold elections could not be regarded as a cause of failure of the Constitution.

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1. See Report of the Constitution Commission, 1960, quoted by Choudhary G.W. in Democracy in Pakistan, pp.132-133.

As regards the defects in the Constitution of 1956, which were said to be one of the causes of its failure, if there were any defects, they could easily have been remedied by constitutional amendments without abrogating the Constitution. Regarding interference by the Heads of the State, the Commission seems to have taken a charitable view of theactions of Ghulam Mohammad and Iskander Mirza, whose arbitrary activities are in many quarters, regarded as mainly responsible for the breakdown of parliamentary democracy. The Commission's view was that they might have been responsible for the confusion in the political field; they were not free from personal responsibility but 'history shows the power passed from the Head of the State to the people's representative only when the latter became disciplined and stood together to oppose autocracy. Till that stage was reached, the Head of the State could always interfere with immunity; our not accepting the interference by the Heads of the State as one of the real causes of the failure of the parliamentary form of Government does not amount to their exoneration... What we should like to point out is that interference by the Heads of the State would not have been possible, if there had been discipline and solidarity in the parties in power.'[1]

It is submitted that Ghilam Mohammad and Iskander Mirza actively engineered the breaking up of solidarity in the parties, a course unbecoming of any Head of State in a parliamentary system. Ghulam Mohammad's attempt to disrupt the Muslim League, the ruling political party in 1953, to oust the Nazimuddin Cabinet and Iskander Mirza's palpable encouragement of the formation of the Republican Party by a dissident group of Muslim Leaguers in 1956 are two glaring instances of Heads of the State actively contributing to the break up of

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1. Ibid. p.134.

the parties' solidarity to consolidate their own power. Furthermore, the emergency provisions of the 1956 Constitution, which, of course, did not confer power to abrogate the Constitution, were used by Iskander Mirza seemingly to further his interests[1]. The unconstitutional actions of both Ghulam Mohammad and Iskander Mirza were clearly abuse of power and breach of duty cast on them by the Constitution. The Constitution Commission, it is submitted, ignored unconstitutional action indulged in by these Heads of State for the purpose of personal aggrandisement in assessing the causes of the unsatisfactory working of parliamentary institutions in Pakistan.

Moreover, Iskander Mirza had endeavoured to induce the public to believe that the Constitution was unworkable by making public statements to the effect that the this was due to illiteracy and lack of experience of democratic government of most of the people. Through his hirelings and henchmen, he put forward the idea of setting up a 'Revolutionary Council' of which he was to be the head for a term of fiver years[2]. But by this time, the politicians were well aware of the intrigues and manoeuvres of Iskander Mirza and wanted to get rid of him. The election date, February,1959, was approaching and he was conscious of the designs of the politicians and the probability of his removal after the election. He had only assented to the 1956 Constitution under secret agreement with the Constituent Assembly that it would, in return, elect him as President. During this period, on account of his intrigues, he had irritated the Muslim League, which passed a resolution against him. The struggle for power between him and the politicians led to the proclamation of martial law, for Iskander Mirza regarded this as the only means of ensuring that he would continue to be President.

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1. Chowdhary, op.cit. p.134.
2. Z.A. Suleri, Pakistan's Lost Years, p.122.

There were rumours of an alliance between Suharwardy, the former Prime Minister, and Feroze Khan Noon, who succeeded Suharwardy, that, after the election, Suharwardy would become Prime Minister and Noon would be President.[1]

As to the undue interference by the politicians in the administration, the Commission cited a number of specific cases. They referred first to the East Bengal Police Committee Report, 1953, which gave an account of undue interference with the police and magistracy by Ministers in cases of rioting and robbery, and the way in which military assistance in preventing smuggling of goods out of East Pakistan, was interrupted by the Awami League Ministry in 1957. They added that criminal cases against certain representatives of the people, for misappropriation of public funds, were withdrawn in E.Pakistan by the Muslim League Cabinet on party considerations. Turning to West Pakistan they cited cases of favours granted to people to secure support for their party; these ranged from granting route permits to waiving of interest due on Taccavi (Revenue) loans, postponing the redistribution of land revenue arrears and promoting a junior officer over a senior in consideration of his doing propaganda for the party. The Commission referred to the note of despair in the comment of the Court of Inquiry, appointed to inquire into the Punjab disturbances of 1953, that democracy seemed to mean subordination of law and order to political ends; the Ministers were so busy in helping their political supporters that they could not concentrate on questions of policy, which was their proper domain. They were so concerned with consolidating their position, that they meddled in minor administrative matters, which, in countries, where the parliamentary democracy has been successful, are left to the experts and the services.[2]

1. Chowdhūri, op.cit. p.115.
2. See Constitution Commission Report, op.cit. pp.11,12 and 36, see also Chowdhūri op.cit.pp.136-137.

As regards the Central Governments' interference in provincial politics, the Commission simply observed that 'such interference shows that the members of the party in power at the Centre were more concerned with maintaining their own position than with working the Constitution[1]'. But the Commission did not consider whether such interference was on so large a scale as to justify the abrogation of the Constitution, the dissolution of Parliament and the imposition of martial law.

The Commission, however, rejected the allegation that the services were also responsible for corruption and the failure of the parliamentary government in Pakistan. They admitted that there were cases of officers playing up to Ministers in order to exploit the situation to their advantage[2]. The defects which the Commission noted in the working of parliamentary democracy in Pakistan 'are but a reflection of indiscipline, lack of sense of duty and want of spirit of service and accommodation in an average member of society, noticeable particularly in countries which have emerged into independence, before attaining universal education and a minimum level of economic development.'[3]

As to dearth of leadership in Pakistan since the death of Mohd.Ali Jinah (Quaid-i-Azam) and Liaqat Ali Khan, which was also referred to by Sir Ivor Jennings[4], it is admitted that it was an important factor in the political deterioration of Pakistan.

It is submitted that, from the report of the Constitution Commission and the statements of political leaders[5], it is clear that the country suffered

1. Const.Comm.Rep.p.9, see also Chowdhuri, op.cit.p.137.
2. Ibid p.13.
3. Ibid.p.14, see also Chowdhuri, op.cit.p.141
4. See Approach to Self-Government, cited by Chowdhuri, op.cit.p.141
5. See replies of Ch.Mohd.Ali and Ataur Ralman to questionnaire issued by Const.Commission, June, 1960.

from extreme political instability, that parliamentary democracy in Pakistan did not work as satisfactory as it works in Britain and other parts of the Commonwealth. Whether the Heads of the State, the politicians or the civil servants were responsible for this is a question on which opinions might differ. But there is no denial that political confusion and chaos prevailed in the country. It is further submitted that the Commission took an unduly lenient view of the role of the Heads of the State in the political drama that brought an end to the country's democracy and that the Heads of the State could not have played such a role, if there had been solidarity and discipline in the parties[1].

As regards the contention that the declaration of martial law was necessary because law and order had been completely subverted, it is submitted that the people were not responsible for it. It was the intrigue and manoeuvring of the Head of the State and the politicians which created chaos and confusion amongst the people and engendered agitations and demonstrations. The menace to law and order was not so serious that it could not be maintained without resorting to martial law.

The question of involvement of society generally in the revolution, as observed by Frank[2], is worth considering. It is to be noted here that it was neither society generally nor the military which brought about the successful coup d'etat or victorious revolutions in Pakistan in 1958 and 1969. It was the constitutional Head, the President, who extra-constitutionally abrogated the Constitution and exposed not only society but himself to the control of the Commander-in-Chief, who, being the Chief Administrator of Martial Law, ousted the President and declared himself President within 20 days of the abrogation of the Constitution, that is on October, 27, 1958.

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1. Chowdhuri, op.cit.pp.140-141
2. Comparative Constitutional Process, op.cit.

Professor Gledhill has taken very practical and juristic approach to the question[1]. He says that, though it may be contended that no other course could have saved Pakistan from disaster and that no law deserves enforcement when the reasons for its enactment have ceased to operate, the action of the President in proclaiming martial law on October,7,1958, was taken in circumstances which cannot be regarded as justifying it, according to the principles accepted elsewhere in the Commonwealth. He further says, as has been discussed above[2], when the Federal Court had to find a way to extricate the Government of Pakistan from an earlier constitutional difficulty, it relied heavily on the common law and the prerogative. But when the Proclamation of October,7,1958 and the L.C.F.O., 1958 were impugned, no Crown prerogative or rule of common law could be invoked to justify what had been done. Instead resort was had to Hans Kelsen's 'General Theory of the Law and State' for the proposition that a victorious revolution or a successful coup d'etat was an internationally recognised method of changing a Constitution. That other States are obliged, sooner or later, to recognise a government which has seized power by force in a state is obvious. But the Constitution of 1956 had provisions for its own amendment. If, in addition to these, the Courts recognise a right to change the Constitution by rebellion, are there any restrictions, apart from success, on this right? Do the Courts approve -

> "The good old law, the ancient plan
> that he may take who has the power
> and he may keep who can ?

He concludes that,conceding that, not for the first time, the Courts had been embarrassed by a claim that they should find some basis for giving their approval to extra-constitutional action and that, if they had not done so, the

1. Pakistan, op.cit.pp.108-109.
2. Federation v. Taznizuddin Khan, supra.

probabilities are that they would have been suspended and replaced by military courts, affording fewer remedies to the citizen who complained of the activities of the government. But the course taken was calculated to encourage an individual, wielding supreme power, to seek the approval of the courts for unconstitutional action. As discussed in the preceeding pages, this was not the first time that the courts were asked to approve pragmatic action. However, the Chief Justice recognised the Laws (Continuance in Force) Order as the 'new Constitution' which determined the jurisdiction of the Supreme Court.[1]

Position of Fundamental Rights:

Mumir C.J. expressing the majority view in State v. Dosso[2], held that, along with the abrogation of the Constitution by the M.L.Proclamation of October,7,1958, the Fundamental Rights were abrogated. As to the question whether Art.2 of the L.C.F.O.,1958, which provided that 'Pakistan shall be governed as nearly as may be in accordance with the late Constitution' could revive the fundamental rights, it was pointed out that the provision did not have the effect of restoring the fundamental rights, because the reference to Government in Art.2 of the L.C.F.O. was to the structure and outline of the Government and not to the laws of the late Constitution which had been expressly abrogated by Art.4; Art.2 and Art.4 of the L.C.F.O., could therefore stand together and there was no conflict between them. But, even if some inconsistency be supposed to exist between the two, the provisions of Art.4 which were more specific and came later in the order must override those of Art. 2.

Art.4 of the L.C.F.O. laid down -

1. Op.cit. 'Pakistan' pp.108-109.
2. Supra.

1. Notwithstanding the abrogation of the late Constitution, and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law, all laws other than the late Constitution, and all Ordinances, Orders-in-Council, Orders other than Orders made by the President under the late Constitution, such Orders made by the President under the late Constitution as are set out in the Schedule to this Order, Rules, bye-laws, Regulations, Notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before the Proclamation, shall so far as applicable and with such necessary adaptations as the President may see fit to make, continue in force until altered, repealed or amended by competent authority.

2. In this Article a law is said to be in force if it has effect as law whether or not the law has been brought into operation.

3. No Court shall call into question any adaptation made by the President under clause (1).

Cornelius J. dissenting from the majority, took a different view and observed that the words in Art.2 of the L.C.F.O.1958, 'Pakistan shall be governed as nearly as may be in accordance with the late Constitution' did not only cover provisions creating organs of government and defining their powers, as held by the majority, but also relating to the fundamental rights. The direction was one which operated by reference to the previous instrument without giving validity to that instrument. According to him, by the Constitution of 1956, the highest authority of an overriding character, governing all laws and legislation in the country, had been given to the principles, which were set out and enumerated as Fundamental Rights in Part II thereof; no valid law could be made in contravention of those rights. He conceded that the said prohibition was permanent, but the L.C.F.O.1958, gave overriding powers to the President and the C.M.L.A. to make Orders and Regulations contrary to anything appearing in the 1956 Constitution. Furthermore Art.4 of the L.C.F.O.,1958, brought into force all laws existing before the abrogation of the Constitution; no such law could be challenged on the ground of its inconsistency with the Fundamental

Rights. But this could not annul the Fundamental Rights as such; they or any one of them could be abrogated only when it was so expressly provided by an Order or Regulation of the President or the C.M.L.A. He further observed that some of the Fundamental Rights, enumerated in Part II of the 1956 Constitution, did not derive their validity from having been formulated in words and enacted in that Constitution. Some of these rights are essential human rights, which inherently belong to every citizen of a civilized country. The contrary view would involve the danger of denial of these elementary rights, expressly assured by being written into the fundamental law of the country, merely because that writing was no longer of any force[1].

But it seems that Cornelius J.was not clear in his mind, in the instant case, about the position of the fundamental rights in the new legal order; he did not say in so many words that the fundamental rights formed part of the new legal order. Possibly he wanted to avoid the determination of the question by simply holding that the fundamental rights are and should be available to the people, whether they are incorporated in the Constitution or not, because they are basic human rights. This is supported by the fact that, in a later case[2], in which, being concerned about the status of the fundamental rights, he expressly declared that the fundamental rights formed part of the law of the land in the new legal order. He also avoided a declaration of the status of the fundamental rights by adopting another approach. He pointed out that the validity of S.11 of the F.C.R., could not be called in question under Art.4 of the late Constitution, on account of its inconsistency with Art.5 of the late

1. State v. Dosso, supra.
2. Mehdi Ali Khan's case infra, dissenting view of Cornelius J.

Constitution, because Art.4 of L.C.F.O.,1958, had given full effect, as enacted, to all laws existing at the time of the abrogation of the Constitution of 1956, insofar as the Frontier Crimes Regulation fell within the category of such laws. But he held that the question of validity of the impugned law on account of its repugnancy to the fundamental rights in question was not a question before the Supreme Court; it had been already decided by the High Court before the Proclamation and the L.C.F.O. 1958, was retrospective in application only from Proclamation Day, 7th October, 1958, and not from a date prior to it.

It is submitted that the question could have also been avoided by determining the basic and crucial question of the jurisdiction of the High Court in issuing the writ of habeas corpus in the instant case; a matter which belonged to the special area, in which neither the Supreme Court nor the High Court had jurisdiction to issue the writ.

The view taken by the majority in Dosso's case was reaffirmed in Province of East Pakistan v. M.Mehdi Ali Khan[1], in which substantially the same question was raised; whether the validity of any law could be called in question, on account of its inconsistency with a fundamental right. It was held that, as the fundamental rights did not exist in the new legal order, the validity of any law could not be challenged on the said ground.

Cornelius J.,dissenting from the majority, reaffirmed his views expressed in the earlier case. He held that the rule laid down in Dosso's case was of a technical character. As it operated to deprive subjects of rights to protect their interests by well-recognised procedure, he conceived that to defeat such a rule by purely technical submissions involved no contravention of

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1. P.L.D.1959, SC.387.

law. But indeed, he observed, he had been at pains, in his examination of the instant case, to proceed as far as he could upon the matters of substance in ascertaining the true nature of the question involved. By analysing the circumstances in Dosso's case and those of the instant case, which were distinguishable and therefore immune from the bar against relief by writ upheld in Dosso's case, he came to the conclusion that the questions were not merely technical, but each had a reality of its own in relation to the intricate subject matter of these cases.

The subject matter was raised in Dosso's case, at a time when the situation created by the abrogation of the Constitution could not yet be said to have taken shape. Indeed, following the pronouncement of the judgement in that case, the momentous announcement was made that the President, who had abrogated the Constitution and promulgated the L.C.F.O.,1958, had himself resigned and was due shortly to leave the country. Now in the instant case, when the situation had been stabilized, it was possible to reappraise the provisions of the L.C.F.O.,1958, in a calmer situation. Nine months had elapsed since its promulgation and its application in actual practice had become a matter of observation. Cornelius J.,therefore, expressed his deep concern with the questions,(i)whether it was the intention of the L.C.F.O. to annul the fundamental rights; and (ii) whether the effect of Art.2(7) of the L.C.F.O., was to bring to an end all pending proceedings for the enforcement of the fundamental rights forthwith, without considering the question whether, in the changed legal structure, such writs were competent or otherwise.

The plain conclusion was that the fundamental rights had lost the binding force conferred upon them by the Constitution. No law could be called

in question on the ground of its inconsistency with a fundamental right under Art.4 of the 1956 Constitution. But the Fundament Rights nevertheless remained as provisions in the late Constitution and were enforceable to the extent assured by Art.2(1)of the L.C.F.O., as discussed above; the L.C.F.O. did not expressly put any restriction of the enjoyment of the general rights of the people, except that, in the case of prevntive detention, the right to personal liberty could not be invoked in the manner available under the late Constitution; under which an order of preventive detention for more than three months had to be referred to an advisory board. From the implication of this provision, it was manifested, beyond any doubt, that all rights, except the right to personal liberty, to the extent discussed above, were kept alive.

He further made the very realistic remark that, giving effect to fundamental rights could not be said to prejudice the success of the new regime; suspension of the constitutional guarantees frequently accompanies the promulgation of martial law. The 1956 Constitution, by Art.191, empowered the President, in a state of grave emergency, to issue a proclamation and, during the continuance of such proclamation,the President was authorised, by Art.192 of that Constitution, to suspend the right to move the Court for the enforcement of such fundamental rights as are specified in the Order and all proceedings pending in any Court for the enforcement of the rights so specified, remain suspended for the period during which the proclamation is in force. By depriving the fundamental rights of compulsive force in law,their enforcement through the Courts was rendered impossible, and any proceedings for that purpose, doomed to failure in any case under Art.192 of the 1956 Constitution. On the other hand, the L.C.F.O., 1958, in terms, expressly provided that notwith-

standing the abrogation of the Constitution, but subject to any order of the President or the C.M.L.A., the country should be governed as nearly as may be in accordance with the late constitution. The provision was, in his opinion, of high importance as furnishing a key to understanding of the true nature of the Martial Law rule imposed in Pakistan on October 7, 1958, The old Constitution was repudiated as to its form, but it was possible to read in the words abrogating the Constitution an assurance that the late Constitution's provisions, so far as applicable in the changed conditions, resulting from the dissolution of the legislatures and the dismissal of the elected Governments, would continue to be applied in practice, though subject to the expressed will of the new Sovereign authorities. This feature gave, it is submitted, a character of novelty to the new regime, as a form of Martial Law Rule.

In Dosso's case, the nature of the provision 'Pakistan shall be governed... as nearly as may be in accordance with the late Constitution' was considered only in its bearing on the question whether the Fundamental Rights had survived the revolution, as such rights. Upon this point the unanimity of opinion appeared from the four Judgements delivered; Cornelius J., dissented. According to Minir C.J.,the provision meant to apply to the 'structure and outline of the Government' Shahabuddin J., thought that the words must be taken to refer rather to the machinery of the Government than to legislation and the matters affecting the validity of the laws.' Amirudrin Ahmad J. expressed the view that the word 'governed' relates to the structure and manner of the Government, which has been changed by the dissolution of the legislative bodies and dismissal of the ministries and the words in the Article have not the effect of reviving the Fundamental Rights. Rahman J. agreed with Munir C.J. According to Cornelius J., the provision implied that Pakistan should be governed in accordance with the

provisions of the1956 Constitution in all practical matters except those which had been expressly repudiated by the Orders of the President or the Regulations of the C.M.L.A.; fundamental rights except the right to be referred to the advisory board in case of preventive detention for more than three months, were not annulled by the L.C.F.O.,1958, any Order of the President or the Regulation of the C.M.L.A.

In Mehdi Ali Khan's[1] case the majority reaffirmed the view expressed in Dosso's case. Cornelius J., dissenting from the majority observed that the aforesaid words in Art.2(i) of the L.C.F.O. conveyed a clear assurance that the new regime would govern the country according to the provisions of the late Constitution; upon the lines to which the people were accustomed, which included the provisions relating to the fundamental rights. In a later case[2] the Supreme Court held that the word 'governed' included not only the outline or the structure of the Government but also all functions, legislative, executive and judicial, of the Government; this included the limitation on legislative power existing in the late Constitution. The Court was, however, reluctant to decide whether the Fundamental Rights existed in the new legal Order. It is submitted that the view that the words 'shall be governed as nearly as may be in accordance with the late Constitution' included all provisions relating to the government of the country is correct. It can be noted that the same words were used in the Government of India Act,1935 and sub-section(2) of S.(8) of the Indian Independence Act, 1947, provided that Pakistan shall be governed as nearly as may be in accordance with the provisional of the Government of India Act,1935;" the language of the provision in question seems to have been lifted from the aforesaid provision of

1. Supra.
2. Iftekharnddin v. Mohd. Sarfraz.,P.L.D.1961,SC.585

the Indian Independence Act,1947, which covered all aspects of the government dealt with in the Government of India Act, 1935.

As regards the position of fundamental rights Cornelius J., in his dissenting judgement in Mehdi Ali Khan's case, pointed out that the question was one of great difficulty, susceptible of discussion in the light of legal theory and political philosophy at great length. The principle which seemed to him most apt to resolve the difficulty was that the directory provisions of the late Constitution,referred to in Art.2(i) of the L.C.F.O.,1958, as expressed in the Order, had been subsumed in Martial Law. The force which they possessed was not relateable any longer to their enactment in the Constitution in which they appeared, but existed only because of and by reason of the Martial Law and only to the extent that the Martial Law by expression did not recall or avoid them. He, therefore, found a clear expression in the L.C.F.O. of the policy of allowing the fundamental rights validity to the extent discussed above. According to him the fundamental rights existed and formed part of the law of the land in the new legal order, subject, of course, to the L.C.F.O.,1958 and the Martial Law Regulations or Orders.

It is submitted that the view expressed by Cornelius J. is correct. It is further supported by the attitude of the Superior Courts which,as early as in 1959, protected the rights of the people by issuing the appropriate writs. In 1960, the Supreme Court itself held that an order made by a local M.L. Authority was ultra vires of powers conferred on it by the M.L.Regulations and Orders; habeas corpus was granted. These cases will be discussed in the following pages, as they indicate the attitude of the superior Courts generally with regard to enforcement of the fundamental rights.

Furthermore, the view expressed by Cornelius J., which goes beyond what he said in the earlier case, is correct, in as much as it maintains that the fundamental rights derived their force from the L.C.F.O.,1958, which did not expressly annul them but clearly laid down that Pakistan should he governed, as nearly as may be, in accordance with the late Constitution; this expression meant to revive the provisions of the late Constitution with regard to the maintenance of the rule of law in the country, which included the basic rights of the people. The view is supported for the implication arising from putting a restriction on one of the fundamental rights and leaving the other rights expressly untouched; this clearly indicated that all fundamental rights, except the right to personal liberty in matters of preventive detention only, were to remain in force.

Though the view expressed by the majority in Dosso's case and re-affirmed in Mehdi Ali Khan's case, was reasserted in Iftekharuddin's[1] case, it was nevertheless said that, if Dosso's case required reconsideration, that could be done at the proper time; it was not in question in the instant case. Kaikaus J., giving the judgement of the Court, however, expressed the view that the argument advanced by the majority in Dosso's case, that fundamental rights did not exist, as the President and the C.M.L.A. were not bound by them, could not be supported on the ground that, because the President and the C.M.L.A. had the power to interfere with the fundamental rights, they had no existence. Under the late Constitution, the President had a power, exercisable in an emergency, and, of course, the Constitution itself was susceptible of amendments in all respects.

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1. Iftekharuddin v. Mohd.Sarfraz.P.L.D.1961 SC.585

It will be seen that the superior Courts soon realised the consequences, which were to emerge from the decision in Dosso's case, and reaffirmed in Mehdi Ali Khan's case, that they could no longer protect the rights of the people against the arbitrary actions of the authorities during martial law rule. Therefore, without reversing the principle laid down in the aforesaid cases, in later cases they issued writs to enforce the rights of the people against the M.L. authorities, if it was found that the actions taken by the authorities were mala fide or ultra vires of powers conferred on them by M.L.Regulations or Orders or by the laws preserved by the L.C.F.O.,1958. They did not, however, challenge the M.L.Regulations or Orders, promulgated by the C.M.L.A. or authorities exercising powers under him; no writ was allowed to call in question any M.L.Regulations or Orders, as their jurisdiction to do so was expressly and completely taken away by the L.C.F.O.,1958. We will discuss in the following pages cases in which the Courts issued writs to enforce the fundamental rights and where they did not.

The question whether the laws, rendered invalid, on account of their inconsistency with the fundamental rights should be regarded void ab initio or void only to the extent of inconsistency, was discussed at length in Mehdi Ali Khan's[1] case. It was contended that the impugned law, which was declared void on account of its repugnancy to the fundamental right in question, was rendered void abinitio; it was not a law in force before the Proclamation, so that it could not be brought into force by Art.4 of the L.C.F.O. The contention was rejected. Applying the principle of eclipse, it was pointed out that such laws were not void ab initio, like legislation outside the competence of the enacting legislature; they were void only to the extent of the inconsistency, as laid down by Art.4 of the 1956 Constitution itself. They were merely under eclipse and

1. Supra.

unenforceable so long as the repugnancy continued. With the abrogation of the Constitution, as fundamental rights were no longer part of the law of the land, such inconsistency had disappeared and they were given full effect by Art.4 of the L.C.F.O.,1958. It was further pointed out that the laws preserved by Art.4 of the L.C.F.O. owed their authority, not to the abrogated Constitution but to the power which abrogated it. That authority could recognise such laws in force before the Proclamation as it pleased. What was recognised was the statute as enacted, not the statute as curtailed by the limitations in the Constitution[1].

The minority view expressed by Cornelius J. was that the impugned law was declared void, on account of its repugnancy with the fundamental right in question long before the Proclamation and the abrogation of the Consititution so that it stood void at the time when the writ was sought to enforce the fundamental right in question. Its validity or otherwise should be judged from its position when the writ jurisdiction was invoked and not at the time when the appeal came before the Supreme Court. The minority view, it is submitted, was in accordance with its earlier observation that fundamental rights were still part of the law of the land and that the fundamental rights should be enforced in the form they stood when the writ petition for its enforcement was filed[2].

The decision in Dosso's case laid down that, as the 1956 Constitution was abrogated by the Proclamation of October 7,1958, the fundamental rights were no longer part of the law of the land; even the Courts lost their existing jurisdiction and could function only to the extent and in the manner determined by the new legal order, the L.C.F.O., 1958, so that the Courts could only be

1. Mehdi Ali Khan's case, supra, per Mimir C.J. see also Prof.Alan Gledhill, Pakistan, p.109.
2. Mehdi Ali Khan's case,supra; per Cornelius J.,Ameekuddin J. with him.

moved for a writ when a right preserved by Art.4 of the L.C.F.O. had been infringed. The application's and proceedings relating to a writ sought on the ground that a fundamental right had been contravened, should abate forthwith, which meant not only that the application for the writ could not be made but also the proceedings instituted to enforce the right must abate; this was held to apply to all writs which were the subject matter of appeal before the Supreme Court, either on certificate or by special leave.

Cornelius J., dissenting from the majority and holding that the fundamental rights were still part of the law of the land, expressed the view that, in view of the provisions of clause (4) of Art.2 of the L.C.F.O.1958, which provided that 'the Supreme Court and the High Courts shall have power to issue writs of habeas corpus, mandamous, prohibition, certiorari and quo warranto,' the Courts had power to issue the prerogative writs, if the fundamental rights were contravened. He further pointed out that no writ could be issued against the C.M.L.A. or the Dy.C.M.L.A. or any authority exercising powers or jurisdiction under the authority of either, as laid down by clause (5) of Art.2 of the L.C.F.O.

Clause (6) of Art.2 of the L.C.F.O. provided that, even where a writ had been sought against a civilian authority, which had been succeeded by an authority mentioned in Cl.(5) of Art.2 and the writ sought was provided for in Cl.(4) of Art.2; the Court, notwithstanding that no writ could be issued against the authority so mentioned, might send to that authority its opinion on a question of law raised. The particular words, whose effect was to be judged, occurred in Cl.(7) of Art.2.; they are 'but saving those orders (as provided by Cl.(4) of Art.2) and judgements (as provided by Cl.(7) of Art.2), no writ or order for a

writ issued or made after the Proclamation shall have effect unless it is provided by this Order (L.C.F.O.,1958),' and 'all applications and proceedings in respect of any writ which is not so provided for,shall abate forthwith.'

It becomes necessary to see what writs had been expressly provided for. In Cornelius,J.'s opinion a reasonable assumption was that the words 'unless it is expressly provided for' meant something stronger than a conclusion based upon a mere inference. One must look diligently first for express words and, if such were lacking, then for a provision, by which a scheme of a strong and necessary character, directly affecting the right sought to be enforced by the writ, was laid down. In search of such expression one need not go far afield. In Cl.(4) of Art.2 of the L.C.F.O., it was expressly stated that the Supreme Court and the High Courts had the power to issue prerogative writs. It was a provision empowering the issue of writs by the Courts mentioned, and the kinds of the writs to be issued were clearly laid down. By the insertion of the prohibitive provision in Cl.(7) of Art.2, writs other than the writs provided for in Cl.(4) of Art.2, could not be issued. But to the power given by Cl.(4), there were exceptions mentioned in clauses (5) and (6) of Art.2 of the L.C.F.O. The Courts mentioned were expressly debarred from issuing writs of any kind provided for by Cl.(4), against the C.M.L.A., the Dy.C.M.L.A. or persons exercising power or jurisdiction under the authority of the either. Specifically then, the L.C.F.O. made a prohibitive provision in respect of every kind of writ only against these authorities and therefore, under Cl.(7) of the L.C.F.O., any writs directed against such authorities should have no effect. In Cl.(6), there was a further provision, saving the authorities specified in Cl.(5), from receiving writs, in the capacity of successors to those authorities, against whom it was competent for the Court to furnish its

opinion on a question of law raised, notwithstanding that no writ might be issued against an authority so mentioned. Hence, according to him, writs, would lie against all authorities to enforce fundamental rights, except those mentioned in Clauses (5) and (6) of Art.2, and even if the Court had come to the consclusion, in the instant case, that the authority, against whom the writ was sought, was not mentioned in Cl.(6), it should have sent its opinion on the point of law raised; the proceedings could not be abated.

As to the expression 'all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith,' he pointed out that word 'abate' was not applicable to the 'application' and 'proceedings' of the instant case, because, as is apparent from the expression, they were not in respect of the writ saved in Clauses (5) and (6); only those 'applications' and 'proceedings' for a writ were to suffer abatement, which were sought against the authorities mentioned in Clauses (5) and (6), and not for the writs mentioned in Clause (4) of Art.2 of the L.C.F.O. He also looked at the matter from another angle, that the instant writ petition for habeas corpus was for the enforcement of a right against the impugned law, which was void before the promulgation of the Proclamation and was decided by the High Court before the Proclamation. It was only the appeal from the decision of the High Court, which involved enforcement of a so called abrogated fundamental right, which was before the Supreme Court. The 'abatement' could, therefore, not be held to apply to those writs, the applications for which were decided before the Proclamation, when the rights were available to the citizen, and which were simply a matter of appeal before the Supreme Court. Lastly, in his opinion, the appeal could have been disposed of on the jurisdictional point, as to whether the High Court had jurisdiction

to rule on the petition, which belonged to 'special area', where neither the High Court nor the Supreme Court had any jurisdiction.

On these considerations he was unable to hold beyond doubt that the concluding words of Cl.(7) of the L.C.F.O. had the effect of bringing to an abrupt end the proceedings in the petitions before the High Court commenced by the two convicted persons in the two cases there under consideration. He did not therefore consider that it was open to him to reverse the judgement of the High Court in those two cases and recall the writs issued by it, unless he was satisfied that the view of the High Court on the point of repugnancy to Art.5 of the 1956Constitution, which was in question, was not tenable.

In a later case[1] the Supreme Court re-affirmed its view about the position of fundamental rights and the writ jurisdiction of the superior Courts as expressed in Dosso's case . But Cornelius J., expressing the minority view[2], declared that fundamental rights did exist in the new legal order and that the writs could be issued to enfore them, as provided by Cl.(4) of the L.C.F.O.,1958, the new Constitution. According to him, no writ could, however, be issued against the M.L.Authorities as prohibed by Cl.(5) of Art.2, or the authorities mentioned in Cl.(6), in which case the Courts could send their opinion to the authorities on the question of law raised in the writ petition.

It is submitted that the view of Cornelius J. is correct; it was his view which was later followed, not only by the High Courts but by the Supreme Court itself; all Judges including Mumir C.J.[3], in later cases, to protect and enforce the fundamental rights; issued prerogative writs. It was, however,

1. Prov. of E.Pakistan v. M. Mehdi Ali Khan, supra.
2. Ameeruddin J. agreeing with him.
3. See Mohd.Ayub Khoro v. Pakistan, infra.

maintained that no writ could be issued against the M.L.Authorities;this was prohibited by Cl.(5) of Art.2 of the L.C.F.O. Nevertheless the writs were issued against the authorities purporting to be exercising power under the Martial Law Regulations or Orders, or against the Orders of the Military Courts, where it was found that the order was mala fide or ultra vires of powers conferred on such authorities by the M.L. Regulations or Orders. The following cases will show where the writs were granted and where they were not.

In Aziz Din v. State[1] the petitioner was convicted by the A.D.M. for violation of Cl.(4) of M.L.Order No.11, issued by the M.L.Adminstrator, West Pakistan, Zone B, and the appeal to the Sessions Judge against the order was rejected on the ground that he had no jurisdiction to hear an appeal against the conviction under the M.L.Regulation or Order as laid down by the M.L.Order No. 10 made by the C.M.L.A., which by implication took away the right to appeal against a conviction by an ordinary Court under a M.L.Regulation or Order. It was contended that M.L.Order No,10 could not amend the Code of Criminal Procedure, which was kept intact by Art.4 of the L.C.F.O.,1958. This could not be done by any authority other than the President. It was pointed out that the L.C.F.O. provided that laws continued in forced could be amended by a Regulation issued by the C.M.L.A. Though M.L.Order No.10 was not a Regulation but an Order, it did not make any material difference, because it was issued by the C.M.L.A., who was competent to issue a Regulation on the point; the mere fact that M.L.Order No.10 was not described as a M.L.Regulation could not deprive it of force it was intended to have. If the Order had been issued by the Authority other than the C.M.L.A. the contention would have been unassailable.

1. P.L.D.1959, Lah.336.

The writ was refused.

In a later case[1] the conviction of the petitioner and sentence of imprisonment to 3 years R.I. and a fine to Rs.25,000 under M.L.Regulations No.25 and 27 by the Addl. Sessions Judge, were challenged. It was contended that convictions by the ordinary courts in matters falling under M.L.Regulations or Orders were not covered by the M.L.Order No.10 but they should be governed by the Cr.P.C., that the law was not laid down correctly in Aziz Din v. State[2] and that, under S.3 of the M.L.Regulation No.61, as reconstituted, revision or appeal lay to the Court of Sessions in respect of sentences inflicted by the Addl. Sessions Judge or Addl.D.M. It was pointed out that, according to terms of the M.L. Regulation No.61, revision or appeal did not lie to the Sessions Judge against the order of the Addl.D.M., if the Order was made under the M.L. Regulation or Order; Aziz Din's case was decided before promulgation of the reconstituted M.L.Regulation No.61, and M.L.Order No.10 did not govern these cases; it was wrongly held that appeal or revision did not lie against the decisions of Ordinary Courts, if made under M.L.Regulations or Orders. It was further pointed out that, if sub-sections(2) and (3) of S.3 of the .M.L. Regulations No.61 were read together, the conclusion was that, when the competent authority had exercised jurisdiction under sub-section (2), the jurisdiction of the Courts was barred under sub-section (3) but, as, in the instant case, the Sessions Judge had failed to exercise a jurisdiction which was conferred on him, it could not be said that the provisions of sub-section (2) were a bar to the exercise of the writ jurisdiction; under Art.2(4) of the L.C.F.O. writ jurisdiction had clearly been given to the Supreme Court and the High Courts; the writ was granted.

1. Mohd. Siddiq v. State, P.L.D.1959,Lah.769.
2. Supra.

In one case[1], on a petition for habeas corpus, the contentions on behalf of the State were, (i) the order of the Summary Military Court could not be questioned in the High Court;, this being prohibited by Art.3(iii) of the L.C.F.O.,1958; (ii) the Zonal M.L.Administrator was competent to pass the impugned M.L.Order (Zonal)No.10, the alleged contravention of which led to the conviction of the detenu; and (iii) the officer presiding over the Summary Military Court, a Major in rank, was competent to pass a sentence exceeding 3 months R.I.

As to the first contention it was pointed out that, Art.3(iii) of the L.C.F.O.,laid down, 'No Court or person shall call or be permitted to call in question any finding, judgement or order of a Special Military Court or Summary Military Court;' being general in terms, it was open to the High Court to pass an appropriate order, if it came to the conclusion that the order of the Military Court was without jurisdiction. If a Military Court passed on a person a sentence which it could not pass, or tried an offence it was not given power to try, the order would be without jurisdiction and would not enjoy immunity from the scrutiny by the High Court;;there was no ouster of jurisdiction of a High Court in such cases.

The reasoning of the Court seems to have been based on the well known principle of law that an order of the Court, which is without jurisdiction, cannot be treated as an order for any purpose.

But it was, undeniable that, if it could not be established that the order of the Summary Military Court was without jurisdiction, no Court of ordinary jurisdiction, including the High Court, would have jurisdiction to declare that

1. Manzoor Elahi v. State, P.L.D.1959,Lah.243.

order invalid, in spite of the fact that the findings of the Military Court were full of gross and inexplicable errors of any dimension or the sentence was considered to be of a severity which appeared to be uncalled for. The question whether the evidence before the Summary Military Court justified the conviction of the detenu could not be open to determination by the High Court, because a Summary Military Court could try all offences and persons by virtue of Cl.(a) of M.L.Regulation No.1-A. But whether or not the sentence passed by the Summary Military Court was with or without jurisdiction was a question which could be looked into by the High Court and, if the conviction or sentence passed by the Summary Military Court was beyond its power, there was nothing to prevent the High Court from passing an Order of release of the detenu. Whether or not such an order could have been passed in a particular case would depend on a variety of circumstances; the power to issue writs was discretionary and no one could claim to be entitled to it as of right.

As regards the second contention, the finding of the Court was that Dy.M.L.Administrator (Zonal) was competent to promulgate the impugned M.L. Order (Zonal) No.10. The contention that a M.L.Regulation should be distinguished from a M.L.Order was rejected; (this decision of the High Court was held to be wrong by the Supreme Court in a later case.)[1] It was, however conceded that the scope of a M.L.Order issued by any M.L.Administrator was limited to the amplification of a relevant M.L.Regulation. The argument that an officer, who was not competent to make a Regulation but only to make Order, could not issue an Order unless there was in existence a M.L.Regulation, which he wanted to implify by his order, was not accepted. It was pointed out that the question, whether or

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1. Mohd. Ayyab Khoro v. Pakistan, P.L.D.1960 SC.237.

not M.L.(Zonal) Order No.10, issued the Dy.(Zonal) M.L. Administrator, was made under a relevant M.L. Regulation in existence at that time, appeared to be a question offact and it was not an answer to the question of a jurisdiction; (this was also declared by the Supreme Court to be a wrong conclusion)[1]. The Court further pointed out that, even if it were held that the decision of the Summary Military Court, constituted under the aforesaid M.L.(Zonal) Order, was a question of law and it was assumed that the decison was wrong, the jurisdiction of the High Court could not be attracted. It is submitted that it was contrary to the Court's own observation, made earlier, that a question of the jurisdiction, could be decided in the High Court.

The Court went on to say that, even if the C.M.L.A. had not given the officers authority to issue M.L.Orders, the Administrators were competent to make M.L·Orders, irrespective of whether or not a M.L.Regulation on the subject to be dealt with was in existence. The C.M.L.A. could, by making changes in the relevant Regulation, have validated all M.L.Orders made or acts done by the M.L.Administrators concerned, if the language employed in the relevant Regulation appeared to be defective or if, what powers had been conferred on them, was not clear. It is submitted that this was to give M.L.Administrators a power which the C.M.L.A. had not himself intended to confer upon them.

The answer to the third question whether the officer of the Military Court, being a Major in rank, was competent to pass a sentence exceeding 3 months R.I., was in the affirmative. It was pointed out that M.L.Regulation No.1-A, made it clear that an officer below the rank of Lieutenant Colonel could pass a sentence of any term; the provisions of S.101 of the Pakistan Army Act,1952, that an officer below the rank of Lieutenant-Colonel could not pass a sentence

1. Mohd. Ayyub Khoro v. Pakistan, supra.

exceeding 3 months R.I., had been amended by the aforesaid Regulation. Therefore a sentence whichexceeded3 months R.I. could not be without jurisdiction, if it was passed by an officer below the rank of Lieutenant-Colonel. The writ jurisdiction of the High Court could not be invoked against such a sentence[1].

In view of the above findings, the writ of habeas corpus was not granted. It is submitted that the High Court was wrong in coming to the conclusion that the competence of a Military Court, constituted under a Zonal Martial Law Order,could not be challenged in the High Court. It was not correct to hold that the validity of a M.L.Order, promulgated by the Administrators exercising power under the C.M.L.A. could not be called in question by a writ petition, irrespective of whether such an Order was valid, or whether it was made under a relevant M.L.Regulation. It is obvious from the later decisions of the Supreme Court and the High Courts that they did have jurisdiction to scrutinize (i) the 'Orders' issued by the Administrators, exercising power under the C.M.L.A. or the Dy. C.M.L.A.; and (ii) the 'Orders' made by the Administrators or Military Courts in a particular case, and rule on whether they were issued under the relevant M.L.Regulation as well as whether the authorities were competent to do so[2].

In another case, where an application, which appeared to be a petition of appeals, a petition for revision,and a petition for habeas corpus and certiorari, was presented to the High Court, an objection was taken on behalf of the State to the jurisdiction of the High Court. The application was dismissed by the High Court, which held that its jurisdiction to interfere with the proceedings of a Special Judge, subject to confirmation by the M.L.Administrator

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1. Manzoor Elahi v. State, supra.
2. See Mohd. Ayub Koro's case, infra, and other cases discussed hereinafter.

under M.L. (C.M.L.A.) Order No.10, was barred by the application of Art.3 (iii) of the L.C.F.O.,1958. But the Supreme Court gave special leave to appeal both from the judgement of the Special Judge and the High Court, because the case raised some questions of fundamental importance for consideration and decision.

The facts of the case were that two days after the Proclamation,the apellant, who was the Defence Minister of Pakistan, was arrested by the police on a charge under the Hoarding and Blackmarket Order,1956. After investigation, he was, on a complaint by the Government, put up for a trial by the Special Judge for offences under the aforesaid Order of 1956, as well as M.L.Regulation No.26 read with M.L.Regulation No.5 and, on being convicted only under the Regulations, the charge under the Order of 1956 having been separated, he was sentenced to 5 years R.I and a fine of Rs.1,50,000, in default of payment of which he was ordered to suffer another 3 years R.I. The charge of which he was found guilty was that he purchased an unregistered car in the black market, paying for it out of public funds.

In the proceedings before the Supreme Court, at the outset,objection was taken to the jurisdiction of the Court to interfere with the proceedings and the Supreme Court was moved to dismiss the petition, being incompetent to hear it. The provision, on which the objection was based, was M.L. Order No.10 issued by the C.M.L.A. on the 18th October, 1958, which provided that 'proceedings of cases tried under the M.L. Regulations or Orders by the criminal courts, after confirmation by the M.L.Administrators, will be forwarded to the Judge Advocate-General, General Head Quarters Rawalpindi, for final review'. The proceedings of the instant case had been confirmed by the M.L. Administrator.

To appreciate the aforesaid objection, some important M.L.Regulations and Orders must be considered. M.L.Regulation No.1-A, which created the Special Military and the Summary Military Courts provided that 'Special Military Courts and Summary Military Courts shall have the power to try and punish any person for offences under the ordinary law. With regard to other Courts it stated that 'the criminal Courts as by law established shall have power to try and punish any person for offences under the ordinary law and for contravention of M.L. Regulations and Orders.' Regulation No.2 provided that 'Notwithstanding anything contained in these Regulations, the criminal Courts, as by law established, shall continue to exercise jurisdiction over persons accused of all offences committed under the ordinary law and also under the Regulations.' Thus the effect of these two Regulations was that Martial Law Courts and ordinary criminal courts were invested with concurrent jurisdiction to try offences under the ordinary law, as well as offences under the M.L. Regulations or Orders. Nothing was said in any of the Regulations as to how this concurrent jurisdiction was to be regulated and a possible conflict avoided. Nor was anything said regarding appeals from or revision of the sentences awarded by the ordinary criminal courts. It was on 15th October, 1958, that M.L.Order No.10, on which reliance was placed by the Government, was passed . This Order said nothing about appeal or revision, but assumed that the proceedings of criminal courts for the trial of offences under the M.L.Regulations and Orders would require the M.L.Administrator's confirmation and directed that, on such confirmation they should be forwarded to the Judge Advocate-General for review, the scope of the review not being defined, though the word 'final' was used. After so many amendments, the M.L.Regulation No.61[1], as reconstituted on 4th February,1959, provided, retrospectively from 24th December,

1. M.L.Regulation No.61 (C.M.L.A.) as originally enacted did not carry this provision.

1958, that 'no appeal or revision shall lie from any sentence imposed in any of the cases, tried and disposed of by Criminal Courts under M.L.Regulations or Orders before the 24th day of December,1958, and confirmed subsequently by Zonal M.L.Administrators concerned.'

Even after Reg.No.61 was reconstituted there was a lacuna in it, because it contained no provision to deal with a case which had not been decided by a criminal court before December,24,1958. The instant case afforded an illustration of the situation, because it was pending on the 24 December,and was not decided by the Special Judge till the 27th February,1959. There arise certain questions; whether the omission was deliberate or inadvertent? Was it meant that, if a case was decided by a Criminal Court not before, but after the 24th December,1958, an appeal or revision lay; or was the intention that, after 24th December, no criminal court, other than that of a Magistrate, even if seized of a case, was to function and therefore there was no necessity of making a provision for confirmation of its sentence? Whether, as after the said day the only criminal courts that could exercise jurisdiction were those of Magistrates and there being provision for revision of their decisions, was confirmation by the M.L.Administrators of the sentences passed by Magistrates necessary? It can be noted here that the power to confirm and the power to entertain an appeal or revision should not co-exist; one should exclude the other and the exclusion should be expressly stated. It seems clear that Regulation No.61, despite the various amendments, from the very inception excluded appeals but provided for revision, and dispensed with confirmation, where revision was provided. It is also clear that, where an appeal was intended to be excluded, it was explicitly done. Therefore, from the terms of M.L.Order (C.M.L.A.)No.10, it could not be

inferred that such exclusion was intended. If such exclusion had been the necessary result of M.L.Order No.10, before M.L.Regulation No.61 was enacted, the last amendment of that Regulation would have contained a provision that no appeal or revision should lie, where the sentence, passed by the Criminal Court, had been confirmed by the M.L.Administrator and the limiting words 'before the 24th December,' would not have been used.

Therefore, it was pointed out, the right of appeal where it exists, has to be taken away expressly or by necessary intendment and a mere provision of a confirming or reviewing authority in a different jurisdiction does not have the effect of destroying or taking away that right, where it has accrued. And in the instant case it was conceded by the State that the right of appeal was never expressly taken away.

As to the contention that the L.C.F.O. 1958, to which the reference was made in the earlier part of the instant case, debarred the Courts from calling in question the orders made by the Military Courts, the Supreme Court commented on the problem of protection of the rights of people against the arbitrary actions and ultra vires exercise of powers by the authorities, which purported to have acted under Martial Law Regulations and Orders. It was said that the instant case created the proper appportunity to examine the exact effect of the L.C.F.O. on the point in question. The Supreme Court seems to have realised, for the first time, the consequences of its decision in Dosso's case and appears to have been anxious to protect the rights of the people. Though it did not expressly say so in so many words, it considered reviewing its earlier decision in Dosso's case insofar as to the real scope of the L.C.F.O. and the issue of writs for protection of the rights of the people are concerned.

In the argument put forward on behalf of the State, it was contended that any interference by the Supreme Court or the High Courts in the exercise of its appellate jurisdiction with the order made by the Dy.M.L.Administrator, confirming the sentence passed by the Military Court, would amount to questioning a M.L.Order, which was prohibited by Art.3(ii) of the L.C.F.O. This argument had found favour in Aziz Din v. State[1] and the unreported case of Mian Mohd.Sajid v. State[2], where the High Court wrongly took the view that, since Art.3(ii) prohibited a Court from calling in question any M.L.Regulation or Order, if, in the exercise of its appellate jurisdiction, the High Court made an order inconsistent with the order made by the Dy.M.L.Administrator (zonal), it would come into conflict with the Martial Law Order itself, which conferred on the M.L. Administrator the power to confirm the sentence. Rejecting the contention, the Supreme Court held that, since the jurisdiction derived by the Courts, including the High Court and the Supreme Court under cl.(2) of Art.2 of the L.C.F.O. was subject only to an Order of the President or a Regulation or Order made by the C.M.L.A. and not to each and every martial law order, the appellate jurisdiction of the High Courts or of the Supreme Court, if it existed otherwise, continued; if it had not been taken away by any M.L.Regulation, it would continue; it would certainly not come into conflict with the M.L.Order itself, which conferred on the Administrator the power to confirm a sentence, which was in question. It was also pointed that the High Court was wrong in coming to the conclusion to the contrary. It is submitted that the reasoning of the Supreme Court is correct and realistic.

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1. P.L.D.1959,Lah.336.
2. Criminal Revision No.46 of 1959

Further the distinction between the terms 'Regulation', 'Order', and 'order' was clarified. For the State it was contended that the word 'Order', wherever it occured, in the first place , in Cl.(ii) of Art.3 of the L.C.F.O., meant an order made in a particular case in pursuance of a M.L.Regulation or Order and (ii) that, since the order of confirmation of the sentence in the instant case was made by the Dr.M.L.Administrator, in exercise of powers conferred on him by M.L.(C.M.LA.) Order No.10, it could not be questioned by the Courts, as this was prohibited by Art.3 of the L.C.F.O. These contentions were rejected: it was pointed out that the word 'Order' with a capital 'O', whenever it occured in the L.C.F.O., meant a body of rules or an order of a general nature such as 'conferment of judicial authority' and not an order made in a particular case, whereas the word 'order' with a small 'o' meant an order made in a particular case. In Cl.(7) of Art.2 of the L.C.F.O.,the word 'Order' occured twice and word 'order' thrice.

The contention that M.L.(C.M.L.A.) Order No.10 was in law a 'Regulation' within the meaning of Art.2(i) of the L.C.F.O., and, therefore affected the Pre-Proclamation jurisdiction of the Supreme Court, as well as the High Courts, was also rejected. The argument in support of this contention was based on decisions of the Lahore High Court, particularly Manzoor Elahi v. State[1]. The Supreme Court, pointed out that the High Court was wrong in holding that there was, in law, no distinction between the words 'Regulation' and 'Order'. Paragraph 2 of the Proclamation stated that 'M.L.Regulations and Orders will be published in such manner as is conveniently possible' and 'anyperson contravening the said Regulations or Orders shall be liable under Martial Law to penalties stated in the Regulations.' It would appear from this provision that while the

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1. Supra.

"Regulations' prescribed the penalties, 'Orders' merely provided the method of enforcing the Regulations, and in Martial Law terminology that is the correct distinction between the two. A Regulation lays down the principle and policy of the law and the penalties for its infringement; it may further lay down a broad outline of the procedure, jurisdictional and processual, for the enforcement of the law. But since the area over which Martial Law may operate may be vast and unmanageable by a general agency, a wide discretion is sometimes given to the Administrators and Sub-Administrators of Martial Law in different regions from time to time to issue Orders for the enforcement of the Regulations. This position was envisaged in M.L.Regulations No.1, which divided the Martial Law area into three zones, appointed an Administrator for each zone and provided in Cl.(c) 'Orders' under these 'Regulations' and additional 'Regulations' hereinafter known as 'Martial Law Regulations' or 'M.L.Orders' may be issued by me or by an Administrator or by any other officer authorised by me.' Thus a general authority was given to Administrators to issue Martial Law Regulations and Orders. This authority was subject to the power conferred upon them by the C.M.L A. In this sense the main legislative authority was kept by the C.M.L.A. with himself while the Administrators and other officers were to exercise a kind of delegated legislative authority. This authority could, of course, extend to the making of 'Orders', determining the manner in which the principle and policy of a Regulation was to be carried out and prescribed penalties enforced. Of course the Chief Martial Law Administrator could himself issue 'Orders' but it would be incorrect to suppose that such 'Orders' had the status of 'Regulations'. It was for the C.M.L.A. himself to determine whether he would describe a rule as a 'Regulation' or an 'Order' and it may well be that the difference between the two was one of form and not of authority. There can, however, be no doubt that,

with and after the promulgation of the L.C.F.O.,1958, the distinction between the two became fundamental and this was recognised by Act.2 of the L.C.F.O., which preserved the existing jurisdiction of the Courts, subject to any Regulation made by the C.M.L.A., indicating quite clearly that, so far as the jurisdiction of the Courts to entertain and determine an appeal was concerned, it was kept intact and could only be taken away by a Regulation. Art.3(ii) which prohibited the Courts from calling in question any M.L.Regulation or Order had, therefore, to be read with Art.2 of the L.C.F.O. In plain language Cl.(ii) of Art.3 of the L.C.F.O. meant no more than that a Court could not declare a M.L.Regulation or Order invalid or ultra vires. But calling in question an order made under a M.L.Order is entirely different; it may or may not amount to questioning the M.L. Order itself; the former being prohibited, the latter not. For instance, in the instant case the order of confirmation was made by Dy.M.L.Administrator and it was not shown on behalf of the State that there was any provision by which an Administrator could delegate his responsibilities under M.L.Order No.10 to Dy. M.L. Administrator. Therefore, it was held that the order of confirmation, not being under M.L. (C.M.L.A.) Order No.10, was not immune from Judicial scrutiny. In the instant case, it was pointed out that the Court was not calling in question any M.L.Order but simply an order made by the Martial Law Authorities; the writ of habeas corpus was not being issued against any M.L. Authority, the jurisdiction in respect of which had been expressly taken away by Art.2(5) of the L.C.F.O; the Courts had, no doubt, jurisdiction to call in question an order and issue an appropriate writ against it which, though made by the M.L.Authority, was invalid or ultra vires of the powers conferred on it by any M.L.Regulation or Order; the jurisdiction was preserved by Art.2(4) of the L.C.F.O. and was certainly no taken away by Art.2(5) of the L.C.F.O.

There is still one point which needs discussion here. The Regulation[1] which distinguished a M.L.Regulation from a M.L.Order came into force on 7th October,1958; the L.C.F.O. was published on 10th October; and Martial Law (C.M.L.A.) Order No.10 was issued on 18th October. It was pointed out that it was reasonable to presume that the draftsman of the L.C.F.O.1958, was aware of the distinction between a Regulation and an Order and this was apparent from the phraseology of Articles 2 and 3 of the L.C.F.O. If, therefore, M.L.(C.M.L.A) Order No.10 was issued as an Order and not as a Regulation, the intention would presumably be that it was not to affect the jurisdiction of the Courts, which, though subject to any Regulation made by the C.M.L.A., was preserved by Art.2 of the L.C.F.O.

Another relevant question, answered by the High Court in the affirmative, was whether the existence of appellate and revisional powers over the Criminal Courts punishing contraventions of M.L. Regulations, was incompatible with the powers of confirmation reserved by a M.L.Order for the Military Authorities. In order to find a correct answer to this question, which was to govern the instant case, it is necessary to bear in mind the distinction between an incorrect decision and a void decision. A judgement is incorrect if it is wrong in law or fact; it is void if it is pronounced by an incompetent Tribunal. One of the questions urged before the Court was that the Special Judge had no jurisdiction to try the offence under M.L. Regulations Nos.26 and 5, and that, therefore, his judgement in the instant case was void. This question had to be determined before the principal question in the instant appeal could be considered. The contention that the Special Judge had no jurisdiction was repelled by the High Court on the ground that the Court of a Special Judge, under the aforesaid

1. Martial Law (C.M.L.A.) Regulation No.1.

Hoarding and Blackmarket Order, 1956, or under the Criminal Law (Amendment) Act, 1958, was a criminal Court, within the meaning of M.L.Regulations No.1-A and M.L.Regulation No.2; the former running as follows:

> "The Criminal Courts, as by law estblished, shall have power to try and punish any person for offences under the ordinary law and for contravention of M.L.Regulations or Orders."

and the latter providing that -

> "Notwithstanding anything contained in these Regulations, the Criminal Courts, as by law established, shall continue to exercise jurisdiction over persons accused of all offences committed under the ordinary law and also under these Regulations."

The argument on behalf of the State was that, if a Court could be described as a criminal court, then its jurisdiction to try an offence under any M.L.Regulation or Order or under the ordinary law, irrespective of any limitations imposed on it by the ordinary law, was established by the aforesaid two Regulations. The reply on behalf of the appellant was that, on this construction of the M.L.Regulations, a Third Class Magistrate would be as competent to try an offence punishable with death under the M.L.Regulation as a Tribunal set up to punish offences against the acquisition or sale of foreign exchange. The Councel went on to maintain that, in this sense, even the territorial limitations on the jurisdiction of ordinary courts would not be applicable after the promulgation of these two Regulations as that an ordinary Courts in East Pakistan would be competent to try offences under a M.L.Regulation or the ordinary law committed in West Pakistan.

The Court's attitude was that, instead of accepting an interpetation leading to the utter chaos suggested on behalf of the appalent, the Court had to be satisfied whether the aforesaid Regulations bore the meaning which was

claimed on behalf of the State. It was pointed out that each of these Regulations referred to the ordinary criminal courts 'as by law established' and the words within the quotation marks could only mean that, if the law imposed any limitation on their powers, either as regards territory or as regards persons or offences, such limitations must continue to exist, even after the promulgation of the two Regulations. This was apparent from Regulation No.2 itself, which said that 'Criminal Courts shall continue to exercise their existing jurisdictions as defined by law.' Now, a Special Judge whether appointed under the Criminal Law (Amendment) Act,1958, or under the Hoarding and Blackmarket Order, 1956, was a Court of Special Jurisdiction, being confined to a specified class of cases, into which the instant case did not fall. If, therefore, the Court of a Special Judge was not empowered by the provisions/ mentioned to try a particular offence, it would not become competent to try it, unless a M.L.Regulation so provided. Furthermore it was conceeded that there was no express provision empowering a Special Judge to take cognizance or try an offence under Martial Law Regulation No.26 read with M.L.Regulation No.5, but it was contended that, since by reason of sub-section (2) of Section 16 of the Hoarding and Blackmarket Order, 1956, a Special Judge was deemed to be a Court of Session, he was a 'criminal court' for the purposes of the two Regulations. This argument completely overlooked the words 'as by law established', which were used in both Regulations to indicate the criminal Courts that were to try offences under the Martial Law as well as under the ordinary law; the offence under the law of which the appellant had been convicted was exclusively triable by a Court of Session.

Section 29 of the Cr.P.C. provides that 'subject to other provisions of this Code, any offence under any other law, (That is any law other than the Pakistan Penal Code) shall, when any Court is mentioned in this behalf in such a law, be tried by such Court,' and that 'when no Court is so mentioned, it may be tried by the High Court or subject, as foresaid, by any Court constituted under this Code, by which such offence is shown in the eight column of the second Schedule of the Cr.P.C. to be triable.' Thus an offence under the Hoarding and Blackmarket Order, could, by reason of this provision, be tried by a Special Judge but, in the instant case, the prosecution's case throughout had been that an offence under M.L.Regulation No.26 was not the same offence as an offence under the Hoarding and Blackmarket Order, that the Regulation in its scope might be wider or narrower than the Hoarding and Blackmarket Order, according to its interpretation and that the appellant was not being proceeded against for any offence committed under the Hoarding and Blackmarket Order and his prosecution was confined to an offence under M.L. Regulation No.26. If the Special Judge was not required to act under the Special Act which had created him, then, for the purposes of an offences created by Regulation No.26, he could only try such offences, if he came within the definition of the High Court or the definition of a 'Court constituted under this Code by which such offence is shown in the eighth column of the second Schedule to be triable.' He was neither, because neither the status of a High Court or that of an ordinary criminal court, constituted under the Cr.P.C., was claimed for him, and none of the Regulations within S.29(1) of the Cr.P.C. specifically mentioned him as a Court competent to try an offence under the M.L.Regulation No.26. When a M.L. Regulation created an offence and empowered ordinary criminal courts to try it, the intention, in the absence of a clear indication to the contrary, always is

that such offences, having become a part of the law to be administered by those Courts,are to be tried under the Cr.P.C. A High Court and the Court of Session were, therefore the only Courts competent to try an offence under M.L.Regulation No.26, because the offences being punishable with 14 years R.I, it came under the eighth column of the second Schedule to the Cr.P.C. It was, however, contended on behalf of the State,that, for the purposes of S.29 and Schedule eight of the Cr.P.C.a Special Judge was a Court of Session, because of sub-section (2) of Section 16 of the Hoarding and Blackmarket Order, 1956, which says 'same as provided in Sub-section (1), the provisions of the daid Code, except the provisions of S.196-A and of Chapter 33 of the Code, shall, so far as they are not inconsistent with this Order, apply to all proceedings of a Special Judge, and for purposes of the said provisions, the Special Judge shall be deemed to be a Court of Session trying cases without a jury.' This sub-section does not have the effect of converting a Special Judge into a Court of Session for all the purposes of the Code of Criminal Procedure. The sub-section says no more than that the provisions of the Code, which are not inconsistent with the Order of 1956, shall apply to the proceedings of a Special Judge, meaning thereby that the only procedure to be adopted by a Special Judge shall conform with the procedure prescribed by the Code unless, on any matter provided by the Code, there was a different provision in the Order of 1956. The provision had nothing to do with the question of jurisdiction of a Special Judge, that having been defined elsewhere, and it was taken for granted that his jurisdiction to proceed with the case existed under the provisions of the Order of 1956, In the same manner, when the aforesaid sub-section says that 'for the purposes of the Code of Criminal Procedure, the Special Judge shall be deemed to be a Court of

Session trying cases without jury, 'it simply means that for purposes of the procedure to be adopted by him, he should consider himself to be a Court of Session, not for all purposes, but only for the purpose of trying the case without a jury, that is, he is a Judge of facts and law. If the contention on behalf of the State that the said sub-section had the effect of converting a Special Judge into 'Court of Session for all purposes' is to be accepted, such Judge could become competent to hear appeals and revisions from the orders of Magistrates in the Division and exercise all other powers conferred by the Cr. P.C. on a Session Judge, a result which was never intended and could not be gathered from the words used. It would, therefore, follow that the Special Judge was not competent to take cognizance of or try the offence under the M.L. Regulation No.26 read with M.L.Regulation No.5, if, as alleged by the prosecution, the offence charged was distinct from an offence under the Hoards and Blackmarket Order, which, of course, he was competent to try. Thus the entire proceedings before him were held to be void and coram non'Judice'.

In view of the above discussion, the vital question whether an appeal was barred by Art.3(ii) of the L.C.F.O.1958, because of the implication that there might be a conflict between an appellate order of the Court and an order of confirmation made by the Dy.M.L.Administrator, can easly be dealt with. Kayani C.J., who wrote the judgement in the instant case in the High Court, held that, though the interpretation of the L.C.F.O.1958, presented from the bar was correct, Art.3(ii) of the same Order prohibited the High Courts from questioning a Martial Law Order, and if Martial Law Order No.10 was questioned, the effect would be that, while the Zonal M.L.Administrator might confirm a sentence passed by the Special Judge, the High Court might set it aside; there would be a

conflict. The petition for the writ of habeas corpus was dismissed and the appeal was rejected by the High Court.

The Supreme Court, accepting the petition as well as the appeal, pointed out that, if an appeal or revision was competent, in the light of the above discussion, the proper order in the case was to quash the conviction and the sentence on the ground that the Special Judge had no jurisdiction to try the offence; it was difficult to hold that any such order would conflict with the M.L.Administrator's order confirming proceedings, because it was made without jurisdiction. It was further pointed out that M.L.(C.M.L.A.)Order No.10, empowered an Administrator to confirm the proceedings of cases tried under the M.L.Regulations and Orders by the 'criminal courts' mentioned in the Regulation No.1-A and Regulation No.2, both of which referred to such courts as 'criminal courts as by law established'. If, therefore, the Special Judge could not, under the law, take cognizance of and try an offence under Martial Law Regulation No.26 read with M.L.Regulation No.5, he could certainly not be described to be a 'criminal court as established by law' for the purposes of the instant case. The Supreme Court went on to say that if Magistrates and Courts were not competent to take cognizance of offences under M.L.Regulation or Order, tried and convicted the accused persons, the convictions and sentences passed by them would be without jurisdiction. Finally, it was pointed out, in the instant case, if the Special Judge had no jurisdiction to try and convict the appellant of an offence under M.L. Regulation No.26, the proceedings before him were void ab initio, and he had produced nothing which could be confirmed by an Administrator under M.L.(C.M.L.A.) No.10; what had to be confirmed by the Administrator was the proceedings in a case tried under the M.L.Regulations and Orders by a

"criminal court as established by law.' If this condition was not satisfied, if the proceedings were not those of a 'criminal court established by law,' the order of confirmation was itself void and the High Court, by quashing the conviction and the sentence, would not come into conflict with an Order of confirmation made by the Administrator; it would certainly not come into conflict with the Martial Law Order itself. It may be noted that it was accepted by the High Court itself that, if a conflict between a Martial Law Order and an appellate order of the Court did not arise, the jurisdiction of the High Court to entertain the appeal would not be affected.

The decisions of the High Court in the cases cited on behalf of the State were distinguishable, the appeal or revision in them being on facts. The Supreme Court, however, did not consider it necessary to decide the question whether a decision in appeal on facts, contrary to what had been confirmed by the M.L.Administrator would amount to questioning the M.L.Order No.10, because that question did not arise in the case, though revision and confirmation did exist together, between the 24th December, 1958 and 16th January,1959. It was, therefore, pointed out that, unless it could be held possible for the M.L.Administrator, by the act of confirmation, to create an ad hoc Court ex post facto, contrary to the Regulations by the C.M.L.A., the confirmation would be void, and void added to void would be doubly void.

The Supreme Court, in conclusion, observed that, from the manner in which the judgement presented by the Special Judge, it was impossible for the confirming authority to appreciate the legal and factual aspect of the case or to separate the alleged Martial Law offence from the alleged pre-martial law blackmarket deal, for which the appellant was admittedly not tried. The Court which tried the Martial Law offence in question, was not set up by any

M.L.Administrator; nor was the case sent to that Court by the Administrator himself. The jurisdictional aspect of the Criminal Court, especially when it raised the intricate question of law, was a matter with which the was not suppoed to be conversant. Therefore, when he confirmed the sentence, he could not have been conscious of the position that what he confirmed was something that did not exist in law or that he was purporting to validate what could not be validated. There was, however, not one word in the judgement on this vital point for the consideration of the confirming authority. The appeal, therefore, from the judgement of the Special Judge was allowed and the appellant was set at liberty by issuing the writ of habeas corpus[1].

It is submitted that the decision of the Supreme Court is correct; the High Court was wrong in dismissing the petition in the instant case on the jurisdiction ground. The principle laid down by the Supreme Court in the instant case was that, under Art.3(ii) of the L.C.F.O.1958, the superior Courts were only prohibited from calling in question the M.L.Regulations or Orders made by the C.M.L.A. or Dy.C.M.L.A. or any other Administrator exercising power under the authority of either; it was not every order made by any M.L.Administrator, which was immune from judicial scrutiny; the Courts had, no doubt, jurisdiction, under Art.2(2) of the L.C.F.O.,which preserved the existing jurisdiction of the superior Courts to issue prerogative writs, to question any order made by the M.L. Authority or decision made by the Military Court in particular cases, if it appeared to the Court that such an Order was void, being mala fide or ultra vires of powers conferred on such authorities by the M.L. Regulations or Orders;

1. Mohd. Ayyub Khoro's case, supra.

they could issue the proper order to enforce the right of the petitioner in question.

It is further submitted that the decision in the instant case amounted to reviewing its earlier judgements. The principle laid down by the Supreme Court in the instant case was its first step towards protection of the rights of the people against the arbitrary and ultra vires actions of the authorities exercising powers under M.L.Regulations or Orders. Whereas in the first two cases the Supreme Court refused to enforce the fundamental rights in question against the authorities purporting to have acted under the Ordinary Law, in the instant case it went as far as to enforce the right even against the acts of the authorities exercising power under the M.L.Order. The High Courts[1] had throughout maintained that they should enforce the fundamental rights by issuing the appropriate writs, wherever they found that the action by the M.L. authority or Military Court was mala fide or ultra vires of the powers conferred on them by the M.L.Regulations or Orders. The following cases are the instances of this fact.

In Zahid Umar v. Ch.Secretary[2], it was pointed out that only those members of the Defence Forces,who had been authorised to do so,could issue valid orders under Martial Law; it was not every action of the Defence Forces which was immune from scrutiny by the courts of ordinary jurisdiction. It was, therefore, held that the jurisdiction of the High Court to issue a writ in a case in which an order was issued by a member of the Defence Forces, who was not authorised to do so, was not ousted by Art.2.(4) of the L.C.F.O.

1. See Mohd.Siddque v. State, supra as well as the cases discussed in the following pages which show that, before the decision of the Supreme Court in Mohd.Ayub Khoro's case, the principle had been followed by the High Courts.
2. P.L.D.1959,Lah.764.

Violation of the principles of natural justice was held to be a gound for issuing the writs. It was pointed out that an order purporting to hav been made under the M.L.Regulation or Order could be investigated by the High Court and a suitable order passed, if it violated the principles of natural justice[1].

Fundamental Rights could only be taken away or altered by the President or C.M.L.A. It was pointed out that, if the Fundamental Rights given to the people of Pakistan were taken away by the President, there was no principle of law, justice, equity or common sense, on which it could be held that the rights of the people could not be altered or taken away by him. In the instant case, in which L.C.F.O.(Amendment) Orders,1958 and 1959,altering the conditions of service were challenged,it was held that the Amendment Orders could not be challenged in the Courts[2], as they were promulgated by the C.M.L.A.

The conditions for the ouster of the jurisdiction of the High Courts were laid down by the Supreme Court[3]. It was pointed out that if a Statute provides that an order made by the authority acting under it shall not be called in question in any court, all that is necessary to oust the jurisdiction of the Court is that (i) the authority should have been constituted as required by the Statute; (ii) the person proceeded against should be subject to the jurisdiction of the authority; (iii) the ground on which the action is taken should be within the grounds stated by the statute; and (iv) the order made should be such as could have been made under the statute. These conditions being satisfied, the ouster is complete, even though, in following /the statutory

1. Abdul Majid, P.L.D.1960,Kar.921.
2. Zafarul Ahsan v. Pakistan, P.L.D.1959,Lah.879; upheld by the Supreme Court P.L.D.1960 1960,SC.113.
3. Zafarul Ahsan v. Pakistan,P.L.D.1960,SC.113.

provisions, some omission or irregularity might have been committed by the authority. If an appellate authority is provided by the statute, the omission or irregularity alleged will be a matter for that authority and not for the High Court. It was held that the test was applicable to the orders purported to have been made under M.L.Regulations or Orders; if any such order did not fulfill the conditions laid down above, the ouster was not complete, and the High Court had jurisdiction to consider the writ petition and issue the appropriate order[1].

In one case, where the writ jurisdiction of the High Court was said to have been completely ousted by S.27 of the M.L. Regulation No.64, it was pointed out that the High Court was not competent to issue any writ against the authorities, who had exercised power and jurisdiction under the authority of the C.M.L.A., merely on the basis that the order was not based on the principles of substantial justice. Where, as in the instant case, the matter in dispute fell within the jurisdiction of such authorities and the impugned order was within the terms of the statute in question, and petitioners had failed to make out a case that the statute had been used merely as a cloak for mal fides on the part of the authorities, it was held that the impugned order was not open to review under the writ jurisdiction of the High Court[2].

With effect from 7th October,1958, when the Constitution of 1956, including the Fundamental Rights, was abrogated, all enactments prior to October 7,1958, were continued in full force, as enacted and irrespective of any conflict

1. Ibid.
2. Pahlomal Motiram v. Ch.Land.Commr.P.L.D.1961,SC.384.

between their provisions and Fundamental Rights under Art.4(i) of the L.C.F.O. 1958, as laid down by the Supreme Court in Mehdi Ali Khan's[1] case. It was, therefore, held that the Karachi Control of Disorderly Persons Act operated, irrespective of its conflict with the freedom of movement and residence guaranteed by Art.11 of the 1956 Constitution; it could not be called into question in the High Courts[2].

The attitude of the Courts had been that they could not call into question any M.L.Regulation or Order being prohibited by Cl.(5) of Art.2 of the L.C.F.O.,1958; this meant they could not declare a M.L.Regulation or Order invalid or ultra vires, but they could call in question any order, purporting to have been made under a M.L.Regulation or Order under Cl.(4) of Art.2 of the L.C.F.O., unless their writ jurisdiction had been expressly ousted by the M.L. Regulation or Order.

The contention that, as the authority had acted under the M.L.Order, the High Court could not look into the matter was rejected. It was held that an authority's assertion, and even his honest belief, that what he was doing fell within the four corners of M.L.Regulation or Order could not deprive any Court of the jurisdiction to decide the question, if it arose in a proceeding which the Court had jurisdiction to hear. The argument that the High Court could not issue any writ, because action had been taken under a M.L.Order, could succeed only if the Court, came to the conclusion that the action intended to be taken was authorised by the M.L. Regulation or Order. If, on the other hand, the Court came to the conclusion that it was not so authorised, the Court had jurisdiction to pass an appropriate order[3].

1. Supra.
2. Tribunal v. Hashim, P.L.D.1960,SC.260; The High Court's judgement granting the writ was reversed
3. Sher Mohd. v. Nasiruddin,P.L.D.1960,Lah.583.

In another case it was held that the decision of a Special Judge purporting to have acted under M.L.Regulation or Order was not immune from the scrutiny by the High Court. It was, however, pointed out that a police officer investigating the case to find out if an offence was committed, was in the same position as the Special Judge trying a case under the M.L.Regulation or Order; the police officer had to decide whether a prima facie case was established against the accused, the Special Judge had to give a verdict, convict an accused and sentence him. Both these agencies were working under the Regulations or Orders made by the C.M.L.A. or officers exercising powers under him; both were subject ot scrutiny by the Courts for acts purporting to have been taken under M.L.Regulations or Order[1], if they contravened the provisions laid down by the M.L.Regulation or Order under which the action was taken.

Martial Law of 1969:

The Martial Law imposed in 1969 has been discussed in Chapter IV. It is clear from that discussion that the specified rights, which include the safeguards against arrest and detention, have been expressly abrogated. Though the right to personal liberty has not been annulled, it cannot be protected by the Courts; its enforcement cannot be invoked in view of the annulment of the safeguards for its protection.

As regards the writ jurisdiction of the Courts, the position is quite clear; they can issue only unspecified writs and not against the authorities exercising powers under M.L.Regulations or Orders or against the decisions of the Military Courts. The power to issue writs against such authorities on the

1. Abdul Majid v. Pakistan, Supra; see also Mohd.Ayub Kharo v. Pakistan,supra.

ground of mala fides or contravention of the provisions of M.L.Regulations or Orders has been abolished. It has been laid down both by the Proclamation of 1969 and the Provisional Constitution Order, 1969, that no writ can issue against any M.L.Authority or judgement of the Military Courts, nor can any M.L. Regulation or Order be called in question. Doubt was,however, expressed, it is submitted wrongly, in Mir Hassan's [1] case as to whether a M.L.Regulation or Order can be questioned by the Courts, if it contravenes the Provisional Constitution Order, 1969, and whether a writ can be issued against the Authorities, even the C.M.L.A., if the action is not taken in accordance with law, as provided by Art.2 of the 1962 Constitution, which was kept intact.

Soon after the decision in that case, on the same day, the jurisdiction of the Courts (Removal of Doubts) Order,1969[2], was issued which laid down that Courts have no jurisdiction to call in question any M.L.Regulation or Order or to issue writs against any M.L.Authority, authorities exercising powers under M.L.Regulation or Order, or the judgements of the Military Courts. It further says that, if any M.L.Regulation or Order requires any interpretation, that will be done by the promulgator of such M.L.Regulation or Order, and the Courts have no power to interpret it. It is, therefore, clear that no writ can be issued to enforce the fundamental rights against the actions of the authorities purporting to have acted under the M.L.Regulations or Orders or against the decision of the Military Courts.

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1. Supra, the case has been discussed in the IV and IX chapter.
2. It has been discussed in the IV Chapter.

CHAPTER 11.

C O N C L U S I O N.

There have been many revolutions in the history of mankind, some resulting in tyranny and intolerable suffering of most of the population. But the French Revolution resulted in the fall of the monarchy, the American Revolution and the declaration of independence, the end of colonialism and the Russian Revolution in the overthrow of absolutism; they have all left indelible impressions upon the minds of political thinkers. These memories have induced them to seek the protection of their rights by their incorporation in a Bill of Rights in the Constitution. Modern Constitutions are, therefore, alert to guarantee the fundamental rights of the individuals.

The English people are traditionally opposed to the incorporation of fundamental rights in the Constitution. According to them, the incorporation of a Bill of Rights in a Constitution limits the scope of the rights, because they are limited to the guaranteed freedoms. They believe that every basic human liberty is a fundamental right of a citizen, except in so far as it is limited by an act of Parliament. As Dicey says, in other Constitutions, the fundamental rights flow from the Constitution, whereas, in England, the Constitution itself springs out of the basic rights of the people. Recent events in Northern Ireland illustrate the traditional view of the English people. There has been a pressing demand from certain people for the incorporation of fundamental rights in the Constitution, but the English people at large and Parliament especially do not seem to accept the view.

In India before independence, there had been demands for the incorporation of a Bill of Rights in the Government of India Act, 1935. On the

recommendations of the Joint Parliamentary Committee, two rights were actually included in the Constitution Act of 1935. They were (i) the right to equal opportunity, which afforded protection against discrimination on the basis of race, religion or creed in relation to the public services and the providing of a profession; and (ii) the right to appropriate compensation for property acquired by the Government for public purpose by authority of law.

It was declared in the 19th Century by the Charter Act of 1833, that there would not be any discrimination in making appointments to the services. Before 1833, British subjects in India were only amenable to the jurisdiction of Justices of Peace and the Supreme Courts of Judicature, established by the British Crown in the Towns of Calcutta, Madras and Bombay. S.46 of the Charter Act,1833, required that no law should be passed making the British subjects capitally punishable, otherwise than by the King's Courts. It did, by necessary implication, authorise the British Indian Government to provide for their trial for non-capital offences by the ordinary tribunals of the Country, but the provision was largely ignored. Even after the Black Act of 1836, British subjects continued to enjoy their old privileged position in this respect. In 1843, an Act of the Indian Legislative Council[1], took away the right conferred by the Charter Act of 1813, of removing by certiorari to the Supreme Court the cases of British subjects tried by the Justices of Peace in mofussil, but British Subjects continued to enjoy certain privileges even for minor offences; they could only be tried by Justice of the Peace, who were either Englishmen or covenanted servants of the East India Company. They also enjoyed a privilege in regard to serious offences for which they could be tried only in the Crown's

1. Act IV of 1843.

Courts. Even when the High Courts were established in 1865, British subjects continued to be under their ordinary original jurisdiction, even though residing outside the presidency towns[1]. The revised Criminal Procedure Code of 1872 continued the privileged status of the British subjects as far as the courts in the interior of the country were concerned; courts having Indian Judges could not try Europeans in criminal cases.

Until 1923, British subjects in India could claim trial by a jury of Englishmen, while Indians had no such corresponding right. In 1884, by the Ilbert Act, provision was made for the trial of British European subjects by a mixed jury, consisting of Indians and Europeans or Americans. Englishmen were used to trial by jury and Indians were not; this did not, in practice, produce notoriously different results. But after the Constitution Act of 1919, it was regarded as a grievance and the Code of Criminal Procedure was amended in 1923 so that, if the parties to a Criminal case were an Indian and an Englishman, the accused would claim to be tried by a jury with a majority of his own people. The European British subjects' right to be tried by the European judges was entirely abrogated.

The provision of equality of opportunity in the public services in the Charter Act of 1833 was evaded in various ways; there was discrimination against Indians in recruitment to the services, until the enactment of the Constitution Act of 1919. The British Indian Government sought to retain the support of zamindars and agriculturists who, in revenue matters, secured favourable treatment.

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1. See Chapter on Habeas Corpus.

The rights which received less protection were freedom of speech, assembly and association. This was necessary for the security of the administration, the senior posts in which were usually occupied by a limited number of administrators from England. It was not practicable to allow the Indian agitator addressing a crowd with a low flash point the same licence as an orator at Hyde Park Corner. Most of the enactments against sedition, unlawful assembly and association have since independence been held to be reasonable restrictions in the interest of public order.

The development of the judiciary in British India was guided by the Privy Council, the ultimate court of appeal. The Privy Council laid down principles of constitutional law, which are still valid and did much to systematise Indian Law, introducing,when appropriate, legal principles developed in the Common Law Courts and the Court of Chancery. After independence the function was taken over by the Supreme Courts in India and Pakistan.

After the partition of India into the dominions of India and Pakistan in 1947, Pakistan was governed by the Government of India Act, 1935, with some amendments, till March,1956, when the first Constitution of Pakistan came into force. The Government of India Act, 1935, did not, with the two exceptions discussed above, formally lay down any fundamental rights, but they were not ignored. In England, there is no formal expression of the fundamental rights in the Constitution, but there are conventions which give protection to the rights of the people; for instance, there can be no preventive detention in time of peace. The same convention was generally followed in India. The writ of habeas corpus, to enforce the right against unlawful arrest or detention, was granted by S.491 of the Code of Criminal Procedure.

The first Constitution of Pakistan 1956, was an adaptation of the Government of India Act 1935, except for some significant additions and changes, including a Bill of Rights and Powers of the higher judiciary to enforce them. the fundamental rights in the 1956 Constitution seem to be an adaptation of the Indian Bill of Rights with slight difference in regard to the rights to personal liberty and equality. The 1962 Constitution of Pakistan departs from the 1956 Constitution, not only in substance but also in form. But the fundamental rights in general and the provisions relating to personal liberty and the safeguards against unlawful detention in particular, are nothing by the reproductions of the provisions of the 1956 Constitution. There are some additions and alterations in the 1962 Constitution. Art.2, which lays down that no person can be deprived of life, liberty or property except in accordance with law, is not new; it was the law before 1947 and is incorporated in the Indian Constitution, Art.98 of the 1962 Constitution is radically difference from Art.170 of the 1956 Constitution or Art.226 of the Indian Constitution, in as much as Art.98 does not describe the writs with their technical names. It only sets out the circumstances in which a Court can issue a writ and for what purposes, whereas in India and in the Pakistan Constitution of 1956, the names habeas corpus, mandamous, probibition, certiorari, and quo warranto were specifically given. The result is that the High Courts in Pakistan are no longer bound by any of the technical rules evolved in the development of these writs in England or elsewhere. But it can be said that the Pakistan Constitution has succeeded in extricating many of the prerogative writs from some of the technicalities which still hamper their working in English law.

Unlike the American, Indian and other moder Constitutions, the Pakistan Constitution is silent about double jeopardy and self-incrimination.

Being procedural safeguards, these rights are, however, available to the accused persons under the ordinary procedural laws, namely, the Code of Criminal Procedure and the Evidence Act, in the same manner as under the Indian and other constitutions. It seems that the framers of Pakistan Constitution were aware that, even before the commencement of the 1956 Constitution, these safeguards were available to aggrieved parties under the aforesaid procedural laws and they might have thought it superfluous, to include them in the Constitution. But a constitutional guarantee is the supreme protection and a constitutional safeguard has more binding force. Although S.491 of the Cr.P.C. provided for habeas corpus, it was thought to be essential to incorporate the provisions relating to habeas corpus in the Constitution. It would, therefore, not be irrational or unreasonable to incorporate the provisions relating to double jeopardy and self-incrimination in the Constitution.

The provisions in the Pakistan Constitution relating to personal liberty as well as the restrictions which may be put on the right in an emergency, are more or less in line with the provisions in the modern Constitutions. It is submitted that the ideal safeguards against the arbitrary deprivation of personal liberty are found in the Philipine Constitution, which lays down that the right of an arrested person to the writ of habeas corpus shall not be suspended, except in cases of invasion, insurrection or rebellion, when the public safety requires it and during such period as the necessity for such suspension exists. The Philipine Constitution does not provide for preventive detention nor does it give legislature power to enact laws relating to preventive detention, like other modern Constitutions. It keeps alive the right to personal liberty during the emergency and simply suspends the remedy for the enforcement of the right during the relevant period only. Moreover by providing that the remedy will only be

suspended 'when public necessity requires it' and for the period during which 'the necessity for such suspension exists', the Philipine Constitution has closed the door on any possibility of abuse of power by arbitrary deprivation of personal liberty, under the plea of an emergency, beyond the period in which the necessity for suspension of the enforcement of the right exists.

In some modern Constitutions, where there are no such limitations as are provided by the Philipine Constitution, preventive detention laws are used more as a political weapon against the opposition by the political party in power than as a necessary legal measure to maintain law and order in time of peace. This generally happens in the democratically under-developed or developing countries, for instance, the African countries, Pakistan and India. Abuse of the power of preventive detention in time of peace has occurred in India and Pakistan. This is because the Constitutions include provisions for preventive detention, notwithstanding that they lay down safeguards against their abuse. If the judiciary adopts the attitude, irrevocably held by the Indian Supreme Court, that the satisfaction of the detaining authority is final. whether in war-time or peace, there can be no limit to the abuse of power to detain political opponents. But if we accept the view expressed by the Pakistan Supreme Court that the detaining authority has to satisfy the court as to legality of the detention, it will be difficult to reconcile it with the principle of state necessity, if Pakistan is at war, can the executive be given extra-ordinary powers to detain persons suspected to be dangerous to the security of state?

Therefore, in order to avoid the abuse of power by the executive in time of peace as well as to provide for the states' security in time of war, there should be a balance between the right to personal liberty and the security

of the State in the provisions relating to preventive detention. Either the Constitution should, like the Philipine Constitution, not countenance preventive detention and simply provide for suspension of habeas corpus during an emergency, or, if it permits preventive detention, it should explicitly declare that the satisfaction of detaining authority will be sufficient while an emergency exists, but that, in time of peace, the detaining authority must justify its action to the satisfaction of the Court.

While modern Constitutions focus attention on the incorporation of safeguards against encroachment upon the basic liberties of individuals, new factors are emerging, which limit the scope of guarantees. Since 1940, the economic, social and political conditions created by the World War II, appear to have changed the scope and nature of these liberties. The liberty of a person has been subjected to greater social control. Liberty in the modern state is subject to control in the general public interest. Whatever may be the ideology of the State, capitalist, socialist or communist, the common factor prevailing in them is that the State today is no longer a tax-collecting or a police-state but a social welfare-state.

The prevalence of crises stifles the liberties of individuals. Wars, nuclear or otherwise, internal disturbances, economic upheavals, instability of the currency, and exchange system, prices inflation, wage inflation, public provision of amenities, crises in fiscal and financial policies, all create a situation prejudicial to the enjoyment of personal liberty . Crises are the anti-thesis to unrestricted liberty. They are the justification for limiting or extinguishing the liberties of the people. In an emergency, 'liberty' is the victim of the arbitrary use of power by the executive for it comes under

regulatory control by the State. Lord Hewart[1] first drew attention to the increasing power of the bureaucracy and the unfettered control of 'liberty' during an emergency. Allen[2] was concerned about the war-time regulations and the regulatory control of liberties of individuals in times of emergency. Lord Summer in a case[3] shortly after World War I commented -

> "Experience in the present war must have taught us all that many things are done in the name of the Executive in such times, purporting to be for the common good, which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to what might have been disputed, and that the absence of contest and even protest is by no means always an admission of the right."

The problem of maintaining personal liberty in an emergency is complex and there is no easy solution to it. It cannot be determined by dogmas; it cannot be solved by passions or prejudice[4]. Every successive war brings an increasing number of restrictions on personal liberty, on account of the advanced techniques of war and the propaganda machinery, the growing degree of consolidation and centralization of governmental power and the rapidly expanding strength of political, economic and social organisations. There can be no dispute that the safety of the State must prevail over individual's liberty. As a matter of fact, the liberty of an individual is complementary to the existence of the State; if the State loses its Sovereignty, the individual will automatically be deprived of his liberty. Certain conclusions have already been drawn in this respect in the previous chapters. Restrictions on the free enjoyment of

1. Hewart, New Despotism.
2. C.K.Allen, Law and Order.
3. A.G. v. De Keyser's Royal Hotel, (1920) AC. p.563.
4. see Mukherji, P.B. Civil Liberties, pp.38-55.

liberty during a crisis or emergency are, therefore, rational and in the general public interest.

The question, however, remains as to what degree of encroachment on the liberty of person in an emergency is permissible. There is difference of opinion on this point. According to one view, the restriction on liberty should be limited to the needs and durationof the emergency. Another view is that there should be complete suspension of the right to personal liberty during an emergency. No hard and fast formula can be worked out in regard to the needs and duration of an emergency. The general rule must be that a declaration of emergency should be an exceptional measure, to be resorted to only in extraordinary circumstances. Only consciousness of law and the rights of the people on the part of judiciary, supported by a responsible parliamentary system of government and strong public opinion, can solve the problem and protect the people from abuse of power by the executive during an emergency. 'The safeguard of British liberty is in the good sense of people and in the system of representative and responsible Government which was evolved.'[1]

But the situation in democratically developing or under-developed countries is different; the desired degree of responsibility on the part of Government is lacking and there is no organised public opinion. The judiciary has often to yield to the irresponsible unconstitutional actions of the unrepresentative government[2]. Then the judiciary, as the Supreme Court of Pakistan did, should assume the responsibility of protecting the liberty of a person, by laying down the principle of 'objective satisfaction', if in its view the emergency is being unnecessarily prolonged and the judiciary cannot, under the circumstances,

1. Liversidge v. Anderson, supra, see Lord Wright's observation.
2. Ghulam Jilani's case, supra.

rule on the legality of the continuance of the emergency. The determination of the existence of an emergency and its continuance is of a political rather than a judicial nature. When the unconstitutional action of abrogating the Constitution and imposing martial law throughout Pakistan was taken by the head of the State, the Supreme Court of Pakistan had no practical alternative to validating the unconstitutional action and the continuance of martial law[1]. But it did protect the rights of the people against the illegal actions of the authorities during martial law period by granting prerogative writs[2]. The problem has been discussed at length in a previous chapter.

A more serious threat to a State's security and to public safety comes from the internal subversive forces which are ever increasing in the present age. Subversion today is the work of well-organised secret associations, which design to capture Government and power without civil war or direct armed conflict with the Government. International power politics and international power-blocks with their military or financial aid programmes, have made it necessary to enact new legislation to protect national secrets, to maintain law and order and the public safety. The Espionage Act, the Official Secrets Act and Statutes intended to maintain law and order have been enacted to counter the threat. Preventive detention laws are, therefore, desirable to combat subversive activities in time of peace. It is essential that a list of the secret and subversive organisations should be prepared and such organisations should be banned. Membership of any organisations cannot be a ground for detention of a person, unless he participates in subversive activities. But there is the danger of abuse of the provision of preventive detention laws for political ends in time of peace by the

1. See Dosso's case , supra.
2. See the cases discussed in Chapter 10 on Martial Law.

party in power in developing or under-developed countries. Preventive detention is a serious inroad into the right of personal liberty which should be guarded against. Preventive detention laws should, therefore, be carefully drafted and action taken under them should be jealously scrutinized by the Courts.

It is contended that, while opinion should be free, action prejudicial to the State security and public safety should be regulated, but it is difficult, in practice, to draw a line between expressed opinion and action, because opinion and action are closely inter-related. On this subject the American Supreme Court has evolved the principle of 'clear and present danger' that action against a person must be justified by the proximity and degree of danger arising out of speech or expression. If the expression or the speech is likely to result in a breach of peace or the subversion of law and order, proper action against the speaker may be taken; but if it is not, the speaker should not be deprived of his personal liberty. The doctrine has not been accepted to any great extent in other countries and in America it is on its way out. However, the Supreme Court of Pakistan seems to have relied on it when holding that a single speech of a detenue which did not result in a breach of peace, was not a sufficient ground for detaining him[1].

The established and continued supremacy of the representatives of the people over other organs of the government is the foundation of the success of democracy. Successful democracy is itself a guarantee of the protection of the rights of people. In a democracy the subordination of armed forces to the civilian authority deters the military from taking over the government and power,

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1. See Begum A.K.S.Kahmiris case, supra; see also A.Baqi Baluch's case, P.L.D.1969 Kar.87

so that the people are protected from arbitrary action by the military authorities. Even the acts of martial law authorities, done during a period of martial law, are subject to law and the authorities are answerable to the civil courts, unless they are protected by an act of indemnity passed by the legislature. In Pakistan this type of responsible system of government has been lacking from its very inception. Democracy has never been given a trial. Till 1956, the President(who was elected from amongst the civil servants by the Constituent Assembly) wielded effective power and the acts of the so-called representatives of the people (as there had been no free elections since the creation of Pakistan) were controlled by the intrigues and manoeuvres of the unrepresentative heads of the State. From 1958 to 1962 Pakistan was governed by a high ranking military officer who assumed the office of head of the State[1], and ruled as an autocrat, without any semblance of representative government. The military authority was supported by the civil servants in the general administration of the country and in return the bureaucrats were given unfettered powers in their respective areas of administration. This arbitrary exercise of power undermined the rights of the people. Eventually the Pakistan high judiciary thought it necessary to strike a balance between the administration of law and order on the one hand and the protection of the rights of people on the other.

The privilege of detaining authority to withhold facts which induced to make detention order appears to have created difficulties in the establishment of principle of 'objective satisfaction'in Pakistan. But any such difficulty can be overcome if it is proved that the information withheld by the detaining authority is really in the interest of State's security.

1. See Chapter 10 on Martial Law.

The question of parliamentary privilege, which has vexed India, has not arisen in Pakistan, because there has been so little parliamentary government. The fundamental rights are no doubt, to some extent, subject to the parliamentary privileges as held in India. The question, however, remains, how far the rights can be encroached upon by the parliamentary privileges. To this end, it is submitted that, (i) the question of privilege of Parliament in the particular matter should be established first; (ii) it should be determined whether the action taken by the House is within the purview of privilege claimed; and (iii) if it is, the courts should disclaim jurisdiction. 'In cases affecting parliamentary privileges the tracing of the boundary between the competence of the courts and the exclusive jurisdiction of either house is a difficult question of constitutional law, which has provided many puzzling cases, particularly from the 17th to the 19th centuries.'[1] In practice, it is difficult to draw a line between the competence of the Courts and the extent of parlimentary privileges.

The rights of aliens with some exceptions, are recognised and protected. However, their status is controlled by treaties with respective foreign countries and by special statutes like the Foreigners Act, the Immigration Act, the Deportation Act and the Passport Acts. The conditions were different when Castioni's[2] case was decided; at that time it was not treason to migrate to another country; countries did not regard each other as enemies, if they were not at war. But today much has changed, a state of belligerence now exists between countries even when there is no actual war between them. A country is not bound to extradite a citizen of a country with which it is at war if he has

1. May, Parliamentary Practice, 16th Ed. pp.50-51.
2. (1891) I.Q.B.149.

taken asylum in that country. This raises questions of International law, which are difficult to solve by municipal law.

The criminal law of India and Pakistan, especially the Penal Code and the Code of Criminal Procedure define offences and make elaborate provisions, for arrest, imprisonment, trial and punishment. But the list of crimes is steadily increasing and the penal laws are not merely confined to Penal Codes. Penal provisions are found in miscellaneous statutes, such as the Customs acts, the Income Tax Acts, the Companies Act and Labour Laws. The encroachment on the right to life and personal liberty increases with the enactment of statutes creating new rights and duties, setting up new tribunals with new rules of procedure and defining new crimes. The necessity for protection against retroactive punishment and double jeopardy has become acute; the superior courts should be vigilant to prevent encroachment upon these rights.

Laws, inconsistent with the fundamental rights will be declared void to the extent of the inconsistency only[1]; they will not be void ab initio, so as to be struck off the statute book, like the legislation made by the incompetent legislature[2]. It is well established principle in Pakistan that, if any statute relating to the right to personal liberty, fails to incorporate the safeguards laid down by right No.2 of the 1962 Constitution, it cannot be said to be inconsistent with Right No.2 and hence void under Art.6 of the Constitution; these safeguards can be read into the statute, if the statute does not expressly or by necessary implication intends to negative the provisions

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1. See Art.6 read with Art.98 of the 1962 Constitution.
2. M.Mehdi Ali Khan's case, supra.

of Right No.2[1], but where it negatives the provisions of Right No.2, it will be void to the extent of inconsistency;[2] Right No.2 cannot be read into such a statute. The fundamental rights as well as the jurisdiction of the High Courts to enforce them cannot be taken away or abridged by amendments made by subordinate legislation; the amendment will be ignored and the right will be enforced[3]. Fundamental rights can, however, be curtailed or taken away by constitutional amendments[4].

Delegated legislation has become an acute problem in the present age, in view of the numerous enactments relating to social control of personal liberty. Delegated legislation should conform to the provisions of the delgating enactment; the delegation of power should not be in excess of delegated authority[5]. If the provisions of the delegating enactment are invalid, the delegated legislation will be void[6]. It is, therefore, submitted that it is the duty of the Court, in appropriate proceedings, to be satisfied that the rules and regulations made in the delegated capacity are, (i) made by the proper authority mentioned in the statute; and (ii) within the scope of the power delegated by the statute.

The principles of natural justice, in the absence of any express provision, substantive or procedural, incorporating them, are sometimes ignored in Pakistan and India. The question generally arises in the case of an authority exercising both administrative and judicial powers at the same time, for instance, Commissioners and Dy.Commissioners exercising powers under the Frontier Crimes Regulation. The general grievance is of bias, of denial of due justice on

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1. Behram Khan v. State.,P.L.D.1957 Kar.709.
2. Govt. of E.Pakistan v. Rowshau, supra, Ramat Elahi's case,supra; Farid Ahmad's case, supra.
3. Begum A.K.S. Kashmiri's case, supra.
4. Fazlul Qadir Chowdhari v. M.A.Haque, P.L.D.1963,SC.486
5. Ghulam Jilani's case, supra.
6. Humayun Khan v. State, P.L.D.1966,Lah.287.

account of the performance of inconsistent functions by such authorites, including investigating, prosecuting, instituting the proceedings and adjudicating upon them. It is, therefore, required that the powers of such authorities should be clearly stated; judicial and administrative functions should be expressly separated by an enactment. It can be done on the pattern of the American Administrative Procedure Act,1946, which lays down -

> "No officer or agent engaged in performance of investigative or prosecuting functions for any agency in any shall, in that or factually related case, participate or advice in the decision, recommended decision or agency review pursuant to S.8, except as witness or counsel in public proceedings."[1]

Fair hearing is the fundamental principle of the rules of natural justice. There is a possibility of this basic principle being ignored or violated by the authorities, exercising powers under enactments like the Frontier Crimes Regulation; the trial and adjudication of guilt or innocence of the accused by the Jirga, constituted under the F.C.R., is not subject to any rules of procedure or evidence. There is the possibility of denial to the accused of an opportunity of being heard, before the Jirga rules on the question of guilt or innocence. It is, therefore, desirable that enactments like the F.C.R. should incorporate the provision that the accused should be notified of the nature of the Charge against him in time to meet it, that he should have such opportunity, after all the evidence against him is introduced and known to him, to produce witness to refute it and that the decision should govern and be based upon the evidence of hearing[2],

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1. See Sec.5(c)
2. see Kapur Singh v. Union of India, A.I.R.1956,Punj.p.62, per Bhadnari C.J., as he then was, citing an American case.

The classification of proceedings into administrative and judicial or quasi-judicial by the judiciary in India and Pakistan and the application of the principles of natural justice only to the latter class calls for attention in the administration of justice. While the same authority is exercising the administrative and judicial or quasi-judicial functions simultaneously, it does not seem proper to hold that the rules of natural justice should apply to judicial or quasi-judicial proceedings and not to the administrative proceedings in the same case. Therefore, both the content and scope of natural justice should be incorporated in the statutes.

The Constitutions of Pakistan have been short lived; the first Constitution of 1956, was abrogated in 1958, after a short life of two years. The Constitution of 1962 was abrogated in 1969 and martial was again imposed; it is still in force. There has been also a period of emergency; the emergency which was preclaimed in 1965 on account of the war with India, continued till the proclamation of Martial Law of 1969. But the higher judiciary was alert to protect the rights of the people with, of course, some exceptions. As a whole the right to personal liberty has been adequately protected in Pakistan. It was during the emergency that decisions of great importance were made. The period of emergency had been prolonged and the judiciary was incapable of protecting and enforcing the suspended fundamental rights. There are good decisions like Ghulam Jilani[2], in which the principle of 'objective satisfaction' was laid down. But there are also bad judgements like Abul Ala Maududi v. State Bank[3], where the Court tried to strain Right No.1 and Art.2 of the 1962 Constitution, to enforce Right No.5, which remained suspended.

1. Ghulam Jilani's case, supra; Abdul Baqi Baluch's case, supra; and Begum A.K.S.Mashmiri's case, supra.
2. Ibid.
3. Supra.

It is, however, desirable that, in view of the multiplying problems in the field of personal liberty discussed above, the provisions relating to personal liberty in the Constitution and their interpretation by the judiciary should confer the fullest possible degree of personal liberty on the citizens, subject, of course, to the security and welfare of the State. This does not mean that any impossible or extravagant provisions relating to personal liberty or an undesirable construction of them should be permitted. The best balance in this regard is found in the report of the South East Asia and Pacific Conference of the International Commission of Jurists. While laying down the basic requirements of the Government under the Rule of law, it stated -

> "Save during a period of public emergency threatening the life of the nation, no person of sound mind shall be deprived of his liberty, except on a charge of a specific criminal offence, and preventive detention without trial shall be contrary to the Rule of Law."

The system of law and justice, and the machinery to adminster it are valuable legacies, which the British have left behind in Indo-Pak sub-continent. The British system of administration of justice is based on high traditions. The judiciary occupies a place of importance in the English Constitution. It ensures the citizens that the law is supreme; a Judge, while dispensing justice, looks only to the laws of the land and his own conscience. The English people slowly built up in India a judicial system, which imbibed some of the values of the English legal system, like the rule of law and independence of the judiciary[1], now enshrined in the judicial system of Pakistan.

Despite all the achievements of the present legal system in India and Pakistan, a few serious defects do exist. The present day system of

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1. Jain,MP., Outline of Indian Legal History, pp.387-390 (1966)

administration of justice suffers mainly from two major defects; (i) the appalling arrears of work in criminal courts at all levels; a person accused of crime has to wait an unnecessary long time before his case is finally disposed of; and (ii) the combination of executive and judicial functions. Another very just criticism of legal system is the huge cost of litigation; the poor have often to go without justice. It can be noted here that Abdul Baqi Baluch, who was detained on account of political reasons, could not secure his release for two years solely because of his poverty; he could not engage a competent lawyer to represent him, as he did not have sufficient money; a lawyer was, however, engaged by the Government on its own terms. The petition in the High Court was dismissed, largely due to the incompetence of that lawyer. It was while his case was pending in the Supreme Court that the detenu, from the jail, made a request to the members of the bar to come to his aid and procure his release from the prolonged unlawful detention; a competent member of the bar conducted the case without receiving any fee; the case was remanded on a point of law to the High Court where he was released as his detention was held to be illegal[1].

One method of dealing with this would be to provide free or assisted legal aid to the poor, so that they could engage competent lawyers of their own choice. In England, the Labour Government successfully introduced a comprehensive scheme to provide legal aid and advice to persons of limited means. Unless some measure is taken to provide legal aid and assistance to the poor man in Pakistan or India, he is denied equality before the law. The rendering of legal aid to the poor parties is, therefore, not a minor problem of procedural law but a question of fundamental character. Lastly, in order to prevent delay in the administration of justice, a considerable increase in

1. See Abdul Baqi Baluch's case, S.C.'s and Karachi H.C.'s decisions.

judicial personell, raising of standard for selection of judges and good pay scales to attract competent law graduates to the judicial cadre, is required to be enforced[1]. But all these measures require money. Where is it to come from? The economic condition of India and Pakistan is not such as to afford these improvements. These are the problems to be solved by the economists of these countries. Unless they adopt the policies of welfare atate, these questions will remain unsolved.

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1. See Indian Law Commission's Report, (XIV Rep.1958) pp.

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